

Proposed Rule 7.2 [RPC 1-400] “Advertising”

(Draft #8, 10/1/09)

Summary: Proposed Rule 7.2 is the second of five proposed rules regulating lawyer marketing that track the Model Rule structure. Rule 7.2 specifically addresses advertising, a subset of communication, that typically involves communications directed at the general public.

Comparison with ABA Counterpart

Rule	Comment
<input checked="" type="checkbox"/> ABA Model Rule substantially adopted	<input type="checkbox"/> ABA Model Rule substantially adopted
<input type="checkbox"/> ABA Model Rule substantially rejected	<input type="checkbox"/> ABA Model Rule substantially rejected
<input checked="" type="checkbox"/> Some material additions to ABA Model Rule	<input checked="" type="checkbox"/> Some material additions to ABA Model Rule
<input type="checkbox"/> Some material deletions from ABA Model Rule	<input checked="" type="checkbox"/> Some material deletions from ABA Model Rule
<input type="checkbox"/> No ABA Model Rule counterpart	<input type="checkbox"/> No ABA Model Rule counterpart

Primary Factors Considered

- Existing California Law

Rule

RPC 1-400.

Statute

Bus. & Prof. Code §§ 6157 et seq.

Case law

- State Rule(s) Variations (In addition, see provided excerpt of selected state variations.)

- Other Primary Factor(s)

Rule Revision Commission Action/Vote to Recommend Rule Adoption

(14 Members Total – votes recorded may be less than 14 due to member absences)

Approved on 10-day Ballot, Less than Six Members Opposing Adoption

Vote (see tally below)

Favor Rule as Recommended for Adoption 9

Opposed Rule as Recommended for Adoption 0

Abstain 1

Approved on Consent Calendar

Approved by Consensus

Minority/Dissenting Position Included on Model Rule Comparison Chart Yes No

Stakeholders and Level of Controversy

No Known Stakeholders

The Following Stakeholders Are Known:

Lawyers who advertise in various media and legal advertising consultants participated in the deliberations concerning this Rule.

Very Controversial – Explanation:

Moderately Controversial – Explanation:

Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 7.2* Advertising

October 2009

(Draft rule following initial round of public comment.)

INTRODUCTION:

1. The Commission has determined that the ability of California lawyers and lawyers from other states to analyze issues concerning legal advertising and solicitation in this state would be enhanced by restating what is currently a single rule, California Rule 1-400, as five separate rules, numbered 7.1 through 7.5, that follow the organization of their ABA Model Rule counterparts. Nationally, there is marked variation among the jurisdictions in this area of lawyer regulation. The Commission believes that advertising of legal services and the solicitation of prospective clients is an area of lawyer regulation where greater national uniformity would be helpful to the public, practicing lawyers, and the courts in light of the current widespread use of the Internet by lawyers and law firms to market their services and the trend in many states toward allowing some form of multijurisdictional practice. However, the Commission has recommended departures from the Model Rules, in part to address Constitutional concerns.
2. Rule 7.1 sets out the general prohibition on a lawyer making false and misleading communications concerning the availability of legal services. **Rule 7.2 specifically addresses advertising, a subset of communication, and typically involves communications directed at the general public.** Rule 7.3 is concerned with regulating various means by which a lawyer seeking to market his or her services might make direct contact with a prospective client. Rule 7.4 sets out basic rules governing the communication of a lawyer's fields of practice and claims to specialization. Rule 7.5 does the same as rule 7.4 for the use of firm names and letterheads. The Commission, however, declines at this time to recommend Model Rule 7.6, which is intended to regulate political contributions made by lawyers to obtain legal work with government entities or to achieve an appointment as a judge. The Commission is still studying the feasibility of a rule analogous to Model Rule 7.6.

* Proposed Rule 7.2, Draft 8 (10/1/09).

