CLM CLAIMS & LITIGATION MANAGEMENT ALLIANCE™

ADVANCING ETHICS, COOPERATION AND EDUCATION

2014 CLM Annual Conference

April 9, 2014 – April 11, 2014

Boca Raton Resort
501 E. Camino Real
Boca Raton, FL 33432

Roundtable 1: Thursday, April 10, 2014 (10:10 am – 11:10 am)

If you think you are an "expert" or you "specialize", be careful how you advertise!

I. Time to get some clients and let everyone know what a great lawyer you are.

a. Sample Online CV (Read to Round Table Group)

b. Quick Q&A regarding what is right and wrong with wording.

i. *"Jean is considered an expert insurance coverage litigation advisor, specializing in the areas of Professional Liability, Insurance Coverage, Bad-Faith, Property and Construction Law, Employment Law, Entertainment Law, Commercial Litigation."*

a) Cannot use "expert insurance coverage litigation advisor" because such designation has not been recognized or approved by a governing body. See ***In re Wells***, 392 S.C. 371, 376-78, 709 S.E.2d 644, 648 (2011) (statement on firm's website that attorneys there are "expert nursing home litigation advisors" violated professional rules).

b) Cannot use "specializing" in certain areas of law unless certified. See ***In re Kearney Soniat du Fossat Loughlin***, Louisiana Attorney Disciplinary Board, Docket No. 12-DB-008 (2013) ("specializing in maritime personal injury and death cases" was improper unless certified).

ii. *"Jean also has substantial expertise in the areas of Environmental/Toxic Tort liability, Subrogation and General Casualty defense."*

a) Should not use "expert" or "expertise" because those terms imply specialization. See ***In re Richmond's Case***, 152 N.H. 155, 159, 872 A.2d 1023, 1029 (2005) (attorney sanctioned for advertising his expertise in financing and raising capital on his website, even though attorney did not have any special training or experience in securities law).

iii. *"Jean is also highly-regarded as an expert in the area of professional negligence for architects and engineers in Louisiana,…"*

a) Should not use "highly-regarded" or "expert" because misleading. See ***Spencer v. Honorable Justices of Supreme Court of Pa.***, 579 F. Supp. 880, 887-88 (E.D. Pa. 1984), *aff'd sub nom. Spencer v. Supreme Court of Pennsylvania*, 760 F.2d 261 (3d Cir. 1985) (Terms such as "experienced," "expert," "highly qualified," or "competent" are difficult for a layman to confirm, measure, or verify).

iv. *Section of CV titled "Specialist in Following Areas"*

a) Cannot use "specialist" unless certified. See ***In re Anonymous Member of the South Carolina Bar***, 386 S.C. 133, 687 S.E.2d 41 (2009) (attorneys used "expert" and "specialist" to describe themselves in the biographical portion of his law firm's website when none were certified as specialists).

II. Rules of Professional Conduct.

a. ABA Model Rules

i. Relevant rules include:

Rule 7.2 (Advertising):
"(a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through written, recorded or electronic communication, including public media. . . ."

Rule 7.1 (Communications Concerning a Lawyer's Services):
"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 contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading."

Rule 7.4 (Communication of Fields of Practice and Specialization):
"(a) A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law."

* * *

"(d) A lawyer shall not state or imply that a lawyer is certified as a specialist in a particular field of law, unless:

(1) the lawyer has been certified as a specialist by an organization that has been approved by an appropriate state authority or that has been accredited by the American Bar Association; and

(2) the name of the certifying organization is clearly identified in the communication."

