CLEVELAND BAR ASSOCIATION
PROFESSIONAL ETHICS COMMITTEE
OPINION NO. 89-6

Headnote

An attorney may list or publicize, in the course of advertising or professional announcements, former government offices or positions held. The listing of these affiliations is permitted provided: they are factual and they are not misleading, not likely to create an unjustified expectation about the results the lawyer can achieve, and do not state or imply an area of specialization or that the particular attorney may obtain results not obtainable by someone without such a background.

Statement of Facts

A number of attorneys resign or retire from judicial or other public positions. They wish to advertise themselves, respectively, as "Former Judge, Common Pleas Court", " Former Prosecutor", "Former Administrator", "Former Referee".

Questions Presented

Whether attorneys may list or publicize former government offices or positions held.

Conclusions and Reasoning

The issue was addressed as early as 1945, in ABA Formal Opinion 264. In that Opinion, the ABA Professional Ethics Committee held that attorneys retiring from government service may send out "simple" announcements of a return to private practice. However, the Committee prohibited attorneys from stating "...that the attorney has been employed by a specified Government department." The Committee reasoned that such a specified announcement did nothing more:

"...than to emphasize (a) special familiarity with the problems of that particular Government department and (the attorney's) acquaintance with the personnel therein, the conclusion being that (the attorney) is unusually well fitted to undertake professional work involving such Government agency.

Formal Opinion 264, 6-21-45, emphasis added.

Sixteen years later, that Opinion was modified by the ABA Professional Ethics Committee Formal Opinion 301, decided November 21, 1961. Here, the Committee saw no problem with attorneys who resigned from Government service and announced that fact with a "...brief and dignified reference to the position occupied with the government immediately prior to such entry or return". The Committee stated that any other rule "...would place an undue limitation upon a large element of our profession." However, the Committee limited the sending of these announcements:
"...to attorneys and former clients, and to other persons with whom returning attorney has a personal relationship such as to make it clear that they would be interested in knowing that (the attorney) has had no professional dealings or relations and to whom such an announcement would be merely a suggestion that (the attorney) be employed."

ABA Formal Opinion 301, 11-21-61.

This Opinion also held that the announcement should be limited to the immediate past connection of the lawyer with the government, and made upon leaving the position to enter private practice.

It should be noted that in light of the dates of each of these opinions, neither is really germane to current standards. However, for historical significance, Opinions 264 and 301 seem to indicate that an attorney should not use a former government position to claim or emphasize a specialty, or imply the ability to obtain special results in matters brought against the government, or which are subject to government review or regulation. The Committees in each Opinion reasoned that the purpose of the announcements should be a notification of a return to practice or an explanation of the absence from practice.

The Arizona Bar Association followed this line of reasoning in its Opinion 87-1, decided 1-13-87. There, the Association held that a law firm which has an of counsel relationship with a retired judge may on its letterhead state "judge of the superior court, retired." The association stated that the (Disciplinary) Code permits advertising to include professional experience, but with this caveat:

"...so long as it is true, not misleading, and does not create the unjustified expectation about the results the lawyer can achieve."

Opinion 87-1.

The Arizona Bar again addressed this issue one month later, in its Opinion 87-4. There, the Bar stated that a law firm which had a new associate who was formerly a "clinical nurse research investigator" may announce that former employment. The Bar held that this was a statement of fact about the associate's prior experience and does not imply a specialty in a particular area, or an ability to achieve a specific legal result. The statement was merely a connotation of a "substantial medical background which might not otherwise be known."

Arguably, then, an announcement or letterhead which includes a reference to a superior court judgeship is a statement of fact regarding previous legal experience. Such a statement is true, but whether it is misleading or the source of unjustified expectations is not so easily answered.

In order to decide whether advertising or announcements which include reference to past governmental or public legal experience is within limitations of the Disciplinary rules, an attorney should
consider two things. Is the reference used to imply or state a specialty, and will the reference create unjustified expectations of results which may be achieved?

Particular attention should be given to DR 2-101:

(C) A communication is misleading if it:

(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; or

(3) Is subjectively self-laudatory, or compares a lawyer's services with other lawyers' services, unless the comparison can be factually substantiated.

The attorney should consider the context in which the reference to past employment is used. The reference should always be factual and should be made in such a way that it is used to emphasize experience or competence of a general nature, or to refresh or enlighten the minds of the public as to past employment. The prior employment should not be overly emphasized so that the public is mislead into believing that the attorney has skills or abilities unmatched by others in the profession. Particular care should be taken so that the reference does not imply a specialized knowledge, the claiming of which is prohibited by DR 2-105 Limitation of Practice:

(5) A lawyer may state that his practice consists in large part or is limited to a field or fields of law. Except as provided in DR 2-105(A) (1) and (4), a lawyer may not claim or imply special competence or experience in a field of law through use of the term "specialize" or otherwise.

Finally, the reference should never be used to imply the particular ability to "get things done" by means other that those which are legal and acceptable methods of practice, and within the confines of the Disciplinary rules. In this regard, the Attorney should review Canon 9, Disciplinary Rule 9-101(C):

"A lawyer shall not state or imply that he is able to influence improperly or upon irrelevant grounds any tribunal, legislative body, or public official."

DR 9-101(C), emphasis added.