

**The views expressed herein have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the policy of the American Bar Association.**

**AMERICAN BAR ASSOCIATION  
COMMISSION ON ETHICS 20/20  
DRAFT INFORMATIONAL REPORT TO THE HOUSE OF DELEGATES**

On February 8, 2010, the ABA House of Delegates adopted the following resolution:

Resolved, that the American Bar Association examine any efforts to publish national, state, territorial, and local rankings of law firms and law schools.

Two actions resulted from that resolution. On February 17, 2010, then ABA President Carolyn B. Lamm asked the Commission on Ethics 20/20 to examine the issue of law firm and lawyer ratings and rankings. In addition, a special committee of the ABA Section of Legal Education and Admissions to the Bar was created to study law school rankings. That committee issued a report to the Section's Council on July 15, 2010, as discussed below.

In response to President Lamm's request, Commission on Ethics 20/20 Co-Chairs Jamie S. Gorelick and Michael Traynor formed the Working Group on Lawyer and Law Firm Ratings and Rankings and asked former ABA President Roberta Cooper Ramo and Donald B. Hilliker to co-chair it. In addition to Commissioners, membership on the Working Group included representatives from the ABA Standing Committees on Professionalism, Specialization, and the Delivery of Legal Services and the liaison to the Commission from the ABA Young Lawyers Division. The task of the Working Group was to collect and analyze as much information as possible about the nature and scope of lawyer and law firm ratings and rankings and report its findings to the Commission. On January 26, 2011, the Working Group submitted its report to the Commission on Ethics 20/20.

This report details outreach efforts and research undertaken by the Working Group, provides an overview of methodologies used by different types of law firm rating and ranking entities, reviews state endeavors to govern lawyers participating in rating or ranking services, and offers conclusions reached by the Commission.

## **I. Outreach**

The Working Group requested information from an array of organizations, including state, local, and metropolitan bar associations; lawyer disciplinary counsel in all U.S. jurisdictions; national consumer organizations; and publishers that rate or rank lawyers.

### ***Bar Associations***

On June 27, 2010, Ms. Ramo and Mr. Hilliker sent a memo to the presidents and executive directors of all state, local, and metropolitan bar associations. The memo specifically requested:

- 1) Any information your bar association has obtained on the impact rating or ranking services have had on your members or on members of the public, including any positive comments or complaints by your members or members of the public;
- 2) Any action taken or planned by your bar association to examine the dynamics and/or propriety of lawyer and law firm participation in rating or ranking services;
- 3) Any reports, guidelines, policy statements or ethics opinions issued by your bar that pertain to the participation by lawyers or law firms in rating or ranking services.

The Working Group's request prompted these replies:

- Three county bar associations replied that no comments or complaints had been received, no action had been taken or was planned, and no policies existed pertaining to lawyers who participate in rating or ranking services.
- The Virginia State Bar Association provided the Working Group with two ethics opinions. Opinion A-0114 specifically addresses participation in the Best Lawyers Directory and Opinion 1750 addresses lawyer advertising in general. These ethics opinions are discussed below.
- The Washington State Bar Association replied that the Bar had received "a handful of complaints" from lawyers about the online lawyer rating service Avvo. Lawyers expressed frustration that Avvo refused to remove them from its web site. The Bar's General Counsel replied to these complaints by stating that Avvo was a private company and the Bar had no control over the content of its posts.

The Working Group repeated its information request to state and local bar associations in the September 29, 2010 edition of *The Bridge*, an electronic newsletter sent by the ABA Division of Bar Services to all state and local bar association presidents, presidents-elect, executive directors, members of the National Association of Bar Executives and the National Conference of Bar Presidents. The Working Group received no additional responses.

On July 30, 2010, Vincent Buzard wrote to the Working Group on behalf of the New York State Bar Association (NYSBA) and advised that the NYSBA had not studied the impact of ratings and rankings services on law firms or issued any opinions about the propriety of lawyers participating in these services. The letter indicated that the NYSBA might do so based upon the results of the ABA's examination. He further reported that the NYSBA had not developed any reports on ethical considerations regarding the participation of lawyers or law firms in ratings or rankings services.

Mr. Buzard also encouraged the ABA to scrutinize the rankings methodologies, particularly that of U.S. News & World Report. As noted below, he appeared before the Commission on October 15, 2010, and reemphasized this position. In addition, he provided the Working Group with two series of emails. Some of those emails were responsive to a letter to NYSBA members from former NYSBA President Michael Getnick announcing the adoption of ABA Resolution 10A in

February 2010. Others were responsive to June and July 2010 posts by Mr. Buzard on the ABA House of Delegates list serve regarding announcements by U.S. News & World Report about its ranking of law firms.

