

NEW YORK STATE BAR ASSOCIATION
COMMITTEE ON ATTORNEY PROFESSIONALISM
REPORT ON ATTORNEY RATINGS

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New York State Bar Association

Committee on Attorney Professionalism

Report on Attorney Ratings

This Report¹ addresses certain aspects of the use of attorney-ratings services. The purpose of this Report is to highlight various relevant considerations that may be applicable to the use of ratings and set forth some suggested guidelines concerning their use.

At the outset, we note that this Report seeks to identify important considerations and recommended practices regarding the use of attorney-ratings services by attorneys and by potential and existing clients. We stress that this Report is not a normative commentary on the value of any particular ratings service or on the value of ratings generally, nor have we attempted to reach any conclusion regarding whether a particular ratings service or ratings in general are valid in a scientific or statistically rigorous sense. For convenience and to avoid any substantive implications, in this Report we will use the terms “ratings” in a nontechnical way, and we will use the term “compilations” of ratings to refer to these various publications. To be clear, in this Report we address characterizations of attorneys and law firms and comparisons among them, which may include groupings in bands or tiers. By contrast, we are not commenting to any extent or otherwise making suggestions with respect to any attempt by any individual, organization or group to assign ordinal rankings to attorneys or law firms in the way that, for example, a newspaper, magazine or other report or organization might rank in numerical order the best players in a particular sport or at a particular position or from a particular era.

I. Background

Over the years, a number of services have periodically published compilations of attorneys and ratings that purport to identify the qualities of attorneys in particular fields and in particular geographic locations. In a number of cases, it appears that the compilations are based on surveys completed by clients and attorneys, sometimes possibly with the participation of the listed attorneys themselves, and on information submitted by those who have been solicited by the various services. Examples of these services include *Best Lawyers in America*, *Chambers*, *Martindale-Hubbell* and *Super Lawyers*.

We have observed that such compilations of various types appear to be proliferating and to be in considerable use by attorneys and their existing and potential clients alike. However, data-collection methodologies and the quality of data may vary widely from service to service, and the services generally do not divulge their methods or raw data in detail. We will not seek herein to render any judgment on the merits of the compilations or their judgments as to quantitative or qualitative differences between attorneys.

Nevertheless, certain things are clear:

¹ The principal authors of this Report are Robert I. Kantowitz and Andrew L. Oringer.

- Compilations have persisted year after year, with steadily increasing coverage and use.
- Attorneys routinely note in promotional materials their having been listed by the ratings services.
- Potential and existing clients show an increasing propensity to refer to and use third-party ratings.²
- The compilations seem to be emerging as a type of third-party validation of respect and capability afforded to lawyers; particularly in light of what might be perceived as the unavailability of other, objective indicia of ability, capabilities and quality.

It would be a daunting task, which we have not undertaken, to determine empirically and quantitatively who uses ratings, why they are used and the degree to which and otherwise how they factor into decisions to hire and retain counsel. Similarly, our aim here is not to comment on the merits of any ratings in particular or general (*e.g.*, whether attorneys whose names appear in these compilations are superior to those who are not or to whether purported ratings in any compilation bear any relationship whatsoever to absolute or relative competence). Nor are we entering the thicket of the collateral consequences that arise from the existence and use - and possible misunderstanding and even misuse- of ratings, such as disciplinary matters, implications for professional-liability actions (and insurance) and any potential liability that those who contribute to or compile the listings may have to attorneys or clients.

Thus, we will not address herein the merits of or otherwise discuss in any detail characteristics of, or differences between, the various ratings services, or address what it means (or should mean) to an attorney to be included on any particular list or listed at any particular level. Rather, the purpose of this Report, given that attorneys and clients are aware of these ratings and are using them, is, as noted above, to highlight various relevant considerations that may be applicable to the use of ratings and set forth some suggested guidelines concerning their use.

We also want to establish clearly that we are not endeavoring herein to analyze or otherwise comment on the ethical and legal implications, whether relating to lawyer advertising or otherwise, of an attorney's use of attorney-ratings services and systems. Attorneys should review and where necessary or appropriate seek advice regarding any such potential ethical and legal ramifications.³ In the same vein, as indicated above, we are not taking any position -

² According to a 2013 study by the Research Intelligence Group, more than 76% of adults looking to hire an attorney used online resources at some point in their process. *See LexisNexis. LexisNexis Releases Findings of Consumer-Focused 'Attorney Selection Research Study'* (September 18, 2012), <http://www.lexisnexis.com/en-us/about-us/media/press-release.page?id=1348154532803488>.