Comments to Rule 7.4

> "[1] Paragraph (a) of this Rule permits a lawyer to indicate areas of practice in communications about the lawyer's services. If a lawyer practices only in certain fields, or will not accept matters except in a specified field or fields, the lawyer is permitted to so indicate. A lawyer is generally permitted to state that the lawyer is a "specialist," practices a "specialty," or "specializes in" particular fields, but such communications are subject to the "false and misleading" standard applied in Rule 7.1 to communications concerning a lawyer's services."
>
> * * *
>
> "[3] Paragraph (d) permits a lawyer to state that the lawyer is certified as a specialist in a field of law if such certification is granted by an organization approved by an appropriate state authority or accredited by the American Bar Association or another organization, such as a state bar association, that has been approved by the state authority to accredit organizations that certify lawyers as specialists. Certification 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. Certifying organizations may be expected to apply standards of experience, knowledge and proficiency to insure that a lawyer's recognition as a specialist is meaningful and reliable. In order to insure that consumers can obtain access to useful information about an organization granting certification, the name of the certifying organization must be included in any communication regarding the certification."

ii. Notably, the ABA Model Rules do not expressly forbid the use of the term "expert" in attorney advertising.

iii. As set forth in ABA Model Rule 7.4 and in Comment 3 thereof, attorneys may advertise that they are "specialists" in a particular field of law so long as they are certified as such by a governing body.

b. State Specific

i. **Louisiana**: Unlike the ABA Model Rules, Louisiana expressly prohibits the use of the term "expert" unless certified.

> Louisiana Rules 7.2(c)(1)(B) and 7.2(c)(5)
>
> "(c) Prohibitions and General Rules Governing Content of Advertisements and Unsolicited Written Communications.
>
> > (1) Statements About Legal Services. A lawyer shall not make or permit to be made a false, misleading or deceptive communication about the lawyer, the lawyer's services or the law firm's services. A communication violates this Rule if it: . . . (B) is false, misleading or deceptive . . ."
> >
> > * * *
> >
> > "(5) Communication of Fields of Practice. A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law. A lawyer shall not state or imply that the lawyer is 'certified,' 'board certified,' an 'expert' or a 'specialist' except as follows:

(A) Lawyers Certified by the Louisiana Board of Legal Specialization. A lawyer who complies with the Plan of Legal Specialization, as determined by the Louisiana Board of Legal Specialization, may inform the public and other lawyers of the lawyer's certified area(s) of legal practice. Such communications should identify the Louisiana Board of Legal Specialization as the certifying organization and may state that the lawyer is 'certified,' 'board certified,' an 'expert in (area of certification)' or a 'specialist in (area of certification).'

(B) Lawyers Certified by Organizations Other Than the Louisiana Board of Legal Specialization or Another State Bar. A lawyer certified by an organization other than the Louisiana Board of Legal Specialization or another state bar may inform the public and other lawyers of the lawyer's certified area(s) of legal practice by stating that the lawyer is 'certified,' 'board certified,' an 'expert in (area of certification)' or a 'specialist in (area of certification) if:

(i) the lawyer complies with Section 6.2 of the Plan of Legal Specialization for the Louisiana Board of Legal Specialization; and,

(ii) the lawyer includes the full name of the organization in all communications pertaining to such certification.

A lawyer who has been certified by an organization that is accredited by the American Bar Association is not subject to Section 6.2 of the Plan of Legal Specialization.

(C) Certification by Other State Bars. A lawyer certified by another state bar may inform the public and other lawyers of the lawyer's certified area(s) of legal practice and may state in communications to the public that the lawyer is 'certified,' 'board certified,' an 'expert in (area of certification)' or a 'specialist in (area of certification)' if:

(i) the state bar program grants certification on the basis of standards reasonably comparable to the standards of the Plan of Legal Specialization, as determined by the Louisiana Board of Legal Specialization; and,

(ii) the lawyer includes the name of the state bar in all communications pertaining to such certification."

ii. **Similar to Louisiana, in Illinois**: Illinois Rule of Professional Conduct Rule 7.4(c) provides that, "Except when identifying certificates, awards or recognitions issued to him or her by an agency or organization, a lawyer may not use the terms 'certified,' 'specialist,' 'expert,' . . .")

iii. **Nevada**: Nevada's approach is slightly different, in that the use of the term "expert" is expressly authorized so long as the attorney complies with the Rules (i.e. fees, registration, etc.).

Nevada Rule 7.4

"(a) A lawyer may communicate that the lawyer is a specialist or expert or that he or she practices in particular fields of law, provided the lawyer complies with this Rule. Nothing in this Rule shall be construed to prohibit communication of fields of practice unless the communication is false or misleading."

