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New York State Bar Association
Committee on Professional Ethics

Opinion 1031 (10/30/14)

Topic: Specialization; Use of term "specialist" in the title of a job held by a lawyer that a nonlawyer may lawfully perform

Digest: A lawyer may use the title "immigration specialist" in a job previously and lawfully held by nonlawyers where the lawyer does not publicly associate the title with his or her status as a lawyer. The lawyer may disclose the status as a lawyer to persons interacting with the lawyer as long as the lawyer does not do so "publicly." Disclosure of the lawyer's status as a lawyer and "specialist" title on a resume ordinarily would not be prohibited by Rule 7.4, but disclosure of this title on a LinkedIn site would be prohibited.

Rules: Rules 5.7(a) & (c), 7.4(a) & (c).

FACTS

1. The inquirer is a lawyer who has been hired as an "immigration specialist" in the Human Resources Department of an educational institution in New York. In that role, the inquirer will prepare filings on behalf of the institution and devise immigration visa strategies, but she will not make any appearance on behalf of the institution and her status as an attorney will not generally be visible to the public. The position was previously held by a nonlawyer. The inquirer's email signature would identify her as "Immigration Specialist, Human Resources Department," with no indication that she is a lawyer.

QUESTION

2. May a lawyer use the title of "specialist" when working in a position in which the lawyer's status as a lawyer is not disclosed to the public?

3. If so, may the lawyer include the title in a resume and LinkedIn profile?

OPINION

4. This inquiry arises at the intersection of two provisions of the New York Rules of Professional Conduct (the "Rules"). First, Rule 7.4 prohibits a lawyer from "publicly" identifying himself or herself as a "specialist" in an area of law unless he or she has been certified by certain approved organizations. *See* N.Y. State 757 (2002).[1]

[1] Rule 7.4(a) states: "A lawyer or law firm may publicly identify one or more areas of law in which the lawyer or law firm practices, or may state that the practice of the lawyer or law firm is limited to one or more areas of law, provided that *the lawyer or law firm shall not state that the lawyer or law firm is a*

5. Second, Rule 5.7 addresses the provision of nonlegal services by lawyers and the circumstances in which the Rules apply to the rendition of such services. Among other things, Rule 5.7(a) provides that where a lawyer renders both legal and nonlegal services to a person in circumstances in which the services are not kept "distinct," the Rules apply to the provision of both legal and nonlegal services. The services at issue here appear potentially to encompass both nonlegal and legal services. "Nonlegal services" means "those services that lawyers may lawfully provide and that are not prohibited as an unauthorized practice of law when provided by a nonlawyer." Rule 5.7(c). We assume that the immigration-related services at issue here are such a nonlegal service – that is, that they could lawfully be provided by a nonlawyer.[2] We have observed, however, that there are services that may be legally undertaken by both lawyers and nonlawyers but "when such services are performed by a lawyer who holds himself out as a lawyer, they constitute the practice of law and the lawyer, in performing them, is governed by the Code." N.Y. State 557 (1984). Some of the services that the inquirer provides – such as the development of immigration visa strategies for her employer and preparation of immigration filings – are services that, if provided by a lawyer "who holds himself out as a lawyer," would be governed by the Rules. *See* N.Y. State 832 ¶ 6 (2009) ("despite the fact that a nonlawyer might be entitled to provide some advice about a shelf corporation without committing the unauthorized practice of law, when a lawyer provides such advice it becomes the provision of legal services").

6. As indicated in ¶5, in our opinions addressing the services that may be provided by both lawyers and nonlawyers, we looked to whether the lawyer was "holding himself out as a lawyer." N.Y. State 557; *see also* N.Y. State 636 (1992) (lawyer could conduct business of selling will forms where lawyer does not identify himself as a lawyer); N.Y. State 832 ¶ 10 (noting that identifying person selling shelf corporations as a lawyer creates risk of confusion that the lawyer has a lawyer-client relationship with buyers); N.Y. State 951 ¶ 12 (2012) (same as to lawyer offering letter-writing service where the letters address legal subjects). Obscuring the fact that the person providing the service in question is a lawyer is not always effective to avoid the application of the Rules. *See* N.Y. State 662 (1994) (lawyer assisting nonlawyer in representing homeowners challenging real estate taxes must disclose status to avoid misleading the tribunal and opposing party). Nevertheless, in this circumstance we see no reason why the bar on use of the term "specialist" would apply to a lawyer who does not hold him- or herself out as a lawyer.