### ***Lawyer Disciplinary Counsel***

On June 22, 2010, Commission Counsel asked all chief disciplinary counsel for information regarding any complaints filed in the last five years regarding lawyers' participation in ratings or rankings services or lawyers' use of the results of those services. The request also asked whether, in the past five years, any lawyers had been publicly disciplined for participating in or communicating the results of ratings or rankings services. The responses were as follows:

- Disciplinary counsel from 13 jurisdictions, including three of New York's Judicial Departments, advised that no complaints had been filed and no disciplinary actions had been instituted against lawyers for their participation in rating or ranking services or for their use of the results of those services.
- Disciplinary counsel from one jurisdiction indicated that its office has received "less than five" complaints, that all those complaints had been from other lawyers and none warranted discipline of any kind.
- Disciplinary counsel from another jurisdiction stated there had been one grievance filed during the past five years, but that no cases had resulted in public discipline over that time.

### ***Consumer Groups***

On July 19, 2010, Ms. Ramo and Mr. Hilliker asked 21 national organizations that represent the interests of consumers for: (1) any information regarding the impact law firm ratings and rankings had on their constituents; (2) any actions the groups had taken or planned to examine the impact of lawyer or law firm rating and ranking services; and (3) any reports or materials developed or disseminated that include information for their constituents regarding lawyer or law firm ratings or rankings.

Only 1 of the 21 organizations replied, with AARP saying that it had not undertaken specific activity on this issue.

The lack of responses or interest by consumer groups may be because people tend to rely upon word-of-mouth for the selection of a lawyer far more often than they rely on advertising. A 2010 public opinion survey conducted by Harris Interactive and sponsored by the ABA Standing Committee on the Delivery of Legal Services indicates that four out of five people turn to a trusted source such as a friend, family member, co-worker or lawyer as their primary path to finding a lawyer for a personal legal matter. Only eight percent of the respondents indicated they would rely on the Yellow Pages or a similar print directory, seven percent would use online searches and three percent would turn to other forms of advertising.<sup>1</sup>

---

<sup>1</sup> See ABA Standing Committee on the Delivery of Legal Services. *Perspectives on Finding Personal Legal Services* (2011).

### ***Ratings and Rankings Providers***

On June 7, 2010, Ms. Ramo and Mr. Hilliker sent a letter to 22 of the more well-known entities that provide ratings or rankings of law firms and/or lawyers. Five providers responded: Martindale-Hubbell, Avvo, Best Lawyers, Lawdragon, and Who's Who Legal. Because U.S. News & World Report had subcontracted with the owners of Best Lawyers to conduct its research, information was also provided for the U.S. News & World Report survey. The information received ranged from that which identified an individual who could be contacted for subsequent details to specifics about methodologies employed by the publishers and researchers.

Upon being contacted, representatives of some rating and ranking providers appeared at the Commission on Ethics 20/20's October 15–16, 2010 meeting. Aric Press, Vice President and Editor-in-Chief, ALM Publications provided information and responded to Commissioners' questions about the methodologies used by the American Lawyer Magazine to rank the AmLaw 100 and AmLaw 200 law firms. He indicated that the methodology changes over time and, in particular, had added in recent years pro bono services as a measure within its metrics. Mr. Press indicated that when law firms did not provide American Lawyer with information, that information was collected from other sources.

Steven Naifeh appeared on behalf of Best Lawyers. Mr. Naifeh is an owner of Best Lawyers and informed the Commission that U.S. News & World Report outsourced the research function for its rankings to Best Lawyers. He detailed the process used on behalf of U.S. News & World Report and indicated that it would make changes in 2011 based on what it learned in 2010.

Joshua King appeared on behalf of Avvo. He explained that Avvo collected publicly-available information in order to rate lawyers on a scale of 1.0 to 10.0. Lawyers could "claim" their sites by adding information about themselves and thereby enhancing their ratings. Lawyers do not have to pay to "claim" their sites and add information, but are given an opportunity to advertise on Avvo. Mr. King also indicated that Avvo provided an opportunity for client or public ratings and comments about lawyers, but that those ratings and comments did not have an impact on the Avvo 1.0 to 10.0 score. Mr. King indicated that the matrix used to determine that score included the law school the lawyer attended, articles written by the lawyer and presentations made by the lawyer, as well as other factors. However, Mr. King indicated that the matrix itself used to determine the rating on the 1.0 to 10.0 scale is Avvo's "secret sauce" and would not be revealed.

In addition, Mr. Buzard appeared on behalf of the NYSBA and advocated that the ABA should engage an expert who could evaluate the methodologies of rating and ranking providers, determine their statistical significance, and opine on their validity as tools to assist potential clients in the selection of their lawyers.

### ***Additional Research and Outreach***

Subsequent to the October, 2010 meeting, Working Group Counsel contacted Robert Nelson, Director of the American Bar Foundation and Professor of Sociology and Law at Northwestern

---

[http://www.americanbar.org/content/dam/aba/migrated/2011\\_build/delivery\\_legal\\_services/20110228\\_aba\\_harris\\_survey\\_report.pdf](http://www.americanbar.org/content/dam/aba/migrated/2011_build/delivery_legal_services/20110228_aba_harris_survey_report.pdf).

