

ETH 2012-2.

## **Ohio Ethics Opinions**

**2012.**

**ETH 2012-2.**

June 20, 2012

### ***OSBA Informal Advisory Opinion 2012-02***

#### **Re: Request for Informal Advisory Opinion**

You have requested the opinion of the Ohio State Bar Association Committee on Legal Ethics and Professional Conduct on the following issue: May lawyers use the title "Advanced Collaborative Practitioner" in marketing their family-law practices?

"Advanced Collaborative Practitioner" is a designation granted to certain members by an organization that promotes "collaborative divorce." The members must meet a series of training benchmarks in order to earn the designation. The organization, however, is not certified by the Supreme Court's Commission on Certification of Attorneys as Specialists.

The Committee concludes that under these circumstances, the Ohio Rules of Professional Conduct prohibit lawyers from using the title "Advanced Collaborative Practitioner" in marketing their practices. However, if truthful, lawyers may indicate their membership in the organization that promotes "collaborative divorce."<sup>(fn1)</sup>

#### **Background:**

You have described collaborative divorce as a non-adversarial dispute resolution process in which an inter-disciplinary team of lawyers, financial professionals and/or mental health professionals helps couples to terminate their marriages. A key feature of the collaborative divorce process is an agreement under which the lawyer for each party must withdraw from representation in the event that the non-adversarial process breaks down and litigation results.

In the context of your question, the professionals who participate in this alternative dispute-resolution process are members of an Ohio organization that was formed in 1998 to promote a collaborative approach to divorce and to help couples seeking a collaborative divorce find practitioners who can assist them ("Organization").

With respect to lawyers, membership in the Organization is open only to those who: a) have had significant involvement for at least three years in the resolution of family-law disputes; and b) complete certain specified courses, comprising approximately 36 hours of training. Lawyers who voluntarily complete an additional 12 hours of advanced training are eligible to apply to the organization for authorization to use the title of "Advanced Collaborative Practitioner" on their website listings, electronic communications and office stationery for the succeeding 24 months. The Organization's authorization to use the title is renewable every 24 months upon completion of an additional 12 hours of voluntary training during each renewal period.

#### **Applicable Rules of Professional Conduct:**

Your request for an opinion requires consideration of the following rules of the Ohio Rules of Professional Conduct ("ORPC" or "Rules"): 7.1 (lawyer shall not make or use a false, misleading

or non-verifiable communication about the lawyer's services).7.4(e) (lawyer shall not state or imply that the lawyer is a specialist in a particular field of law unless certain conditions apply).

**Opinion:**

Rule 7.4(e) of the ORPC provides that "A lawyer shall not state or imply that a lawyer is a specialist in a particular field of law, unless both of the following apply: (1) the lawyer has been certified as a specialist by an organization approved by the Supreme Court Commission on Certification of Attorneys as Specialists; [and] 2) the name of the certifying organization is clearly identified in the communication."

The Supreme Court established the Commission on Certification of Attorneys as Specialists ("CCAS") under Rule XIV of the Rules for the Governance of the Bar ("Gov. Bar R.") in order (1) to identify the areas of law that constitute fields of specialty and (2) to set minimum standards for the certification of lawyers as specialists.

Under Gov. Bar R. XIV, the CCAS (on petition or on its own motion) can recommend to the Supreme Court the fields of law that practitioners may designate as fields of "specialization." Then, the CCAS must approve agencies that are in turn qualified to certify lawyers as specialists in those particular fields. The field of "Family Relations Law" is one of the 15 fields of law that the Supreme Court has approved as specialty areas to date.(fn2) The Supreme Court has not approved a specialty designation for "collaborative legal practice" or "collaborative divorce practice."

The CCAS has also to date approved four agencies that are qualified to certify lawyers as specialists: the Ohio State Bar Association, the National Board of Trial Advocacy, the National Elder Law Foundation and the American Board of Certification. These four agencies administer certification programs in a total of 17 specialties. (fn3)

All communications regarding a lawyer's services must comply with Rule T.I's requirement of truthfulness. See ORPC 7.1 cmt. [1] ("Whatever means are used to make known a lawyer's services, statements about them must be truthful."). Under the circumstances outlined above, lawyers who are members of the Organization, and who meet the benchmarks that the Organization sets, are entitled by the Organization to apply the term "Advanced Collaborative Practitioner" to themselves.

