

APPENDIX C

(Not previously published)

**COMMITTEE ON ATTORNEY ADVERTISING
Appointed by the New Jersey Supreme Court**

**PROPOSED SUPPLEMENT TO OPINION 24
Communicating Expertise and Specialization**

In Opinion 24, 5 *N.J.L.* 2381, 149 *N.J.L.J.* 1298 (1997), the Committee held that RPC 7.4 does not prohibit self-described specialization or expertise. Rather, it is the communication or suggestion of certification as a specialist that is governed by the Rule. Consequently, the Committee concluded that accurate self-described specialization or expertise, without more, is not *per se* misleading and, if true, may be included in advertisements and other related communications.

On October 7, 1997, approximately one week following the publication of Opinion 24, the Board on Attorney Certification ("the Board") submitted a memorandum to the Supreme Court expressing its belief that the opinion was incorrect and that the Committee had failed to properly interpret RPCs 7.1 and 7.4, and R. 1:39. According to the Board, the opinion essentially "usurped" the Court's ability to regulate this important aspect of attorney advertising and "indirectly encourag[ed] malpractice." Among other things, the Board was concerned that enabling non-certified attorneys to designate themselves as "experts" or "specialists" in areas of practice for which certifications exist would substantially undermine the purposes of attorney certification and might likely defeat the program itself. Additionally, the public would have no way of distinguishing between the self-proclaimed expert and a certified specialist through advertising alone. The Board concluded its remarks by seeking reversal of the Opinion "[b]ecause of the effect that Opinion 24 will have on the certification program, because the Opinion misinterprets and misapplies the provisions of RPCs 7.1 and 7.4, and because the Court has already preempted the field of certification under Rule 1:39 et seq."

On October 27, 1997, the Supreme Court issued an Order staying the operation of Opinion 24 pending the further review of the Court. The Court also formally asked the Committee to reconsider its opinion after consulting with the Board on Attorney Certification. Pending further Order of the Court, Opinion 7, 127 *N.J.L.J.* 753 (1991), was to remain controlling

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on the subject of communicating specialization and expertise in a field of practice.

Pursuant to the Court's Order, the Committee met with the Board on December 17, 1997. The Committee also invited the Board to submit additional written comments, which were received on March 9, 1998. Having had an opportunity to consider the Board's concerns and conduct additional research, the Committee has decided to modify its prior opinion.

As originally adopted in 1984, RPC 7.4 provided:

A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law. However, when the Supreme Court has designated areas of specialty certification, only those attorneys so certified may advertise that they are specialists in or limit their practice to those areas. Uncertified attorneys may nevertheless list these areas as among the areas in which they practice.

The Rule did not expressly prohibit communication of specialization in a field of law in which the Supreme Court had not established a certification program. Rather, it provided that "when the Supreme Court has designated areas of specialty certification, only those attorneys so certified may advertise that they are specialists in or limit their practice to those particular areas.

RPC 7.4 was amended in 1993 in response to the United States Supreme Court's decision in *Peel v. Illinois Attorney Registration and Disciplinary Commission*, 496 U.S. 91 (1990). In *Peel*, the Supreme Court made it clear that states could not, consistent with the First Amendment, categorically prohibit lawyers from advertising their certifications as specialists by *bona fide* organizations. Although the Justices were divided in their approaches to the subject, with no one view commanding a majority, one of several things that unified a majority of the Court was that its chief concern about any advertising claim is whether it is inherently false or misleading. If it is not, then it cannot be banned outright. If it is potentially misleading, then those concerns must be addressed in much less restrictive ways. Among other things, disclaimers were suggested as a possible alternative to a categorical prohibition.

Although the original Rule appeared, on its face, to be consistent with *Peel*, RPC 7.4(a), was amended in 1993 to

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incorporate the United States Supreme Court's disclaimer suggestion. The Rule currently reads as follows:

(a) A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law. A lawyer may not, however, state or imply that the lawyer has been recognized or certified as a specialist in a particular field of law except as provided in paragraph (b) of this Rule.

(b) A lawyer may communicate that the lawyer has been certified as a specialist or certified in a field of practice only when the communication is not false or misleading, states the name of the certifying organization, and states that the certification has been granted by the Supreme Court of New Jersey or by an organization that has been approved by the American Bar Association. If the certification has been granted by an organization that has not been approved, or has been denied approval, by the Supreme Court of New Jersey or the American Bar Association, the absence or denial of such approval shall be clearly identified in each such communication by the lawyer.

The current difference of opinion between the Committee and the Board may, in part, be ascribed to the second sentence in paragraph (a) of the Rule. Does it prohibit a lawyer from communicating specialization unless the lawyer is recognized or certified as a specialist, or does it prohibit a lawyer from stating or implying that the lawyer has been recognized or certified as a specialist in a particular field of law unless the lawyer has, in fact, been so certified? Or, has been advanced by some, is this a distinction without a difference?

Our version of the Rule is remarkably similar to Model Rule of Professional Conduct 7.4, which provides 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 has been recognized or certified as a specialist in a particular field of law except as

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follows:

...
...

(c) [for jurisdictions where there is a regulatory authority granting certification or approving organizations that grant certification] a lawyer may communicate the fact that the lawyer has been certified as a specialist in a field of law by a named organization or authority but only if:

(1) such certification is granted by the appropriate regulatory authority or by an organization which has been approved by the appropriate regulatory authority to grant such certification; or

(2) such certification is granted by an organization that has not yet been approved by, or has been denied the approval available from, the appropriate regulatory authority, and the absence or denial of approval is clearly stated in the communication, and in any advertising subject to Rule 7.2, such statement appears in the same sentence that communicates the certification.

