Comparing Services Can Be Dicey

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Recently, a column in this space addressed changes to the Minnesota Rules of Professional Conduct governing advertising and solicitation. An example based on an admonition that the Office of Lawyers Professional Responsibility (OLPR) issued recently illustrates the application of one of the rules.

A lawyer in private practice wanted to represent governmental entities. The lawyer sent solicitation letters to the members of the governing boards (city council members, county commissioners and the like). Among other things, the letters stated: "[My law firm] offers the opportunity for [the governmental unit] to achieve a higher level of services than you are currently receiving and to achieve those levels at a lower cost."

The lawyer's letter violated Rule 7.1(c) of the Minnesota Rules of Professional Conduct, as in effect before Oct. 1, 2005. Among other things, Rule 7.1(c) prohibited a lawyer from making a communication about the lawyer's services that "compares the lawyer's services with other lawyer's services, unless the comparison can be factually substantiated." In this matter, the lawyer made two comparisons: that he would (1) provide a higher level of service; and (2) do so at a lower cost.

The lawyer's statement of a "higher level of services" is a comparison to the services of others that cannot be factually substantiated. Arguably, the lawyer's statement is so inherently subjective as to be incapable of measurement. A reasonable reader can interpret the statement to mean that no matter what services were performed, the lawyer would perform them with a greater degree of competence and efficiency. Such a statement is inherently subjective.

The lawyer claimed, however, that the statement was capable of factual substantiation. The lawyer stated that he ascertained the services of other lawyers providing similar services to governmental entities and believed that he was offering services that were additional to, and/or different from, the services those lawyers performed and would provide total services at a lower cost.

This defense was unavailing for two reasons. First, the lawyer said he would provide a "higher" level of services, not "different" or "additional" services. The lawyer also stated that he had taken notes of his research but unfortunately had destroyed those notes before he received the disciplinary complaint, thus eliminating the ability to factually substantiate his claim. Nor was he able to recreate the research.

The lawyer's statements clearly violated Rule 7.1 before it was amended. Effective Oct. 1, 2005, however,

the text of Rule 7.1 was changed. The rule now simply prohibits the making of statements which are false or misleading. As in several other rules, the specific instances previously identified in the rule are now listed as examples in the comment to the rule. The comment to rule 7.1 instructs that statements which cannot be factually substantiated may be misleading, whereas before Oct. 1, 2005, such statements plainly were misleading per se.

Although the Supreme Court did not adopt the comments as the court's official comments, the comments generally will reflect the OLPR's interpretation and enforcement position. Lawyers can follow the comments' guidance with confidence. Thus, even under the amended rule, the lawyer's conduct would have been a violation.

There are few complaints, and fewer disciplines, arising out of violations of the rules governing advertising and solicitation. Nevertheless, lawyers must be mindful of those rules when attempting to procure business, and incorporate any changes made to the rules.