



## Committee on Professional Ethics

Opinion #487 - 7/10/78 (33-78)

Topic: Advertising and publicity; identification of areas of practice; representation of experience.

Digest: Advertising may contain truthful statements concerning lawyer's experience, but special care should be taken to avoid ambiguities tending to mislead.

Code: EC 2-10;  
DR 2-100(A), 2-101(A) through (J), 2-103(A), 2-105(A) and (B).

### QUESTION

May a lawyer advertise that he has

"[a specified number of] years' experience representing licensees, applicants, ABC Boards, SLA, Federal Alcohol Bureau, Judicial Review"?

### OPINION

The past year has seen the elimination of many of the traditional prohibitions against lawyer advertising, triggered by the landmark decision of the United States Supreme Court in Bates v. State Bar of Arizona, 433 U.S. 350 (1977). In New York, each Department of the Appellate Division has adopted a set of uniform rules governing lawyer advertising and has approved their incorporation into the New York State Bar Association's Code of Professional Responsibility as a totally revised DR 2-101. Each Department has also approved a number of additional amendments to various other Canon 2 Disciplinary Rules pertaining to related forms of lawyer publicity and, most recently, amended Ethical Considerations conforming to the revised Disciplinary Rules have been adopted.<sup>1</sup> Hence, at present, the Disciplinary Rules and Ethical Considerations of Canon 2 which pertain to lawyer advertising would appear to be well within the ambit of constitutionally permissible regulation announced in Bates and fully consistent with the judicial mandate of the Appellate Division.

The Code, as will be seen, now clearly permits a lawyer to advertise information which is relevant to the process of lawyer selection generally or which reasonably bears upon his competence

to serve as counsel in certain kinds of matters.<sup>2</sup>

The principal limitations pertaining to lawyer advertising and publicity are set forth in subdivisions (A) and (B) of DR 2-101. These subdivisions prohibit the use of statements that are "false, deceptive, misleading or cast reflection on the legal profession as a whole" or contain "puffery, self-laudation, claims regarding the quality of the lawyer's legal services or claims that cannot be measured or verified." Subdivision (D) further requires that "[a]dvertising and publicity shall be designed to educate the public to an awareness of legal needs and to provide information relevant to the selection of the most appropriate counsel." Thus, operating together, subdivisions (A), (B) and (D) of DR 2-101 broadly serve to define the absolute limits of permissible advertising and publicity.

The balance of DR 2-101 can be viewed as generally consisting of three additional elements. Subdivision (C) serves to illustrate various kinds of acceptable publicity. Subdivisions (E) through (I) specify procedures for the advertising of fee information as well as the use of certain kinds of advertising media. And, finally, subdivision (J) prohibits the giving of compensation for "professional publicity in a news item."

Somewhat more directly germane to the question posed, it will be observed that the amended provisions of DR 2-101(C)(1) and DR 2-105(A) expressly authorize a lawyer to identify the "areas of the law in which the lawyer ... practices."

A truthful representation, not otherwise deceptive or misleading, of a specified number of years' experience in an accurately identified area of practice, appears to be proper under the amended provisions of the Code. The information can be "measured or verified." DR 2-101(B). And, certainly, such information is "relevant to the selection of the most appropriate counsel." DR 2-101(D).

What is truthful and non-deceptive in the context of a statement concerning a lawyer's experience is not always easy to define and may vary with the area of the law or practice involved, as well as the relative sophistication of the persons to whom the statement is addressed. It is clear, however, that a representation of "experience" without further qualification implies that the lawyer's experience over the stated period has been frequent, rather than merely occasional, and substantial as distinguished from casual.

We conclude, therefore, that if the lawyer's experience throughout the stated period has in fact been both frequent and substantial

with respect to the area of law or practice advertised, the Code would now permit the lawyer to advertise such experience without further qualification, provided the advertisement conforms to the other provisions of the Code bearing upon the particular medium employed. See, e.g., DR 2-101(F) through (I) (specifying various procedures for broadcast media).

In approving the use of statements concerning a lawyer's experience, it is important to note that the Code continues to limit the use of the term "specialist". Only a lawyer "certified as a specialist in a particular area of law or law practice by the authority having jurisdiction under the laws of this State over the subject of specialization by lawyers" may use the term. DR 2-105(B). The Code thereby seeks to reserve for future use a category or standard of verifiable excellence upon which the public may hereafter safely rely. It is, in concept, an exception to the prohibition set forth in DR 2-101(B) concerning the use of "claims regarding the quality of the lawyer's legal services". The "authority having jurisdiction ... over the subject of specialization by lawyers", however, has not as yet established any standards or rules for the certification of specialists. Until these standards or rules are established, it is possible that some members of the public may confuse advertised claims of "experience" with the standard of excellence which they would otherwise associate with the use of such terms as "specialist". Nevertheless, weighing that risk against the present Code's express authorization to identify the "areas of the law in which the lawyer ... practices" (DR 2-101 [C][1] and DR 2-105[A]) and its requirement that advertising set forth information "relevant to the selection of the most appropriate counsel" (DR 2-101[D]), we find the balance clearly preponderates in favor of assuming that risk in the hope that a better informed public will ultimately be less susceptible to such confusion.

