NEW HAMPSHIRE BAR ASSOCIATION
Ethics Committee Formal Opinion 1992-93/11
Certification as a Specialist/Problems with Seminars
June 9, 1993
(*Bar News*, p.18, 9/1/93)

RULE REFERENCES:
- *Rule 1.1
- *Rule 1.6
- *Rule 7.1
- *Rule 7.2
- *Rule 7.2(a)
- *Rule 7.3
- *Rule 7.4
- *Rule 7.4(c)
- *Rule 8.4(d)

CODE REFERENCES:
- *DR2-104(A)
- *EC2-5

SUBJECTS:
- *Advertising & Solicitation
- *Bankruptcy
- *Media Issues
- *Seminars/Public Discussions
- *Specialization

ANNOTATION:

Rule 7.4(c) as currently written prohibits an attorney from stating that an attorney is a specialist or has other certifications not yet recognized by the NH Supreme Court. (Rule 7.4(c)).

An attorney has a limited right under the First Amendment to advertise certifications by a meritorious program, such as the National Board of Trial Advocacy. (Peel v. Attorney Registration and Disciplinary Commission, 496 US 91 (1990)).

An attorney may advertise a seminar or lecture in a newspaper or by direct mailing to non-clients not known to need legal service of the kind advertised, provided the attorney complies with requirements of Rule 7.2 & 7.3. (Rule 7.2; Rule 7.3(c))

An attorney participating in publicly advertised seminars or lectures, should be cautious in answering specific questions posed by those attending, so as not create a "client" relationship, nor engage in prohibited solicitation. (Rule 7.3)

The attorney participating in a seminar or public lecture should be careful to caution that advice and answers have only general applications and may not solve individual problems that are fact-specific, and otherwise not intentionally mislead participants as to what they can expect of the lawyer in the future.

There is no longer any prohibition from representing as a client, a participant in a seminar in which the attorney participated.

QUESTIONS:

1. In advertising which is otherwise acceptable, may an attorney publicize the attorney's certification by the American Bankruptcy Board of Certification (ABBC). Does it make any difference if the attorney avoids describing the attorney as a "specialist"?

2. May an attorney solicit, through a newspaper of general circulation, attendance of the general public at a seminar in consumer bankruptcy to be offered by the attorney? Does it make any difference if the solicitation is made by direct mail (to non-clients), rather than through a newspaper of general circulation?

3. May the attorney answer questions posed by participants, where the answer constitutes individual counseling? Does it make any difference if a fee is charged?

4. May the attorney represent seminar participants who subsequently decide to file bankruptcy?

RESPONSE:

1. Rule 7.4 states that: "A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law. A lawyer shall not state or imply that the lawyer is a specialist except as follows:

> (a and b) [exceptions for patent attorneys and proctors in admiralty]
>
> (c) A lawyer who is certified as a specialist in a particular field of law or law practice by the New Hampshire Supreme Court may hold him or herself out as such, but only in accordance with the rules prescribed by that authority.

The New Hampshire Supreme Court has not issued any rules for publicizing certifications. In the absence of any such rule, Rule 7.4 read literally says that any publicizing of certification, even if true and not misleading, would be a violation. However, Rule 7.4(c), as so applied, is of dubious constitutionality. The United States Supreme Court, in Peel v. Attorney Registration and Disciplinary Commission of Illinois, 496 U.S. 91, 110 L Ed 2d 83, 110 S Ct 2281, (1990) found that a similar Illinois rule "restricting lawyers' advertising is 'broader than reasonably necessary to prevent the' perceived evil.'" [citations omitted]. The need for a complete prophylactic [Rule] against any claim of specialty is undermined by the fact that use of titles such as "Registered Patent Attorney" and "Proctor In Admiralty," which are permitted under [the Illinois rule]'s exceptions, produces the same risk of deception." Id at 107. A plurality of the court found that a listing on Peel's letterhead of his certification by the National Board of Trial Advocacy was "neither actually nor inherently misleading . . . Disclosure of information such as that on petitioner's letterhead both serves the public interest and encourages the development and utilization of meritorious certificate programs for attorneys." Id at 110-111. A majority, however, found Peel's letterhead potentially misleading, and would have allowed "regulations other than a total ban to ensure that the public is not misled by such representations." Concurrence, Id at 111.

