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Utah State Bar

Ethics Advisory Opinion Committee

Opinion No. 00-02

Approved March 9, 2000

Issue: May a Utah lawyer ethically state on her letterhead that she is "also admitted" in another state when she is on inactive status in that state?

Opinion: A lawyer on inactive status in a state may not ethically communicate by means of letterhead or otherwise that the lawyer is "admitted" in the state unless (i) the lawyer also affirmatively discloses the lawyer's inactive status or (ii) the lawyer reasonably concludes that the communication would not be materially misleading under the circumstances as a whole, including the time and requirements involved in transferring from inactive to active status in the state in question. Further, the lawyer must (i) comply with any applicable requirements of the other state concerning inactive lawyers and (ii) guard against engaging in the unauthorized practice of law in the other state.

Analysis: A lawyer's letterhead is a form of public communication (fn1) subject to the requirements of Rule 7.1, which provides in relevant part as follows:

A lawyer shall not make a false or *misleading* communication about the lawyer or the lawyer's services. A communication is false or *misleading* if it:

(a) Contains a material misrepresentation of fact or law, *or omits a fact necessary to make the statement 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. (fn2)

In a series of cases beginning with *Bates v. State Bar of Arizona*, (fn3) the U.S. Supreme Court has made it clear that public communication concerning a lawyer's services (including any form of advertising) is commercial speech, enjoys First Amendment protection, and can be regulated only to further substantial state interests, and then only in the least restrictive manner possible. (fn4) The cardinal rule concerning all public communication about a lawyer and her services is that the communication not be false or misleading. (fn5) In this regard, Rule 7.1 "captures the essence" of the Court's opinions in *Bates* and its progeny, and "informs all of Part 7: lawyers have a First Amendment right to communicate truthfulinformation about their services, and potential clients have a right to hear such information, but society has a right to protect against communications that are false and misleading." (fn6)

The three subsections of Rule 7.1 undertake to identify what constitutes permitted and prohibited speech and establish guidelines for the development of a common law of false and misleading communications with respect to legal services. The provision most applicable to the present analysis, Rule 7.1(a), **7**not only prohibits statements which contain material misrepresentations, but also requires "acaveat or explanation when a statement would otherwise be misleading." Determining whether a particular communication is misleading requires an examination of the particular circumstances in question. There is no bright-line test for determining what is or is not misleading.**8**Rather, "[e]ach statement must be judged on its facts to determine whether it would have that effect and how much explanation is necessary."**9**

It is well-established that a lawyer admitted or licensed to practice law in more than one jurisdiction may make that fact known by any form of otherwise permissible communication, including letterhead, business cards, announcements, billing statements, mailings, advertisements, signs and the like. In *In re R.M.J.*, **10**the U.S. Supreme Court held that certain rules of the Missouri Supreme Court providing that a lawyer could communicate only certain categories of information, which did not include a category for listing the courts in which the lawyer was admitted to practice, were unconstitutional. In doing so, the Court observed not only that "[s]uch information is not misleading on its face," but that the lawyer in question was licensed to practice in both Illinois and Missouri "is factual and highly relevant information particularly in light of the geography of the region in which the [lawyer] practiced."**11**

The *R.M.J.* court, however, did not deal with the precise issue before this Committee: Is it misleading for a lawyer to state that the lawyer is "admitted" or "licensed" in a jurisdiction when the lawyer is on "inactive status" in that jurisdiction without making any reference or disclosure

concerning such status? Before we address this specific question, it is necessary to review and define for purposes of this opinion what is meant by the term "inactive status."

Utah, like other states, has different categories of bar membership, one of which is designated as "inactive."**12**Generally, "inactive" refers to a type of bar membership where a lawyer for any number of reasons, may voluntarily be removed from the bar's list of active lawyers and thereby be relieved of some or all of the obligations and burdens relating to active practice.**13**Typically, when a lawyer becomes inactive, she is still a member of the bar,**14**but she may not practice law in the relevant jurisdiction unless and until she is placed back on active status by the appropriate licensing authority.**15**

