

YELLOW PAGES LISTING

The Idaho State Bar Committee on Ethics and Professional Responsibility has received a request for an opinion on the question:

"... whether the practice of listing oneself in the areas of practice section of the yellow pages is a violation of the Code of Professional Responsibility?"

The question, of course, applied to listings by telephone companies of lawyers in the classified yellow pages of the telephone directory according to areas of practice.

Disciplinary Rule DR 2-101 provides:

- "A. A lawyer shall not on behalf of himself, his partner, or associate, or any other lawyer affiliated with him or his firm, use or participate in the use of any form of public communication containing or implying a false, fraudulent, misleading, or deceptive representation.
- "B. Without limitation a false, fraudulent, misleading, or deceptive statement or claim includes a statement or claim which:
  - "4. States or implies that a lawyer specializes or limits his practice except as permitted by law;"

Additionally, DR 2-105 specifically prohibits a lawyer from holding himself out publicly as a specialist or as limiting his practice (with the exceptions of certification of patent, trademark, or admiralty practice) unless he is certified as a specialist by the authority having jurisdiction under state law over the subject of specialization. No such certification program has been implemented in the State of Idaho.

In Bates v. State Bar of Arizona, 433 U.S. 350, 53 L.Ed.2d 810, 97 S.Ct. 2691, the United States Supreme Court extended the First Amendment protection to commercial speech to the regulation of advertising by lawyers. The Court specifically held advertising was a form of commercial speech, protected by the First Amendment, and advertising by lawyers could not be subjected to blanket suppression.

The Bates concept was further defined and held applicable by the United States Supreme Court to a rule of the Missouri Supreme Court regulating advertising by lawyers. In Re: R.M.J., 454 U.S. 191, 71 L.Ed.2d 64, 102 S.Ct. 929 (January, 1982). This particular rule of the Missouri Supreme Court regulated, inter alia, the listing of areas of specialization. The Court held the rule constituted a restriction upon speech in violation of the First Amendment as applied to that specific case where there existed no indication or finding that the listing published by the attorney was misleading or that the restriction promoted a substantial state interest.

Both the Bates and In Re: R.M.J. decisions, however, emphasize that advertising by lawyers could still be regulated in the case of false, deceptive, or misleading advertising. In both cases, the Court commented:

"... claims as to quality or in person solicitation might be so likely to mislead as to warrant restriction."

Thus, the Committee is of the opinion the provisions of DR 2-101 are acceptable and valid regulations within the allowable areas of regulation of the Bates decision, but that the provisions of DR 2-101(B) and DR 2-105 are suspect. This is particularly so if the latter provisions are interpreted rigidly to preclude specialization listings where no certification program has been instituted. The existence of the disclaimer in the yellow page listings can also be interpreted to take the present issue out of the confines of prescriptive conduct under DR 2-101.

The question must be answered in the negative with the conclusions of the Committee that the yellow page listings under "Guide Lawyers Grouped by Type of Cases They Will Accept" is not in and of itself a violation of any of the disciplinary rules.

However, recently developed case law in other states has cast suspicion upon ethical considerations involved in certain specific factual situations which warrant a caveat to this opinion. The caveat is based upon the possibility of violation of the Disciplinary Rules and particularly DR 2-101 through excesses or abuses of the listing processes. An example of this type of conduct is found in Zimmerman v. Office of Grievance Committees, App.Div. 438, N.Y.S.2d 400. In the Zimmerman case, an attorney advertised that he practices in each of the twenty-five (25) areas of law which appear under the caption "Lawyers Grouped by Practice" and who admitted during the proceeding no experience in several of the categories. The lawyer was publicly censured. The New York Court stated:

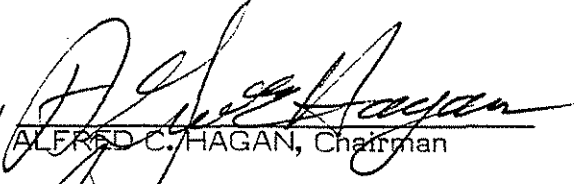
"The thrust of the regulation (DR 201-1A) is honest public communication so that 'the stream of commercial information (may) flow cleanly as well as freely' (Virginia B.D. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 772, 96 S.Ct. 1817, 1831, 48 L.Ed.2d 346). No detailed guideline or sign post other than an innate sense of right or wrong should be necessary to achieve this goal. A lawyer, particularly, should have an awareness of the moral quality of his own conduct and the ability to make the obvious judgment that the design of such an advertisement is to gain clients by guile and delusion."

In summation, the Committee appreciates the effect of the extension by the United States Supreme Court of the commercial speech First Amendment right to the regulation of advertising by lawyers. However, the Supreme Court decisions have not precluded regulation in the areas of false, deceptive, or misleading advertising. Certainly DR 2-101(A) has not been weakened or abrogated. False, fraudulent, misleading,

or deceptive advertising is still a violation of the Disciplinary Rules and excesses or abuses of yellow page advertising, such as existed in the Zimmerman case are still within the area of regulation.

DATED This 12 day of March, 1983.

COMMITTEE ON ETHICS AND  
PROFESSIONAL RESPONSIBILITY

By   
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By   
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By   
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