University; James Meeker, Professor of Criminology, University of California at Irvine; William Henderson, Professor of Law at the Indiana University Mauer College of Law; and Deborah R. Hensler, Ph.D., Judge John W. Ford Professor of Dispute Resolution and Associate Dean, Graduate Studies, Stanford Law School,<sup>2</sup> all of whom have been involved in social science research pertaining to the legal profession. They advised that they are not aware of a standardized methodology for evaluating law firm and lawyer ratings and rankings. If a rating or ranking service were to be evaluated, a methodology would have to be created. Professor Hensler indicated that this process would require input from a team that includes psychometricians and other measurement experts, survey research methodologists, sampling statisticians, experts on legal education, legal sociologists who have focused on the organization of law firms and other legal service providers, and industrial organization and labor economists who have focused on the legal services industry. Different methodologies could come to different conclusions about any particular rating or ranking service. A comprehensive determination of statistical validity of a rating or ranking service is likely to be very expensive. Professor Hensler suggested the cost might exceed one million dollars.

The Working Group's literature review located the following two articles<sup>3</sup>:

*Say Hello to Avvo, Whether You Like it or Not*, Cliff Tuttle, Allegheny Bar Association Journal, August 3, 2007;

*Simply the Best: A comparison of lawyer rating systems*, Jennifer Young, Hawaii Bar Journal, June 2008.

As is set out in the ABA Section of Legal Education and Admissions to the Bar's July 15, 2010 Report of its Special Committee on the U.S. News and World Report Rankings, there are, of course, many articles on the impact of ranking law schools. That Report highlights three adverse effects resulting from law school rankings by U.S. News & World Report. First, it concludes that the methodology used by U.S. News & World Report to rank law schools tends to increase the cost of legal education for students. Second, the report concludes that the methodology used by U.S. News & World Report to rank law schools tends to discourage the award of financial aid based on need. Finally, the report concludes that the methodology used by U.S. News & World Report to rank law schools tends to reduce incentives to enhance diversity of the legal profession.

Concerns raised in the aforementioned report are well-taken and of substantial concern, but do not pertain to the ratings and rankings of lawyers and law firms. That report concluded that the impact of the U.S. News & World Report law school rankings may have been adverse to prospective students because it dominates law school rankings. However, no entity similarly dominates ratings and rankings of lawyers or law firms, nor, given the degree of competition in this area, is any one entity likely to do so in the foreseeable future. Thus, the Commission concludes that any future consideration of policy governing lawyers who participate in or communicate lawyer or law firm ratings or rankings should be disassociated from considerations of policy regarding law school ratings or rankings.

---

<sup>2</sup> Professor Hensler, the former Director of the RAND Corporation's Institute for Civil Justice, is an expert in empirical studies/methodologies in the legal context.

<sup>3</sup> Ethics opinions are listed where this Report addresses the governance of lawyer and law firm ratings and rankings.

## II. Methodologies

The methodologies used by entities that rate or rank lawyers and law firms vary widely. A few entities rank law firms by numerical order. Others rank lawyers or firms by placing them in tiers, bands or categories. Some entities list lawyers or firms in directories according to their criteria. In addition, consumer feedback websites seem to be emerging as a popular vehicle for distinguishing lawyers from one another.

Many of the rating and ranking entities have national reach, but there are multiple regional and metropolitan area ratings or rankings issued by business publications of varying types. The Working Group identified about 35 metropolitan areas throughout the country with such ratings or rankings. State and region-wide publications also exist in about 25 states that issue their views on top lawyers or firms in various categories. Overall, several hundred different lists, which purport to identify top lawyers or firms in communities around the country, currently exist and have done so, in many cases, for years. Ratings and rankings have become so prevalent that law firm marketing consultants are specializing in assisting law firms on the management of their participation in rating and ranking endeavors and similar recognitions. At least one firm has created a tab on its website homepage linking viewers to its list of rankings.<sup>4</sup>

### *Ranking by Numerical Order*

Entities that rank law firms in numerical order include the AmLaw 200, from the American Lawyer Media, Inc.; the NLJ 250, from the National Law Journal; and the VaultLaw 100, from Vault.com. The AmLaw 200 ranks firms according to factors including, but not limited to, their revenues, including profits per partner, revenue per lawyer, compensation and value. The information is usually submitted by the law firms, but is supplemented by ALM staff if the law firm does not submit it or if it is incomplete.<sup>5</sup>

The National Law Journal lists law firms by the number of lawyers and, most recently, by full-time equivalents of lawyers. It then merely lists the firms according to their size.<sup>6</sup> The Vault relies on surveys of law firm associates and maintains ranks based on prestige, the best firm to work for, diversity, practice areas and regional areas.<sup>7</sup>

### *Ranking through Tiers*

U.S. News & World Report, Chambers and Martindale-Hubbell are among the entities that place law firms or lawyers into categories, sometimes labeled tiers or bands.

