March 3, 2017

Dear ABA Standing Committee on Ethics and Professional Responsibility and the Association of Professional Responsibility Lawyers,

In regard to the proposed amendments to the ABA Model Rules of Professional Conduct 7.1, 7.2, 7.3, 7.4, and 7.5 from the Association of Professional Responsibility Lawyers. Although we applaud the hard work of APRL and generally concur with many of its proposed amendments to the ABA Model Rules, we are greatly concerned with one omission.

Currently, Model Rule 7.4(d) states:

(d) A lawyer shall not state or imply that a lawyer is certified as a specialist in a particular field of law, unless:

(1) the lawyer has been certified as a specialist by an organization that has been approved by an appropriate state authority or that has been accredited by the American Bar Association;

and

(2) the name of the certifying organization is clearly identified in the communication.

We strongly urge that the long-existing limitation on proper use of the term “certified specialist” presently contained in Rule 7.4(d) be incorporated into the proposed Comment 8 of an amended Rule 7.1, in order to avoid unintentionally creating the problem we outline below. This can be easily accomplished with the following wording (with the proposed additional language in red):

[8] A lawyer may indicate areas of practice in communications about the lawyer’s services. If a lawyer practices only in certain fields, or will not accept matters except in a specified field or fields, the lawyer is permitted to so indicate. A 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. A lawyer may state that the lawyer is certified as a specialist in a field of law if such certification is granted by an organization approved by an appropriate state authority or accredited by the American Bar Association or another organization, such as a state bar association, that has been approved by the state authority to accredit organizations that certify lawyers as specialists; otherwise a lawyer should not state or imply that the lawyer is certified as a specialist in a particular field of law.
Certification signifies that an objective entity has recognized an advanced degree of knowledge and experience in the specialty area greater than is suggested by general licensure to practice law. Certifying organizations may be expected to apply standards of experience, knowledge and proficiency 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 must be included in any communication regarding the certification.

Our great concern is succinctly stated in *Peel v. Attorney Registration and Disciplinary Commission of Illinois*, 496 U.S. 91, 109, 110 S.Ct. 2281, 110 L.Ed.2d 83 (1990):

We do not ignore the possibility that some unscrupulous attorneys may hold themselves out as certified specialists when there is no qualified organization to stand behind that certification. A lawyer's truthful statement that “XYZ Board” has “certified” him as a “specialist in admiralty law” would not necessarily be entitled to First Amendment protection if the certification were a sham. States can require an attorney who advertises “XYZ certification” to demonstrate that such certification is available to all lawyers who meet objective and consistently applied standards relevant to practice in a particular area of the law. There has been no showing—indeed no suggestion—that the burden of distinguishing between certifying boards that are bona fide and those that are bogus would be significant, or that bar associations and official disciplinary committees cannot police deceptive practices effectively.

The ABA Standing Committee on Specialization, in addition to multiple state bar organizations, has a long history of consistently and effectively reviewing and approving proposed specialty certification requirements submitted by any organization which wishes to offer ABA-accredited specialty certification. We are not aware of any organizations other than the state bar organizations and the ABA Standing Committee on Specialization having filled the role of rigorously vetting potential board certifying organizations in the legal profession. There has been no suggestion of which we are aware, and certainly no credible evidence, that the ABA Standing Committee has failed in its mission to make certification available through any organization which is willing to offer bona fide, verifiable standards and testing to merit specialty certification.

Despite this history, a removal of Model Rule 7.4(d) without inclusion in a new comment of the proposed language above will inevitably lead to at least the argument that APRL and the ABA are implicitly expressing approval of “[a] lawyer's truthful statement that 'XYZ Board' has 'certified' him as a 'specialist’” without regard to whether that “board” has made any attempt to comply with the accessible, bona fide, and historically approved standards for certification of the ABA Standing Committee or a state bar organization. There is no legal or practical necessity for introducing this ambiguity and potential invitation for abuse when both the ABA Standing Committee and state bar organizations are functioning fairly and effectively.

We strongly urge inclusion of the redlined language above in the newly proposed Comment 8.

Sincerely,

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