³ We note that there have been several statements on this subject dealing specifically with social media. *See, e.g.*, N.Y. County Bar Association Formal Op. 748 (Mar. 10, 2015); *Social Media Ethics Guidelines of the Commercial and Federal Litigation Section of the NYSBA* at 5-10 (updated June 9, 2015). Consistent with the limitations on the scope of this Report as noted in text, we do not endeavor herein to comment to any extent on any of those statements or on the approaches underlying those statements.

supportive or critical - regarding the fact that the ratings exist and do have an impact on the relationships between lawyers and clients.

With that background, we set forth below possible guidelines for the use by attorneys and potential and existing clients of attorney ratings and ratings agencies.

II. Certain Possible Concerns Regarding the Use of Ratings and Compilations

A. Confusion in Connection with Terminology and Categories

Initially, we observe something that, while obvious, may be extremely important as a contextual matter: ratings can be misunderstood, sometimes in very significant ways. Comparisons of attorneys should be evaluated in light of the engagement for which the comparison is being made. For example, suppose a client were interested in finding counsel for a white collar criminal case. Many clients would be sufficiently aware of the difference between civil and criminal cases such that, if they were to consult a compilation, they would search under headings such as “criminal defense” or “white-collar defense” and would not rely on listings under a more general category such as “litigation” or “trial lawyers.” On the other hand, although a lawyer may be listed in a highly specialized area, leading practitioners may also handle a variety of other matters in which the attorney has not been rated. It is also noted that the categories in the listing may not make it apparent to the prospective client that a lawyer can perform services in a particular area. For example, if a case involves a sales contract supported by a letter of credit issued by a bank in a foreign jurisdiction, a client could be forgiven for not knowing whether to search under “banking law,” “commercial litigation,” “international law,” or perhaps some other heading or category.

As another example, an attorney who is experienced across the range of commercial litigation may be one of a smaller group of experts in environmental cases or land-use planning. Should this attorney be listed only in the specialized categories, in the general category, or both categories? Will a ratings service be reluctant to list a generalist in category after category, where the generalist may qualify for recognition in multiple areas? Confusion may arise where, to use a more general analogy, the high-school valedictorian - the generalist, so to speak - might not also be given the award for excellence in English literature since the attorney was already recognized for overall excellence as valedictorian. However, the valedictorian may actually be more accomplished in every single subject than the other students who are given those awards even though that proficiency may not be noted in the graduation ceremony.

Adding to the potential confusion, some services may differ in how they divide and categorize the various specialties and subspecialties. These differences can lead to varying results in terms of the ways that attorneys are ultimately listed, as well as results among services that are extremely difficult to compare. Without a solid understanding of how the various services assign listings among categories, clients, both existing and potential, may be misled.

The compilations themselves also may be unclear as to the type of firm in which a listed attorney practices. “Small firm” does not necessarily mean “suitable for small-sized matter” any more than the length of a firm’s name provides any indication of the firm’s size or reach.

B. Potential Unstated Biases and Lack of Transparency in Methodology

There may be a tendency for the compilations to be populated with attorneys at larger firms, if but for no other reason that larger firms may have higher profiles, more continuous and recurring exposure to each other, and more developed public-relations resources. In some cases, it may be more difficult for attorneys at smaller firms and sole practitioners to penetrate the consciousness of the publishers and of masses of other practitioners and therefore the compilations. Thus, some ratings services could theoretically miss a capable class of potentially includable attorneys. It may also be difficult for capable attorneys outside of major metropolitan areas to be appropriately noticed. Depending on the situation, the methodology may inherently favor attorneys who have been listed previously in or otherwise involved with the service, for example by affording them automatic consideration for future inclusion either in general or specifically if they have made purchases from the publisher.⁴

Not only may the categorization by the various services be less than uniform, but the specific market methodologies and other approaches used by the various services will often not be fully apparent. There can be many important factors that enter into the selection of counsel, and the ratings are not always transparent regarding these factors.

Finally – although an analysis and discussion of this matter is beyond the scope of this report – we recommend that any user consider taking the time to understand the differences between compilations and ratings that purport to be based on objective criteria or peer reviews and those where an attorney's inclusion is based solely on, or is conditioned on, payment of a fee to the publisher. Further, even with those that purport to be based on objective criteria or peer reviews, there is ample anecdotal evidence that suggests the potential for concerted efforts to influence the system unduly. By way of example, attorneys might agree to recommend each other or inappropriately press clients to recommend them.

