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## Communications Concerning a Lawyer's Services

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### Key Concepts



- Rule 7.1 governs all communications by a lawyer about the lawyer and the lawyer's services.
  - This Rule prohibits both false and misleading communications.
  - Whether a communication proves misleading depends on context from both the lawyer's perspective and the perspective of a reasonable consumer, and omissions in context can be misleading.
  - Disclaimers are important to the question of whether a communication proves false or misleading.
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### Introduction



To the surprise of no person who has watched midday or latenight television, lawyers advertise. Quite a bit, and sometimes quite ridiculously. Nevertheless, despite lawyers' robust exercise of their First Amendment right to advertise, the Rules of Professional Conduct do regulate lawyer advertising. These regulations target largely consumer protection interests.

Rule 7.1 supplies the foundation to this regulation of lawyer advertising. To prevent false and misleading communications, this Rule regulates every professional communication by a lawyer. Therefore, regardless of medium or context, any advertisement or other professional communication by a lawyer about the lawyer's services must satisfy Rule 7.1. Your analysis of every lawyer communication thus should begin with this Rule.

## The Rule

Rule 7.1 contains a single provision. The Rule addresses false or misleading communications by a lawyer:

### THE RULE

### 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.

This Rule prohibits lawyers from communicating untruthful information about themselves or their services, regardless of whether the statements mislead.<sup>1</sup> This prohibition draws on the Supreme Court's First Amendment case law on lawyer advertising by categorically prohibiting false and misleading communications.

#### 1. False Communications

According to the Rule, a communication is false if it contains a material misrepresentation of fact or law. Consider this example:

**Example.** Lawyer Prickney graduated from law school one year ago and completed a one-year judicial clerkship. Prickney had little real-world litigation experience beyond observing lawyers in court during his clerkship. Prickney nevertheless was eager to develop a solo family and criminal law practice, so Prickney created a website with the domain, "www. divorcecriminallawyer.com." Prickney also created profiles on several commercial web sites, such as LinkedIn. On these web sites, Prickney claimed that he graduated from law school five years earlier than he actually did, that he had practice experience in federal court, that he had trial experience, and that he had experience in numerous practice areas. Prickney sincerely believed that he could practice at the experience level he advertised because of his clerkship experience and his outstanding grades in law school and top class rank. Representatives of the web sites also assured

Prickney that his profile information would comply with ethical requirements. Another lawyer who graduated from law school with Prickney saw the web sites and complained to the State Bar.

**Analysis.** Prickney's communications on his own web site and on the commercial web sites constituted false statements in violation of Rule 7.1 because they materially misrepresented Prickney's professional experience and credentials. Prickney has no defense to communicating falsely about his experience and credentials just because he subjectively believed that he could practice at the experience level he advertised—the question is simply whether he communicated false information about himself or his services. Nor did the advice Prickney received from representatives of the commercial web sites protect Prickney, because Prickney was personally responsible for his communications' compliance with the Model Rules. Therefore, Prickney is subject to discipline.<sup>2</sup>

## 2. Misleading Communications

Rule 7.1 further prohibits factually truthful communications that are misleading to consumers. a truthful communication may prove misleading if it omits a material fact necessary to make the communication as a whole not misleading.<sup>3</sup> a communication also proves misleading if a substantial likelihood exists that it will lead a reasonable person to form specific conclusions about the lawyer's services that lack a reasonable factual foundation.<sup>4</sup>

This standard leaves lawyers, presumably trained in the art of persuasion, significant room to editorialize about their professional services—a fact anyone who has watched television, examined billboards, or viewed the internet can confirm. At a minimum, lawyers may advertise their areas of practice, experience, language skills, office location, standard fees schedules or bases for fees, education, and othersimilarly verifiable information that, if truthful and not misleading, would help consumers to learn about and assess a lawyer and the lawyer's services.<sup>5</sup>

Nevertheless, Rule 7.1 requires a lawyer to evaluate her professional communications not only for literal factual accuracy from the lawyer's perspective, but also for overall accuracy and completeness from the perspective of the public in learning about legal services.<sup>6</sup> Otherwise, a lawyer risks discipline for his or her professional communications. This mixed subjective-objective assessment of whether to discipline lawyer communications understandably can lead to doubt about precisely where the line should be drawn in categorizing a lawyer's communication as "misleading."

Sometimes the line between a materially accurate and a false or misleading statement is not entirely clear. Where should this line be drawn?

**Example.** Lawyer Mauricio had practiced for years in the State of New Jersey under his birth surname, Mauricio Formername. Mauricio recently married his long-time partner, Freddy Newname, following New Jersey's adoption of same-sex marriage rights. Mauricio legally adopted Freddy's surname for personal and social purposes. Mauricio, however, decided to keep his pre-marriage surname for professional purposes, because Mauricio had used it for so many years in building a successful practice. a staunch opponent of same-sex marriage filed a complaint with the State Bar when he learned that Mauricio still used the name Mauricio Former-name for legal practice when he otherwise went by Mauricio Newname.

