

**STATE BAR OF NEVADA
STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY**

**Formal Opinion No. 13 -- Updated
October 3, 2005**

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QUESTION

May a lawyer who has been certified as a specialist in a certain area of law list this certification on his or her advertisements, letterhead, and business cards?

ANSWER

A lawyer who has been certified in a certain area of law may list this certification on his or her advertisements, letterhead, and business cards so long as (1) the certifying organization has been approved by the State Bar Board of Governors, (2) the lawyer meets the conditions set forth in SCR 198(3)(a)-(e), and (3) the advertisement states the name of the certifying organization.

AUTHORITIES RELIED ON

Nevada Rules of Professional Conduct (Supreme Court Rules) 195, 196, 196.5, 198, 198.5; Nevada State Bar Board of Governors *Governing Rules For Attorney Specialization*; *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977); *In re R.M.J.*, 455 U.S. 191 (1981); *Gary E. Peel v. Attorney Registration and Disciplinary Commission of Illinois*, 496 U.S. 91 (1990).

DISCUSSION

The Bates Case and Its Progeny

The present question is best considered in historical context. In *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), the U.S. Supreme Court concluded that attorney advertising was a form of commercial speech, protected by the First Amendment and that advertising by attorneys “may not be subject to blanket suppression.” *Bates*, 433 U.S. at 383.

In *In re R.M.J.*, 455 U.S. 191 (1982), the Supreme Court reiterated the message of *Bates* that:

False, deceptive, or misleading advertising remains subject to restraint, and the (Bates) Court recognized that advertising by the professions poses special risks of deception-"because the public lacks sophistication concerning legal services, misstatements that might be overlooked or

deemed unimportant in other advertising may be found quite inappropriate in legal advertising."

In re R.M.J., 455 U.S. at 200 (quoting *Bates*, 433 U.S. at 383).

[T]he States retain the authority to regulate advertising that is inherently misleading or that has proved to be misleading in practice. There may be other substantial state interests as well that will support carefully drawn restrictions. But although the States may regulate commercial speech, the First and Fourteenth Amendments require that they do so with care and in a manner no more extensive than reasonably necessary to further substantial interests.

In re R.M.J., 455 U.S. at 207.

With some developments not relevant to the present inquiry, that is where the matter stood until the U.S. Supreme Court decided *Gary E. Peel v. Attorney Registration and Disciplinary Commission of Illinois*, 496 U.S. 91 (1990). Gary Peel was certified as a Certified Civil Trial Specialist by a private certifying group, the National Board of Trial Advocacy ("NBTA"). His letterhead listed his certification, in violation of Rule 2-105(a)(3) of the Illinois Code of Professional Responsibility, which banned any lawyer from holding himself out as "certified" or a "specialist."

Citing *In re R.M.J.*, five U.S. Supreme Court justices concluded that Mr. Peel's letterhead was constitutionally protected from a blanket ban, because it was not actually or inherently misleading. *Peel*, 496 U.S. at 110. They found that the facts stated on the letterhead were true and verifiable, and that there was no contention that any potential clients had actually been misled or deceived by the stationery. *Id.* at 100. The Court distinguished between statements of opinion or quality and statements of objective facts from which a potential client might draw an inference of quality. *Id.* at 101. A plurality opined that the public understands that licenses are issued by governmental agencies and that certificates are issued by private organizations. *Id.* at 102.

Responding to concerns that certifications might be issued by spurious certifying organizations whose certifications might be meaningless, the majority noted that there had been no showing that the burden of distinguishing between bona fide and bogus organizations would be significant or that state bar disciplinary committees could not police deceptive practices effectively. *Id.* at 109. In a statement that has particular applicability to the present inquiry, the Court said:

To the extent that potentially misleading statements of private certification or specialization could confuse consumers, a State might consider screening certifying organizations or requiring a disclaimer about the certifying organization or the standards of specialty.

FN 17 -- A State may not, however, completely ban statements that are not actually or inherently misleading, such as certification as a specialist by bona fide organizations such as NBTA.

Id. at 110.