* * *

"(d) *Specialist or expert.* In addition to the designations permitted by paragraphs (b) and (c) of this Rule, a lawyer may communicate that he or she is a specialist or expert in a particular field of law if the lawyer complies with the provisions of this paragraph."

iv. **Massachusetts**: The Professional Rules in Massachusetts do not expressly prohibit the use of the term "expert"; however, the Rules limit attorneys from holding out as experts when doing so is false or misleading. Furthermore, an attorney holding himself out as a specialist in a particular area of law will be held to a higher standard of care.

Massachusetts Rule 7.4 (Communication of Fields of Practice):

"(a) Lawyers may hold themselves out publicly as specialists in particular services, fields, and areas of law if the holding out does not include a false or misleading communication. Such holding out includes (1) a statement that the lawyer concentrates in, specializes in, is certified in, has expertise in, or limits practice to a particular service, field, or area of law, (2) directory listings, including electronic, computer-accessed or other similar types of directory listings, by particular service, field, or area of law, and (3) any other association of the lawyer's name with a particular service, field, or area of law.

(b) Lawyers who hold themselves out as "certified" in a particular service, field, or area of law must name the certifying organization and must state that the certifying organization is "a private organization, whose standards for certification are not regulated by the Commonwealth of Massachusetts," if that is the case, or, if the certifying organization is a governmental body, must name the governmental body.

(c) Except as provided in this paragraph, lawyers who associate their names with a particular service, field, or area of law imply an expertise and shall be held to the standard of performance of specialists in that particular service, field, or area. Lawyers may limit responsibility with respect to a particular service, field, or area of law to the standard of an ordinary lawyer by holding themselves out in a fashion that does not imply expertise, such as by advertising that they "handle" or "welcome" cases, "but are not specialists in" a specific service, field, or area of law."

COMMENTS TO RULE 7.4

"[1] . . . The Rule removes prohibitions against holding oneself out as a specialist or expert in a particular field or area of law so long as such holding out does not include any false or misleading communication but provides a broad definition of what is included in the term 'holding out.'"

* * *

"[3] The Rule also specifies that lawyers who imply expertise in a particular field or area of law should be held to the standard of practice of a recognized expert in the field or area. It gives specific examples of commonly used forms of advertising that fall within that description. The Rule also recognizes that there may be good reasons for lawyers to wish to associate their names with a particular field or area of law without wishing to imply expertise or to accept the responsibility of a higher standard of conduct. Such a situation might describe, for example, a lawyer who wishes to develop expertise in a particular or field area without yet having it. The Rule identifies specific language that might be used to avoid any implication of expertise that would trigger the imposition of a higher standard of conduct."

v. **Missouri**: Missouri prohibits an attorney from designating himself as a "specialist" unless the advertisement contains a disclaimer. The Missouri Rules are silent on the use of the term "expert."

Missouri Rule 4-7.4

". . . Except as provided in Rule 4-7.4(a) and (b), a lawyer shall not state or imply that the lawyer is a specialist unless the communication contains a disclaimer that neither the Supreme Court of Missouri nor The Missouri Bar reviews or approves certifying organizations or specialist designations.

(a) A lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation "patent attorney" or a substantially similar designation;

(b) A lawyer engaged in admiralty practice may use the designation "admiralty," "proctor in admiralty" or a substantially similar designation."

vi. **South Carolina**: South Carolina expressly forbids the use of the term "expert." Rules of Professional Conduct Rule 7.4(b) provides as follows:

"To avoid confusing or misleading the public and to protect the objectives of the South Carolina certified specialization program, any such advertisement or statements shall be strictly factual and shall not contain any form of the words 'certified,' 'specialist,' 'expert,' . . ."

