



Dear Ethics Lawyer™

The Legal Ethics Project. Supporting professionalism with information.

Q: Dear Ethics Lawyer,

If I truly believe it to be the case, can I properly tell a prospective client that I am confident that I will provide legal service as good or better than any other lawyer in my city? Or have I been watching too many cheesy lawyer ads on television?

A: Model Rule 7.1 governs communications about a lawyer's services, whether made directly or in advertising or other promotional communications. However, the Rule has evolved along with changing attitudes about lawyer advertising and solicitation. In its current version, it simply prohibits false or misleading communications about a lawyer or the lawyer's services. Comment 2 and 3 to the Rule clarify that a statement that is truthful "is misleading if a substantial likelihood exists 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" or leads 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." Before 2002 amendments, the Rule also contained a prohibition on statements comparing a lawyer's services with that of other lawyers unless the comparison could be "factually substantiated," i.e., the Rule expressly put the burden on the lawyer to justify a comparison statement. The current version removed this prohibition from the text of the Rule, preserving a discussion in Comment 3 about "unsubstantiated comparisons" as potentially ("may be") misleading "if presented with such specificity as would lead a reasonable person to conclude that the comparison or claim can be substantiated."

As The Ethics Lawyer has noted before, however, the rules concerning attorney solicitation and advertising (Rules 7.1-7.3) vary substantially by jurisdiction, so please examine the rule in effect in your jurisdiction. For example, some jurisdictions retain the prohibition on comparisons with other lawyer's services, unless the comparison can be factually substantiated. E.g., Mo. R. Prof. Conduct 4-7.1(e); Kan. R. Prof. Conduct 7.1(c). There is also a First Amendment commercial speech overlay to regulation of lawyer advertising and communications about a lawyer's services. E.g., *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985) (lawyer discipline may not apply to solicitation of legal work through advertising that is truthful and not deceptive). This may limit state regulation of lawyer communications to those narrowly drawn to advance state interests.

So where does this leave the answer to your question? The Ethics Lawyer recommends that you first check the version of Rule 7.1 in effect in your jurisdiction. Then consider whether or how you would substantiate your statement with facts if called upon to do so, and make only statements that can be substantiated with evidence. Alternatively, if consistent with your risk tolerance for disciplinary action, you could also take the position that the statement you wish to make is not "presented with such specificity as would lead a reasonable person to conclude that the comparison or claim can be substantiated," or otherwise argue that the statement is protected as commercial speech by the First Amendment, for example, because it is not specific enough as to its parameters to be proved false (similar to a statement that a certain toothpaste is the "best").

One additional consideration: query whether if you make a statement that you provide services equal to or better than other lawyers, you are elevating the standard of care that may be applied to those services in the event of a malpractice action? Will a claimant argue that your conduct should be judged not against a reasonable lawyer standard, but against a "best lawyer" standard, because that is what you represented?

The Ethics Lawyer

About Dear Ethics Lawyer

The twice-monthly "Dear Ethics Lawyer" column is part of a training regimen of the Legal Ethics Project, authored by [Mark Hinderks](#), former managing partner and counsel to an AmLaw 132 firm; Fellow, American College of Trial Lawyers; and speaker/author on professional responsibility for more than 25 years. Mark leads Stinson LLP's [Legal Ethics & Professional Responsibility](#) practice, offering advice and "second opinions" to lawyers and law firms, consulting and testifying expert service, training, mediation/arbitration and representation in malpractice litigation. The submission of questions for future columns is welcome: please send to mark.hinderks@stinson.com.

Discussion presented here is based on the ABA Model Rules of Professional Conduct, but the Model Rules are adopted in different and amended versions, and interpreted in different ways in various places. Always check the rules and authorities applicable in your relevant jurisdiction – the result may be completely different.