Justices Marshall and Brennan separately concurred that the letterhead was not actually nor inherently misleading. *Id.* Noting that facts as well as opinions may be misleading when presented without adequate information, they concluded that the letterhead in question was potentially misleading in that it might imply governmental sanction of Mr. Peel's certification. *Id.* at 112, 115. Because they felt that the claim of NBTA certification was potentially misleading, they suggested that states might enact measures other than a total ban to prevent deception and confusion. *Id.* at 116. A disclaimer was specifically suggested as a possible option. *Id.* at 117.

In sum, while a majority of the Peel court did not find his listing of his NTBA certification actually or inherently misleading, five of the Peel justices found the letterhead in that case at least potentially misleading.

The power of states to regulate lawyer advertising may, therefore, be summarized as follows:

- (1) Advertising which is false, deceptive, or misleading may be prohibited entirely.
- (2) Advertising which is presented in a way that is not deceptive, but is nonetheless potentially misleading, cannot be subject to a blanket prohibition. In those cases the state may require disclaimers or explanations or impose whatever other restrictions are necessary to prevent deception.
- (3) Advertising which is neither inherently nor potentially misleading may be regulated only if there is some substantial state interest involved. In that instance the state may promulgate regulations which are narrowly drawn so that they limit free speech only to the extent that the regulations further the state's substantial interests.

Supreme Court Rules

Effective January 18, 2004, the Nevada Supreme Court amended Supreme Court Rules 196 and 198 and adopted Supreme Court Rule 198.5. References herein to these rules will be to the latest versions.

Supreme Court Rule 195 is the same as Rule 7.1 of the ABA Model Rules of Professional Conduct ("Model Rules"). In pertinent part it states:

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it:

1. Contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading;
2. Is likely to create an unjustified expectation about results the lawyer can achieve,

SCR 196.5 also contains another general statement against false or misleading statements:

7. Any factual statement contained in any advertisement or written communication or any information furnished to a prospective client under this rule shall not:
 - (a) Be directly or impliedly false or misleading;
 - (b) Be potentially false or misleading;
 - (c) Fail to disclose material information necessary to prevent the information supplied from being actually or potentially false or misleading;

SCR 196 provides that:

4. A lawyer shall not state or imply that the lawyer is a specialist in a field of law unless the lawyer is currently certified as a specialist in accordance with Rule 198, and the name of the authorized certifying organization is clearly identified in the advertisement.
7. Every advertisement and written communication that indicates one or more areas of law in which the lawyer or law firm practices shall conform to the requirements of Rule 198.
12. The following information in advertisements and written communications shall be presumed not to violate the provisions of Rule 195:
 - (c) Technical and professional licenses granted by the state or other recognized licensing authorities.
 - (e) Fields of law in which the lawyer is certified or designated, subject to the requirements of Rule 198.

SCR 196.5 provides that lawyers may include in a "Lawyer's Biographical Data Form" areas of specialization under Rule 198, and other information detailing background, training and experience.

SCR 196.5(5)(b) further provides that whenever a potential client shall request information regarding the lawyer, the lawyer may furnish such additional factual information as is "deemed valuable to assist the client."

SCR 198 sets forth specific requirements which must be complied with in order to communicate that the lawyer is a specialist or practices in limited areas of law. SCR 198(1) and (2) provides that properly registered patent attorneys and those engaged in admiralty practice may so designate themselves.

SCR 198(3) states that a lawyer may communicate that he or she is a specialist in a particular field of law if the lawyer complies with the following requirements: (1) the lawyer is certified as a specialist by an organization that has been approved under SCR 198.5; (2) the lawyer shall have devoted at least one-third of his or her practice to each designated field of specialization for each of the preceding 2 calendar years; (3) the lawyer shall have completed 10 hours of accredited continuing legal education in each designated field of specialization of practice during the preceding calendar year (Note—the carry-forward and exemption provisions of Rules 210 and 214 do not apply); (4) the lawyer shall carry a minimum of \$500,000 in professional liability insurance, with the exception of lawyers who practice exclusively in public law.; and (5) the lawyer shall submit written confirmation annually to the state bar and board of continuing legal education demonstrating that the lawyer has complied with these requirements. See SCR 198(3)(b).