III. A Survey of Certain Other Reviews of Ratings Services

Others have looked at ratings services, in some cases with a more substantive review than the one here undertaken here. We briefly summarize below, for context and reference, certain authority bearing on attorney ratings.

A. Action of the Executive Committee of the New York State Bar Association, and Related Report of the American Bar Association

At the January 28, 2010 meeting of the Executive Committee of the New York State Bar Association (the "Association"), a past president of the Association presented a proposed report and resolution for submission to the House of Delegates of the American Bar Association (the "ABA") regarding one periodical's planned publication of rankings of law firms in numerical order. To quote from item 23(a) of the minutes of the meeting, the past president "outlined concerns raised by this plan, including how the rankings would be made and how best to ensure that any ranking system serves both the profession and clients, and reported that the resolution

⁴ See *infra* § III(B)(2) & notes 6 & 28.

would call upon the ABA President to appoint a task force to study these issues. After discussion, a motion was adopted to approve the report and resolution in concept." The Association introduced a resolution the next month in the ABA House of Delegates calling for the study of law firm and law school rankings, which was adopted. Shortly thereafter, the periodical in question announced that it would not rank law firms in numerical order but rather would rate practice groups in tiers.

At the April 10, 2010 meeting of the Association's House of Delegates, the past president reviewed the report and resolution submitted by the Association to the ABA House of Delegates as described above, as well as the activity that took place in connection with the consideration by the ABA House of Delegates of the report and approval of a resolution. The past president also reported that the Association's efforts had been successful in that as a result the periodical that had planned to rank lawyers in numerical order had withdrawn that plan but was instead ranking practice groups in tiers. He stated that the Association would continue to seek to have the ABA study the validity of placing practice groups in tiers, but the ABA never conducted such a study. Ultimately, the ABA did issue a report discussing, among other things, state bar associations' issuance of ethics or advisory opinions that apply the Model Rules of Professional Conduct to an attorney's participation in attorney rating services.⁵

B. Certain Other New York Authority

The Committee on Professional Ethics of the Association (the "CPE") has discussed certain aspects of ratings services and their use.

1. Opinion 877

In Opinion 877, issued on September 12, 2011, the CPE addressed, among other things, certain references that a law firm might make on its website. The CPE determined that the website may accurately quote bona fide professional ratings if the ratings are factually supportable when published. The CPE also determined that the website may quote comments from a ratings publication if the comments are factually supportable when published (and if the lawyer obtains and confirms in writing the client's informed consent in a case in which a matter with the client is still pending).

Opinion 877 notes that Rule 7.1(a)(1) provides that an advertisement may not contain statements or claims that are false, deceptive or misleading. According to the CPE, not only

⁵ See ABA Comm. on Ethics 20/20, *Informational Report to the House of Delegates* (August 2011), http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/rankings_2011_hod_annual_meeting_info_rnformational_report.authcheckdam.pdf; see also *supra* page 1 (first paragraph) (expressly noting that we are not herein commenting to any extent or otherwise making suggestions with respect to any attempt by any individual, organization or group to assign ordinal rankings to attorneys or law firms or law firms in the way that, for example, a travel or similar service or group might numerically rank hotels, restaurants and similar establishments).

must the website quote the publication accurately, but the quotations themselves must not be false, deceptive or misleading.⁶

The CPE indicated that, under Rule 7.1(d)(4) and (e)(2)-(3), if a quoted statement describes or characterizes the "quality" of the lawyer's work, the statements need to be able to be factually supported as of the date on which the advertisement is published or disseminated, and need to be accompanied by the specific disclaimer that prior results do not guarantee a similar outcome.

The CPE noted that the last clause of Rule 7.1(b)(1) provides that an otherwise compliant advertisement may include information as to "bona fide professional ratings." Citing to Comment 13 to Rule 7.1 (also discussed below), the CPE stated:

We do not opine as to whether the ratings in any particular publications qualify as bona fide, but for a rating to be bona fide and nondeceptive, it should at least be unbiased, nondiscriminatory and based on some defensible method. . . . If the quotations from the rating publication comply with all applicable restrictions on advertising and lawyer web sites, it is permissible to include them.