However, because the title "Advanced Collaborative Practitioner" implies that the lawyer is a specialist in a particular field of law (collaborative divorce), its use must not only be truthful under Rule 7.1 - it must also comply with Rule 7.4(e).

Certification of a lawyer as a specialist in a defined area "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." ORPC 7.4 cmt. [3]. Here, the Organization is an objective entity that provides the opportunity for certain of its members to obtain advanced knowledge of a specific dispute resolution technique as applied to the domestic relations area. The benchmarks that the Organization sets require the acquisition of both advanced knowledge and advanced experience in order to earn the title of "Advanced Collaborative Practitioner," which the lawyer member is only then entitled to use in order to market the lawyer's practice through the lawyer's website, electronic communications and office stationery. The use of the term "Advanced Collaborative Practitioner" is thus intended to and does imply that the lawyer is a specialist in the

area of collaborative divorce.

However, "collaborative divorce" is not one of the 15 fields of law that the Supreme Court has approved as specialty areas on recommendation of the CCAS; nor has the CCAS designated the Organization as one qualified to certify lawyers as specialists. Thus, using the term "Advanced Collaborative Practitioner" would not comport with the requirements of Rule 7.4.

On the other hand, the Ohio Rules of Professional Conduct do not bar truthful and non-misleading descriptions of a lawyer's membership in organizations or the lawyer's education, training or achievements. ORPC 7.1 and cmts. [2], [3]. Therefore, truthful communication of the fact that a lawyer is a member of the Organization, without using the term "Advanced Collaborative Practitioner" or otherwise implying specialization, is not proscribed.<sup>(fn4)</sup>

In reaching this conclusion, we note that only two Ohio authorities have provided guidance on what conduct or statements would "imply" that a lawyer is a specialist. First, in 1987, the Board of Commissioners on Grievances and Discipline ("Board") opined under the former Code of Professional Responsibility that a lawyer could not indicate on his stationery that he had been certified as a Civil Trial Advocate by the National Board of Trial Advocacy, because such conduct would be "implicitly a statement of specialization." Oh. Adv. Op. 87-039 (Ohio Bd. Comm. on Griev. & Discp. Dec. 18, 1987). Today, however, the same conduct would be permitted under Rule 7.4(e), as the National Board of Trial Advocacy has been approved to certify that same specialty in Ohio. Second, in 1992, the Board held that a legal advertisement in a trade magazine for farmers, stating that "being a farmer of over 20 years experience, I understand farmers and ... their problems," did not impermissibly imply specialization in farm law. Such conduct, however, is not analogous to that under consideration here - using a title endorsed by an organization in order to promote the lawyer's advanced qualifications in a particular legal area.

Other Ohio opinions under the analogous Disciplinary Rule of the former Code of Professional Responsibility are likewise not instructive, because they considered the conduct of lawyers who expressly stated that they were "specialists." See *Office of Disciplinary Counsel v. Furth*, 93 Ohio St. 3d 173, 2001-Ohio-1308, 754 N.E.2d 219, 223, 229 (2001) (lawyer's statement to public defender and to father of juvenile client that lawyer "specialized" in juvenile law violated former DR 2-105(A) [holding self out publically as specialist] and former DR 1-102(A)(6) [conduct adversely reflecting on fitness to practice]); *Trumbull Cty. Bar Ass'n v. Joseph*, 58 Ohio St. 3d 258, 569 N.E.2d 883 (1991) (statement in telephone book advertisement that lawyer "specialized" in field of medical malpractice violated DR 2-105(A)(5), as it was not based on formal recognition from certified agency or even on experience).