INTRODUCTION:

3. Proposed Rule 7.2 includes the basic concepts contained in Model Rule 7.2: a provision expressly sanctioning the use of advertising by lawyers, (see paragraph (a)); a provision identifying exceptions to the general prohibition on paying a person to recommend the lawyer's services, (see paragraph (b)); and a provision requiring identifying information in any legal advertisement to facilitate the Bar's enforcement of the rules, (see paragraph (c)).
4. Proposed Rule 7.2 diverges from the Model Rule by broadening the kinds of media in which advertising is permitted (paragraph (a)); addressing specifics of the California statutes or regulations (paragraph (b)(2)); and including provisions currently found in the California Rules (paragraph (b)(5)).
5. The Model Rule Comment has been revised to remove purely expository language, (e.g., Comment [2]) or to conform the comment to the revised Rule, (e.g., Comment [5]).
6. *Variation in Other Jurisdictions.* There is a wide range of variation among jurisdictions in their approach to regulating lawyer advertising and solicitation. States that have diverged widely from the Model Rules include smaller jurisdictions such as the District of Columbia, Kentucky, Mississippi and Iowa, and larger states, such as Florida, New York, and Texas. Unlike these states that have either eliminated or added to marketing restrictions in the Model Rules, the Commission recommends keeping the same basic concepts found in the Model Rules, revised only to clarify or to address unique aspects of the California statutory and regulatory landscape, and to obviate potential constitutional infirmities.

<p style="text-align: center;"><u>ABA Model Rule</u> Rule 7.2 Advertising</p>	<p style="text-align: center;"><u>Commission's Proposed Rule*</u> Rule 7.2 Advertising</p>	<p style="text-align: center;"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>(a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through written, recorded or electronic communication, including public media.</p>	<p>(a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through <u>any</u> written, recorded or electronic communication<u>media</u>, including public media.</p>	<p><u>Paragraph (a)</u> is based on Model Rule 7.2(a). Model Rule 7.2(a) was revised by the ABA Ethics 2000 Commission through the deletion of references to specific types of public media (e.g., telephone directory, newspaper) and the addition of a reference to "electronic communications". The Commission recommends substituting "media" for Model Rule word, "communication."</p> <p>The reference to "electronic" media has been added in recognition that much of modern advertising is accomplished through such means. Specific examples of the kinds of communications contemplated by paragraph (a), including types of electronic communications, have been added to Comment [2], with a cross-reference to the prohibition in Rule 7.3(a) of solicitation of clients through real-time electronic communications.</p>
<p>(b) A lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may</p>	<p>(b) A lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may</p>	<p><u>Paragraph (b)</u> is based on Model Rule 7.2(b) and provides five (as opposed to the Model Rule's four) exceptions to the general prohibition against a lawyer giving anything of value to a person to recommend the lawyer's services. Paragraph (b) is intended to strike a balance between loyalty to the client, which could be adversely affected by the payment of referral fees, and a lawyer's need to pay for the legitimate costs of marketing the lawyer's legal services.</p>

* Proposed Rule 7.2, Draft 8 (10/1/09). Redline/strikeout showing changes to the ABA Model Rule

<p align="center"><u>ABA Model Rule</u> Rule 7.2 Advertising</p>	<p align="center"><u>Commission's Proposed Rule*</u> Rule 7.2 Advertising</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>(1) pay the reasonable costs of advertisements or communications permitted by this Rule;</p>	<p>(1) pay the reasonable costs of advertisements or communications permitted by this Rule;</p>	<p><i>Subparagraph (b)(1)</i> is identical to Model Rule 7.2(b)(1) and permits payment of the “reasonable costs” of advertisements. Comment [5] gives examples of kinds of costs that may be expended. A similar exception may be found in current rule 1-320, Discussion.</p>
<p>(2) pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service. A qualified lawyer referral service is a lawyer referral service that has been approved by an appropriate regulatory authority;</p>	<p>(2) pay the usual charges of a legal service<u>services</u> plan or a not-for-profit or qualified lawyer referral service. A qualified lawyer referral service is a lawyer referral service that has been approved by an appropriate regulatory authority<u>established, sponsored and operated in accordance with the State Bar of California's minimum standards for a lawyer referral service in California;</u></p>	<p><i>Subparagraph (b)(2)</i> is based on Model Rule 7.2(b)(2), with modifications to conform the Rule to the current regulatory landscape in California. See Bus. & Prof. Code § 6155 and associated regulations. The phrase “legal services” has been added to modify the word “plan” for clarity. The phrase “not-for-profit or” has been deleted because in California, a “qualified lawyer referral service” may be “not-for-profit” or “for-profit.” The clause “established, sponsored and operated in accordance with the State Bar of California's minimum standards for a lawyer referral service in California” has been substituted to identify the specific regulatory mechanism in California.</p>
<p>(3) pay for a law practice in accordance with Rule 1.17; and</p>	<p>(3) pay for a law practice in accordance with Rule 1.17; and</p>	<p><i>Subparagraph (b)(3)</i> is identical to Model Rule 7.2(b)(3).</p>

