Are You Really An 'Expert' In Md., Va. And DC?

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Law360, New York (September 02, 2014, 11:59 AM ET) -- Attorneys enhance the marketing of legal services to prospective clients by distinguishing themselves through a variety of means. Some lawyers cite to their expertise or specialty in particular areas of the law on their firm websites, business cards, tweets, blogs and other media platforms. For example, a law firm website may tote the accomplishments of a partner by proclaiming her an expert in international dispute resolution, or an attorney may advertise that he specializes in labor and employment law on his business cards. But is this practice ethical? Before employing such distinctions, lawyers practicing in Maryland, Virginia and the District of Columbia should consider the ethical implications of using either word in legal advertising.

Legal advertising is a form of commercial speech, and may be restricted only when “the particular content or method of the advertising suggests that it is inherently misleading or when experience has proved that in fact such advertising is subject to abuse.” Because the public generally lacks sophistication concerning legal services, misstatements that might be overlooked or deemed unimportant in other advertising may be inappropriate in legal advertising. Generally, potential clients cannot authenticate claims of legal expertise through quantifiable measures. Without standard means of verification, such claims are subjected to restriction.

The ABA Model Rules of Professional Conduct, adopted in Maryland, Virginia and the District of Columbia, with amendments, set forth several provisions governing legal advertising and claims of expertise. Rule 7.1 (Communications Concerning a Lawyer’s Services) covers all communications, and requires that attorneys not make false or misleading statements about themselves or their 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 7.2 (Information about Legal Services) covers legal advertising and incorporates by reference the limitations imposed by Rule 7.1.

The prohibition of false or misleading communications includes truthful statements that may be misleading. A truthful statement is misleading if it omits a necessary fact that causes the statement to become materially misleading. A truthful statement is also misleading if there is a substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer’s services for which there is no reasonable factual foundation. For example, when an attorney advertises that he secured a multimillion-dollar verdict for his client, but fails to state that this verdict was later overturned by an appellate court, the omission of this key fact makes the statement misleading. Additionally, when a lawyer heralds “three decades of trial experience” but

does not indicate that this calculation is the combined experience of all the attorneys in his law firm and not just his own individual experience, which falls substantially short of the 30-year mark, this statement becomes materially misleading.

Rule 7.4 governs lawyer communications of fields of practice and specialization. Attorneys may advertise that they limit their practice to certain areas of the law, but such communications are subject to the false and misleading standard applied in Rule 7.1 to communications concerning a lawyer's services. Attorneys may advertise that they are recognized or certified as a specialist in patent law, admiralty, or are certified as a specialist by an organization that has been approved by the state or accredited by the ABA. For example, many jurisdictions have certified mediators. The certifying organization, however, must be clearly identified in the attorney communication.

Although Maryland, Virginia and the District of Columbia have adopted, with amendments, the ABA Rules of Professional Conduct, all three jurisdictions apply these model rules differently to claims of specialty and expertise in legal advertising. In Maryland, a lawyer is prohibited from holding himself or herself out publicly as a specialist or expert. The Maryland State Bar Committee on Ethics opined that holding oneself out as an expert or specialist in an advertisement connotes that someone or some organization has determined that such is the case. However, Maryland has no specialty designations. Therefore, any such distinction is inherently misleading to potential clients. The committee also held that the use of the word "expert" in place of "specialist" was not in keeping with the spirit of Rule 7.4 and therefore should not be used to sidestep the ban on specialty titles.

The Virginia Standing Committee on Lawyer Advertising and Solicitation also cautions attorneys who use terms such as "specialist" and/or "specializing in," to be mindful of Rule 7.4's requirement that only certain specialties have been certified and recognized by the Virginia Supreme Court. Unless an attorney is engaged in patent law, admiralty law, or holds a certification recognized by the Virginia Supreme Court, he or she should only use the term "certified specialist" in accordance with Rule 7.4.

Further, a Virginia lawyer's use of the words "expert" or "expertise" in legal advertisements is generally prohibited unless the claim can be factually substantiated. Similarly, in the District of Columbia, attorneys are permitted to advertise truthful claims of legal specialization and expertise so long as they can be substantiated. (The District of Columbia does not make a distinction between expertise and specialty.) Practitioners must be capable of authenticating their claims of expertise with documentation upon request by the client. For example, prospective clients may evaluate an attorney's expertise claim by learning the number of cases an attorney has handled in a particular area of the law and/or the number of years he has been practicing in that specialized area of the law. Prospective clients may inquire about favorable results an attorney obtained for former clients in similar legal predicaments, so long as the lawyer explains that case results depend upon a variety of factors unique to each case, and he or she cannot predict or guarantee a particular result.

In attempting to avoid potentially misleading claims of specialty or expertise, lawyers practicing in Maryland, Virginia and the District of Columbia should generally avoid using these labels in legal advertisements. In Maryland, attorneys are prohibited from using these distinctions entirely. In Virginia and the District of Columbia, attorneys may hold themselves out as experts, but this practice should be used with caution since neither jurisdiction offers concrete guidance to attorneys on what is a 'factually substantiated' claim of expertise. Further, Virginia attorneys can only advertise specialties in limited areas of the law. Thus, as lawyers continue to market and promote their services to prospective clients through the use of legal advertising, they should generally steer clear of claims of expertise and specialty in Maryland, Virginia and the District of Columbia.

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