The Supreme Court of Ohio

BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

65 SOUTH FRONT STREET, 5TH FLOOR, COLUMBUS, OH 43215-3431
(614) 387-9370 (888) 664-8345 FAX: (614) 387-9379
www.sconet.state.oh.us

OFFICE OF SECRETARY

OPINION 2004-12

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[CPR Opinion-provides advice under the Ohio Code of Professional Responsibility which is superseded by the Ohio Rules of Professional Conduct, eff. 2/1/2007.]

SYLLABUS: Attorneys who advertise in telephone directories must follow the disciplinary rules governing telephone directory advertising. The Ohio Code of Professional Responsibility governs telephone directory advertising specifically in DR 2-101(B)(2) and generally through the publicity rules within DR 2-101 to DR 2-105 and other applicable rules. Among the restrictions, there should be no use of trade names, misleading statements, unverifiable statements, improper terms implying specialization, and any inclusion of contingent fee information in the advertisement must comply with the requirements of DR 2-101)(E)(1)(c).

OPINION: This opinion provides guidance as to attorney advertising in telephone directories.

Ohio attorneys may advertise, and do advertise, their legal services through telephone directories. Attorneys who advertise in telephone directories must follow the disciplinary rules governing telephone directory advertising. They must resist the urge to rely blindly upon the advice of non-attorney marketers or the misguided advertisements of attorneys who did not check the rules before placing their advertisements.

The Ohio Code of Professional Responsibility specifically governs telephone directory advertisements in DR 2-101(B)(2). DR 2-101(B)(2) is straightforward.

> DR 2-101(B) Subject to the limitations contained in these rules:
>
> (2) A lawyer or law firm may permit or purchase inclusion of information in a telephone or city directory, subject to the following standards:
>
> (a) The lawyer's or the firm's name, address, and telephone number may be listed alphabetically in the residential, business, or classified sections.
>
> (b) Listing or display advertising in the classified section shall be limited to one or more of the following:

(i) under the general heading "Lawyers" or "Attorneys;"

(ii) if a lawyer or a firm meets the requirements of DR 2-105(A)(1), under the classification or heading identifying the field or area of practice in which the lawyer or firm is so qualified;

(iii) under a classification or heading that identifies the lawyer or firm by geographic location, certification as a specialist pursuant to DR 2-105(A)(4) or (5), or field of law as provided by DR 2-105(A)(6).

(c) Nothing contained in this rule shall prohibit a lawyer or law firm from permitting inclusion in reputable law lists and law directories intended primarily for the use of the legal profession, of such information as has traditionally appeared in those publications.

Alphabetical listings in residential, business, or classified sections

Under DR 2-101(B)(2)(a), the name of a lawyer or law firm, along with an address and telephone number, may be listed *alphabetically* in the residential, business, or classified section of a telephone directory.

Requiring an alphabetical listing seems foolproof, but it is not. Instead of alphabetically listing the attorney name or law firm name, attorneys sometimes wrongly throw trade names into the alphabetical listings.

Use of Trade Names

Attorneys must resist the temptation to use a trade name in an alphabetical listing (or elsewhere for that matter). Trade names for legal practices are improper under DR 2-102(B) and may be misleading under DR 2-101(A)(1) (rule prohibiting public communication containing any false, fraudulent, misleading, deceptive, self-laudatory, or unfair statement.) Trade names for legal clinics are specifically prohibited pursuant to DR 2-102(G) that states, "[t]he use of a trade name or geographical or other type of identification or description is prohibited."

An Ohio attorney's use of the heading "Body Injury Legal Centers" in yellow pages is the improper use of a trade name. *Medina Cty. Bar Assn. v. Grieselhuber* (1997), 78 Ohio St.3d 373, 374-375. Use of a geographical description in a firm name, such as "Austintown Legal Center" is an improper trade name. See Ohio Sup.Ct., Bd. Commrs. Grievances & Discipline, Op. 89-27 (1989). " 'Debt Relief Clinic' is both a trade name and a misleading name." See Ohio Sup.Ct., Bd. Commrs. Grievances & Discipline, Op. 91-4 (1991). Practicing law in Ohio using a common trade name franchised to attorneys across the nation

is improper. See Ohio Sup.Ct., Bd. Commrs. Grievances & Discipline, Op. 97-1 (1997).