The limitations arising out of inactive status are significant, and the consequences of practicing law where a lawyer is on inactive status are serious. For example, states that have addressed the subject by rule or opinion have concluded that a lawyer on inactive status may not be listed on firm letterhead or in Martindale-Hubbell or similar professional directories,**16**or even hold equity in the lawyer's former firm.**17**If the lawyer violates the terms of inactive status, she is subject to appropriate disciplinary or other action. For example, if the lawyer were to hold herself out as being "admitted to practice" in the jurisdiction, she would be making a false and misleading statement, and if the lawyer were to practice law in the jurisdiction, she would be engaged in the unauthorized practice of law.**18**

Turning now to the specific issue before us, we believe that, when a lawyer states that she is "admitted" in a jurisdiction, she is also implying that she is admitted *to practice law* in the jurisdiction and is *available* to do so.**19**Thus, if a lawyer communicates that she is admitted in a state when she is on inactive status in the state, there is a potential for a person to misconstrue the ability of the lawyer to represent a client in that state. The lone statement that the lawyer is admitted in a state may technically be truthful, but the implication that the lawyer is authorized to practice law there could be misleading and, *without more*, might violate Rule 7.1. In circumstances governed by Rule 7.5(b), a lawyer must indicate affirmatively any jurisdictional limitations she may have.**20**

Having concluded that could be is misleading to communicate (without appropriate disclosure) that a lawyer is admitted when she is on inactive status in a state, the more difficult question is whether the Committee should adopt a bright-line rule and conclude that such a communication would be *materially* misleading *per se*, without reference to any facts or circumstances surrounding a particular statement or a particular lawyer's situation. It is troubling that a lawyer may make a statement that she knows or should know could be misleading at the time the statement is made (e.g., when pre-printed letterhead or cards are sent or given to a client or prospective client, or when an advertisement is published) without violating Rule 7.1.**21**Nevertheless, we believe that it would be going too far to adopt a *per se* rule. Again, whether a statement is misleading, especially *materially* so, is to be judged on the facts of each statement.**22** Further, the rule itself suggests that a fact-oriented analysis is necessary and appropriate, since it contains a "materiality" standard and provides that whether an omission of fact makes a statement materially misleading must be "considered as a whole."**23**

If a lawyer desires to communicate that she is admitted in a jurisdiction where she is on inactive status,**24**the preferred course of action would be for the attorney to disclose her inactive status in the communication and, as appropriate, inform the client or prospective client of the meaning and consequences of the status. **25**Although such a disclosure may be awkward or unwieldy on letterhead, professional cards and the like, it would reduce, or eliminate the chance that the statement concerning admission elsewhere would misinform, mislead or violate Rule 7.1.**26**

To the extent that a lawyer is on inactive status and chooses to omit reference to that status, the Committee concludes that the lawyer may do so ethically only if the lawyer is (i) ready and willing, if engaged by the client, to transfer to active status as may be necessary to represent properly the interests of a client *and* (ii) actually able to regain active status on a prompt, efficient and reasonable basis.**27**The ability of a lawyer to transfer from inactive to active status on a rapid and relatively effortless basis, however, varies widely from state to state.

For example, in some states a lawyer has the right to transfer from inactive to active status by simply requesting the change of status, providing a minimum amount of basic information-e.g., "good standing" and continuing legal education information, and paying a nominal fee.**28**In such circumstances, it would not be materially misleading to omit reference to inactive status because the lawyer essentially is *entitled* to move to active status, and doing so would require relatively simple actions the lawyer's part and only ministerial actions on the part of the licensing authority.

In other jurisdictions, however, regaining active status may not be so quick and easy. For example, some states require that a lawyer effectively reapply to practice law, undertake additional educational activities or pay significant fees and dues. In some states, a review and deliberate decision-making process by the licensing authority may be required.**29**In such circumstances or any other circumstances where a lawyer cannot be assured of a prompt, certain, efficient and economically nominal

reactivation, or where there are any other significant barriers to re-entry, the Committee believes that it would be materially misleading for a lawyer not to provide appropriate disclosure.