U.S. News & World Report relies on surveys from lawyers, clients, marketing directors and other law firm staff. Law firms of all sizes, including solo practices, are eligible to be placed into

---

<sup>4</sup> See <http://www.velaw.com/>.

<sup>5</sup> The methodology is set out at <http://www.law.com/jsp/tal/PubArticleTAL.jsp?id=1202458614777>.

<sup>6</sup> See <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202474471097>.

<sup>7</sup> For details of these categories, see <http://www.vault.com/wps/portal/usa/rankings/index> and <http://www.vault.com/wps/portal/usa/rankings/methodology?rankingId1=2&rankingId2=2&rankingYear=2011&rankings=1>.



first, second or third tiers on a national, metropolitan or state basis for a range of practice areas.<sup>8</sup>

Chambers interviews lawyers and clients and places law firms and individual lawyers in bands from 1 to 6. It also includes special lists such as Senior Statesmen and Associates to Watch.<sup>9</sup>

Martindale-Hubbell maintains both peer reviews of lawyers and client reviews of lawyers and law firms. The peer reviews measure legal abilities and ethical standards resulting in “AV,” “BV,” or “CV” categories.<sup>10</sup> In addition, Martindale-Hubbell publishes guidelines for the use of its ratings. An icon is also offered to those with AV or BV ratings.<sup>11</sup>

### ***Inclusionary Listings and Directories***

Instead of creating tiers or bands, some entities conduct surveys of lawyers and/or clients to determine whether a lawyer should be included in the directory. These include Best Lawyers, Super Lawyers, Leading Lawyers, Lawdragon 500 and Who’s Who Legal. Inclusion in these directories does not usually involve the direct participation of the lawyer. The lawyers who are included are most frequently identified by peer-based surveys.<sup>12</sup>

### ***Consumer Feedback***

Avvo is unique in its methodology in that individual lawyers are rated on a scale of 1.0 to 10.0. Avvo creates this rating based on publicly available information. Lawyers may “claim” their profiles by registering with Avvo and adding information that may result in a recalibration of the lawyer’s rating.<sup>13</sup> The information that is used to calculate this rating includes the lawyer’s publications, presentations, and law school attended. However, the totality of information used and the relative weight of that information are deemed a proprietary matrix that Avvo does not release. During his October 2010 appearance before the Commission, Avvo counsel Joshua King referred to the matrix as Avvo’s “secret sauce.” In addition to the Avvo rating, the site facilitates consumer feedback. However, according to Mr. King, this information results in a 5-point rating scale that is separate from the 10.0 rating scale using the Avvo matrix.<sup>14</sup> Mr. King also confirmed that a lawyer who requests to be removed from Avvo will not be removed, but has the opportunity to claim his or her profile and make any corrections.

---

<sup>8</sup> Details are set out at <http://bestlawfirms.usnews.com/methodology.aspx>.

<sup>9</sup> Details are at <http://www.chambersandpartners.com/Rankings-Explained>.

<sup>10</sup> The methodology for detailing ratings is set out at [http://www.martindale.com/Products\\_and\\_Services/Peer\\_Review\\_Ratings.aspx](http://www.martindale.com/Products_and_Services/Peer_Review_Ratings.aspx).

<sup>11</sup> Information about the icons is located at [http://www.martindale.com/Products\\_and\\_Services/Peer\\_Review\\_Ratings.aspx#toolkit](http://www.martindale.com/Products_and_Services/Peer_Review_Ratings.aspx#toolkit).

<sup>12</sup> Methodologies for these lists and publications can be viewed at:  
Best Lawyers: <http://www.bestlawyers.com/aboutus/selectionprocess.aspx>  
Super Lawyers: [http://www.superlawyers.com/about/selection\\_process.html](http://www.superlawyers.com/about/selection_process.html)  
Leading Lawyers: <http://www.leadinglawyers.com/meth.cfm>  
Lawdragon 500: [http://www.lawdragon.com/index.php/newdragon/ld\\_500\\_10/](http://www.lawdragon.com/index.php/newdragon/ld_500_10/)  
Who’s Who Legal: <http://www.whoswholegal.com/faqs/>

<sup>13</sup> Lawyers “claim” their Avvo profiles by completing a registration process and adding, updating or correcting information about themselves. There is no fee for “claiming” a profile. However, Avvo does charge lawyers for enhanced advertising services.

<sup>14</sup> Details about the Avvo rating are at [http://www.avvo.com/support/avvo\\_rating](http://www.avvo.com/support/avvo_rating).

