

Vermont Rules of Professional Conduct
Rule 7.1 – Communications Concerning a Lawyer’s Services

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Kennedy’s Highlights

(NOT a substitute for full research of the rule & opinions/decisions on it)

- Rule 7.1 has not been amended since 2009

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.

Comment

[1] This rule governs all communications about a lawyer’s services, including advertising permitted by Rule 7.2. Whatever means are used to make known a lawyer’s services, statements about them must be truthful.

[2] Truthful statements that are misleading are also prohibited by this rule. A truthful statement is misleading if it omits a fact necessary to make the lawyer’s communication considered as a whole not 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.

[3] An advertisement that truthfully reports a lawyer’s achievements on behalf of clients or former clients may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client’s case. Similarly, an unsubstantiated comparison of the lawyer’s services or fees with the services or fees of other lawyers may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison can be substantiated. The inclusion of an appropriate disclaimer or qualifying language may preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead a prospective client.

[4] See also Rule 8.4(e) for the prohibition against stating or implying an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law.

Reporter’s Notes — 2009 Amendment

V.R.P.C. 7.1 is amended to conform to the changes in the Model Rule.

In *In re PRB Docket No. 2002-093*, 2005 VT 2, 177 Vt. 629, 868 A.2d 709 (mem.), after a thorough review of the basis and scope of V.R.P.C. 7.1-7.4, the Court held that the PRB could have reasonably found that an advertisement stating “WE ARE THE EXPERTS IN” three enumerated areas violated former V.R.P.C. 7.1(c) as an unsubstantiated comparison with the quality of other lawyers, and that the phrase “INJURY EXPERTS” violated former V.R.P.C. 7.1(b) as creating an unjustified expectation of results that the lawyer could achieve and could

not be characterized as a proper description of a specialty under V.R.P.C. 7.4.

The ABA Reporter's Explanation is as follows:

TEXT:

1. Modify to limit prohibition to false and misleading communications

The Commission has limited Rule 7.1 to a prohibition against false or misleading communications, defined in terms of the material misrepresentations or omissions that are the subject of current paragraph (a). The categorical prohibitions in [former] paragraphs (b) and (c) have been criticized as being overly broad and have therefore been relocated from text to the commentary as examples of statements that are likely to be misleading.

The Commission believes this approach strikes the proper balance between lawyer free-speech interests and the need for consumer protection.

2. Paragraph (b): Delete "is likely to create an unjustified expectation about results the lawyer can achieve"

The Commission recommends deletion of this specification of a "misleading" communication because it is overly broad and can be interpreted to prohibit communications that are not substantially likely to lead a reasonable person to form a specific and unwarranted conclusion about the lawyer or the lawyer's services. See Comment [2].

3. Paragraph (b): Delete "states or implies that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other law"

The Commission recommends that this portion of paragraph (b) be moved to Rule 8.4(e) because this prohibition should not be limited to advertising. Comment [4] provides a cross-reference.

4. Delete paragraph (c)

The Commission also believes that a prohibition of all comparisons that cannot be factually substantiated is unduly broad. Whether such comparisons are misleading should be assessed on a case-by-case basis in terms of whether the particular comparison is substantially likely to mislead a reasonable person to believe that the comparison can be substantiated. See Comment [3].

COMMENT:

[1] The matters addressed by the deleted portions of [former] Comment [1] are now addressed in Comment [3].

[2] New Comment [2] discusses the prohibition against materially misleading statements. The third sentence sets forth a new standard for determining whether a lawyer's truthful statement is misleading. The "substantial likelihood" test is used in Rule 3.6 to balance the competing interests in free speech and fair trial. The Commission thinks that this standard strikes the proper balance between the lawyer's free-speech interests and the need for consumer protection.

[3] New Comment [3] addresses the problem areas covered in [former] paragraphs (b) and (c), explaining circumstances under which statements raising unjustified expectations and making unsubstantiated comparisons may be false or misleading. The first sentence is a modification of the deleted portion of [former] Comment [1]. Rather than stating that truthful reports of a lawyer's achievements are ordinarily prohibited as misleading, the Comment is limited to a warning that such statements may be misleading. The second sentence indicates that

comparisons that cannot be factually substantiated will be misleading only if there is a substantial likelihood that a reasonable person would conclude that the comparison could be factually substantiated. Neither statement is as sweeping as its counterpart in the [former] Comment or paragraph (c). Because many jurisdictions encourage or require the use of disclaimers in lawyer advertising, the final sentence indicates that disclaimers may reduce the likelihood that a statement about the lawyer or the lawyer's services will be misleading.

[4] This new Comment is a cross-reference to Rule 8.4(e) which prohibits lawyers from stating or implying that they have an ability to influence improperly a government agency or official or that they can achieve results by means that violate the Rules of Professional Conduct or other law.

ANNOTATIONS

1. Qualitative advertising claims. Attorney's advertisement proclaiming his firm to be "injury experts" and "the experts" in certain enumerated fields of law fell squarely within that category of qualitative advertising claims that are not susceptible of measurement or verification; thus, they were likely to create an unjustified expectation and differentiation among those reading the advertisement about the results which can be achieved by a lawyer

claiming to be an expert in violation of this rule. In re PRB Docket No. 2002.093, 2005 VT 2, 177 Vt. 629, 868 A.2d 709 (mem.).

Any attorney advertisement using the term “specialist” or “specialty” in the sense that the terms imply expertise should be qualified by a disclaimer that the attorney has not been certified as a specialist by any recognized organization, in order to avoid potential confusion to the consumer and to comport with this rule’s prohibition against misleading communications. In re PRB Docket No. 2002.093, 2005 VT 2, 177 Vt. 629, 868 A.2d 709 (mem.).