Given the similarity between the two Rules, the American Bar Association's official *Comments* to Model Rule 7.4 provide substantial guidance in addressing the current dispute. The *Comments*, in pertinent part, provide:

[1] This Rule permits a lawyer to indicate areas of practice in communications about the lawyer's services. If a lawyer practices only in certain fields, or will not accept matters in a specified field or fields, the lawyer is permitted to so indicate. **The lawyer is generally permitted to state that the lawyer is a "specialist," practices a "specialty," or "specializes in" particular fields, but such communications are subject to the "false and misleading" standard applied in Rule 7.1 to communications concerning a lawyer's services.**

[2] However, a lawyer may not

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communicate that the lawyer has been recognized or certified as a specialist in a particular field of law, except as provided by this Rule... .

[3] Paragraph (c) provides for certification as a specialist in a field of law when a state authorizes an appropriate regulatory authority to grant such certification or when the state grants other organizations the right to grant certification. Certification procedures imply that an objective entity has recognized a lawyer's higher degree of specialized ability than is suggested by general licensure to practice law. Those objective entities may be expected to apply standards of competence, experience and knowledge to insure that a lawyer's recognition as a specialist is meaningful and reliable. In order to insure that consumers can obtain access to useful information about an organization granting certification, the name of the certifying organization or agency must be included in any communication regarding the certification. [Emphasis supplied].

The ABA's *Comments* to the Model Rule make it abundantly clear that, subject to the limitations of RPC 7.1(a) that it not be false or misleading, a general communication of specialization was clearly contemplated by the drafters of the Rule and should be permitted.

In Opinion 24, *supra*, 5 *N.J.L.* 2381, 149 *N.J.L.J.* 1298, the Committee found that terms such as "specialist" and "specialization" connote devotion to or concentration in a particular branch of study or research and, if true, are not inherently misleading. Thus, their use, if accurate, is not and should not be prohibited under RPC 7.1(a)(1) or (3). The Committee believed that should the use of either of these terms be challenged, the burden of demonstrating the accuracy of the description should fall on the attorney making the claim.

However, "recognized" and "recognition," or "certified" and "certification," the Committee found, "attempt to suggest the recognition and certification of self-described

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specialization ... by a qualified independent authority." Opinion 24, *supra*, 5 *N.J.L.* 2381, 149 *N.J.L.J.* 1298. The terms inherently suggest something more than "devotion to a particular occupation or branch of study or research." *Id.* Certification procedures imply that an objective entity has independently recognized a lawyer's greater degree of specialized knowledge and ability and help raise the consumer's expectations. The Committee, therefore, concluded that attorneys should not be permitted to communicate certification or recognition unless they have, in fact, been certified or recognized. RPC 7.4.

The Committee's overall approach to this issue remains unchanged. Nevertheless, discourse with, and consideration of the written comments submitted by, the Board on Attorney Certification have convinced the Committee that communication of specialization, without more, may be potentially misleading.

As the United States Supreme Court held in *Peel v. Attorney Illinois Attorney Registration and Disciplinary Commission, supra*, 496 *U.S.* 91, if a statement is potentially misleading, that concern must be addressed in ways much less restrictive than an outright ban. Among other things, a disclaimer was suggested as a possible alternative to a categorical prohibition.

The United States Supreme Court in *Peel* and the American Bar Association in Model Rule 7.4, have held and acknowledged, respectively, that an outright ban of potentially misleading statements is unconstitutional. A state must instead find other less restrictive means to address the problem. Therefore, instead of prohibiting lawyers from communicating certification as a specialist by a *bona fide* certifying organization other than the state or one authorized by the state to grant certification, the ABA and the New Jersey Supreme Court have accepted the United States Supreme Court's suggestion and opted to require lawyers certified by such certifying organizations to include disclaimers with any such communications of certification or recognition.

Similarly, self-described certification ought not be banned outright. Rather, it should instead be limited by or made subject to less restrictive means designed to reduce the risk of misleading the public. Therefore, the Committee would recommend that RPC 7.4 be revised to permit, but restrict, self-described specialization. Although the task of formally revising the Rule will ultimately lie with the Professional Responsibility Rules Committee, this Committee would suggest

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the following revision:

RPC 7.4 Communication of Fields of Practice and Certification

(a) A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law. A lawyer may not, however, state or imply that the lawyer specializes or has been recognized or certified as a specialist in a particular field of law except as provided in paragraphs (b) and (c) of this Rule.

(b) A lawyer may communicate that the lawyer is a specialist, practices a specialty, or specializes in a particular field of practice only when the communication is not false or misleading and clearly states that the lawyer has not been certified as a specialist by the Supreme Court of New Jersey or by a certifying organization in each such communication by the lawyer.

(c) A lawyer may communicate that the lawyer has been certified as a specialist or certified in a field of practice only when the communication is not false or misleading, states the name of the certifying organization, and states that the certification has been granted by the Supreme Court of New Jersey or by an organization that has been approved by the American Bar Association. If the certification has been granted by an organization that has not been approved, or has been denied approval, by the Supreme Court of New Jersey or the American Bar Association, the absence or denial of such approval shall be clearly identified in each such communication by the lawyer.

The Committee believes that such a revision of RPC 7.4 will balance lawyers' First Amendment Rights and the State's interest in protecting the public from false or misleading advertising.

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