Other sites, including Yelp.com and LawyerRatingz.com, do little more than facilitate consumer feedback. They cross-reference geographic office locations with fields of practice and include maps and advertisements along with consumer feedback. Yelp includes lawyers among many other job categories where consumers can provide feedback. It uses a five-star rating scale and permits consumers to include a brief narrative. LawyerRatingz uses a 1 to 5 point scale on five characteristics (knowledge, work quality, value, tenacity, and communication) along with smiley-face emoticons. It also permits consumers to provide a short narrative. The architecture for LawyerRatingz is the same used for other professionals such as RateMyProfessor.com.

Google recently launched a “local search” feature. Lawyers may optimize searches of key phrases, such as “Chicago divorce lawyer” by completing a Google “place page,” which is a brief online bio, and by having reviews of the lawyer’s services from any source, including Google, Avvo, Yelp, etc. The more reviews a lawyer has, regardless of content, the more likely the lawyer is to surface at the top of a search for lawyers in a geographic area. This development may be a strong stimulus for lawyers to seek out and encourage reviews from clients.

### **III. The Governance of Rating and Ranking Services and Their Use**

Whether in print form, online or both, the ratings and rankings of lawyers and law firms are the creatures of publishers and have First Amendment protections.<sup>15</sup> The legal profession and the organized bar have no authority to directly govern their conduct.<sup>16</sup>

Many, if not the majority, of ratings and rankings services are not dependent on the lawyer’s or law firm’s participation. The services obtain information from third parties, including clients and other lawyers, or from other publicly available information. Nevertheless, applicable state rules of professional conduct govern lawyers who directly participate in the ratings and rankings processes and who communicate the results of those ratings and rankings for purposes of marketing and advertising. These rules must be consistent with the First Amendment protections that extend to lawyers the right of commercial speech. Ethics opinions provide additional guidance and interpretation of the application of the rules to these lawyers and law firms.

Since *Bates v. State Bar of Arizona*,<sup>17</sup> it has been clear that First Amendment protection extends specifically to lawyer advertising as a form of commercial speech. The Court in *Bates* held that a state may not constitutionally prohibit a lawyer's advertisement for fees for routine legal services although it may prohibit commercial expression that is false, deceptive, or misleading and may impose reasonable restrictions as to time, place, and manner.

After *Bates*, the Supreme Court clarified that the commercial speech doctrine set forth in *Central*

---

<sup>15</sup> In regard to ratings in other areas, *see Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485 (1984) (Supreme Court assumed Appellate Court’s ruling that *New York Times v. Sullivan* standard of actual malice should be applied to a claim of product disparagement); and *California Medical Association v. Blue Shield of California Life & Health Insurance Co.*, No. RG10 535619 (holding that physician rating system should be regarded as protected consumer information).

<sup>16</sup> The July 2010 Report issued by the ABA Section of Legal Education and Admissions to the Bar’s Special Committee on U.S. News & World Report Rankings similarly concluded that the profession has no authority to impose restrictions on the publishers of law school rankings.

<sup>17</sup> 433 U.S. 350 (1977).



*Hudson Gas & Electric Corporation v. Public Service Commission of N.Y.*<sup>18</sup> is applicable to lawyer advertising. Under the *Central Hudson* analysis, a state may constitutionally prohibit inherently misleading speech or speech that has been proven to be misleading; however, other restrictions are appropriate only where they serve a substantial state interest, directly advance that interest, and are no more restrictive than reasonably necessary to serve that interest.

Thirteen years after *Bates*, in *Peel v. Attorney Registration and Disciplinary Commission of Illinois*,<sup>19</sup> a plurality of the Supreme Court concluded that a lawyer has a constitutional right, under the standards applicable to commercial speech, to advertise his or her certification as a trial specialist by the National Board of Trial Advocacy (NBTA). The Court in *Peel* found the NBTA to be a “bona fide organization,” with “objectively clear” standards that had made inquiry into Peel’s fitness for certification and that had not “issued certificates indiscriminately for a price.”<sup>20</sup>

If a state is concerned that a lawyer’s claim to certification may be a sham, the state can require the lawyer “to demonstrate that such certification is available to all lawyers who meet objective and consistently applied standards relevant to practice in a particular area of the law.”<sup>21</sup> In concluding that the NBTA certification advertised by Peel in his letterhead was neither actually nor potentially misleading, the Court emphasized “the principle that disclosure of truthful, relevant information is more likely to make a positive contribution to decision-making than is concealment of such information.”<sup>22</sup>

Analogously, in *Ibañez v. Florida Department of Business and Professional Regulation, Board of Accountancy*,<sup>23</sup> the Court held that a state may not prohibit a CPA from advertising his or her credential as a “Certified Financial Planner” (CFP) where that designation was obtained from a private organization. As in *Peel*, the Court found that a state may not ban statements that are not actually or inherently misleading such as a statement of certification, including the CFP designation, by a “bona fide organization.”<sup>24</sup> The Court dismissed concerns that a consumer will be misled because he or she cannot verify the accuracy or value of the designation by observing that a consumer may call the CFP Board of Standards to obtain this information.<sup>25</sup>

Within this constitutional context, ABA Model Rule 7.1 prohibits communications that are misleading. Specifically it states:

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer’s services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

The Rule’s Comments elaborate on what is “materially misleading.” For example:

---

<sup>18</sup> 447 U.S. 557 (1980).