III. Rationale behind Rules.

a. The main rational is that it is difficult for a layperson to confirm, measure, or verify such terms.

b. ***Spencer v. Honorable Justices of Supreme Court of Pa.***, 579 F. Supp. 880, 887-88 (E.D. Pa. 1984), *aff'd sub nom. Spencer v. Supreme Court of Pennsylvania*, 760 F.2d 261 (3d Cir. 1985):

Claims of terms such as "experienced," "expert," "highly qualified," or "competent" are difficult for a layman to confirm, measure, or verify. A lawyer who has handled three or four tort or antitrust cases clearly is less "experienced" than one who has handled fifty, yet the term 'experienced' would arguably be available to both. Rather than identify himself as an "experienced" pilot, plaintiff can convey his experience through the use of

more objective information such as the number of hours flown in various types of aircraft, his certification by the Federal Aviation Administration as a pilot in single engine planes, and his certification as a flight instructor in single and multi-engine aircraft. Similarly, a lawyer may describe the quality of his legal services only through the use of objective, verifiable terms such as the number of cases handled in a particular legal field or the number of years in practice. Thus, the State's prohibition of the use of terms which subjectively evaluate a lawyer's credentials or the quality of his services directly advances the State's substantial interest in protecting consumers from misleading claims, and is not more extensive than necessary to serve that interest.

c. ***In re Amendments to The Rules Regulating The Florida Bar-Adver.***, 971 So. 2d 763, 765-70 (Fla. 2007) (Lewis, J. concurring in part and dissenting in part):

> Attorney "expert" status exemplifies this very type of misleading, useless advertising. . . . Substituting "expert " status for "specialist " status accomplishes nothing apart from increasing attorneys' capacity to deceive the consuming public, regardless of whether their deception is intentional or unintentional. . . . According to a widely used dictionary, "specialist" and "expert" are not at all synonymous terms. Merriam Webster's Collegiate Dictionary supplies two germane definitions for the term "expert": The first definition is a person "having, involving, or displaying special skill or knowledge derived from training or experience"; however, the second definition is "one with the special skill or knowledge representing mastery of a particular subject." Merriam Webster's Collegiate Dictionary 409 (10th ed.1993). In contrast, that same source defines "specialist" as "one who specializes in a particular occupation, practice, or branch of learning." Merriam Webster's Collegiate Dictionary 1128 (10th ed.1993). Merely focusing upon a particular "branch of learning" is not the same exercise as obtaining "mastery of a particular subject." Hence, when a layperson—unaccustomed with the varied and nuanced definitions that the law places upon the term "expert"—sees or hears that a particular attorney is an "expert" in a field of law for which the layperson desires representation, that layperson is likely to labor under the misconception that the advertising attorney is a "master" or a preeminent mind in the particular field.
>
> * * *
>
> Thirty-seven United States jurisdictions and the American Bar Association do not include the term "expert" in their field-of-practice and attorney-specialization rules. Furthermore, at least three jurisdictions indirectly reference the term "expertise," but refer to field-certified attorneys as "specialists." Thus, the overwhelming majority approach is to label this classification of attorneys "specialists," not "experts."

IV. <u>Examples of Cases; Implications; Sanctions</u>.

a. <u>Case examples</u> of attorneys getting in trouble for holding out as "experts" without proper designation by governing body:

> i. ***In re Kearney Soniat du Fossat Loughlin***, Louisiana Attorney Disciplinary Board, Docket No. 12-DB-008 (2013) (law firm's website contained statement that it is a firm "specializing in maritime personal injury and death cases"; found to be in violation of Rule 7.4 [predecessor of Rule 7.2] because such specialization had not been recognized or approved by a governing body).

Rule 7.4, Communication of Fields of Practice, was effective from March 1, 2004 until October 1, 2009. It read:

> A lawyer shall not state or imply that the lawyer is certified, or is a specialist or an expert, in a particular area of law, unless such certification, specialization or expertise has been recognized or approved in accordance with the rules and procedures established by the Louisiana Board of Legal Specialization.

On December 1, 2008, Rule 7.6, Computer Accessed Communications, was made effective. The definition of such communications, at 7.6 (a), includes home pages or World Wide Web (WWW) sites.

Section 7.6 (b), Internet Presence, states such WWW sites and home pages:

> That are controlled, sponsored, or authorized by a lawyer or law firm and that contain information concerning the lawyer's or law firm's services:
> (3) are considered to be information provided upon request and , therefore, are otherwise governed by the requirements of Rule 7.9.