<p align="center">ABA Model Rule Rule 7.2 Advertising</p>	<p align="center">Commission’s Proposed Rule* Rule 7.2 Advertising</p>	<p align="center">Explanation of Changes to the ABA Model Rule</p>
<p>(4) refer clients to another lawyer or a nonlawyer professional pursuant to an agreement not otherwise prohibited under these Rules that provides for the other person to refer clients or customers to the lawyer, if</p> <p>(i) the reciprocal referral agreement is not exclusive, and</p> <p>(ii) the client is informed of the existence and nature of the agreement.</p>	<p>(4) refer clients to another lawyer or a nonlawyer professional non-lawyer pursuant to an agreement not otherwise prohibited under these Rules that provides for the other person to refer clients or customers to the lawyer, if</p> <p>(i) the reciprocal referral agreement is not exclusive, and</p> <p>(ii) the client is informed of the existence and nature of the agreement.</p>	<p><i>Subparagraph (b)(4)</i> is nearly identical to Model Rule 7.2(b)(4), except that the word “professional” has been deleted, with the intention that subparagraph (b)(4)’s exception for reciprocal referral agreements should apply not only to other lawyers and non-lawyer “professionals,” but also to arrangements with any non-lawyer.</p> <p>The two qualifications to the exception in subparagraph (4)(i) and (ii) – that the reciprocal referral arrangement is non-exclusive and that the client is informed of the arrangement – remain the same as in the Model Rule.</p>
	<p><u>(5) offer or give a gift or gratuity to any person or entity having made a recommendation resulting in the employment of the lawyer or the lawyer’s law firm, provided that the gift or gratuity was not offered or given in consideration of any promise, agreement, or understanding that such a gift or gratuity would be forthcoming or that referrals would be made or encouraged in the future.</u></p>	<p><i>Subparagraph (b)(5)</i> has no counterpart in Model Rule 7.2. It is a carryover from the current California Rules and incorporates the concepts found in current rules 1-320(B) and 2-200(B). These latter rules address fee division or sharing with lawyers or non-lawyers. The Commission determined that this exception to the conditional prohibition on dividing fees with lawyers and the general prohibition on sharing fees with non-lawyers should be retained as a reasonable compromise between maintaining loyalty to the client and making a reasonable payment for marketing services provided the lawyer.</p>

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<p>(c) Any communication made pursuant to this rule shall include the name and office address of at least one lawyer or law firm responsible for its content.</p>	<p>(c) Any communication made pursuant to this ruleRule shall include the name and office address of at least one lawyer or law firm responsible for its content.</p>	<p><u>Paragraph (c)</u> is identical to paragraph (c) of Model Rule 7.2. Model Rule 7.2(c) itself was revised by the ABA Ethics 2000 Commission through the addition of the phrase "law firm" and the requirement that the advertisement include the "office address" of the lawyer or law firm responsible for the advertisement. A lawyer's name and office address should be sufficient to enable the State Bar disciplinary authorities to take action necessary to protect the public from false or misleading advertising.</p> <p>The requirement that the "office address" of the responsible lawyer or law firm be included in the advertisement was added because lawyers frequently use trade names and advertise in areas in which they do not maintain offices (e.g., providing an 800 number in local telephone directories throughout a state.)</p> <p>Notwithstanding the burden this requirement may place on lawyers or law firms that engage in cooperative advertising, it was believed that this information was necessary not only to enable the State Bar disciplinary authorities to track down those responsible for an advertisement, but also to provide prospective clients with information about where the lawyer or law firm is located, which may be an important factor in the prospective client's decision to retain counsel. Comment [9], which has no counterpart in the Model Rule, specifically provides that paragraph (c) applies to lawyers who engage in group advertising. See Explanation of Changes, Comment [9].</p>

