

New York State Bar Association

Committee on Professional Ethics

Opinion 757 – 7/16/02

Topic: Certification as specialist; advertising

Digest: Professional announcements of certification as a specialist that are distributed to members of the bar or mailed to present and former clients are “public” communications within the meaning of DR 2-105 and thus should include the disclaimer set forth in DR 2-105(C).

Code: DR 2-101(A); 2-102(A)(2); 2-105(A); 2-105(C).

QUESTION

Must an announcement that a lawyer has been certified in a particular field of law by an organization accredited by the American Bar Association contain the disclaimer set forth in DR 2-105(C) if it is (a) mailed to members of the local bar association, (b) reprinted in the local bar association newsletter distributed to its members, and/or (c) mailed to present and former clients?

OPINION

The inquirer has recently been certified as an “elder law attorney” by the National Elder Law Foundation, a private organization approved for that purpose by the American Bar Association. The inquirer wishes to send an announcement to members of the local county bar associations and to have the announcement reprinted in the local bar association newsletter, which is distributed to its members monthly. The announcement would state that the inquirer has “been certified as an Elder Law Attorney by the National Elder Law Foundation as accredited by the American Bar Association.” The announcement would further state that the inquirer’s practice would continue to be concentrated in certain areas.

The inquirer asks whether the disclaimer required by DR 2-105(C)(2) needs to be included when the announcement is not being disseminated to the general public but only to attorneys who are members of the county bar associations. The inquirer also asks whether it is permissible to send the announcement to existing and former clients.

DR 2-105 prohibits a lawyer from “publicly” identifying himself or herself as a “specialist” in an area of law unless he or she has been certified by certain approved organizations. If the lawyer so states, the lawyer must include a disclosure or disclaimer that (1) the certifying organization is not a government entity, (2) certification is not a requirement to practice law, and (3) certification does not necessarily imply greater competence than other attorneys experienced in the field of law. The rule states, in relevant part:

- A. A lawyer or law firm may publicly identify one or more areas of law in which the lawyer or law firm practices, or may state that the practice of the lawyer or law firm is limited to one or more areas of law, provided the lawyer or law firm shall not state that the lawyer or law firm is a specialist or specializes in a particular field of law, except as provided in DR 2-105 [1200.10] (B) or (C).
- B. . . .
- C. A lawyer may state that the lawyer has been recognized or certified as a specialist only as follows:
 - 1. A lawyer who is certified as a specialist in a particular area of law or law practice by a private organization approved for that purpose by the American Bar Association may state the fact of certification if, in conjunction therewith, the certifying organization is identified and the following statement is prominently made: “The [name of the private certifying organization] is not affiliated with any governmental authority. Certification is not a requirement for the practice of law in the State of New York and does not necessarily indicate greater competence than other attorneys experienced in this field of law.”

This rule, promulgated in 1999, reflects the holding in *Peel v. Attorney Registration and Disciplinary Commission of Illinois*, 496 U.S. 91 (1990), which recognized a lawyer’s First Amendment right to state on letterhead “certified civil trial specialist by the National Board of Trial Advocacy.” Justice Marshall’s concurring opinion (there was no majority opinion) found the statement not actually misleading, but potentially so, and said that a state could require that such statements be accompanied by disclaimers or disclosure “in order to prevent that claim [of certification] from being misleading.” 496 U.S. at 117.

The first question is whether the proposed announcement constitutes a statement that the inquirer is a “specialist or specializes in a particular field of law” within the meaning of DR 2-105. The proposed announcement does not use the word “specialist” or “specializes” but rather the term “certified as an Elder Law Attorney.” In

N.Y. State 722 (1999) we applied DR 2-105 to a proposed letterhead notation that would say “certified by AICP [American Institute of Certified Planners],” and noted that if membership in a professional organization “implies certification in a legal field, the reference must comply with DR 2-105(C).” We think it plain from the express references in DR 2-105(C) to certification by precisely the sort of organization involved here that the reference to certification proposed would be covered by the rule regardless of whether the term “specialist” is used.

The next question is whether the announcement constitutes the “public” identification of an area of specialization within the meaning of DR 2-105(A). There is no question that announcements sent to newspapers in any form – announcement cards, press releases, ghost-written articles – will require a disclaimer. We conclude that distributing a professional announcement to a number of people large enough to justify a mass mailing or printing in a newsletter is also “public” for these purposes. We believe this is a natural reading of the term and accords with other provisions of the Code as well as with the evident purpose of the disclaimer.