2. Opinion 1007

In Opinion 1007, issued on April 4, 2014, the CPE addressed whether a lawyer may advertise the lawyer's inclusion in *Best Lawyers*. The CPE determined that such advertisement could be permissible, provided that the lawyer's assessment of the methodology used to determine inclusion demonstrates that the methodology involves an unbiased, nondiscriminatory and defensible process.

In Opinion 1007, the CPE addressed an inquirer's concern that inclusion in *Best Lawyers* may violate Rule 7.1 of New York's Rules of Professional Conduct because the listing implies that he has skills or results that are better than those of other lawyers without a basis in objective criteria. According to the CPE, *Best Lawyers* publishes lists that may constitute professional ratings of lawyers in various geographic areas and areas of legal practice. The inquirer noted that the listing in *Best Lawyers* might be considered a statement comparing him to other attorneys or implying to the public that he is one of the best attorneys without any presentation of objective criteria, and he suggests he may not be the best attorney as compared to others.

The CPE stated that whether advertising that a lawyer is listed in *Best Lawyers* is permissible is governed by Rule 7.1, which, as relevant here, prohibits the use or dissemination of an advertisement that contains statements or claims that are false, deceptive or misleading. While Rule 7.1(b) provides that an advertisement may include information as to bona fide professional ratings, Comment 13 to Rule 7.1 states that a rating is not bona fide unless it is unbiased and nondiscriminatory.

⁶ The CPE also noted that, under Rule 7.11(c)(1), if a quotation is a paid endorsement, the lawyer must disclose that fact.

Comment 13 goes on to state:

[The professional rating] 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.

The CPE then pursued a fact-specific inquiry. *Best Lawyers* explained that its lists are based on peer-review and attempts to depict the consensus opinion of leading lawyers about the professional abilities of colleagues in the same geographical and legal practice areas. Nominations are generally open for lawyers other than in-house counsel. The ballots are distributed to lawyers currently listed based on the voters' practice areas and geographic regions and ask a number of ratings-based questions. Voters can complete ballots for other lawyers in their own firm, but these votes do not weigh as heavily as votes from outside the firm. *Best Lawyers* reviews the responses and selected lawyers are checked against sanction lists. Listed lawyers are notified of their inclusion and the list is then released to the public.

The CPE stated:

While we will not opine on whether a *Best Lawyers* listing is bona fide, the Committee has not identified a disqualifying defect in the methodology used. The lawyer must assess whether the methodology is unbiased, nondiscriminatory and defensible.⁷

The CPE turned to the inquirer's question about whether advertising that he is listed in *Best Lawyers* may constitute a comparative statement or an implication that he is one of the best attorneys. The CPE stated that Rule 7.1(d)(2) permits comparative advertising and that Rule 7.1(d)(4) permits descriptive advertising "provided that the statement can be factually supported by the lawyer or law firm as of the date on which the advertisement is published or disseminated."

Comment 12 to Rule 7.1 explains that comparative descriptions that cannot be factually supported could mislead potential clients and that, therefore, it would be improper for a lawyer to advertise that he or she is "the 'Best,' 'Most Experienced,' or 'Hardest Working.'" The CPE concluded that "describing a lawyer as the 'Best' can be distinguished from inclusion in a 'Best Lawyers.'" Thus, according to the CPE:

⁷ The CPE also noted: "Although it does not appear that inclusion is biased by direct economic interest in the form of the receipt of payment from the listed lawyers, an assessment of the bona fides of inclusion in *Best Lawyers* might also consider that automatic nomination of lawyers previously listed in the publication ensures the nomination of lawyers to whom *Best Lawyers* has sold additional marketing materials associated with the listing, including special reprints and enhanced advertising."

Rather than stating that any particular lawyer is the best, the magazine publishes a long list of attorneys selected according to a nomination and voting methodology that is described in the publication, without ranking the attorneys or making any specific statement about a particular lawyer's skills as compared to those who are not listed. The listing is simply a factual statement that the compilers of the listing have selected the lawyer based on the disclosed methodology. Even if the rating is construed as a comparison of the quality of the lawyers services to others, the lawyers determination that the rating is bona fide satisfies the requirement under Rule 7.1([d])(2) that the statement be factually supported as of the date that it is published or disseminated.

The CPE concluded that "[a] lawyer may advertise his or her inclusion in Best Lawyers provided that an assessment of the methodology used to determine a lawyer's inclusion reveals that it is an unbiased, nondiscriminatory and defensible process."