Several ethics committees in other states have considered conflict issues and other issues arising in connection with collaborative law practice; but apparently none has opined on the issue we consider here. See Ken. Eth. Op. KBA E-425 (Ken. Bar Ass'n June 2005) (lawyers engaging in collaborative-type resolution process are bound by the Rules of Professional Conduct and cannot circumvent those rules through the collaborative agreement; in communicating with public regarding a collaborative law organization or its members, advertising and solicitation rules apply, although Bar Ethics Committee unable to speculate as to the type of communications that might be contemplated); Md. Eth. Dkt. 2004-23 (Md. St. Bar Ass'n Comm. on Ethics [no date]) (attorneys

practicing primarily in family law area, wishing to form "collaborative dispute resolution non-profit organization" including mental health professionals and investment advisers raise multiple ethics issues, including under advertising and solicitation rules; "The closer the lawyers in the organization come to participation in an organization which is truly a marketing entity, the more likely issues of concern arise under the Rules of Professional Conduct.").

**Conclusion :**

Although directly applicable guidance is lacking, it seems clear nonetheless that the purpose and effect of using the title "Advanced Collaborative Practitioner" is to imply that some entity has recognized the lawyer's advanced knowledge and experience in a specialty area, within the scope of Rule 7.4(e). Because collaborative divorce is not a recognized specialty designation in Ohio, and because the Organization is not one that is approved for certifying lawyers as specialists, we advise that the use of the title "Advanced Collaborative Practitioner" does not comply with Rule 7.4. However, if truthful, a lawyer may indicate in brochures and on the lawyer's website, for example, that the lawyer is a member of the Organization.

Sincerely,

Legal Ethics and Professional Conduct Committee

OHIO STATE BAR ASSOCIATION

**Note: Advisory Opinions of the Ohio State Bar Association Legal Ethics and Professional Conduct Committee are informal, non-binding opinions in response to prospective or hypothetical questions regarding the application of the Supreme Court Rules for the Government of the Judiciary, the Rules of Professional Conduct, the Code of Judicial Conduct, and the Attorney's Oath of Office.**

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Footnotes:

1. You have not asked, and the Committee is not considering, whether the practice of collaborative law implicates other issues under the Ohio Rules of Professional Conduct. See, e.g., ABA Comm. on Ethics & Prof 1 Resp., Formal Op. 07-447 (Aug. 9, 2007) (lawyer may represent client in collaborative law process as a form of limited-scope representation and is bound by rules of professional conduct, including duties of competence and diligence).

2. See <http://www.supremecourt.ohio.gov/Boards/certification/fctw/attyspecfaq.pdf>.

3. The Ohio State Bar Association administers certification programs in: Administrative Agency Law; Appellate Law; Business, Commercial and Industrial Real Property Law; Estate Planning; Family Relations Law; Federal Taxation Law; Labor and Employment Law; Ohio Workers' Compensation Law; Residential Real Property Law; and Trust and Probate Law. The National Board of Trial Advocacy administers certification programs in: Civil Law Trial Advocacy, Criminal Law Trial Advocacy; and Family Law Trial Advocacy. The National Elder Law administers a certification program in Elder Law. The American Board of Certification administers certification programs in: Business Bankruptcy Law; Consumer Bankruptcy Law; and Creditor's Rights Law. See <http://www.supremecourt.ohio.gov/Boards/certification/faw/attyspecfaq.pdf>.

The CCAS has adopted procedures for approving agencies that are qualified to certify lawyers as

specialists. See [http://www.supremecourt.ohio.gov/Boards/certification/ccas\\_standards.pdf](http://www.supremecourt.ohio.gov/Boards/certification/ccas_standards.pdf).

4. We recognize that some commentators have cited the tension between the First Amendment right to disseminate accurate factual information about legal services and the state's ability to regulate the manner in which lawyers hold themselves out as "specialists." See generally, R. Rotunda & J. Dzienkowski, *Lawyer's Deskbook on Professional Responsibility* § 7.4-3 at 1235-38 (2012-13 ed.) (citing *Pee/v. Attorney Reg. & Disc. Comm. of Ill.*, 496 U.S. 91 (1990), and questioning whether a state may constitutionally restrict any accurate statement regarding a lawyer's certification as a specialist).