Listing or display advertising in classified section

Under DR 2-101(B)(2)(b)(i), (ii), (iii), listing or display advertising in the classified section may be placed in one of five ways.

- Under the general heading "Lawyers" or "Attorneys;"
- Under the classification or heading "Patents," "Patent Attorney," "Patent Lawyer," "Trademarks," "Trademark Attorney," "Trademark Lawyer," "Admiralty," "Proctor in Admiralty," or "Admiralty Lawyer" pursuant to DR 2-105(A)(1);
- Under a classification or heading identifying the lawyer or firm by geographic location;
- Under a classification or heading identifying the lawyer by certification as a specialist pursuant to DR 2-105(A)(4) or (5);
- Under a classification or heading identifying the lawyer by field of law as provided by DR 2-105(A)(6).

Additional guidance as to acceptable information

For guidance as to what information may be placed in a display advertising, a lawyer should review all of the publicity rules—DR 2-101 through DR 2-105. The Code helpfully lists, in DR 2-101(D), information presumed to be informational.

> DR 2-101 (D) The following information with regard to lawyers, law firms, or members of firms will be presumed to be informational rather than solely promotional or self-laudatory, and acceptable for dissemination under these rules, if accurate and presented in a dignified manner:
>
> 1. Name or names of lawyer, law firm, and professional associates, together with their addresses and telephone numbers, with designations such as "Lawyer," "Attorney," "Law Firm";
> 2. Field or fields of practice, limitations of practice, or areas of concentration, but only to the extent permitted by DR 2-105;
> 3. Date and place of birth;

4. Dates and places of admission to the bar of the state and federal courts;

5. Schools attended, with dates of graduation and degrees conferred;

6. Legal teaching positions held at accredited law schools;

7. Authored publications;

8. Memberships in bar associations and other professional organizations;

9. Technical and professional licenses;

10. Military service;

11. Foreign language abilities;

12. Subject to DR 2-103, prepaid or group legal service programs in which the lawyer or firm participates;

13. Whether credit cards or other credit arrangements are accepted;

14. Office and telephone answering services hours.

Fields of Practice and Certification as Specialist

Advertising information regarding fields of practice and certification as specialist is sometimes an area of confusion for attorneys.

Each Ohio attorney, if he or she chooses, may advertise a field or fields of practice. Under DR 2-105(A)(6), an attorney is permitted to state that his or her practice consists in large part or is limited to a field or fields of law. Under DR 2-101(D)(2), an attorney is permitted to provide information as to fields of practice, limitations of practice, or areas of concentration. The attorney may be listed under the appropriate field of practice heading in a telephone directory or the attorney may want to provide information regarding the field of practice in the text of the attorney display advertisement. For example, if true, it would be proper in the text of a display advertisement to state "practice consists in large part of domestic relations law," "practice is limited to domestic relations law," area of concentration is domestic relations law" or "practice concentrating in the area of domestic relations law," or words of very similar import.

Only Ohio attorneys who are certified may state certification as a specialist or use the term "specialist" in advertising.

> DR 2-105(A)(5) A lawyer who has received certification from a private organization of special training, competence, or experience in a particular field of law may communicate the fact of the certification only if the certifying organization is bona fide, certification is issued only to lawyers who meet objective and consistently applied standards relevant to practice in that field of law that are higher than those required for admission to the practice of law, and certification is available to all lawyers who meet the standards. Any communication regarding certification shall comply with DR 2-101 and, unless the certifying organization is so approved, shall contain a statement that the certifying organization is not approved by the Supreme Court Commission on Certification of Attorneys as Specialists.