3. Opinion 1052

In Opinion 1052, issued on March 25, 2015, the CPE addressed, among other things, whether a lawyer may give clients a credit on their legal bills if they rate the lawyer on an Internet website. The CPE determined that such a credit may be permissible if the credit against the lawyer's bill is not contingent on the content of the rating, the client is not coerced or compelled to rate the lawyer and the ratings and reviews are done by the clients and not by the lawyer.

4. Opinion 1032

In Opinion 1032, issued on October 30, 2014, the CPE expressed the view that a lawyer may not disclose confidential client information solely to respond to a former client's criticism of the lawyer posted on a ratings website.

C. Judicial Opinions

The New Jersey Supreme Court was the first court to address the issue of attorney-ratings systems, specifically focusing on an attorney's reference to his inclusion in ratings in his service advertisements.⁸ Vacating the Committee on Attorney Advertising's Opinion 39, which had prohibited the inclusion of references to *Super Lawyers* and *Best Lawyers in America* in advertisements, the court concurred with the special master and concluded that "state bans on truthful, fact-based claims in lawful professional advertising could be ruled unconstitutional when the state fails to establish that the regulated claims are actually or inherently misleading."⁹

Similarly, the Eleventh Circuit addressed the issue of attorney ratings in the context of attorney advertisements. An attorney's advertisement had included the phrase, "'AV' Rated, the Highest Rating Martindale-Hubbell National Law Directory," which the Florida Bar claimed had

⁸ *In re Opinion 39 of the Comm. on Attorney Advertising*, 961 A.2d 722 (N.J. 2008).

⁹ *Id.*

violated regulations against self-laudatory statements, even though the attorney was in fact AV-rated.¹⁰ The court stated that, while the Florida Bar may regulate an attorney's commercial speech if it could show that the regulation directly addresses an actual harm, merely assuming a potential harm is insufficient to justify regulation of that speech.¹¹ In addition, even though the rankings were primarily intended for use within the legal community, lay clients could still find the ratings useful.¹² According to the court, a rating "is not an unverifiable opinion of the ultimate quality of a lawyer's work or a promise of success, but it is simply a fact from which a consumer may or may not draw an inference about the likely quality of an attorney's work."¹³ Thus, lay clients' unfamiliarity with the rankings system alone is insufficient to justify the Florida Bar's imposing a disclaimer requirement on a truthful attorney's advertisement.¹⁴

D. Non-N.Y. State Bar Association Advisory Opinions

A handful of state bar associations have issued ethics or advisory opinions applying the rules of professional responsibility to an attorney's participation in, and use of, ratings systems. Specifically, these opinions tend to address the ethical implications of communicating one's being included in a ratings list in client solicitations and attorney advertisements. Below is an outline of several instructive examples:

1. Alaska

The Ethics Committee of the Alaska State Bar Association has stated that an attorney's inclusion of a "Super Lawyers" designation in his or her commercial publications does not constitute an ethical violation, if the complete context is provided. The attorney must accurately specify the publication in which he or she is ranked, the year of publication, and the field in which the ranking is concerned.¹⁵ The Association adopted the approach of the Connecticut Statewide Grievance Committee, determining that while the selection process is often "subjective and arbitrary," a truthful reference to a ranking by *Super Lawyers* is not unethical so long as an adequate explanation is provided.¹⁶ Specifically, the format for including the attorney rating must adhere to the following requirement: "Attorney's name was selected for inclusion in Publication Date in the area of field of practice." Thus, for example, an attorney may state:

¹⁰ *Mason v. Fla. Bar*, 208 F.3d 952, 954 (11th Cir. 2000).

¹¹ *Id.* at 956.

¹² *Id.* at 957.

¹³ *Id.* (quoting *Peel v. Attorney Registration & Disciplinary Comm'n*, 496 U.S. 91, 101 (1990)).

¹⁴ *Id.*

¹⁵ Alaska State Bar Ass'n, Op. 2009-2 (Apr. 2, 2009), https://www.alaskabar.org/servlet/content/2009_02.html.

¹⁶ *Id.*

“John Smith was selected for inclusion in *Alaska Super Lawyers 2008* in the area of environmental law.”