We find Respondent in authorizing the WWW site at issue, which contained the statement that his firm was one "specializing in maritime personal injury and death cases" was stating or implying that his firm was a "specialist" in maritime personal injury and death cases, in violation of Rule 7.4. This is a violation because such a specialization had not been recognized or approved in accordance with the rules and procedures established by the Louisiana Board of Legal Specialization.

It is hereby found there is clear and convincing evidence that Respondent violated said Rule 7.4 during the 2007, 2008 and 2009 time period described above.

3. No evidence of actual injury caused by Respondent's violation was introduced. There was little potential injury shown. Witness Mr. Richard Lemler, Ethics Counsel for the Louisiana State Bar Association for almost eleven years, discussed Rule 7.4, the predecessor to Rule 7.2 (c) (5). (See Transcript, pages T.68 – 71). Witness Richard C. Stanley, member of the Rules of Professional Conduct Committee or its predecessor for ten years, and a law professor, testified that the latter rule was designed to protect the public by avoiding its confusion about lawyers claiming to be specialists. (See Transcript, pages T.111 – T.114).

Affairs, Colleen Timmons stating that Respondent received a Juris Doctor degree, and "also completed the requirements and was awarded a certificate in Maritime Law." The word "specialization" was not used, although this word has been at the center of controversy since formal charges were filed in this matter, Number 12 – DB – 008, on February 2, 2012. The word "specialization" is used in a Tulane Law School WWW site description of its Admiralty and Maritime Law academic program, in referring to a "Certificate of Specialization in Maritime Law" issued to graduating students. (See Exhibit R – 38). However the date shown on that page, presumably a date of printing from the WWW site, is at the bottom and reads "2/9/2012". The only evidence, of what the certificate was called in 1999 when Respondent received it, is the February 21, 2013 letter described above, and Respondent's testimony cited above. Clarification of this issue is needed before it should serve as a factor.

ii. ***In re Wells***, 392 S.C. 371, 376-78, 709 S.E.2d 644, 648 (2011): Attorney's website referred to the firm's "expertise" in personal injury matters and the firm's "expert nursing home litigation advisors." The website and firm brochures also stated that the firm "specializes in several areas of law." Attorney, however, admitted that no one in his firm was a certified specialist in any area of law. Attorney found to be violating, among other rules, Rule 7.4(b)(4), which prohibits the use of the words "expert" and "specialist" in advertisements where a lawyer is not a certified specialist.

iii. ***In re Anonymous Member of the South Carolina Bar***, 386 S.C. 133, 687 S.E.2d 41 (2009): Attorney had used forms of the words "expert" and "specialist" to describe himself and two other attorneys in the biographical portion of his law firm's website when neither he nor his associates were certified as specialists by the Court. Court affirmed issuance of letter of caution, finding minor misconduct where attorney's use of the words "expert" and "specialist" on his firm's website violated Rule 7.4(b) of the Rules of Professional Conduct.

iv. ***In re PRB Docket No.2002.093***, 177 Vt. 629, 868 A2d. 709 (2005): Lawyer placed an advertisement in the Yellow Pages describing his law firm—in large capital letters placed at the top of the advertisement—as "INJURY EXPERTS." Below this description was a list of the firm's attorneys and a second, smaller caption reading: "WE ARE THE EXPERTS IN" followed by three enumerated areas of law. Court affirmed private admonition imposed upon lawyer because the ad "likely to create an unjustified differentiation and expectation among those reading the advertisement about the results which can be achieved by a lawyer claiming to be an expert."

v. ***In re Richmond's Case***, 152 N.H. 155, 159, 872 A.2d 1023, 1029 (2005): Attorney sanctioned for, *inter alia*, advertising his expertise in financing and

raising capital on his website, even though attorney did not have any special training or experience in securities law. In fact, he previously had merely drafted, but had never filed with New Hampshire Bureau of Securities Regulation, a securities registration statement for issuance of stock. Attorney's website constituted a false or misleading communication about the lawyer or the lawyer's services in violation of Professional Conduct Rule 7.1, which prohibits a lawyer from making a "false or misleading communication about the lawyer or the lawyer's services."