Conclusion: Whether a lawyer may ethically communicate that the lawyer is "also admitted" in another state when the lawyer is on inactive status in that state depends on whether the communication is materially misleading within the meaning of Rule 7.1. The Committee believes that a communication of the fact that a lawyer is admitted in a state implies that the lawyer is authorized and available to practice law in that state. Accordingly, the lawyer must either disclose the lawyer's inactive status or reasonably determine that the lack of such disclosure is not materially misleading under the totality of the circumstances, including the time, effort and cost involved in the lawyer's transferring from inactive to active status. A lawyer on inactive status who desires to communicate the bare fact of "admission" to the bar of another state must be fully acquainted with any requirements and limitations imposed upon her by the laws and rules of the other state by reason of such status, and the lawyer must refrain from taking any actions that would constitute engaging in the unauthorized practice of law in the other state unless and until she regains active status in the state.

Footnotes

1. All forms and means of communications regarding a lawyer's services, including advertising, are governed by Utah Rules of Professional Conduct 7.1 cmt. Further, Rule 7.5 expressly prohibits a lawyer's use of any "letterhead or other professional designation that violates Rule 7.1."

2. Utah Rules of Professional Conduct 7.1 (emphasis added).

3. 433 U.S. 350 (1977). *See generally In re Primus*, 436 U.S. 412 (1978); O*hralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978); *In re R.M.J.*, 455 U.S. 191, 207 (1982); *Zauderer v. Office of Disciplinary Counsel for Supreme Court of Ohio*, 471 U.S. 626 (1985); *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466 (1988); *Peel v. Attorney Registration and Disciplinary Comm'n of Illinois*, 496 U.S. 91 (1990); *Florida Bar v. Went for It, Inc.*, 515 U.S. 618 (1995).

4. The upshot of the cases is clear: Truthful written communications about legal services are permitted, but appropriate ancillary limitations or requirements may be imposed. E.g., *In re R.M.J.*, 455 U.S. 191; *Florida Bar v. Went for It, Inc.*, 515 U.S. 618; *McDevitt v. New Mexico Supreme Court Disciplinary Bd.*, 108 F.3d 341 (10th Cir. 1997). *See generally* Geoffrey C. Hazard, Jr. & W. William Hodes, The Law of Lawyering, § 7.1: 101 (2d ed. Supp. 1998) [hereinafter Hazard].

5. As this Committee has noted on prior occasions: "The comment to Rule 7.1 states in part, 'whatever means are used to make known a lawyer's services, statements about them should be truthful.' This is the *sine qua non* regarding communications, whatever the medium, between lawyers and their clients or the public in general." Utah Ethics Advisory Op. 131, 1993 WL 75097 (Utah St. Bar). *See also* Utah Ethics Advisory Op. 138, 1994 WL 579848 (Utah St. Bar); and Utah Ethics Advisory Op. 108, 1990 WL 600110 (Utah St. Bar). *See generally In re* Utah State Bar Petition for Approval of Changes in Disciplinary Rules on Advertising, 647 P.2d 991, 993 (Utah 1982) (state has substantial and compelling interest in protecting the public against false or misleading advertising by lawyers).

6. Hazard, *supra* note 4, § 7.1:102, at 859.

7. Although Rule 7.1(b) is intended primarily to prohibit statements about favorable results achieved on behalf of one client and thereby creating unjustified expectations about results that may be obtained for other clients without reference to particular factual or legal circumstances (see Rule 7.1 cmt.), the subsection may also be applicable to the extent that a communication about where a lawyer is admitted may be viewed as creating an unjustified expectation about where, when and how results may be achieved.

8. Hazard, *supra* note 4, § 7.1:201, at 862.

9. *Id.*

10 455 U.S. 191 (1982).

11. *Id.* at 205. See, e.g., N.Y. Ethics Op. 637, 1992 WL 450727 (N.Y. St. Bar Ass'n).

12. Any member of the Bar who has retired [or is not otherwise practicing law] may upon request be enrolled as a inactive member." Rule 19, Rules for Integration and Management of the Utah State Bar. Other states have the same, similar or further levels or designations of membership (e.g., "special" or "affiliate" members). *See, e.g.*, Idaho Bar Commission Rule 302.

13. For example, lawyers on inactive status generally pay significantly reduced licensing fees, and are exempt from otherwise applicable assessments, reporting requirements and continuing legal education requirements.