<p align="center"><u>ABA Model Rule</u> Rule 7.2 Advertising Comment</p>	<p align="center"><u>Commission's Proposed Rule*</u> Rule 7.2 Advertising Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>[1] To assist the public in obtaining legal services, lawyers should be allowed to make known their services not only through reputation but also through organized information campaigns in the form of advertising. Advertising involves an active quest for clients, contrary to the tradition that a lawyer should not seek clientele. However, the public's need to know about legal services can be fulfilled in part through advertising. This need is particularly acute in the case of persons of moderate means who have not made extensive use of legal services. The interest in expanding public information about legal services ought to prevail over considerations of tradition. Nevertheless, advertising by lawyers entails the risk of practices that are misleading or overreaching.</p>	<p>[1] To assist the public in obtaining legal services, lawyers should be allowed to make known their services not only through reputation but also through organized information campaigns in the form of advertising. Advertising involves an active quest for clients, contrary to the tradition that a lawyer should not seek clientele. However, the <u>The</u> public's need to know about legal services can be fulfilled in part through advertising. This need is particularly acute in the case of persons of moderate means who have not made extensive use of legal services. The interest in expanding public information about legal services ought to prevail over considerations of tradition. Nevertheless <u>Lawyers must be aware, however, that</u> advertising by lawyers<u>them</u> entails the risk of practices that are misleading or overreaching.</p>	<p>The Commission recommends that Model Rule 7.2, cmt. [1], be revised to remove the Model Rule's expository language, which provides no guidance beyond that provided by the language the Commission recommends.</p>
<p>[2] This Rule permits public dissemination of information concerning a lawyer's name or firm name, address and telephone number; the kinds of services the lawyer will undertake; the basis on which the lawyer's fees are determined, including prices for specific services and payment and credit arrangements; a lawyer's foreign language ability; names of references and, with their consent, names of clients regularly represented; and other information that might invite the attention of those seeking legal assistance.</p>	<p>[2] This Rule permits public dissemination of information concerning a lawyer's name or firm name, address and telephone number; the kinds of services the lawyer will undertake; the basis on which the lawyer's fees are determined, including prices for specific services and payment and credit arrangements; a lawyer's foreign language ability; names of references and, with their consent, names of clients regularly represented; and other information that might invite the attention of those seeking legal assistance.</p>	<p>Proposed Comment [1] is identical to Model Rule 7.2, cmt. [2].</p>

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<p align="center"><u>ABA Model Rule</u> Rule 7.2 Advertising Comment</p>	<p align="center"><u>Commission's Proposed Rule*</u> Rule 7.2 Advertising Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>[3] Questions of effectiveness and taste in advertising are matters of speculation and subjective judgment. Some jurisdictions have had extensive prohibitions against television advertising, against advertising going beyond specified facts about a lawyer, or against "undignified" advertising. Television is now one of the most powerful media for getting information to the public, particularly persons of low and moderate income; prohibiting television advertising, therefore, would impede the flow of information about legal services to many sectors of the public. Limiting the information that may be advertised has a similar effect and assumes that the bar can accurately forecast the kind of information that the public would regard as relevant. Similarly, electronic media, such as the Internet, can be an important source of information about legal services, and lawful communication by electronic mail is permitted by this Rule. But see Rule 7.3(a) for the prohibition against the solicitation of a prospective client through a real-time electronic exchange that is not initiated by the prospective client.</p>	<p>[3] Questions of effectiveness and taste in advertising are matters of speculation and subjective judgment. Some jurisdictions have had extensive prohibitions against television advertising, against advertising going beyond specified facts about a lawyer, or against "undignified" advertising. Television is now one of the most powerful media for getting information to the public, particularly persons of low and moderate income; prohibiting television advertising, therefore, would impede the flow of information about legal services to many sectors of the public. Limiting the information that may be advertised has a similar effect and assumes that the bar can accurately forecast the kind of information that the public would regard as relevant. Similarly, electronic media, such as the Internet, can be an important source of information about legal services, and lawful communication by electronic mail is permitted by this Rule. But see Rule 7.3(a) for the prohibition against the solicitation of a prospective client through a real-time electronic exchange that is not initiated by the prospective client. <u>This Rule permits advertising by electronic media, including but not limited to television, radio and the Internet. But see Rule 7.3(a) concerning real-time electronic communications with prospective clients.</u></p>	<p>Comment [3], addresses the same general subject matter as Comment [3] to Model Rule 7.2, but has been significantly truncated to delete the purely expository language in the Model Rule. Proposed comment [2] is limited to providing specific examples of electronic communications that are permitted, including the Internet, with a cross-reference to the prohibition in Rule 7.3(a) of solicitation of clients through real-time electronic communications.</p>