The admonition to use "special care" in the preparation of lawyer advertising set forth in EC 2-10 seems particularly apt as we turn to consider the specific language employed in the proposed advertisement. The need for careful draftsmanship cannot be over-emphasized. Even the slightest ambiguity may tend to mislead the uninformed. For example, while it should be obvious to other members of the Bar that the lawyer in question means to say that he has represented licensees and applicants before the enumerated agencies, an unsophisticated reader of the proposed advertisement could reasonably assume that the lawyer had represented the agencies themselves. A simple modification of the language employed should cure this ambiguity.

For the reasons stated, and subject to the qualifications hereinabove set forth, the question posed is answered in the affirmative.

FOOTNOTES

1. The Appellate Division rules on lawyer advertising and publicity became effective March 1, 1978 in the Second, Third and Fourth Departments, and effective March 13, 1978 in the First Department. 22 NYCRR § 603.22 (1st Dept.); *id.*, § 691.22 (2nd Dept.); *id.*, § 806.13 (3rd Dept.); *id.*, § 1022.16 (4th Dept.). The New York State Bar Association conditionally incorporated these Appellate Division rules into the Code of Professional Responsibility on April 29, 1978, together with other amendments to other Canon 2 Disciplinary Rules, subject to Appellate Division approval. Such approval was given in the First Department on June 12, 1978; in the Second Department on June 6, 1978; in the Third Department on June 6, 1978; and in the Fourth Department on May 22, 1978. Approval was made effective retroactively to April 29, 1978 in all Departments except the Third where the retroactive effective date was May 1, 1978. On June 24, 1978, the amended Canon 2 Ethical Considerations were given final approval by the Association retroactively effective to April 29, 1978.

2. For ease of reference, we are hereinbelow setting forth the text of those provisions of the recently amended Code which bear upon the present inquiry.

"DR 2-100 Publicity and Advertising Violative of Statute or Rule of Court.

"(A) A lawyer shall not advertise or publicize himself or herself in violation of any statute or rule of court.

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"DR 2-101 Rules of Court Applicable to Advertising and Publicity by Lawyers.

"(A) A lawyer on behalf of him or herself or partners or associates, shall not use or disseminate or participate in the preparation or dissemination of any public communication containing statements or claims that are false, deceptive, misleading or cast reflection on the legal profession as a whole.

"(B) Advertising or other publicity by lawyers, including participation in public functions, shall not contain puffery, self-laudation, claims regarding the quality of the lawyer's legal services, or claims that cannot be measured or verified.

"(C) It is proper to include information, provided its dissemination does not violate the provisions of subdivisions (A) and (B) herein, as to

"(1) education, degrees and other scholastic distinc-

tions; dates of admission to any bar; areas of the law in which the lawyer or law firm practices, as authorized by the Code of Professional Responsibility;

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"(D) Advertising and publicity shall be designed to educate the public to an awareness of legal needs and to provide information relevant to the selection of the most appropriate counsel. Information other than that specifically authorized in subdivision (C) that is consistent with these purposes may be disseminated providing that it does not violate any other provisions of this rule."

"DR 2-105 Identification of Practice and Specialty.

"(A) A lawyer or law firm may publicly identify one or more areas of law in which the lawyer or the law firm practices, or may state that the practice of the lawyer or law firm is limited to one or more areas of law.

"(B) A lawyer who is certified as a specialist in a particular area of law or law practice by the authority having jurisdiction under the laws of this State over the subject of specialization by lawyers may hold himself or herself out as a specialist, but only in accordance with the rules prescribed by that authority."

Also germane to the question posed are the amended provisions of EC 2-10.

"A lawyer should ensure that the information contained in any advertising which the lawyer publishes, broadcasts or causes to be published or broadcast is relevant, is disseminated in an objective and understandable fashion, and would facilitate the prospective client's ability to select a lawyer. A lawyer should strive to communicate such information without undue emphasis upon style and advertising stratagems which serve to hinder rather than to facilitate intelligent selection of counsel. In disclosing information, by advertisements or otherwise, relating to a lawyer's education, experience or professional qualifications, special care should be taken to avoid the use of any statement or claim which is false, fraudulent, misleading, deceptive or unfair, or which is violative of any statute or rule of court."

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