2. South Carolina

The South Carolina State Bar Association’s Ethics Committee has stated that attorneys who maintain profiles on third-party websites such as *Martindale-Hubbell*, *Super Lawyers*, *LinkedIn* and *Avvo* are responsible for insuring compliance with state-bar rules, and such profiles must not be false, misleading, deceptive or unfair.¹⁷ Mere participation in these websites, however, is not unethical, because advertising factual information about verifiable, independent ratings is not likely to “create unjustified expectations about results.”¹⁸

3. Utah

The Ethics Committee of the Utah State Bar Association has stated that inclusion in an attorney ranking list is permissible where: (i) the comparing organization has made an appropriate inquiry into the attorney’s fitness; (ii) the attorney did not pay to receive the rating itself; (iii) the comparing organization’s methodology or standard used to determine the rating or ranking is fully disclosed; explained, and conveniently available to the public; and (iv) the communication disclaims the approval of the Utah Supreme Court and the State Bar.¹⁹ Any attorney advertisement must state that the attorney was included in a “Super” or other similar list or ranking rather than describe the attorney as a “super lawyer.”²⁰

4. Washington

The Washington State Bar Association Ethics Committee has stated that client ratings or peer endorsements may be included in an attorney’s advertisement or website, so long as the attorney affirms that the rating agency bases its system on the attorney’s performance or merit, and the agency discloses how the ratings are calculated.²¹ If the attorney determines that the rating or endorsements are false or misleading, however, the attorney must rescind his or her participation from the website and delete or disclaim any rating.²²

¹⁷ S.C. Bar Ass’n, Op. 09-10 (Mar. 22, 2010), <http://www.scbar.org/News/News-Details/ArticleId/107/Ethics-Advisory-Opinion-09-10>.

¹⁸ *Id.*

¹⁹ Utah State Bar Ass’n Ethics Comm., Op. 14-04 (Nov. 12, 2014), <http://www.utahbar.org/ethics-advisory-opinions/ethics-advisory-opinion-14-04/>.

²⁰ *Id.*

²¹ Wash. State Bar Ass’n Ethics Comm., Op. 201402 (Dec. 2014), <http://mcle.mywsba.org/IO/print.aspx?ID=1681>.

²² *Id.*

IV. Recommendations

Unlike others who have commented substantively on the merits of attorney ratings, we are herein proposing a framework related to the consideration of compilations by potential and existing clients and by attorneys, so that the compilations and their contents may be made more useful for all concerned. Our recommendations regarding the types of factors that could be considered are set forth below. We note specifically that our list is intended to be non-exclusive, and that the parties should be sure to include whatever considerations they might consider relevant.

We also note the obvious fact that the readers of this Report are overwhelmingly likely to be attorneys (or so we hope) and not their clients (we assume that reception areas will have reading material that most clients are likely to find more interesting). Accordingly, we stress that one of the responsibilities that attorneys have is to guide clients in how to consider compilations and ratings, as we set forth more fully below.

A. Use by Potential Clients

1. In General

Potential clients may consult compilations, for example, to guide them to a particular attorney or firm, or to help them evaluate an attorney under consideration. Existing clients may look to compilations, also for example, to see if an attorney or firm should be retained for an additional project, to help with the review of an attorney or firm or otherwise to provide comfort regarding the attorney's or firm's continuing retention. We have the following suggestions for the use of compilations by potential and existing clients:

- If a potential client seeking counsel consults any of the ratings services and their published materials, the potential client should seek to understand what the ratings may or may not represent, in light of the different criteria and data employed by the various services.
- Clients should not rely on ratings alone to conclude that an attorney is necessarily better than other attorneys or otherwise better able to handle the client's matters. Stated another way, ratings should be viewed as evidentiary rather than dispositive -- mere indicators, not determiners of quality and expertise. Ratings are at most one aspect of the evaluation process: one size does not fit all. It would not be unreasonable for a client to ask an attorney whose name is included in a compilation how the attorney rates himself or herself relative to others who were or were not included, and whether the attorney or his firm had done anything to promote his inclusion. In addition, the question of whether there is a dispute-resolution process could be relevant, particularly to the extent that such a process might bear on the reliability of the published information.
- Clients should discuss ratings and what they mean in connection with each particular matter or representation in the context of a number of other factors that are important to cover early on in the decision process, including the following:

- The attorney's experience and capacity to handle the matter, where and how the services will be performed and who in the office will be working on the matter.
- The amounts of attorney's fees and disbursements and how they will be handled.
- Other references and background material the attorney may be able to provide.