The lawyer must file a registration of specialty, along with a \$250 fee, with the executive director of the state bar on a form supplied by the state bar. The form shall include attestation of compliance with the above requirements. The registration must be renewed annually by completing a renewal form provided by the state bar, paying a \$250 renewal fee, and providing current information as required under SCR 198(3)(b) for each specialty registered. A lawyer may include more than one specialty on the initial registration or include additional specialties with the annual renewal without additional charge. Additional specialties added at any other time will be assessed a one-time \$50 processing fee.

A lawyer certified as a specialist under this rule may advertise the certification during such time as the lawyer's certification and the state bar's approval of the certifying organization are both in effect. Advertising by a lawyer regarding the lawyer's certification under this rule shall comply with SCR 195 and 196 and shall clearly identify the name of the certifying organization.

SCR 198.5 allows the Board of Governors of the State Bar to approve organizations that certify lawyers as specialists. At a minimum, to be approved under SCR 198.5, in addition to meeting the standards adopted by the board of governors, an organization that certifies lawyers as specialists in a particular area of the law must make certification available to all lawyers who meet objective and consistently applied standards relevant to the specialty area of law.

Thus, the State Bar does not itself certify a lawyer as a specialist. Rather, the lawyer is certified by a private organization that is approved by the State Bar Board of Governors. The Board of Governors reciprocally approves all such organizations that are approved by the American Bar Association. See Governing Rule for Attorney Specialization 3(a).

The American Bar Association Standing Committee on Specialization has developed a set of proposed standards for approving private certifying organizations. The purpose of the ABA Standards is to provide a national accreditation mechanism and uniform standards to permit state licensing agencies the option of using these private certifying groups rather than developing and administering their own separate specialty certifying plans. Presently, the following organizations are approved by the American Bar Association, and thus, reciprocally approved by the State Bar:

[American Board of Certification](#)
[American Board of Professional Liability Attorneys](#)
[National Association of Counsel for Children](#)
[National Association of Estate Planners & Councils Estate Law Specialist Board, Inc.](#)
[National Board of Trial Advocacy](#)
[National College for DUI Defense, Inc.](#)
[National Elder Law Foundation](#)

SCR 198.5 also authorizes the Board of Governors to approve certifying organizations that have not been approved by the American Bar Association. The process that a certifying organization must follow to be approved by the State Bar is set forth in Governing Rules 4-6 and 15.

Additionally, a lawyer may state that the lawyer's practice is limited to a certain area. SCR 198(4) states that a lawyer may communicate to the public that the lawyer's practice is limited to no more than three fields of practice from the group there listed, or such others as are not "false or misleading." Before a lawyer may communicate a limitation of practice, a lawyer (1) must have devoted at least 300 hours each year to each separate designated field of practice for each of the preceding two calendar years and (2) must have completed at least six hours of accredited continuing legal education in each designated field of the practice during the preceding calendar year (Note—the general exemptions and carry-forward provisions of Rules 210 and 214 do not apply). A lawyer must report in a statement of compliance signed by the lawyer the specific courses and hours which apply to each designated field of practice. The report shall be public information.

Under SCR 198(4)(a), such a communication to the public must be designated by the use of specific language. If the lawyer accepts only legal matters in the designated fields of practice, they shall be preceded by the words "Practice limited to" If the lawyer is practicing primarily in the designated fields of practice but also accepts other types of legal matters, the designated fields of practice shall be preceded by the words "Practicing primarily in"

CONCLUSION

Therefore, a lawyer who has been certified in a certain area of law may list this certification on his or her advertisements, letterhead, and business cards so long as (1)

the certifying organization has been approved by the State Bar Board of Governors, (2) the lawyer meets the conditions set forth in SCR 198(3)(a)-(e), and (3) the advertisement states the name of the certifying organization. Additionally, a lawyer may state that the lawyer's practice is limited to a certain area of law so long as (1) the lawyer meets the conditions set forth in SCR 198(4) and (2) the advertisement states words "Practice limited to . . ." or "Practicing primarily in"

This opinion is issued by the Standing Committee on Ethics and Professional Responsibility of the State Bar of Nevada, pursuant to SCR 225. It is advisory only. It is not binding upon the courts, the State Bar of Nevada, its Board of Governors, any person or tribunal charged with regulatory responsibilities, or any member of the State Bar