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Specialties, Endorsements and other Social Media Traps for Bankruptcy Lawyers

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A recent ethics opinion issued by the New York State Bar Association's Committee on Professional Ethics[1] has added more fuel to the ethical debate regarding what attorneys and law firms can and cannot post on their social media profiles.

NYSBA Opinion 972 and "Specialties"

Opinion 972, which was issued on June 16, 2013, held that a law firm may not list its services or practice areas (*e.g.*, Bankruptcy, Arbitration),under the heading "Specialties" on a social media site, such as LinkedIn, as doing so would be a violation of the New York Rules of Professional Conduct. The applicable rule (Rule 7.4(c)) and its predecessor have long provided that, although a lawyer or law firm may publicly identify areas of law in which the lawyer or law firm practice, a lawyer or law firm may not claim that he, she or it is a "specialist" or "specializes" in a particular field of law. The only exception to this rule is for individual lawyers who are in fact certified "by a private organization approved for that purpose by the American Bar Association or by an authority having jurisdiction over specialization under the laws of another state or territory."[2] This exception is not germane to bankruptcy law, no matter how extensive one's practice.

Although Opinion 972 is meant to apply to all forms of social media, it was written in response to a question about a LinkedIn profile and is therefore most directly applicable to that medium. LinkedIn is currently the most popular social media platform for attorneys. The ABA 2013 Technology Survey found that 98% of attorneys on social media were using LinkedIn.[3]

Opinion 972 would have had even more impact had it been issued 18 months earlier, since in March 2012, LinkedIn deleted the "Specialties" heading as an option on individual profiles and replaced it with the "Skills and Expertise" heading. Law firms, however, can create company profiles, which allow firms to post firm-wide information and provide updates, employee information, job openings, and other news, and LinkedIn company profiles still provide law firms with the option to list a firm's "Specialties." Opinion 972 now makes it clear that listing practice areas in this "Specialties" section of company profiles is unacceptable in New York State. As a result of this opinion, most law firms now list their various practice areas in the general firm description or separately as Services under the Products and Services tab of the Company Page (which provides additional opportunities for descriptions and disclaimers).

Notably, Opinion 972 states that it does not address the question of whether a lawyer or law firm can list practice areas under other headings such as "Products & Services" or "Skills & Expertise."[4] Other Bar Ethics committees have weighed in on dealing with the "Skills & Expertise" section. In Opinion 2012-8, the Philadelphia Bar Association Professional Guidance Committee found that listing an attorney's areas of practice under the "Skills & Expertise" section is acceptable, and analogized it to listing areas of practice on an attorney's website. However, the opinion went on to add that making any further representations regarding the level of proficiency in any particular area would be prohibited.

By contrast, other states, including South Carolina, have been much more restrictive in what can be listed under the "Skills & Expertise" heading. South Carolina's version of Rule 7.4 expressly prohibits use of the term expert and expertise, finding that any "advertisement of statements shall be strictly factual and shall not contain the words "certified," "specialist," "expert," or "authority" except as permitted by Rule 7.4(d). New York and Florida also have restrictive rules on this point.

Endorsements and Testimonials

South Carolina is also one of the few states to come out against one of LinkedIn's newest features, the ability for users to be "endorsed" by someone with whom they are connected. Such endorsements will appear in one's "Skills & Expertise" section. In February 2013, the South Carolina bar sent a notice to its members and cautioned its members to hide skill endorsements in order to minimize the risk of being disciplined.[5]

Florida's new social media advertising rules take a similar position. Florida's new ethics rules have been criticized by some for the ways in which they limit the use of social media by Florida attorneys. Like the South Carolina rules, Florida's rules bar lawyers from listing third party endorsements on LinkedIn. In addition, the Florida Bar also prohibits attorneys from holding

themselves out as experts and therefore prohibits the listing of specialties under LinkedIn's "Skills & Expertise" heading. The Florida rules also warn attorneys about posting inappropriate and unprofessional photos or videos on social media and require law firms to state an office location on each tweet that they make, which many firms have found to be burdensome due to Twitter's 140 character per tweet limit.

Related issues that face attorneys and law firms in the social media age include misrepresenting or mischaracterizing one's experience when creating one's social media profile, rules on testimonials by clients or others, the listing of ratings (*Super Lawyers*, *Chambers*, *etc.),* and the need for advertising disclaimers. Several states, including Florida and New Jersey, have onerous ethics rules regarding testimonials,[6]which far surpass the standard advertising disclaimers of New York and a number of other jurisdictions. Indeed, a question exists whether all evolving forms of social media ought to be considered advertising or solicitation at all. For now, it must be assumed that it may be, and since ethics rules vary from state to state and continually change, vigilance and caution are necessary.

Other Emerging Social Media Issues

Of course the advertising rules are only one of several pitfalls for bankruptcy lawyers that may be created by careless use of social media. Commentary on pending matters may disclose client confidences. Advice on a blog or chat room may lead to an inadvertent creation of an attorney-client relationship for conflicts or even malpractice purposes.

Rules are also evolving on searching the social media sites of adverse parties, witnesses and jurors. Ethics opinions in different states have taken different approaches to what is and is not appropriate when performing such research. In New York, one must even be aware of whether or not a juror can detect that one has been looking at the juror's social media site.[7] As the use of social media continues to grow, more and more judges are using this form of communication; attorneys must be careful when friending or interacting on social media with judges before whom an attorney or his or her firm may appear. This is an area where rules are only now evolving.

A recent opinion by one of several leading ethics committees in New York provided the first known guidance on what lawyers may and may not do with respect to advising a client on what information it should post on social media[8]. In the courts, preservation and spoliation of social media evidence is now treated no differently from preservation and spoliation of emails and electronic data. An attorney was suspended for five years and fined $542,000 for telling his client to "clean up" his Facebook page.[9] Perhaps of particular relevance to insolvency attorneys is commentary on public companies with a potential impact on trading. A broker was recently fired by his company and fined and suspended by the Financial Industry Regulatory Authority ("FINRA") for passing on inappropriate commentary that omitted material information. FINRA is now reportedly collecting information and monitoring information about financial firms' use of social media. While FINRA's apparent monitoring does not include law firms, the potential implications for bankruptcy practitioners and their firms should not be ignored.

Future articles may explore some of these other developments. But the lesson is clear. In the old days it was enough to look before one leapt. Now it is also necessary to think before one tweets.

1. New York State Bar Association Committee on Ethics, Opinion 972 (June 26, 2013).

2. Portions of Rule 7.4(c) of the New York Rules of Professional Conduct are currently in the process of being rewritten on other fronts after the Second Circuit's opinion in *Hayes v. Grievance Comm.of the Eighth Jud. Dist.*, 672 F. 3d 158 (2d Cir. 2012)

3. http://www.lawsitesblog.com/2013/08/lawyers-social-media-use-continues-to-grow-aba-annual-tech-survey-shows.html

4. New York State Bar Association Committee on Ethics, Opinion 972 (June 26, 2013) at 4.

5. http://abnormaluse.com/2013/03/the-south-carolina-bar-and-the-linkedin-loophole.html

6. See Florida Rule of Professional Conduct 4-7.14(a)(3)&4-7.13(b) and New Jersey Rule of Professional Conduct 7.1.

7. New York City Bar Association Formal Opinion 2012-2.

8. New York County Lawyers Ethics Opinion 745, (July 2, 2013)

9. *Lester v. Allied Concrete Co.,* Nos. CL.08-150, CL09-223 (Va. Cir. Ct. Sept. 1, 2011).