

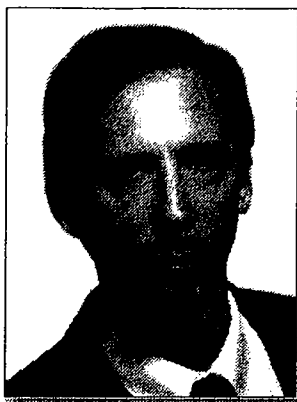
ELDER LAW

BY DANIEL G. FISH

New Ethics Opinion Regarding Elder Law Certification

A RECENT ETHICS opinion requires the disclaimer language quoted below,* even when a certified elder law attorney communicates with other attorneys. This requirement makes it more difficult for seniors to get accurate, verifiable information about the qualifications of an elder law attorney when they are trying to make an informed decision about retaining counsel.

* Certified as an Elder Law Attorney by the National Elder Law Foundation. The National Elder Law Foundation is not affiliated with any governmental authority. Certification is not a requirement for the practice of law in the State of New York and does not necessarily indicate greater competence than other attorneys experienced in this field of law.



Re-certification is required every five years. This is to ensure that the attorney's skills are current.

The High Court's Decision

Attorney Gary E. Peel received a certificate in trial court advocacy from the National Board of Trial Advocacy. He was publicly censured by the Supreme Court of Illinois for including a statement on his letterhead that he was a "Certified Civil Trial Specialist" by the National Board of Trial Advocacy."

A fractured United States Supreme Court, in four separate decisions, reversed the censure. *Peel v. Attorney Registration and Disciplinary Commission of Illinois*, 496 US 91 (1990).

Four justices, a plurality of the Court, concluded that the letterhead was neither actually nor potentially misleading. They voted to reverse the censure and allow the attorney to advertise his certification without any restriction, finding that it served the public interest.

One justice dissented, believing the letterhead to be potentially misleading. He voted to affirm the censure but would allow advertisement of certification with state-approved disclaimer language. Three justices dissented, finding the letterhead to be "inherently likely to deceive" so that even disclaimer language would not save it. They voted to affirm the censure.

The court was thus evenly divided: four justices in favor of reversal and four justices in favor of affirmation. Justice Thurgood Marshall, joined in his opinion by one of the plurality members, voted to reverse the public censure, but found the letterhead, while neither actually misleading nor inherently misleading, to be potentially misleading. This potential harm led him to conclude that a state could require an attorney to provide more than the fact of certification on letterhead. He held that a state may not require an "exhaustive, detailed recounting" of the certifying agency requirements. The authority of the state to regulate specialization lay somewhere between these two poles.

Justice Marshall's opinion was the hinge vote. This left it to the states to decide whether to allow the statement of specialization alone or to allow it with disclamatory language. Commentators have noted that the right to attorney advertising hangs by a slender thread, one vote.

New York State

New York State has adopted the Marshall approach of allowing a statement of specialization but requiring a disclaimer, DR 2-105(c)(2). The disclaimer is in three parts: the certifying agency is not a governmental body; certification is not a requirement to practice law; and certification does not necessarily connote superior legal skills.

Opinion 757-7/16/02

The Committee on Professional Ethics of the New York State Bar Association was asked by a recently certified elder law attorney whether an announcement of that fact, without a disclaimer, could be sent to any of the following: members of the local bar, the local bar association

Specialization in elder law is available to attorneys who pass an examination and qualification process. The National Elder Law Foundation (NELF) administers the qualification examination. The American Bar Association accredited NELF as the certifying body in elder law. Certification was created to help the public identify qualified attorneys. Prior to certification there was no way to verify an attorney's skills in elder law. NELF created a standardized test to measure knowledge in elder law. To be able to judge the value of certification, the most important issue is to understand the elements of the test.

Arduous Testing

NELF established arduous and verifiable measurements from which a consumer may infer likely quality.

The applicant must be in practice for a minimum of five years. There must be a showing that a minimum of 16 hours each week, within the last three years, was devoted to elder law. This is to ensure that a significant proportion of the attorney's practice is in the field of elder law.

The applicant must have provided legal services in 60 matters in specifically identified areas. Thirteen discrete areas are included: health and personal care planning; pre-mortem legal planning; fiduciary representation; legal capacity counseling; public benefits advice; advice on insurance matters; resident rights advocacy; housing counseling; income, estate and gift tax advice; employment and retirement advice; counseling about tort claims against nursing homes; age or disability discrimination claims; and litigation or administrative advocacy related to the above matters. This is to ensure that there is a breadth to the practice and not simply a concentration in one aspect of elder law.

There must be a showing of attendance at 45 hours of continuing legal education in elder law during the last three years.

There is a comprehensive one-day, closed book written examination. It includes short answer, multiple choice and essay questions.

Peer review is required. Five attorney references are required.

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newsletter and former clients. The opinion concludes that disclaimer language is required in all three instances. The opinion finds mass communication with attorneys to be a "public" dissemination triggering the need for the disclaimer language. As to a mailing to the local bar association or placing a notice in the local bar journal, the opinion concludes that the disclaimer is required "since sending the announcement to other lawyers is intended in part to encourage lawyers to recommend the specialist to their clients, it is reasonable to suppose that copies of the announcement or newsletter item might well be given to the potential clients." This position is inapposite to the conclusion reached by Missouri and Tennessee. They found that communication with other attorneys presumed a level of awareness such that the statement would not mislead them.

As to current or former clients, the opinion concludes that the disclaimer is required to protect the lay public from being misled.

Many certified elder law attorneys have questioned the need for dis-

claimer language, even when the information is presented to the public. They argue that the disclaimer language itself is devoid of intrinsic meaning and is inherently misleading. From their perspective, this disclaimer language is the same as a total ban because when used it signifies nothing.

Requiring a statement that the qualifying agency is not a governmental agency purportedly prevents consumer confusion. It raises a silent question as to whether NELF has any credibility. It ignores the fact that NELF was accredited by the American Bar Association. Requiring a disclaimer that certification is not a requirement for practice in New York, leads to the implication that certification is unimportant or of no weight.

Requiring a disclaimer that certification does not necessarily indicate greater competence than that of other elder law attorneys, strongly suggests that certification is of no probative value.

This is the heart of the certification issue. Certification means that the attorney passed a process designed to measure skills in elder law. The non-certified attorney's abilities have not been measured at all

and cannot meaningfully be compared.

Taken together, the disclaimer language is so negative that they themselves are likely to confuse the lay public. It is hard to imagine the public having anything other than a strongly adverse impression or at best a flatly neutral one.

An ethical opinion is advisory. It is a product of a committee of the New York State Bar Association and not a judicial decision. It holds a curious position in that it has no force of law. The New York State Court of Appeals has held that "... such opinions — like the Code of Professional Responsibility on which they are based — do not have the effect of law ..." *State v. Herr*, 86 NY2d 638.

The ethics opinion will have the effect of discouraging attorneys from seeking the elder law certification. It will remove any incentive for an attorney to measure his or her legal ability against a standard. It makes it less likely that attorneys will improve their skills in elder law. The ethics committee has taken the most restrictive interpretation possible of the term "public." The opinion should have favored disclosure of information to the public instead of concealment.