Additional guidance as to communication regarding certification is provided in the Supreme Court Rules for the Government of the Bar of Ohio

> Gov.Bar R. XIV(5)(A) A specialist certified under this rule may communicate the fact that he or she is certified by the certifying agency as a specialist in the field of law involved. A specialist shall not represent, expressly or impliedly, that he or she is certified by the Supreme Court or the Commission or by an entity other than the certifying agency. A specialist may represent that the certifying agency is approved by the Commission, but shall not represent that the certifying agency is approved by the Supreme Court of Ohio.

Attorneys who are not certified must not use the term "specialist" in their telephone directory advertisements. An attorney violated DR 2-105(A)(5) by using in a telephone directory advertisement "specializing in" the field of medical malpractice. The court found that the attorney's "use of the term was clearly misleading in fact because it did not derive from formal recognition, or even from experience but from his personal aspirations." *Trumbull Cty. Bar Assn. v. Joseph* (1991), 58 Ohio St. 3d 258, 259.

Prohibited information

The Code provides both general and specific information as to what is impermissible in advertising.

> DR 2-101 (A) A lawyer shall not, on his or her own behalf or that of a partner, associate, or other lawyer affiliated with the lawyer or the lawyer's firm, use, or participate in the use of, any form of public communication, including direct mail solicitation, that:
>
> (1) Contains any false, fraudulent, misleading, deceptive, self-laudatory, or unfair statement;
>
> (2) Seeks employment in connection with matters in which the lawyer or law firm does not intend to actively

> participate in the representation, but that the lawyer or law firm intends to refer to other counsel, except that this provision shall not apply to organizations defined in DR 2-103(D)(1);
>
> (3) Contains any testimonial of past or present clients pertaining to the lawyer's capability;
>
> (4) Contains any claim that is not verifiable
>
> (5) Contains characterizations of rates or fees chargeable by the lawyer or law firm, such as "cut-rate," "lowest," "giveaway," "below cost," "discount," and "special;" however, use of characterizations of rates or fees such as "reasonable" and "moderate" is acceptable.

The Code explains what communication is false or misleading.

> DR 2-101(C) A communication is false or misleading if it satisfies any of the following:
>
> (1) Contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading;
>
> (2) 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 Code of Professional Responsibility or other law;
>
> (3) Is subjectively self-laudatory, or compares a lawyer's services with other lawyers' services, unless the comparison can be factually substantiated.

Use of "and Affiliates" and "and Associates."

An Ohio attorney violated DR 2-101(A)(1) by making misleading representations in yellow page advertising. *Medina Cty. Bar Assn. v. Grieselhuber* (1991), 78 Ohio St.3d 373, 374-75. The attorney used the words, "Pierre A. Grieselhuber and Affiliates" suggesting that he had affiliates when he did not. Also, he used the words "Practice limited to representing the Injured across the Country and around the World" but his practice included other areas of the law, and his national and international experience was limited to having done business in twenty-three other states, having some clients from foreign countries, and having been admitted pro hac vice in the British Virgin Islands. In addition, by stating "We Do It Well," he made a claim not verifiable, violating DR 2-101(A)(4). Id.

Similar to the use of "and Affiliates" is the use of "and Associates": Use of the terms in advertising is misleading when the attorney has no associates. An Ohio

attorney violated DR 1-102(A)(4) and DR 3-101(A) for, among other misconduct, using the term "Mitchell and Associates" when the attorney was a sole practitioner who hired a felon and nonlawyer to work for him. *Portage County Bar Assn. v. Mitchell*, 101 Ohio St. 3d 1, 3, 2003-Ohio-6449.