In light of Peel, the American Bar Association has amended Model Rule 7.4 to permit attorneys to advertise that they have achieved certification if the certifying organization has been approved by the appropriate state agency, or, alternatively, by the ABA. This amendment has not yet been adopted by the New Hampshire Supreme Court.

Caveat:

The cautious lawyer will note that:

a) Rule 7.4(c) remains on the books

b) Issuance of rules under Rule 7.4(c) by the New Hampshire Supreme Court may be enough to swing the vote of the Peel court the other way.

c) If Rule 7.4 is applied without reference to U.S. Supreme Court opinions, the use or non-use of the word "specialist" is immaterial in light of the prohibition of the implication of specialization.

2. The proposed advertising of a bankruptcy seminar in a newspaper of general circulation is governed by Rule 7.2, "Advertising", and may be carried out within the confines of the mechanical restrictions contained in Rule 7.2. A direct mail solicitation to non-clients is excluded from the definition of "solicit" and "solicitation" in Rule 7.3 if it consists of "letters addressed or advertising circulars distributed generally to persons not known to need legal services of the kind provided by the lawyer in a particular matter, but who are so situated that they might in general find such services useful." As the proposed activity is exempt from coverage under Rule 7.3, it is not affected by the constitutional infirmities of that Rule, see Shapero v. Kentucky Bar Association, 486 U.S. 466, 100 L Ed 2d 475, 108 S Ct 1916 (1988). As the activity is not "solicitation" as defined in Rule 7.3, the activity is "advertising" as defined under Rule 7.2(a), and is permitted subject to the mechanical restrictions of that Rule.

Both newspaper and direct mail advertising, of course, are subject to the general restrictions of Rule 7.1, barring false or misleading communications about the lawyer or the lawyer's services.

3. Lawyer participation in seminars can provide a valuable public service. However, the increased use of seminars by lawyers for marketing purposes gives rise to some difficult issues. For example, it may be difficult to determine, even in hindsight, the extent to which the lawyer's response to individual questions at such seminars confers the status of "client" on a member of the public, or, on the other hand, the extent to which the lawyer's contact with those attending constitutes direct in-person "solicitation", which is prohibited under Rule 7.3.

For another example, seminar organizers commonly wish to "enhance" the seminar by bringing in public officials as panelists; lawyers should be sensitive to the risk of misleading the public and those attending the seminar as to the lawyer's ability to make use of "connections." See Rule 8.4(d).

As to the particular questions asked of the Committee, while there is no specific problem under the Rules with answering questions posed by participants in a bankruptcy seminar, there are risks running with this course of action.

Any answer, which may be entirely appropriate for the questioner, may confuse or be misapprehended by other listeners as applying to other facts. Off-the-cuff answers without an opportunity for in-depth examination of the client's situation present potential issues of competence under Rule 1.1, and the lawyer (and the audience) may be exposed to disclosure of potentially criminal or tortious acts by the questioner, which may in turn lead to difficult decisions under Rule 1.6, Confidentiality of Information. Ethical Consideration 2-5 under the former Code, while no longer in force, is still worth reviewing:

A lawyer who writes or speaks for the purpose of educating members of the public to recognize their legal problems should carefully refrain from giving or appearing to give a general solution applicable to all apparently similar individual problems, since slight changes in fact situations may require a material variance in the applicable advice; otherwise, the public may be misled and misadvised. Talks and writings by lawyers for laymen should caution them not to attempt to solve individual problems upon the basis of the information contained therein.

Lawyers can reduce these risks further by making clear the limitations to the applicability of the specific answer.

Also, as it may not be sufficiently clear whether the questioner is a client, the possible client relationship may raise problems of potential conflicts of interests with existing or former clients, which will be difficult to check under the circumstances. It may also unintentionally mislead participants as to what

they can expect of the lawyer in the future. Lawyers can lessen these risks by specifically disclaiming a client relationship, and by being careful not to imply one.

The charging of a fee makes no difference in the application of the Rules as to advertising and solicitation. However, charging a fee may increase the risk of raising in the participant's mind an expectation that an attorney-client relationship has been created.

4. Barring any other case-specific prohibiting factors, an attorney may represent bankruptcy seminar participants who subsequently decide to file bankruptcy. The former prohibitions under Disciplinary Rule 2-104(A) of the old Code of Professional Responsibility were not retained in the current Rules of Professional Responsibility.