<sup>19</sup> 496 U.S. 91 (1990).

<sup>20</sup> *Id.* at 102, 110.

<sup>21</sup> *Id.* at 109.

<sup>22</sup> *Id.* at 108.

<sup>23</sup> 512 U.S. 136 (1994).

<sup>24</sup> *Id.* at 145.

<sup>25</sup> *Id.*

Even a truthful statement can be misleading if there is a substantial likelihood that a reasonable person reading it would come to a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable factual foundation. Cmt. [2].

Even an advertisement that truthfully reports a lawyer's achievements on behalf of clients or former clients may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar circumstances. Cmt. [3].

An unsubstantiated comparison of the lawyer's services with the services of other lawyers can be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison can be substantiated. Cmt. [3].

Comments [2] and [3] were added to Model Rule 7.1 in 2002. They present a less sweeping statement than did the prior Rule, based upon the ABA Commission on Evaluation of the Rules of Professional Conduct's (Ethics 2000 Commission) belief that the prior Rule was too broad and that whether or not "comparisons are misleading should be assessed on a case-by-case basis in terms of whether the particular comparison is substantially likely to mislead a reasonable person . . . ."<sup>26</sup>

There is little case law on the subject of ratings. However, the United States Court of Appeals for the Eleventh Circuit has ruled that a lawyer who states that he is "AV Rated, the Highest Rating in the Martindale-Hubbell National Law Directory" is not making a misleading or potentially misleading statement. The Florida Bar had contended "that it has an interest in encouraging attorney rating services to use objective criteria." The court found no "value in the distinction between objective and subjective criteria in the specific context before [it]," and therefore rejected the Bar's argument. The court also rejected the argument that the public's unfamiliarity with the Martindale-Hubbell Law Directory made the reference potentially misleading. It stated that "[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."<sup>27</sup>

Nevertheless, many state rules are still based on the pre-2002 version of Model Rule 7.1, which included a prohibition on comparing "the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated." Twenty-six states still include that portion of the rule.

While several states interpret the propriety of a lawyer's participation in ratings or rankings under the current or prior versions of Model Rule 7.1, three states (New Jersey, New York, and North Dakota) have adopted rules that specifically address a lawyer's participation in ratings or rankings services. New Jersey and North Dakota have similar rules and identical comments on this issue.

---

<sup>26</sup> ABA, A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, 1982-2005, at 705 (2006).

<sup>27</sup> *Mason v. Fla. Bar*, 208 F.3d 952 (11th Cir. 2000).

New Jersey Rule 7.1(a)(3) states:

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: ...

- (3) compares the lawyer's services with other lawyers' services, unless
  - (i) the name of the comparing organization is stated,
  - (ii) the basis for the comparison can be substantiated, and
  - (iii) the communication includes the following disclaimer in a readily discernable manner: "No aspect of this advertisement has been approved by the Supreme Court of New Jersey..."

The comment states:

A truthful communication that the lawyer has received an honor or accolade is not misleading or impermissibly comparative for purposes of this Rule if: (1) the conferrer has made inquiry into the attorney's fitness; (2) the conferrer does not issue such an honor or accolade for a price; and (3) a truthful, plain language description of the standard or methodology upon which the honor or accolade is based is available for inspection either as part of the communication itself or by reference to a convenient, publicly available source.

North Dakota Rule 7.1 was amended in 2010 to state:

... A communication is false or misleading if it: ...

(d) compares the lawyer's services with other lawyers' services based on the lawyer having received an honor or accolade, unless:

- (1) the name of the comparing organization is stated, and
- (2) the basis for the comparison can be substantiated.

The comment to this North Dakota rule was amended in 2010 to mirror the New Jersey comment.

New York Rule 7.1(b)(1) states that an advertisement that is not false or misleading may include information as to "bona fide professional ratings." Comment 13 to Rule 7.1 states:

[13] An advertisement may include information regarding bona fide professional ratings by referring to the rating service and how it has rated the lawyer, provided that the advertisement contains the "past results" disclaimer as required under paragraphs (d) and (e). However, a rating is not "bona fide" unless it is unbiased and nondiscriminatory.

Thus, it must evaluate lawyers based on objective criteria or legitimate peer review in a manner unbiased by the rating service's economic interests (such as payment to the rating service by the rated lawyer) and not subject to improper influence by lawyers who are being evaluated. Further, the rating service must fairly consider all lawyers within the pool of those who are purported to be covered. For example, a rating service that purports to evaluate all lawyers practicing in a particular geographic area or in a particular area of

practice or of a particular age must apply its criteria to all lawyers within that geographic area, practice area, or age group.