Implying partnership when none exists

An advertisement implying partnerships when there is no partnership is improper. DR 2-102(C) states "[a] lawyer shall not hold himself or herself out as having a partnership with one or more other lawyers or professional corporations unless they are in fact partners." DR 2-102(B) prohibits, inter alia, practicing under a name that is misleading as to the identity of the lawyer or lawyers practicing under the name. See, e.g., *Disciplinary Counsel v. Mbakpuo*, 98 Ohio St.3d 177, 179, 2002-Ohio-7087 (attorney falsely representing to the public and clients that he was partners in a law firm that did not exist); *Columbus Bar Assn. v Smith*, 97 Ohio St. 3d 497, 499, 2002-Ohio-6728 (attorney misrepresenting that he practiced law in partnership with another attorney and the partnership was a licensed professional association); *Cincinnati Bar Assn. v Stidham* (2000), 87 Ohio St. 455, 460 (practicing law under the firm name "Sand, Stidham & Bernard" when Stidham and Bernard had never been partners and were not members of the same firm); *Disciplinary Counsel v. Watson*, 98 Ohio St. 3d 181, 182, 2002-Ohio-7088 (practicing law under the name "Watson and Watson, Attorneys and Counselors at Law" notwithstanding Watson was a sole practitioner).

Client testimonials

Client testimonials must not be included in advertising legal services. See Ohio Sup.Ct., Bd. Commrs. Grievances & Discipline, Op. 89-24 (1989), Op. 2000-6 (2000). The ban on client testimonials in advertising applies to telephone directory advertising as well. See, e.g., *Disciplinary Counsel v. Henderson* (1998), 81 Ohio St. 3d 494 (Attorneys' television commercials contained client testimonials as well as improper statements about fees). In *Henderson*, the court stated "we are also informing all members of the profession that such advertisements whether in newspapers, on television, or in the 'yellow pages,' are improper and should be either withdrawn or modified as soon as feasible to conform with this decision." Id. at 498. "There is a fine line between separating the law firm's right to make its services known not only through reputation but also through advertising, and the law firm's duty not to mislead the public or overreach in its zeal to obtain clients." Id. at 497.

Misleading, self–laudatory, unfair, and unverifiable information

Use of misleading, self-laudatory, unfair, and unverifiable information is prohibited in all advertising by DR 2-101(A)(1) and (4). See, e.g., Ohio Sup.Ct., Bd. Commrs. Grievances & Discipline, Op. 2002-7 (2002) (advising that "[i]n advertising legal services, it is improper under DR 2-101(A)(1) and (4) for an attorney or law firm to list settlement or verdict amounts obtained in past cases.

Statements such as "Trip/Fall sidewalk-brain injury, $1,000,000 verdict" or "Dog bite, $50,000 settlement" are misleading, self-laudatory, and may be unfair. In addition, confidential settlement amounts are misleading."

Fee information

Attorneys who advertise fee information in a display advertisement in a telephone directory should carefully review the bounds established in the Code for publicizing information regarding fees.

> DR 2-101(E)(1) Any of the following information with regard to fees and charges, if presented in a dignified manner, is acceptable for communication to the public in the manner stipulated by DR 2-101(B):
>
> (a) Fee for an initial consultation;
>
> (b) Availability upon request of either a written schedule of fees or of an estimate of the fee to be charged for specific services;
>
> (c) Contingent fee rates, subject to DR 2-106(C), provided that the statement discloses whether percentages are computed before or after deduction of costs and expenses and advises the public that, in the event of an adverse verdict or decision, the contingent fee litigant could be liable for payment of court costs, expenses of investigation, expenses of medical examinations, and costs incurred in obtaining and presenting evidence;
>
> (d) Fixed fee or range of fees for specific legal services or hourly fee rates, provided the statement discloses that;
>
> i. Stated fixed fees or range of fees will be available only to clients whose matters are included among the specified services;
>
> ii. If the client's matter is not included among the specified services or if no hourly fee rate is stated, the client will be entitled, without obligation, to a specific written estimate of the fee likely to be charged.
>
> (2)(a) If a lawyer or a law firm quotes a fee for a service in an advertisement or direct mail solicitation, the service must be rendered for no more than the fee advertised or quoted.
>
> (b) Unless otherwise specified in the advertisement, if a lawyer or a law firm includes any fee information in a publication that is

> published more frequently than one time per month, the lawyer or law firm shall be bound by any representation made in the advertisement for a period of not less than thirty days after such publication. If a lawyer or law firm publishes any fee information in a publication that is published once a month or less frequently, the lawyer or law firm shall be bound by any representation made in the advertisement until the publication of the succeeding issue. If a lawyer or law firm advertises any fee information in a publication that has no fixed date for publication of a succeeding issue, the lawyer or law firm shall be bound by any representation made in the advertisement for a reasonable period of time after publication, but in no event less than one year.
>
> (c) Unless otherwise specified, if a lawyer or law firm broadcasts any fee information by radio or television, the lawyer or law firm shall be bound by any representation made in the broadcast for a period of not less than thirty days after the date of the broadcast.