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<p>[4] Neither this Rule nor Rule 7.3 prohibits communications authorized by law, such as notice to members of a class in class action litigation.</p>	<p>[4] Neither this Rule nor Rule 7.3 prohibits communications authorized by law, such as notice to members of a class in<u>court-approved class action litigation</u>notices.</p>	<p>Comment [4] is identical to Model Rule 7.2, cmt. [4], except that the Model Rule's reference to class action notices has been revised to clarify that only court-approved notices fall outside this Rule.</p>
<p><i>Paying Others to Recommend a Lawyer</i></p> <p>[5] Lawyers are not permitted to pay others for channeling professional work. Paragraph (b)(1), however, allows a lawyer to pay for advertising and communications permitted by this Rule, including the costs of print directory listings, on-line directory listings, newspaper ads, television and radio airtime, domain-name registrations, sponsorship fees, banner ads, and group advertising. A lawyer may compensate employees, agents and vendors who are engaged to provide marketing or client-development services, such as publicists, public-relations personnel, business-development staff and website designers. See Rule 5.3 for the duties of lawyers and law firms with respect to the conduct of nonlawyers who prepare marketing materials for them.</p>	<p><i>Paying Others to Recommend a Lawyer</i></p> <p>[5] Lawyers are not permitted to pay others for channeling professional work. Paragraph (b)(1), however, allows a lawyer to pay for advertising and communications permitted by this Rule, including the costs of print directory listings, on-line directory listings, newspaper ads, television and radio airtime, domain-name registrations, sponsorship fees, banner ads, and group advertising. A lawyer may <u>also</u> compensate employees, agents and vendors who are engaged to provide marketing or client-development services, such as publicists, public-relations personnel, business-development staff and website designers. See Rule 5.3 for the duties of lawyers and law firms with respect to the conduct of nonlawyers who prepare marketing materials for them.</p>	<p>Comment [5] is based on Model Rule 7.2, cmt. [5], which provides examples of advertising and communications for which payment is permitted under subparagraph (b)(1). Comment [5] is nearly identical to the Model Rule comment except that the word "also" has been added to emphasize that not only may lawyers engage the services of advertisers, but may also retain intermediaries to help them obtain those services.</p> <p>The Commission recommends not carrying forward current rule 1-320(C), because the substance of that provision is already contained in paragraph (b) and this comment. Current rule 1-320(C) provides:</p> <p>(C) A member shall not compensate, give, or promise anything of value to any representative of the press, radio, television, or other communication medium in anticipation of or in return for publicity of the member, the law firm, or any other member as such in a news item, but the incidental provision of food or beverage shall not of itself violate this rule.</p>