2. Certain Factors

When referring to attorney ratings, a potential client should consider the nature of the proposed representation, and as a part of the review process the following factors:

- Size of the law firm
 - Does the client need a large firm with significant resources and expertise in multiple areas?
 - Is the client large enough to command the attention of the attorneys at the firm whom the client wants?
- Nature and sophistication of the client (*e.g.*, small versus large, business versus personal, civil matter versus criminal matter)
 - How much so-called hand-holding or other personal attention does the client need or want?
 - How involved will the client be in day-to-day work on the matters?
- Nature of the project, both in substance and as to whether the project is a stand-alone undertaking, including elements such as:
 - Is the project a highly technical one insofar as legal and other issues are concerned?
 - What is the budget?
 - What is the timing?
 - What information is available or needs to be assembled, and what resources will that take?
 - What level of coordination will be required with other persons and advisors?

B. Use by Existing Clients

What is said above regarding use by potential clients applies equally for existing clients with the obvious overlay that all the discussions should be informed by a healthy back-and-forth evaluation of past services. Where the experience has been a positive one of long standing and the continuing representation proceeds along familiar lines, the existence or addition of a rating

may be largely irrelevant. Where a new area of practice or substantially different subject matter is under consideration, however, the discussion should be more along the lines set forth above for new clients.

C. Use by Attorneys²³

1. In General

Attorneys should reflect on whether in any given situation to promote one's ratings or inclusion in these compilations. While the desire to capitalize on a favorable rating or on inclusion is understandable, different situations could call for different approaches. The attorney must try to make sure that clients are not being misled, particularly where the ratings are being actively promoted by the attorney.

The nature and sophistication of the recipient(s) of the communication in question should be taken into account, and the task of considering the appropriateness of promoting one's ratings may not be a straightforward one. For example, in the case of an existing client, there may already be a rapport and shared understanding between the attorney and the client that creates a reasonable context to understand the rating and what it represents. Conversely, a potential client, without knowing the attorney in question, may be perusing a set of compilations and trying to make sense of the ratings and descriptions more in a vacuum. Other situations may fall somewhere in the middle.

We have set forth certain possible relevant considerations below:

- Are there multiple potential audiences of possible clients for a particular communication, where there may be different characteristics of the various recipients?
- Is the attorney dealing with a potential client, a new client or an existing client?
- General dissemination of ratings information, rather than directly to identified individuals, may implicate special concerns, particularly in that the information will presumably be received without the attorney's further opportunity to provide clarification.
- As part of the intake process where matters material to the representation are being discussed,²⁴ to the extent that ratings are likely to be relevant as a factor relating to the retention, the attorney may wish, as appropriate, to include a discussion of such things as, for example, the client's awareness of ratings, how much the ratings influenced the client's decision process and contextual information that the attorney may believe is important so as to attempt to avoid misunderstandings as to what the ratings mean or imply.

²³ See also N.Y. Rules of Prof. Conduct, Rule 1.18 ("Duties to Prospective Clients").

²⁴ See *supra* § IV(A)(1) (third bullet-point).

2. Participation of Attorneys in the Ratings Process

An attorney who provides information regarding either the attorney's own capabilities and qualifications or those of others, or otherwise responds to inquiries from publishers of compilations, is responsible for what he or she says or writes and for understanding how the information will be used.²⁵ Conversely, in certain circumstances, a question may also arise as to whether an attorney should seek to clarify, supplement or otherwise correct information provided about that attorney by others, where the attorney has actual knowledge that the service is relying on it or publicizing it.

Attorneys should not take any action that might game or otherwise confuse the ratings system. For example, an attorney should, at a minimum, reflect seriously before soliciting others -- whether clients or other attorneys -- to log a favorable vote or to provide other favorable input or, conversely, from avoiding making any unfavorable comments, and should be extremely careful about potential impropriety to the extent that any type of favorable reciprocal action is expected. (To be clear, as noted above, we are not endeavoring herein to analyze or otherwise comment on the ethical and legal implications of an attorney's use of attorney-ratings services and systems.)