b. Case examples of where State Bar Committees discourage attorneys from participation in websites or online forums where they are labeled as "experts":

i. **Ohio Supreme Court Board of Grievances and Discipline Op. 2005-6 (2005)**: A law firm was asked to participate in an "Ask the Expert" program sponsored by a local television station. "Ask the Expert" is described as both an advertising program and a public service program. There is a fee for participation. In Ohio, a lawyer may not claim or imply special competence or experience in a field of law, unless an exception applies: the lawyer is a patent attorney, trademark attorney, admiralty attorney; the lawyer is certified as a specialist in a field of law under the Rule XIV of the Supreme Court Rules for the Government of the Bar of Ohio; or the lawyer is certified by a bona fide private organization. This restriction is set forth in DR 2-105(A)(6), which provides that a lawyer may state that his or her practice consists in large part or is limited to a field or fields of law. Construing Ohio DR 2-105, there is "no leeway for attorneys to use the term "expert" in advertising."

ii. **South Carolina Bar Ethics Advisory Committee Op. 12-03 (2012)**: This particular website invites specific questions about specific legal matters in online forums. The website offers specific legal advice but uses buried small-type statements to attempt to disclaim the creation of attorney-client relationships and to warn against reliance on the advice. The website also identifies its lawyers as "experts." Rule 7.4(b) prohibits the use of the word "expert" or any variation thereon in lawyer advertising and public statements, with few exceptions not applicable here. As such, the website's use of the word "expert," among other things, prohibit lawyers' participation. The Advisory Committee believes lawyers' participation under these circumstances would be improper.

c. Implications – Subject to Higher Standard of Care: As we noted under the Massachusetts Professional Rules earlier, one implication of holding out as an "expert" is that you are held to higher standard of care.

i. ***Duffey Law Office, S.C. v. Tank Transport, Inc.***, 194 Wis.2d 674, 535 N.W.2d 91 (Wis. App. 1995) (holding an attorney who "presented himself as an expert in the areas of labor law, collective bargaining agreements, and pension-fund contribution law . . . to a standard of care that is consistent with that representation")

ii. ***Rhodes v. Batilla***, 848 S.W.2d 833 (Tex. App. 1993) (attorney holding out as tax specialist was "properly held to the standard of care which would be exercised by a reasonably prudent tax attorney").

d. Sanctions under ABA Standards, Section 7, Violation of Duties Owed to the Profession provides, in relevant part, as follows:

"Absent aggravating or mitigating circumstances, upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases involving false or misleading communication about the lawyer or the lawyer's services, improper communication of fields of practice, improper solicitation of professional employment from a prospective client, unreasonable or improper fees, unauthorized practice of law, improper withdrawal from representation, or failure to report professional misconduct . . ."

"In general, then, a sanction of disbarment or suspension will rarely be required, and a sanction of reprimand, admonition or probation will be sufficient to ensure that the public is protected and the bar is educated. While it will as a rule be inappropriate to impose a sanction of disbarment or suspension for six months or more, there are situations when a more severe sanction should be imposed. The standards set out below identify those exceptional situations."

V. Round Table Discussion: How to Remedy.

a. What have we learned?

i. There is a distinction between "expert" and "specialist", as well as "expertise" and "specialization."

ii. Must know your state's applicable Rules as the Rules vary from state to state

iii. Generally, most states will permit use of the term "specialist" if so certified by a governing body.

b. Why is it important?

i. To avoid misleading laypersons, we should avoid unverifiable terms such as "expert", "expertise", "highly qualified" and the likes.

ii. Certification 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. Certifying organizations may be expected to apply standards of experience, knowledge and proficiency to insure that a lawyer's recognition as a specialist is meaningful and reliable.

c. How do we remedy the problem? What should we do differently?

i. Be objective – describe the quality of your legal services only through the use of objective, verifiable terms, such as the number of cases handled in a particular legal field or the number of years in practice.

ii. Homework:

Read your CV, website, biography, LinkedIn and Facebook profiles, and other advertisements or communications.

Then, ask yourself whether the terms describing your legal services are verifiable; whether the information you represented can be measured or confirmed in some way.

If not, it may be considered impermissibly false or misleading under the Professional Rules.