7. In short, whether the prohibition on use of the term "specialist" in Rule 7.4(a) applies here depends, first, on whether the inquirer is holding herself out as a lawyer, and second, whether she "publicly" uses the term "specialist." Combining these two provisions, we conclude

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specialist or specializes in a particular field, except as provided in Rule 7.4(c)." (Emphasis added.) Rule 7.4(c), the exception referred to, provides that a lawyer may state that the lawyer has been recognized or certified as a specialist only if certified by certain organizations and only if the statement is accompanied by certain disclosures.

[2] Whether a particular service would be the unauthorized practice of law if rendered by a nonlawyer is a question of law that is beyond the jurisdiction of this Committee. *See, e.g.*, N.Y. State 863 ¶¶ 4-5 (2011) (whether lawyer admitted in another state is engaging in the unauthorized practice of law if he practices exclusively immigration law is a question of law beyond the Committee's jurisdiction).

that the use of the term "specialist" for a lawyer rendering immigration services that can lawfully be provided by a nonlawyer does not offend Rule 7.4 if the lawyer does not publicly associate the services with his or her status as a lawyer.

8. This conclusion is supported by substantial policy. The prohibition on the term "specialist" is derived from concerns that the term implies a statement as to the quality of services being provided by lawyers that may be difficult for laymen to assess and therefore particularly likely to be misleading. *See, e.g.*, *Bates v. State Bar of Arizona*, 433 U.S. 350, 383-84 (1977) ("misstatements that might be overlooked or deemed unimportant in other advertising may be found quite inappropriate in legal advertising"). It makes little sense to bar a term that might be used by nonlawyers providing the same services if the lay public does not know that the person providing the services is in fact a lawyer. Second, the inquirer has taken a job with a title assigned by her employer for reasons apparently unrelated to her status as a lawyer. It would be unfair and counterproductive to bar her from taking the job, or to condition her ability to take the job on the extent of her ability to persuade her employer to change the title, because of her status as a lawyer.

9. This does not necessarily mean that the inquirer must hide her status from those within the institution with whom she interacts – the institution itself and the individual employees whose immigration status is at issue. Even if that might in some circumstances constitute "holding herself out as a lawyer," Rule 7.4 would not prohibit the use of the term "specialist," because disclosure to this relatively limited universe of persons would not constitute a "public" statement.

10. Turning to the second question, an accurate statement of the inquirer's title on her resume does not constitute a "public" statement for purposes of Rule 7.4, as long as the inquirer does not post or distribute the resume beyond specific potential employers. A notation on the inquirer's LinkedIn page, however, must be construed as "public." *See* N.Y. State 757 (letterhead and business cards are forms of public communications for purposes of DR 2-105 (now Rule 7.4)). If the LinkedIn page notes the inquirer's status as an attorney, it cannot also note a title including the word "specialist." We have considered whether a notation on the site that the job does not entail the rendering of legal services might be sufficient to avoid the prohibition. The difficulty is that, as noted above, it appears that the inquirer does in fact render services that are "legal services" if rendered by a lawyer, so that the disclaimer would not be accurate. *Cf.* N.Y. State 832 ¶ 11 (a disclaimer that no legal services are being rendered and the protections of the attorney-client relationship do not exist "would not be effective if the lawyer actually provided legal advice or other legal services to the customer of the nonlegal business").

CONCLUSION

11. The inquirer may use the title "immigration specialist" as long as she does not publicly associate her status as an attorney with her title. Noting the title on her resume would not ordinarily be prohibited by Rule 7.4, but noting it on her LinkedIn page together with her status as a lawyer would be prohibited.

(40-14)