

Nebraska Ethics Advisory Opinion for Lawyers  
No. 81-9

AN ATTORNEY OR A LAW FIRM MAY LIST HIS, HER OR ITS NAME, OR THE NAME, OR NAMES, OF ANY ONE OR MORE OF THE MEMBERS OF THE LAW FIRM UNDER CATEGORIZED AREAS OF THE PRACTICE OF LAW SET OUT IN THE YELLOW PAGES OF A TELEPHONE DIRECTORY, PROVIDED THE LAWYER OR LAW FIRM ACTIVELY PRACTICES OR IS QUALIFIED TO PRACTICE IN THE LISTED AREAS.

FACTUAL SITUATION

The GTE Directories Corporation (GTE) which solicits and sells advertising and listings to be placed in the Yellow Pages of the Lincoln Telephone Directory proposes to list all attorneys who desire to be included under the category of "Attorneys." In addition, GTE is soliciting listings of individual attorneys and law firms under thirty categories of law practice. These thirty categories are the same thirty areas of practice the Nebraska State Bar Association Committee on Specialization and Advertising recommended be used for that purpose in its annual report which was presented to the House of Delegates at its meeting in October of 1980.

QUESTIONS PRESENTED

May individual attorneys and law firms, under the Code of Professional Responsibility of the Nebraska State Bar Association (Code), list their names under the categorized areas of law practiced proposed to be utilized by the publishers of the Yellow Pages of a telephone directory; and, if this is permissible, must the attorneys or law firms be actively practicing in the area, or areas, under which they are listed, or may the attorney or law firm merely desire to practice in the area, or areas.

DISCUSSION

EC 2-8 of the Code, as amended by the Supreme Court of Nebraska on May 9, 1979, to provide for advertisements and public communications on television as well as in the print media and on radio, provides:

Selection of a lawyer by a layperson should be made on an informed basis. Advice and recommendation of third parties-relatives, friends, acquaintances, business associates, or other lawyers-and disclosure of relevant information about the lawyer and his practice may be helpful. A layperson is best serviced if the recommendation is disinterested and informed. In order that the recommendation be disinterested, a lawyer should not seek to influence another to recommend his employment. A lawyer should not compensate another person for recommending him, for influencing a prospective client to employ him, or to encourage future recommendations. Advertisements and public communications, whether in law lists, telephone directories, newspapers, other forms of print media, television or radio, should be formulated to convey only information that is necessary to make an appropriate selection. Such information includes: 1) office information, such as, name, including name of law firm and names of professional associates, addresses, telephone numbers, credit card acceptability, fluency in foreign languages, and office hours; 2) relevant biographical information; 3) description of the practice in one or more fields of law in which the lawyer or law firm practices, and a statement, if true, that practice is limited to one or more fields of law; and 4) permitted fee information. Laudation of the lawyer, or law firm, by himself or by others, testimonials, statements of the quality of services to be rendered, comparative statements about the lawyer's or law firm's services in relation to those of others. and statements of

performance records are considered undignified, are primarily solicitative rather than informative, and are apt to be misleading to the public. They should be avoided.

At the same time EC 2-8 above was amended, DR 2-101(B) of the Code was amended to read as follows:

In order to facilitate the process of informed selection of a lawyer by potential consumers of legal services, a lawyer may publish or broadcast, subject to DR 2-103, the following information in print media distributed or over television or radio broadcasted in the geographic area or areas in which the lawyer resides or maintains offices or in which a significant part of the lawyer's clientele resides, provided that the information disclosed by the lawyer in such publication or broadcast complies with DR 2-101(A), and is presented in a dignified manner:

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(2) One or more fields of law in which the lawyer or law firm practices, a statement that practice is limited to one or more fields of law, or a statement that the lawyer or law firm specializes in a particular field of law practice, to the extent authorized under DR 2-105.

DR 2-105, which is under the heading "Limitation of Practice," provides:

(A) A lawyer shall not hold himself out publicly as a specialist, as practicing in certain areas of law or as limiting his practice permitted under DR 2-101(B), except as follows:

(1) A lawyer admitted to practice

before the United States Patent and Trademark Office may use the designation "Patents," "Patent Attorney," "Patent Lawyer," or "Registered Patent Attorney" or any combination of those terms, on his letterhead and office sign.

(2) A lawyer who publicly discloses fields of law in which the lawyer or the law firm practices or states that his practice is limited to one or more fields of law.

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

And DR 2-103, which is referred to in DR 2-101(B) quoted above, provides in pertinent part:

(A) A lawyer shall not, except as authorized in DR 2-101(B), recommend employment as a private practitioner, of himself, his partner, or associate to a layman who has not sought his advice regarding employment of a lawyer.

From the above quoted Ethical Consideration and Disciplinary Rules it appears that a lawyer or a law firm ethically may list his, her or its name, or the name, or names, of any one or more of the members of the law firm under categorized areas of the practice of law set out in the Yellow Pages of a telephone directory.