In addition to Model Rule 7.1, governing false or misleading communications, a lawyer's communications regarding selection or placement by a rating or ranking service may be governed by state variations of Model Rule 7.4, which specifically addresses communications of fields of practice and specialization. Illinois and Washington include provisions under their versions of Rule 7.4 that govern this.

Illinois Rule 7.4(c) states:

Except when identifying certificates, awards or recognitions issued to him or her by an agency or organization, a lawyer may not use the terms "certified," "specialist," "expert," or any other, similar terms to describe his qualifications as a lawyer or his qualifications in any subspecialty of the law. If such terms are used to identify any certificates, awards or recognitions issued by any agency, governmental or private, or by any group, organization or association, the reference must meet the following requirements:

- (1) the reference must be truthful and verifiable and may not be misleading in violation of Rule 7.1;
- (2) the reference must state that the Supreme Court of Illinois does not recognize certifications of specialties in the practice of law and that the certificate, award or recognition is not a requirement to practice law in Illinois.

Washington Rule 7.4(d) states:

A lawyer shall not state or imply that a lawyer is a specialist in a particular field of law, except upon issuance of an identifying certificate, award, or recognition by a group, organization, or association, a lawyer may use the terms "certified", "specialist", "expert", or any other similar term to describe his or her qualifications as a lawyer or his or her qualifications in any subspecialty of the law. If the terms are used to identify any certificate, award, or recognition by any group, organization, or association, the reference must:

- (1) be truthful and verifiable and otherwise comply with Rule 7.1;
- (2) identify the certifying group, organization, or association; and
- (3) state that the Supreme Court of Washington does not recognize certification of specialties in the practice of law and that the certificate, award, or recognition is not a requirement to practice law in the state of Washington.

In addition to the rules of professional conduct addressing the communications of legal services, lawyers must comply with their obligations under applicable versions of Model Rule 1.6 governing confidential client information. In pertinent part, Model Rule 1.6 states, "A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent..."

Some states have issued ethics or advisory opinions applying the rules of professional conduct to a lawyer's participation in specific or general rating and ranking endeavors or directories. Most

often, these opinions have examined the permissibility of communicating that the lawyer is listed in Best Lawyers or Super Lawyers. These opinions include the following:

Alaska Opinion 2009-2 concludes that it is permissible for a lawyer to refer to a listing in Super Lawyers, Best Lawyers or “another commercial professional ranking so long as the reference includes the publication name, date and the practice area, if one was specified, in which the lawyer was ranked or selected.” At the time of the opinion, Alaska had the more restrictive pre-2002 version of Model Rule 7.1, which prohibits unsubstantiated comparisons of a lawyer’s services to those of another lawyer.

Arizona Opinion 05-03 concludes that a lawyer may refer to a listing in an advertisement if the lawyer indicates the year of the publication and the specialty for which the lawyer is listed.

Connecticut Advisory Opinion 07-00188 concludes that the designation “Connecticut Super Lawyer” is potentially misleading and the use of the designation in an advertisement must include an explanation and disclaimer in order to avoid creating an unjustified expectation.

Delaware Opinion 2008-2 concludes that it is permissible for a lawyer to advertise that he or she has been designated a “Super Lawyer” or “Best Lawyer” as long as the “lawyer states the year and particular specialty or area of practice of the designation” and the ad is otherwise compliant.

Iowa Opinion 07-09 indicates that a lawyer may advertise the fact that the lawyer is listed in Best Lawyers or Super Lawyers because they are open to all lawyers regardless of whether they subscribe to the services.

Michigan Opinion RI-341 concludes that a lawyer may state that he or she is listed in Super Lawyers, but cannot state that he or she is the best as a result of the listing.

North Carolina Opinion 2007-14 states that a lawyer’s advertisement that mentions inclusion in a listing in North Carolina Super Lawyers is not misleading or deceptive provided that the listing uses objective, verifiable standards; the ad contains the standards or information on how to obtain them; and no compensation is paid for inclusion in the listing.

Virginia Advertising Opinion A-0114 states that a lawyer may advertise that he or she is listed in a publication such as Best Lawyers, but may not communicate credentials that are not based upon objective criteria or legitimate peer review, but instead on willingness to pay a fee.

Prior to changing its rule as noted above, New Jersey issued Opinion 39, which concluded that a lawyer could not participate in Super Lawyers or Best Lawyers because doing so violated that portion of Rule 7.1 that prohibited comparisons of a lawyer’s services to those of other lawyers. Unlike other states, the New Jersey Advertising Committee has the authority from its Supreme Court to issue binding opinions. Opinion 39 was challenged, resulting in a 304 page report from a special master who had been appointed by the court. The Court vacated Opinion 39.<sup>28</sup> The report, which listed 12 regulatory components to be considered, established the record leading to

---

<sup>28</sup> *In re* Opinion 39 of the Committee on Attorney Advertising, 961 A.2d 722 (N.J. 2008).

the rule change subsequently adopted by the New Jersey Supreme Court and set out above.<sup>29</sup>

Finally, Avvo has generated at least one ethics opinion and a comment from another bar association. South Carolina Ethics Advisory Opinion 09-10 states that a lawyer may participate in a website listing that includes peer endorsements, client ratings and a rating by the website sponsor. Citing to Rule 8.4, the Opinion concludes that a lawyer may not violate the rules through the acts of another. Therefore, a lawyer who “claims” a site is responsible for its contents and must monitor them. If any part of the listing does not conform to the rules, the lawyer should remove the entire listing and discontinue participation in the service. As noted above, Avvo does not permit lawyers to become unlisted and the obligation of imputed compliance is unclear under this circumstance.