**Analysis.** Mauricio's professional continued use of his pre-marriage surname technically could be a type of false statement after he legally adopted his spouse's surname. But this misrepresentation would not be material if Mauricio continued to practice solely under the name he always used for practice and that he registered with the State Bar. Nor would Mauricio's use of his pre-marriage name be misleading in this context, because Mauricio had no improper or fraudulent motive, and used his married name solely for personal and social purposes unrelated to the practice of law. a different situation would exist, however, if Mauricio used a different name for practice that he did not register with the State Bar, because clients and third parties could not verify Mauricio's authority to practice, contact information, or history of any discipline.<sup>7</sup>

Even if truthful, a lawyer's communication will violate Rule 7.1 if it would mislead a reasonable consumer of legal services. Consider whether this lawyer's communications met this standard of "misleading":

**Example.** Lawyer Lazy bought space on some highly-trafficked web pages to advertise his personal injury practice. The advertisement presented quotes from supposed former clients that claimed, "Lazy won me a \$100,000 judgment!" and "Lazy was awesome—by far the best lawyer in town!" Lazy indeed won a \$100,000 judgment for a former client. Another former client once wrote to Lazy, "You are awesome—by far the best lawyer in town." But Lazy's advertisement used actors portraying clients to deliver these communications instead of Lazy's actual former clients. The advertisement also depicted Lazy himself giving a thumbs up to the camera with the caption, "No lawyer will obtain better results in your case than Lazy, so call me now. No recovery—no fee!" When a client did not find Lazy to be so awesome because Lazy failed to win the client a \$100,000 judgment, the client complained to the State Bar.

**Analysis.** Lawyer Lazy's communications may have been technically accurate from Lazy's perspective. But Lazy's communications will remain subject to discipline if they would be misleading to a reasonable consumer of legal services. Lazy's use of actors to portray former clients could prove misleading, even if the actors communicated accurate information from former clients, because prospective clients could not know that they were hearing the testimonial from an actor rather than a former client. Lazy's advertisement should have employed former clients to communicate the information they shared, or have included a disclaimer identifying the testimonials as "dramatizations" of testimonials by former clients.<sup>8</sup>

Moreover, client testimonials, even if accurate, present a significant risk of misleading consumers, because prospective clients may form unjustified expectations that their cases will end with the same results. Every client's case could turn on specific factual and legal circumstances.<sup>9</sup> Lazy, therefore, should have included an

appropriate disclaimer in his advertisement to communicate that new clients may obtain different results depending on those specific circumstances.<sup>10</sup>

Unsubstantiated comparisons of the lawyer's services or fees with the services or fees of other lawyers also may prove misleading if the comparison would lead a reasonable person to conclude that the comparison in fact could be substantiated.<sup>11</sup> Lazy's former client's opinion that Lazy is "awesome" may be sufficiently apparent as an individual and subjective opinion that it would not mislead consumers. But the former client further claimed that Lazy is the best lawyer in town, and Lazy himself claimed that no lawyer could obtain better results. Lazy and his former client sincerely may believe that Lazy is the best lawyer in town who can obtain the best results. But Lazy could not possibly substantiate these claims. These communications thus invited unjustified expectations in prospective clients, and should not have been used.<sup>12</sup>

Finally, Lazy's claim, "No recovery—no fee," also may have been misleading in context. True, if Lazy charged only a contingent fee in his practice, clients who did not recover would owe no "fee" to Lazy. But Lazy's communication did not distinguish between legal fees and other litigation costs and expenses, when the client could remain liable for those costs and expenses under the fee agreement.<sup>13</sup> a reasonable consumer therefore could be misled by Lazy's advertisement into believing he or she also would owe nothing for litigation costs and expenses absent a recovery. Lazy's advertisement instead should have clarified that clients could remain liable for litigation costs and expenses.<sup>14</sup>

Rule 7.1's prohibition on false or misleading communications thus should cause a lawyer pause before engaging in too much puffery. At a minimum, the lawyer should be prepared to demonstrate some objective basis for self-congratulatory claims that otherwise could give the public unjustified expectations about what the lawyer can accomplish—especially unjustified expectations about case outcomes. Do not worry, however, that lawyers are overly constrained in their ability to communicate with the public about themselves and their services. As you will read in the next Chapter, Rule 7.2 makes clear that the Rules of Professional Conduct welcome robust advertising by lawyers.

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## Quick Summary



**Rule 7.1** categorically prohibits any false and misleading communication by a lawyer about the lawyer or the lawyer's professional services. The key question underlying this prohibition is whether a lawyer's communication "contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading." Communications that may mislead only in context, however, may be cured by an appropriate disclaimer that alerts prospective clients to that limiting or clarifying context.

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## Test Your Knowledge



To assess your understanding of the material in this chapter, [click here](#) to take a quiz.

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- <sup>1</sup> See *id.*
  - <sup>2</sup> Cf. *In the Matter of Dickey*, 722 S.E.2d 522 (S.C. 2012) (finding similar claims by a lawyer to be untruthful and therefore subject to discipline).
  - <sup>3</sup> See DLRPC Rule 7.1, comment 2.
  - <sup>4</sup> See *id.*
  - <sup>5</sup> See DLRPC Rule 7.2, comment 2.
  - <sup>6</sup> See DLRPC Rule 7.1, comments 2 & 3.
  - <sup>7</sup> See generally AZ Bar Opinion 12-02 (2012); WA Advisory Opinion 2180 (2008).
  - <sup>8</sup> See generally Glenn Machado, *Practice Tips*, Nevada Lawyer at 40 (Jan. 2013) (noting amendment to Nevada advertising rules to require lawyers to disclose when communications rely on actor portrayals or depict fictional scenes or events); WA Advisory Opinion 1192 (1988).
  - <sup>9</sup> See DLRPC Rule 7.1, comment 3.
  - <sup>10</sup> See *id.*
  - <sup>11</sup> See *id.*
  - <sup>12</sup> See *id.*
  - <sup>13</sup> See DLRPC Rule 1.5(c).
  - <sup>14</sup> See generally WA Advisory Opinions 1182 (1988) and 918 (1985).