All of the above is independent of whether the information is provided with attribution or anonymously. It should go without saying, but we will say it anyway, that an attorney should never, ever, submit any recommendation or statement, even under the supposed cloak of anonymity, that he would not be prepared to defend in the open.²⁶

D. The Rating Services

It is clear that a number of the rating services devote considerable resources and effort to realizing, developing, and providing their ratings and compilations. Given the potential for these services to affect commercial advantage in selection of attorneys and ultimately, attorney's fees, rating services should be scrupulously careful and accurate in what they state and publish. Thus, we also have a number of comments intended for consideration by the rating services themselves as set forth below.

²⁵ As discussed above, the CPE has stated that the advertisement of a lawyer's inclusion in a certain ratings compilation "could be permissible, provided that the lawyer's assessment of the methodology used to determine inclusion demonstrates that the methodology involves an unbiased, nondiscriminatory and defensible process." Therefore, an attorney is on notice that what he says or writes may be quoted not only in the publication itself, but in the subject attorney's own advertising. *See generally supra* § III(A) (discussing Opinion 877 of the CPE).

²⁶ Whether a person who submits information will be able to avoid disclosure of his identity if it is sought is an evolving question on which there are some variations from state to state. *See, e.g., Johnson v. Doe*, No. 72321-9-I (Wash. App. July 6, 2015).

1. Transparency

We recommend that the services increase transparency,²⁷ and acknowledge and communicate to users the services' own views as to the utility of and limitations regarding their respective ratings. The service should summarize the type of approach it uses, possibly with express contrasts to the approaches used by others, including the extent to which the respective services rely on and incorporate the results of the following kinds of inputs and factors (and any relevant others):

- Polling of peers, clients or the market for legal services generally;
- Targeted or selective polling of peers, clients or the market and the basis for that targeting and polling;
- Detailed interviews of peers, clients or other market participants;
- Whether (and if so how) an individual attorney's purchases from the service has any bearing on the process;²⁸
- Substantive or other review of results, including the extent, if any, to which the process is limited to only positive inputs; or whether negative inputs are also balanced against the positive recommendations;
- Additional subjective considerations and review;
- Whether there has been any statistical analysis regarding the design of the process and in testing of results (and describing such analysis, if any);
- Whether there is a dispute-resolution policy and what the policy might be, particularly where such a process might bear upon the reliability of the published information, and especially where attorneys' reputations are at stake; and
- Safeguards regarding attorney abuse of the rating process.

Certain kinds of numerical information would help to give a clearer picture of what the list of lawyers who have been selected represents and how selections were made. One example would be indications like, "of [X number] of attorneys who practice in [the geographic area and/or the practice area], we received nominations for and considered [Y number] and ultimately selected [Z number] for inclusion." Another example would be explanations of whether the number of lawyers listed was capped at a particular percentage and, if so, how that percentage was decided

²⁷ Obviously there is likely to be some tension between transparency and preservation of proprietary information and processes. The development and application of criteria for how to resolve that tension are beyond the scope of this Report. However, in the spirit in which we offer this Report, we would hope that users of the compilations will encourage transparency and that the publishers will find it in their interests to respond with more information.

²⁸ We note that such a criterion raises ethical issues for the attorneys concerned; as indicated earlier, a discussion and resolution of such issues is beyond the scope of this Report.

and at least in a qualitative sense how “close” the lawyers listed are to each other and to those who might just have missed the cutoff.

2. Maintaining Integrity and Identifying Biases

As noted above, inappropriate actions that may tend to skew or otherwise corrupt the ratings may be hard or even impossible to defend. Consequently, we believe that, to the extent they do not already do so, the various services should monitor and refine their methodologies and how they operate in practice, so as to reduce and hopefully minimize the extent to which they are or can be manipulated by the questionable suggestive activities of the attorneys and others. We believe it to be to the benefit of all interested parties that the ratings services and organizations have in place a robust system of checks and balances that is designed to root out even the potential for manipulation.

More subtly, while we recognize that certain biases will be inherent in every approach, we believe that the services should consider each self-identifying potential deficiencies and sources of bias in their own ratings. Our overall intention is that the services give readers the tools to interpret the listings more fully.

Thus, for example, the following are among the potential issues that may arise:

- Do smaller firms, sole practitioners and capable but younger attorneys face special challenges in being listed and otherwise recognized?
- Is it more difficult for attorneys from smaller cities and states, or from outside of metropolitan areas, to be appropriately included?

V. Conclusion

We do not seek herein to make judgments about the use of attorney-ratings services in general or to compare the approaches used by the ratings services. We hope, however, that our suggested guideposts for the use of such services by clients, potential clients and attorneys will be useful.

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