The term “public” appears not only in DR 2-105(A) but also in the Code’s general prohibition on false, deceptive or misleading “public communication[s],” DR 2-101(A). We have given this term a broad interpretation consistent with its purpose of regulating all forms of advertising and publicity. Thus, we have held letterhead and business cards to be forms of public communication subject to DR 2-101(A). N.Y. State 704 (1997); N.Y. State 557 (1984). Since the specific limitations on use of the term “specialist” in DR 2-105 are essentially an application of the general proscription in DR 2-101(A), it makes sense to read the term “public” in the two provisions in the same way. We also note that DR 2-102(A)(2) specifically provides that a “professional announcement card” must comply with DR 2-105 if it addresses the nature of the lawyer’s practice. That is not dispositive – because the two provisions can be read to require compliance with DR 2-105 only when the professional announcements are distributed “publicly” -- but it tends to support a view that professional announcements should be viewed as a form of publicity subject to these regulations.

Moreover, the intent of the disclaimer is clearly to ensure that lay readers and potential clients are not misled as to what certification as a “specialist” means. From the point of view of the provision’s purpose, therefore, a mailing to current and former clients should include the disclaimer. Further, with almost any mass mailing, and still more with a newsletter announcement, the sender has little idea where the announcements are going to end up. Since sending the announcement to other lawyers is intended in part to encourage lawyers to recommend the specialist to their clients, it is reasonable to suppose that copies of the announcement or newsletter item might well be given to the potential clients.

We are aware that two other ethics opinions have reached the opposite conclusion in somewhat similar circumstances. In Inf. Op. No. 970024, the Missouri

Chief Disciplinary Counsel concluded that a similar disclaimer in Missouri's Rule 7.4 did not need to be included in an announcement of certification sent to bar association publications but did need to be included in a press release as well as on business cards and letterhead.¹ Tenn. 2001-F-144(b) concludes that a prescribed disclosure regarding the nature of certain certifications should be included in Martindale-Hubbell or other directories or websites "available to the general public" but suggests that the disclosure is not necessary in directories "intended for the use of lawyers and not actively marketed to the lay public."² *But see* Iowa No. 90-39 (1991) (requiring that disclaimer accompany certification statement "whether on a professional card or by any other means or medium of communication," but not addressing bar publications). The rules in each of these states are not the same as the rules here, however. Taking the New York Code provisions as a whole, and the historically broad interpretation of "public," we do not find a basis in the Code for an exemption for certain mass mailings or publications.³

CONCLUSION

A professional announcement card stating a lawyer's certification as a specialist that is mailed to members of the local bar association, reprinted in a newsletter

¹ Missouri's rule refers to "communication[s]" generally and does not contain the qualifier "public" that is in DR 5-105(A). The disclaimer required in Missouri is "that neither the Supreme Court of Missouri nor the Missouri Bar reviews or approves certifying organizations or specialist designations." Mo. Rule of Conduct 7.4.

² The Tennessee rule requires a lawyer who "publishes or broadcasts a communication with regard to any area of law in which the lawyer practices" to state whether certification by the Tennessee Commission on Continuing Legal Education is available in the area of practice and whether the lawyer has been so certified. Tenn. Sup. Ct. Rule 8.

³ One commentator has suggested that identification as a "specialist," which would be prohibited by DR 2-105(A) if made "publicly," is common in legal publications, although the commentator concludes that this practice finds no support in the Code:

"[L]awyers may apparently hold themselves out as 'specialists' or 'experts' in particular fields of law when advertising to the legal profession as opposed to the general public. Perhaps this is not considered 'publicly' identifying an area of practice. Accordingly, the New York Law Journal and many other legal publications regularly contain advertisements in which lawyers offer their services as 'counsel to the profession' with a 'specialty' in one or more fields of law. The text of DR 2-105(A) does not reflect this exception, and any claim that a lawyer is 'certified as a specialist' must still comply with DR 5-105(C), but the disciplinary authorities appear untroubled by claims of specialization in periodicals aimed mainly at other lawyers."

Roy Simon, *Simon's New York Code of Professional Responsibility Annotated* 208 (2002).

distributed to those members, and mailed to the lawyer's present and former clients should contain the disclaimer set forth in DR 2-105(C).

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