

Digest of Ethics Advisory Panel Opinion #87-1
Request #2
Issued September 2, 1987

An attorney appointed to serve on a state professional regulatory board sought the Ethics Advisory Panel's advice concerning the relationship of his private legal responsibilities and his responsibilities as a board member.

The attorney first asked what he should do if a matter comes before the board which concerns an individual the attorney had previously sued in a different matter. Second, the attorney asked what he should do if he participates in a board decision and, later, a case is referred to him which involves the individual who was the subject of the board decision.

The Ethics Advisory Panel advice is protective in nature. There is no requirement that an attorney abide by a Panel opinion, but if he or she does, he or she is fully protected from any charge of impropriety.

In response to the two queries posed, the Panel determined that the spirit and content of Canons 8 and 9, and the related Ethical Considerations and Disciplinary Rules, bar the attorney from participating as a board member in deliberations involving any individual against whom he has brought suit on behalf of a private client in the past, or against whom he has a suit pending. Furthermore, the Panel took the position that the attorney may not represent a client against an individual who has been brought before the board if the attorney participated in the individual's case as a board member. The Panel reasoned that confidential information would necessarily be part of the information given to the attorney as a board member.

The attorney's third and fourth queries focus on the practical measures he must take to preserve the integrity of his two roles. First, he asked what he should do if a case comes before the board involving an individual with whom he is presently involved in litigation. Second, he asked what he should do if, as a board member, he inadvertently comes into possession of damaging information concerning an individual with whom he is presently involved in litigation.

The Panel advised the attorney to immediately recuse himself if a case comes before the board involving an individual with whom he is presently involved in litigation. The Panel also advised the attorney to make arrangements with the board staff to review the names of all individuals to be brought before the board before any information is passed to him in his capacity as board member. The Panel warned that failure to establish such a screening practice could result in a conflict situation which would force the attorney to recuse himself as a board member and withdraw as attorney in a pending matter.

(LES 2160J)

considered as a whole not materially misleading;

(b) is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other law; or

(c) compares the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated.

Rule 7.4 and the comment thereto provide further detail as to what will be deemed "misleading" in the specific context of identifying fields of practice:

Rule 7.4. Communications of Fields of Practice. -- A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law. A lawyer may not, however, indicate that his or her practice is limited to or concentrated in particular fields of law unless, as part of the same communication, the lawyer also indicates that Rhode Island does not have a procedure for certification or recognition of specialization by lawyers. A lawyer shall not state or imply that the lawyer is a specialist except as follows:

(a) a lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation "Patent Attorney," or a substantially similar designation; or

(b) a lawyer engaged in Admiralty practice may use the designation "Admiralty," "Proctor in Admiralty" or a substantially similar designation.

The comment adds, in pertinent part:

stating that the lawyer is a "specialist" is not permitted. Stating that the lawyer's practice is "limited to" or "concentrated in" particular fields is permitted only where the same communication also states that "Rhode Island does not have a procedure for certification or recognition of specialization by lawyers." These terms have acquired a secondary meaning implying formal recognition as a specialist. Hence, use of these terms may be misleading unless the lawyer also communicates the fact that Rhode Island does not recognize or certify "specialist."

Rule 7.4 thus expressly permits an attorney to indicate the fact that he does or does not practice in particular fields of law. However, Rule 7.4 also expressly prohibits a lawyer from implying that he or she is a specialist.

(LES 2160J)

The Panel's mandate is to assist attorneys in identifying and adhering to the highest possible ethical goals for the practice of law rather than to identify the minimum conduct necessary to avoid action by the court's Disciplinary Counsel. Many attorneys provide typical professional data such as name, address, and phone number, followed by a short list of types of cases handled such as real estate, probate, personal injury. The Panel takes the position that this type of list, and, indeed, any indication of types of cases handled implies specialization. An attorney who wishes to include such information in his or her advertisement must include the disclaimer set forth in rule 7.4 which states that "Rhode Island does not have a procedure for certification or recognition of specialization by lawyers" in order to obtain Panel protection.

The Panel's position is consistent with the United States Supreme Court's reasoning in Peel v. Attorney Disciplinary Commission of Illinois, 58 USLW 4684 (U.S., June 4, 1990). The Court states "To the extent that potentially misleading statements of private certification or specialization could confuse consumers, a State might consider . . . requiring a disclaimer about the certifying organization or the standards of a specialty." 58 USLW at 4684. In his concurring opinion Justice Marshall adds that "[f]acts as well as opinions can be misleading when they are presented without adequate information." 58 USLW at 4688.

Ethics Advisory Panel advice is protective in nature. There is no requirement that an attorney abide by a Panel opinion, but if he or she does, he or she is fully protected from any charge of impropriety. Future inquiries submitted to the Panel concerning attorney advertising will be decided with reference to this General Informational Opinion.