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<p>[6] A lawyer may pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service. A legal service plan is a prepaid or group legal service plan or a similar delivery system that assists prospective clients to secure legal representation. A lawyer referral service, on the other hand, is any organization that holds itself out to the public as a lawyer referral service. Such referral services are understood by laypersons to be consumer-oriented organizations that provide unbiased referrals to lawyers with appropriate experience in the subject matter of the representation and afford other client protections, such as complaint procedures or malpractice insurance requirements. Consequently, this Rule only permits a lawyer to pay the usual charges of a not-for-profit or qualified lawyer referral service. A qualified lawyer referral service is one that is approved by an appropriate regulatory authority as affording adequate protections for prospective clients. See, e.g., the American Bar Association's Model Supreme Court Rules Governing Lawyer Referral Services and Model Lawyer Referral and Information Service Quality Assurance Act (requiring that organizations that are identified as lawyer referral services (i) permit the participation of all lawyers who are licensed and eligible to practice in the jurisdiction and who meet reasonable objective eligibility requirements as may be established by the referral service for the protection of prospective clients; (ii) require each participating lawyer to carry</p>	<p>[6] A lawyer may pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service. A legal service plan is a prepaid or group legal service plan or a similar delivery system that assists prospective clients to secure legal representation. A lawyer referral service, on the other hand, is any organization that holds itself out to the public as a lawyer referral service. Such referral services are understood by laypersons to be consumer-oriented organizations that provide unbiased referrals to lawyers with appropriate experience in the subject matter of the representation and afford other client protections, such as complaint procedures or malpractice insurance requirements. Consequently, this Rule only permits a lawyer to pay the usual charges of a not-for-profit or qualified lawyer referral service. A qualified lawyer referral service is one that is approved by an appropriate regulatory authority as affording adequate protections for prospective clients. See, e.g., the American Bar Association's Model Supreme Court Rules Governing Lawyer Referral Services and Model Lawyer Referral and Information Service Quality Assurance Act (requiring that organizations that are identified as lawyer referral services (i) permit the participation of all lawyers who are licensed and eligible to practice in the jurisdiction and who meet reasonable objective eligibility requirements as may be established by the referral service for the protection of prospective clients; (ii) require each participating lawyer to carry</p>	<p>Comment [6] addresses the same substantive concepts as does Model Rule 7.2, cmt. [6], which elaborates on the exception contained in subparagraph (b)(2). However, the language of Model Rule 7.2, cmt. [6] has been replaced with a specific reference to the applicable California statutes that regulate lawyer referral services in this state.</p>

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<p>reasonably adequate malpractice insurance; (iii) act reasonably to assess client satisfaction and address client complaints; and (iv) do not refer prospective clients to lawyers who own, operate or are employed by the referral service.)</p>	<p>reasonably adequate malpractice insurance; (iii) act reasonably to assess client satisfaction and address client complaints; and (iv) do not refer prospective clients to lawyers who own, operate or are employed by the referral service.) Paragraph (b)(2) permits a lawyer to pay the usual charges of a group or pre-paid legal service plan exempt from registration under Business & Professions Code section 6155(c). Paragraph (b)(2) permits a lawyer to pay the usual charges of a qualified lawyer referral service established, sponsored and operated in accordance with the State Bar of California's minimum standards for a lawyer referral service in California. See Business & Professions Code, section 6155, and rules and regulations pursuant thereto. See also Rule 5.4(a)(4).</p>	

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<p>[7] A lawyer who accepts assignments or referrals from a legal service plan or referrals from a lawyer referral service must act reasonably to assure that the activities of the plan or service are compatible with the lawyer's professional obligations. See Rule 5.3. Legal service plans and lawyer referral services may communicate with prospective clients, but such communication must be in conformity with these Rules. Thus, advertising must not be false or misleading, as would be the case if the communications of a group advertising program or a group legal services plan would mislead prospective clients to think that it was a lawyer referral service sponsored by a state agency or bar association. Nor could the lawyer allow in-person, telephonic, or real-time contacts that would violate Rule 7.3.</p>	<p>[7] A lawyer who accepts assignments or referrals from a legal service plan or referrals from a lawyer referral service must act reasonably to assure that the activities of the plan or service are compatible with the lawyer's professional obligations. See RuleRules 5.3 and 5.4. Legal service plans and lawyer referral services may communicate with prospective clients, but such communication must be in conformity with these Rules. Thus, advertising must not be false or misleading, as would be the case if the communications of a group advertising program or a group legal services plan would mislead prospective clients to think that it was a lawyer referral service sponsored by a state agency or bar association. Nor could the lawyer allow in-person, telephonic, or real-time contacts that would violate Rule 7.3.</p>	<p>Comment [7] is identical to Model Rule 7.2, cmt. [7], except for the addition of a reference to proposed Rule 5.4. Among other things, Rule 5.4 prohibits a lawyer sharing fees or entering into partnerships with non-lawyers, concerns that are evident in the regulatory framework of lawyer referral services.</p>