DR 2-101(B)(2) specifically provides that a lawyer may publish in print media distributed in the geographic area or areas in which the lawyer resides or maintains offices or which a significant part of the lawyer's clientele resides "one or more fields of law in which the lawyer or law firm practices," to the extent authorized under DR 2-105. DR 2-105(A)(2) provides a lawyer shall not hold

himself out publicly as a specialist, as practicing in certain areas of law or as limiting his practice permitted under DR2-101(B), except "A lawyer who publicly discloses fields of law in which the lawyer or the law firm practices or states that his practice is limited to one or more fields of law." This quoted exception is difficult to read from a grammatical standpoint, but an examination of its source is helpful. DR 2-105(A)(2), as it appears in the Code of Professional Responsibility adopted by the House of Delegates of the American Bar Association, reads that a lawyer may not hold himself out publicly as a specialist, as practicing in certain areas or as limiting his practice, except:

(2) A lawyer who publicly discloses fields of law in which the lawyer or the law firm practices or states that his practice is limited to one or more fields of law shall do so by using designations and definitions authorized and approved by [the agency having jurisdiction of the subject under state law].

The underlined portion of the quote above was not adopted by the Supreme Court of Nebraska as a part of the Code. Nevertheless, the portion which was adopted is in the disjunctive, and, when considered in conjunction with EC 2-8 and DR 2-101(B), provides for the public disclosure of fields of law in which the lawyer or law firm practices or limits his or its practice.

With reference to whether the listing of areas of practice should be of fields of law in which lawyers or law firms actively practice, as distinguished from fields of law they may desire to practice in, it should be noted that both DR 2-101(B) and DR 2-105 are worded in terms of "fields of law in which the lawyer or law firm practices." These words suggest that the lawyer or law firm actually should be engaged in the listed areas of practice, or be qualified to practice in those areas, although the Code does not provide any standards, and specialization or certification is not involved. Nevertheless, the layman who makes use of the listings by lawyers and law firms under areas of practice fairly may consider such listings

as implied representations of expertise on the part of the lawyers or law firms in the fields of law under which they are listed. In this respect, a general disclaimer by the publisher of the Yellow Pages that the listings of lawyers and law firms under the categorized areas of practice are not representations that those listed are specialists or certified in those areas of practice would be helpful. Absent such a disclaimer a lawyer or law firm should consider the following further Ethical Considerations of the Code before subscribing to listings under areas of practice in the Yellow Pages of a telephone directory. EC 2-9 provides in part:

The lack of sophistication on the part of many members of the public concerning legal services, the importance of the interests affected by the choice of a lawyer and prior experience with unrestricted lawyer advertising, require that special care be taken by lawyers to avoid misleading the public and to assure that the information set forth in any advertising is relevant to the selection of a lawyer. The lawyer must be mindful that the benefits of lawyer advertising depend upon its reliability and accuracy. Examples of information in law advertising that would be deceptive include misstatements of fact, suggestions that the ingenuity or prior record of a lawyer rather than the justice of the claim are the principal factors likely to determine the result, inclusion of information irrelevant to selecting a lawyer, and representations concerning the quality of service, which cannot be measured or verified. . . .

EC 2-10 provides in part:

A lawyer should ensure that the information contained in any advertising which the lawyer publishes, broadcasts or causes to be published or broadcasted is relevant, is disseminated in an objective and understandable fashion, and would facilitate

the prospective client's ability to compare the qualifications of the lawyers available to represent him. . .

EC 2-14 provides:

In some instances a lawyer confines his practice to a particular field of law. In the absence of state controls to insure the existence of special competence, a lawyer should not be permitted to hold himself out as a specialist or as having official recognition as a specialist, other than in the fields of admiralty, trademark, and patent law where a holding out as a specialist historically has been permitted. A lawyer may, however, indicate in permitted advertising, if it is factual, a limitation of his practice or one or more particular areas or fields of law in which he practices. If a lawyer discloses areas of law in which he practices or to which he limits his practice, he should avoid any implication that he is either in fact certified or officially recognized as a specialist.

And, lastly, EC 6-3 provides:

While the licensing of a lawyer is evidence that he has met the standards then prevailing for admission to the bar, a lawyer generally should not accept employment in any area of the law in which he is not qualified. However, he may accept such employment if in good faith he expects to become qualified through study and investigation, as long as such preparation would not result in unreasonable delay or expense to his client. Proper preparation and representation may require the association by the lawyer of professionals in other disciplines. A lawyer offered employment in a matter in which he is not and does not expect to become so qualified should either

decline the employment or, with the consent of his client, accept the employment and associate a lawyer who is competent in the matter.

Considering that Ethical Consideration 6-3 above states that a lawyer generally should not accept employment in any area of the law in which he is not qualified, it follows that he likewise should refrain from advertising for employment in that area if he is not qualified.

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