Perhaps the most confusing rule for attorneys to apply as to fees is DR 2-101(E)(1)(c) addressing advertisement of contingent fee rates.

An Ohio attorney violated DR 2-101(E)(1)(c) by using in telephone yellow page advertising the words "WE GET PAID FROM OUR RECOVERY OF MONEY DAMAGES FOR YOU" because it failed to inform prospective clients about the costs and expenses of litigation." *Medina Cty. Bar Assn. v. Grieselhuber* (1991), 78 Ohio St.3d 373, 374-75. Ohio attorneys have also violated DR 2-101(E)(1)(c) in written solicitation and in televisions advertisements. See *Mahoning Cty. Bar Assn. v. Sinclair*, 88 Ohio St.3d 328 (2000) (written solicitation); *Disciplinary Counsel v. Shane* (1998), 81 Ohio St.3d 494 (television advertisements).

When the misconduct occurred in *Grieselhuber, Sinclair, and Shane,* DR 5-103(B) required that a client be ultimately responsible for repayment of expenses advanced by a lawyer or law firm. Upon amendment of DR 5-103(B), effective June 14, 1999, a client's repayment of litigation expenses to a lawyer or law firm may be contingent upon the outcome of the matter.

Even with the 1999 amendment to DR 5-103(B), it is still imperative under DR 2-101(E)(1)(c) for an attorney who advertises contingent fees to state whether the client will pay for or be responsible for repayment of litigation expenses. (Of course, the attorney also should address this in the fee contract.)

Telephone directory advertisement may violate various rules in the Code.

On a case-by-case basis, other rules within the Code are applicable to telephone directory advertising.

An Ohio attorney's telephone directory created an impression that an out-of-state licensed attorney (who was not licensed in Ohio) was an attorney associated with the Ohio attorney. *Cleveland Bar Assn. v. Reed*, 94 Ohio St.3d 139, 140-41

(2002). For this and other misconduct, the Ohio attorney was found to have violated DR 3-101(A) (a lawyer shall not aid a nonlawyer in the unauthorized practice of law), DR 3-102 (a lawyer or law firm shall not share legal fees with a nonlawyer, and 1-102(A)(5) (a lawyer shall not engage in conduct prejudicial to the administration of justice). Id.

An attorney, admitted in Ohio and who passed the bar examination of another state but was not sworn in, advertised in the yellow pages (and on letterhead) that he was licensed to practice law in both Ohio and the other state. *Disciplinary Counsel v. Lloyd*, 71 Ohio St.3d 312, 314-15 (1994). For this and other misconduct, the attorney was found to have violated DR-102(A)(6), 9-102(B)(3), 9-102(A), 1-102(A)(5), 5-103(B), and 3-101(B). Id.

Conclusion

Attorneys who advertise in telephone directories must follow the disciplinary rules governing telephone directory advertising. The Ohio Code of Professional Responsibility governs telephone directory advertising specifically in DR 2-101(B)(2) and generally through the publicity rules within DR 2-101 to DR 2-105 and other applicable rules. Among the restrictions, there should be no use of trade names, misleading statements, unverifiable statements, improper terms implying specialization, and any inclusion of contingent fee information in the advertisement must comply with the requirements of DR 2-101)(E)(1)(c).

Advisory Opinions of the Board of Commissioners on Grievances and Discipline are informal, nonbinding opinions in response to prospective or hypothetical questions regarding the application of the Supreme Court Rules for the Government of the Bar of Ohio, the Supreme Court Rules for the Government of the Judiciary, the Code of Professional Responsibility, the Code of Judicial Conduct, and the Attorney's Oath of Office.