

WEST VIRGINIA STATE BAR JOURNAL
Winter, 1978
Volume 4, Number 4

ANNOUNCEMENT OF SPECIALIZATION BY LAWYER-CPA

Legal Ethics Inquiry 77-11

(This opinion was issued prior to the approval
of the advertising amendment)

Reference is made to your letter wherein you asked approval of a professional announcement which you propose to mail to members of The West Virginia State Bar. The text of the proposed announcement is as follows:

I wish to announce the opening of my offices and in accordance with DR 2-105 take this opportunity to inform you that I am available to act as a consultant or associate in matters of taxation and estate planning. I am a certified public accountant and would welcome your referrals while restricting my practice to the above legal services.

You discussed the foregoing announcement with the Executive Director of The West Virginia State Bar by telephone, who expressed to you the concern of this Committee over the use of the phrase "in accordance with DR 2-105" and the statement "I am a certified public accountant." You have asked for this Committee's approval of the text of your proposed announcement, including the use of the phrase and the statement mentioned in the preceding sentence.

Since you have mentioned the case of Bates v. State Bar of Arizona, 53 L. Ed. 2d 810 (1977), in your letter, it is appropriate

that we first discuss the effect of that decision on the disciplinary rules currently in effect in West Virginia. Bates v. State Bar of Arizona did not proscribe all regulation of lawyer advertising. The Supreme Court expressly refused to apply the First Amendment overbreadth doctrine to professional advertising. The issue in the case was described by the Court itself as "a narrow one." The heart of the case was whether lawyers may advertise the price at which they will perform certain routine legal services. The case did "not address the peculiar problems associated with advertising claims relating to the quality of services." The Court specifically stated that there may be reasonable restrictions on the time, place and manner of advertising.

Following the decision in Bates v. State Bar of Arizona, the American Bar Association created a Task Force on lawyer advertising. This Task Force drafted two proposals for the amendment of the Code of Professional Responsibility with respect to the regulation of lawyer advertising. The first of these proposals, called Proposal A, was adopted by the House of Delegates in August of 1977. Proposal A has been described as regulatory in nature. It specifically authorizes certain forms of lawyer advertising if approved by state regulatory authorities. It retains many of the present disciplinary rules that specify the categories of information that may be published: name, field of law, practice concentration, education, client references, and other similar matters. Certain fee information may also be included. Present DR 2-105(A) (3), which authorizes announcements to other lawyers of

a lawyer's ability to serve as a consultant or as an associate in a particular branch of law or legal service, was omitted from the Code of Professional Responsibility by the amendments adopted by the American Bar Association in August, 1977.

The Code of Professional Responsibility in effect in West Virginia was adopted and promulgated by the Supreme Court of Appeals of West Virginia effective July 1, 1970. There have been certain amendments to Disciplinary Rule 2, specifically, amendments which would permit prepaid legal services plans. The amendments to the Code of Professional Responsibility adopted by the American Bar Association in August, 1977, are not effective in West Virginia. Proposed amendments to the West Virginia Code of Professional Responsibility regulating lawyer advertising probably will be presented to the State Bar at its meeting in April, 1978. Any amendments adopted by the State Bar must be approved and promulgated by the Supreme Court of Appeals before they become effective.

In considering the propriety of your announcement, we are to be guided by the present Code of Professional Responsibility in effect in West Virginia as it may have been affected by the decision of the Supreme Court of the United States in Bates v. State Bar of Arizona, which, as pointed out above, permits certain limited forms of lawyer advertising.

DR 2-105(A) (3) provides as follows:

A lawyer shall not hold himself out publicly as a specialist or as limiting his practice, except as permitted under DR 2-102(A)(6) or as follows:

* * *

(3) A lawyer available to act as a consultant to or as an associate of other lawyers in a particular branch of law or legal service may distribute to other lawyers and publish in legal journals a dignified announcement of such availability, but the announcement shall not contain a representation of special competence or experience. The announcement shall not be distributed to lawyers more frequently than once in a calendar year, but it may be published periodically in legal journals.

This rule would seem to permit announcements of the type you propose. Early opinions of the Committee on Ethics and Professional Responsibility of the American Bar Association did not recognize taxation as a special branch or field of the law. However, there has been a liberalizing tendency in the construction of the rule pertaining to announcements sent to other lawyers. Even under former canons it was held that labor law was a particular branch of the law. It is the opinion of this Committee that taxation and estate planning constitute practice "in a particular branch of law or legal service" within the meaning of DR 2-105(A)(3) and that the proposed announcement of availability in those areas of the law is not improper. We disagree with ABA Informal Opinion 238 insofar as it fails to consider tax matters and estate planning as particular branches of law or legal service. Were we to adopt that position, your announcement would, of course, be improper.

A more difficult question is presented by the inclusion of the statement "I am a certified public accountant." DR 2-105(A)(3), while permitting announcements to other lawyers of one's availability as a consultant or as an associate, proscribes the inclusion therein of any "representation of special competence or experience."

Informal Opinion C-445 of the American Bar Association Committee on Ethics and Professional Responsibility held that it was improper for a lawyer to show on his letterhead the designation "CPA," stating:

As to the use of CPA, your letter would clearly indicate special qualification as a lawyer. This is a form of advertising that is prohibited under Canon 27.

In Informal Opinion C-409 it was held to be improper for a lawyer to refer to honorary degrees held by him; in Opinion C-410 it was held improper for a lawyer to show "tax counsel" on his letterhead; in C-365 it was held improper for a lawyer to show on his letterhead that he was a registered engineer; and in C-331 it was held improper for a lawyer to designate himself as "accountant" or "tax specialist." Informal Opinion C-749 held that a lawyer was precluded from holding himself out, even passively, as employable in any other independent professional capacity, including that of certified public accountant.

While we recognize that the foregoing opinions are concerned with a lawyer's letterhead which, of course, will be distributed to lay persons as well as to other lawyers, these opinions have as

their basis the principle that a lawyer should not hold himself out as having any special competence or experience in any particular branch or field of the law.

DR 2-105(A) (4) provides:

A lawyer shall not hold himself out publicly as a specialist or as limiting his practice except as permitted under DR 2-102(A) (6) or as follows:

* * *

(4) A lawyer who is certified as a specialist in a particular field of law or practice by the authority having jurisdiction under state law over the subject of specialization by lawyers may hold himself out as such specialist but only in accordance with the rules prescribed by that authority.

The West Virginia State Bar has not prescribed any rules governing specialization, and it is improper for a lawyer in West Virginia to hold himself out as a specialist in any particular field. This is not to say that a lawyer may not limit or restrict his practice if he does so in language which cannot be construed as holding himself out as a specialist. DR 2-105(A) and DR 2-102(A) (6).

The Committee believes that the use of the phrase "I am a certified public accountant" violates the spirit of DR 2-105(A) (3) which provides that an announcement of availability as a consultant or as an associate shall not contain a statement of special competence or experience.

The Committee likewise frowns upon the use of the phrase "in accordance with DR 2-105." As you point out in your letter, unless your announcement is found to comply with DR 2-105, the

State Bar's mailing list will not be made available to you. The inclusion of this phrase is unnecessary and adds nothing to the information contained in the announcement. It strikes the Committee as an attempt to give a special importance or emphasis to the announcement or to indicate some special approval or sanction of the announcement.

Your announcement, if the phrase "in accordance with DR 2-105" and the statement "I am a certified public accountant" are omitted therefrom, and distribution thereof to other lawyers only not more frequently than once a year and publication in legal journals published periodically would not be improper.