

# Specialization Announcement Requires Disclaimer Notice

BY LAZAR EMANUEL

The NYSBA Committee on Professional Ethics has construed the disciplinary rules which apply when a lawyer who has been certified in a particular field of law wishes to announce her certification to her present and former clients and to other lawyers. Opinion 757, July 16, 2002.

The Opinion was issued in response to an inquiry by a lawyer who was certified as an "elder law attorney" by the National Elder Law Foundation, a private organization approved by the American Bar Association as a source of certification for lawyers who practice in the field of elder law. The Foundation requires applicants for certification to have practiced for at least five years, to have devoted a substantial portion of their time to elder law, to be familiar with all of the substantive areas relating to elder law, and to have attended 45 hours in CLE programs on elder law.

The inquiring lawyer asked whether any disclaimer was required if he intended to distribute his announcement only to members of county bar associations and not to the general public. In response, the NYSBA Opinion considered the following disciplinary rules in the New York Code: DR 2-101(A); DR 2-102(A)(2); DR 2-105(A); and DR 2-105(C).

A lawyer may publicly identify one or more areas of law in which she practices, or she may state that her practice is limited to one or more areas of law. DR 2-105(A). But the Rule prohibits the lawyer from stating that she has been certified as a "specialist" in a particular area of law unless her statement identifies the certifying organization 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 State of New York and does not necessarily indicate greater competence than other attorneys experienced in the field. DR 2-105(C).

The New York rule, adopted in 1999, was prompted by the decision of the Supreme Court in *Peel v. Attorney Registration and Disciplinary Committee of Illinois*. 496 US 91 (1990). Attorney Peel was censured by the Illinois courts for printing on his letterhead, "Certified Civil Trial Specialist by the National Board of Trial Advocacy." Split 4-4 on whether this legend was misleading, the Court's decision was determined by the controlling ninth vote of Judge Thurgood Marshall, who found the legend to be at least potentially misleading. The states were therefore permitted to require reasonable qualifying language for the purpose of dispelling any risk of public confusion. The disclaimer language in DR 2 105(C) was New York's response.

## **A "Certified" Lawyer Is A Specialist**

The first question answered by Opinion 757 is: Does the statement that a lawyer has been "certified" in a particular field of law constitute a statement that the lawyer is a "specialist" in that field within the meaning of DR 2-105(A)? The Committee's answer was, "Yes." A claim of certification by an approved organization in a particular field is a statement of specialization in that field.

The next question was: Was the announcement proposed by the inquiring lawyer a "public" identification of an area of specialization within the meaning of DR 2-105(A). Again, the answer was, "Yes." Because the term "public" appears not only in DR 2-105(A) but also in DR 2-101(A) - the Code's general prohibition against false, deceptive or misleading "public communication" - the Committee gave the term "public" a broad interpretation "consistent with [the] purpose of regulating all forms of advertising and publicity."

The Committee found that the intent of the disclaimer language in DR 2-105(C) was clearly to ensure that lay readers and potential clients not be misled as to the meaning of certification as a "specialist" in a field of law. Clearly, any mailing or distribution to present or former clients would require that the disclaimer language accompany the announcement of certification.

The risk that the public may be misled in the absence of the disclaimer language of DR 2-105(C) is not dispelled by limiting distribution of the announcement to lawyers. "Sending the announcement to other lawyers is intended in part to encourage lawyers to recommend the specialist to their clients." It is therefore reasonable to conclude that these lawyers will distribute copies of the announcement to clients who need the services of the specialist.

The Committee recognized that other states have reached a different conclusion on announcements sent only to lawyers.

Thus, Missouri has held that a disclaimer similar to New York's did not need to accompany an announcement of certification sent only to a bar association.

But the Committee insisted on its view. "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 publication."

The Committee concluded:

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