The District of Columbia Bar has issued a notice regarding Avvo stating that Avvo has obtained Bar member information in violation of the Bar’s restriction on use. “The Bar has asked Avvo to remove all improperly acquired D.C. Bar member information from its Web site, cease all attempts to acquire such information from the Bar’s Web site, and cease using improperly acquired information for any commercial purpose.” The statement then goes on to indicate that the Bar takes no position on a lawyer’s voluntary participation with Avvo or similar services.

#### **IV. Conclusion**

1. The Commission concludes that no change is currently required to the black letter text of or Comment to Model Rule 7.1. However, it has alerted the ABA Standing Committee on Ethics and Professional Responsibility that should future events warrant, it may consider whether amendments to the Comment to Model Rule 7.1 consistent with those in the comments of the New Jersey and North Dakota Rules of Professional Conduct are necessary.

2. The Commission further requested that the Standing Committee on Ethics and Professional Responsibility consider whether a Formal Ethics Opinion on the application of Model Rule 1.6 to a lawyer’s participation with entities that rate and rank lawyers and law firms is needed. Current Model Rule 1.6, governing confidential client information makes clear that a lawyer does not have the authority to provide to a third party information about the representation unless the lawyer obtains the client’s informed consent to the disclosure.

3. Based upon its examination of efforts to publish national, state, territorial, and local ratings and rankings of law firms as described above, the Commission on Ethics 20/20 concludes that the ABA need not, at this time, undertake, support or contribute further resources to the study of this subject for the following reasons:

A. There is a paucity of evidence that there exists a pervasive problem that warrants such an undertaking by the ABA. Further, lawyers and law firms are rated or ranked by hundreds of entities and undertaking a scientific evaluation of the methodologies for all of them is not feasible. Conducting selective evaluations for any particular individual or group of providers could expose the Association to accusations of, or

---

<sup>29</sup> See <http://www.judiciary.state.nj.us/notices/2008/n080701a.htm>.



possible litigation for, preferential treatment or inappropriate targeting.

B. Hiring an expert or team of experts to conduct such an analysis would be prohibitively expensive. Because the rating and ranking providers are constantly modifying their methodologies, the ABA would have to retain these experts on an ongoing basis to ensure currency of results.<sup>30</sup>

C. The potential finding that a methodology is “statistically invalid” pursuant to the standards of a psychometrician or team of experts would not necessarily mean that a lawyer’s reference to the rating or ranking is false or misleading pursuant to the Model Rules, particularly when the methodology is available to the public.

D. Were the ABA to engage an expert or team of experts to conduct and publish the results of this analysis, it would open the door for providers to claim that their methodologies had received the “ABA seal of approval” or endorsement. The Commission believes that, even with disclaimers, the risk of such behavior in an internet driven world is far too high.

E. Rule 7.1 of the Model Rules of Professional Conduct is sufficient to govern a lawyer’s participation with entities that rate or rank lawyers or law firms. Model Rule 7.1 has been the basis for several ethics opinions that define the boundaries of a lawyer’s participation in a rating or ranking service. These opinions make it clear that the credential may not be based on payment, the lawyer cannot overstate the credential, such as stating he or she is the best lawyer because he or she was listed in the Best Lawyers Directory, and details about the selection must be included, such as the name of the publication, date of selection and field of practice.

States facing specific and identifiable concerns about consumers being misled by ratings or rankings or situations where there is a demonstrated need for the jurisdiction’s lawyers to have additional guidance should make relevant resources available. Those resources could take the form of an online bibliography or the development and adoption of practice suggestions addressing the range of issues pertaining to a lawyer’s participation with entities that rate or rank lawyers or law firms and/or communicate the results of those ratings or rankings.

Respectfully Submitted,

ABA Commission on Ethics 20/20<sup>31</sup>

---

<sup>30</sup> In October 2010, Mr. Naifeh reported that U.S. News and World Report will change some of the factors in its surveys for the next assessments. Mr. Press described how the methodology for the AmLaw 200 evolved and advised that it now includes measures of pro bono service, which were not in effect in earlier surveys.

<sup>31</sup> Commission Co-Chair Jamie S. Gorelick and Commissioner Frederic S. Ury recused themselves from deliberations on this subject.