14. State rules vary as to whether the lawyer remains a member in "good standing."

15. In all jurisdictions surveyed by this Committee for purposes of this opinion, lawyers on inactive status are

precluded from engaging in the practice of law. Further, all jurisdictions surveyed preclude inactive lawyers from holding office or voting in their respective bar organizations.

16. Ohio Adv. Op. 91-18, 1991 WL 717488 (Ohio St. Bar); Ohio Adv. Op. 91-1 1991 WL 717471 (Ohio St. Bar) (such listings are misleading in that they give the impression that the lawyer is authorized to practice law).

17. Ohio Adv. Op. 96-3, 1996 WL 202277 (Ohio St. Bar).

18. *See, e.g., People v. Newman*, 925 P.2d 785 (Colo. 1996) (lawyer censured because he "implied that he was licensed to practice law in Colorado even though he was on inactive status . . . [and] . . . engaged in the practice of law in Colorado while he was on inactive status"); *In re Sousa*, 915 P.2d 408 (Ore. 1996) (lawyer disbarred for numerous serious ethics violations, including "engaging in conduct involving dishonesty or misrepresentation" by affirmatively representing to client that he was currently licensed to practice law in another state and could take care of the client's problems there when he was on inactive statutes in that state).

19. Terms such as "admitted" or "licensed" have little meaning without express or implied reference to a particular action. That is, a person is admitted or licensed to do something, and in the case of a lawyer that something is to practice law.

20. Utah Rules of Professional Conduct 7.5(b).

21. This Committee believes that a lawyer should be scrupulous in all dealings and communications and has previously suggested that a misleading statement may be viewed as a "material misrepresentation of fact" within the meaning of Rule 7.1. See Utah Ethics Advisory Op. 138, 1994 WL 579848 (Utah St. Bar).

22. *See* notes 4 and 8, supra, and accompanying text. *See alsoMississippi Bar v.Attorney R.*, 649 So. 2d 820 (Miss. 1995).

23. Utah Rules of Professional Conduct 7.1(a).

24. This opinion assumes that the lawyer is on inactive status voluntarily. Where a lawyer has been placed on inactive status involuntarily (e.g., for disability or other such reasons) and would effectively need to obtain a favorable determination from the appropriate governing body before being reinstated to active status, we believe that the lawyer would be required to refrain from communicating that the lawyer is "admitted" in the jurisdiction unless she disclosed the inactive status.

25. If a lawyer desires the benefits of communicating that she is also admitted in another jurisdiction, the best course of action would be to remain on active status in the state. *See, e.g.*, Ohio Adv. Op. 96-3 1996 WL 202277 (Ohio St. Bar) (in advising that an attorney could not take inactive status before retiring and keep the lawyer's name part of a firm name, the Board observed that, after all, "prior to reaching age sixty-five, it is not too onerous a burden for an attorney to keep his or her license active if he or she wishes the privilege of his or her name being continued in a firm name").

26. *See, e.g.*, N.C. Ethics Op. RPC 13, 1986 WL 327916 (N.C. St. Bar); Response to Inquiry No. 86-137 (Penn. St. Bar). *See also Florida Bar v. Lange*, 711 So. 2d 518 (Fla. 1998).

27. The Committee believes that a lawyer has the duty (i) to know and be prepared to do whatever it may take to regain active status, and (ii) to know and comply with any rules of the jurisdiction applicable to the lawyer's duties as an inactive lawyer in the jurisdiction.

28. For example, an inactive member of the Utah Bar may quickly transfer to active status, if she is otherwise in good standing. "Upon . . . request and the payment of the full annual license fee for the current licensure year and any other fees authorized by the Court, less any fee paid as an inactive member for such licensure year, the applicant shall be *immediately* transferred from the inactive roll to the active roll." Rule 19, Rules for Integration and Management of the Utah State Bar (emphasis supplied).

29. In Florida, for example, an inactive member (who under the state's rules is not considered to be in good standing) seeking reinstatement as an active member "must file a petition with the board of governors setting forth the reason [the lawyer went inactive] and showing good cause why the petition for reinstatement should be granted." Further, if the petitioner has been inactive for more than five years, certain Florida Bar educational requirements must be met. Rules 1-3.7(b) and (g), Rules Regulating the Florida Bar. *See also* Bylaws of the State Bar of New Mexico § 2.2.

Rule Cited:

7.1