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<p>[8] A lawyer also may agree to refer clients to another lawyer or a nonlawyer professional, in return for the undertaking of that person to refer clients or customers to the lawyer. Such reciprocal referral arrangements must not interfere with the lawyer's professional judgment as to making referrals or as to providing substantive legal services. See Rules 2.1 and 5.4(c). Except as provided in Rule 1.5(e), a lawyer who receives referrals from a lawyer or nonlawyer professional must not pay anything solely for the referral, but the lawyer does not violate paragraph (b) of this Rule by agreeing to refer clients to the other lawyer or nonlawyer professional, so long as the reciprocal referral agreement is not exclusive and the client is informed of the referral agreement. Conflicts of interest created by such arrangements are governed by Rule 1.7. Reciprocal referral agreements should not be of indefinite duration and should be reviewed periodically to determine whether they comply with these Rules. This Rule does not restrict referrals or divisions of revenues or net income among lawyers within firms comprised of multiple entities.</p>	<p>[8] <u>A Paragraph (b)(4) permits a</u> lawyer also may agree to refer clients <u>make referrals</u> to another lawyer or a nonlawyer professional, in return for the undertaking of that person to refer clients or customers to the lawyer. Such reciprocal referral arrangements must not interfere with the lawyer's professional judgment as to making referrals or as to providing substantive legal services. See Rules 2.1 and Rule <u>5.4 (c)</u>. Except as provided in Rule 1.5(e), a lawyer who receives referrals from a lawyer or nonlawyer professional must not pay anything solely for the referral, but the <u>A</u> lawyer does not violate paragraph (b)(4) of this Rule by agreeing to refer clients to the other lawyer or nonlawyer professional <u>customers to another</u>, so long as the reciprocal referral agreement is not exclusive and the client is informed of the referral agreement. Conflicts of interest created by such <u>arrangements made pursuant to paragraph (b)(4)</u> are governed by Rule 1.7. Reciprocal referral agreements should not be of indefinite duration and should be reviewed periodically to determine whether they comply with these Rules. This Rule does not restrict referrals or divisions of revenues or net income among lawyers within firms <u>a law firm</u> comprised of multiple entities. <u>A division of fees between or among lawyers not in the same law firm is governed by Rule 1.5.1.</u></p>	<p>Comment [8] is based on Model Rule 7.2, cmt. [8]. It elaborates on the exception to payment for referrals in subparagraph (b)(4), which permits reciprocal referral arrangements with lawyers and non-lawyers so long as those arrangements are not exclusive and the client or customer is informed of the arrangement. A cross-reference to proposed Rule 5.4(c), which is the counterpart to Model Rule 5.4(c), has been included to emphasize that a lawyer may not permit the referring person to interfere with the lawyer's independent judgment.</p>

<p align="center"><u>ABA Model Rule</u> Rule 7.2 Advertising Comment</p>	<p align="center"><u>Commission's Proposed Rule*</u> Rule 7.2 Advertising Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p><i>Required information in advertisements</i></p> <p>[9] Paragraph (c) also applies to a group of lawyers that engages in cooperative advertising. Any such communication made pursuant to this Rule shall include the name and office address of at least one member of the group responsible for its content. See also Business & Professions Code section 6155(h). See also Business & Professions Code section 6159.1, concerning the requirement to retain any advertisement for one year.</p>	<p>Comment [9] has no counterpart in Model Rule 7.2. The two sentences of Comment [8] emphasize that paragraph (c)'s requirement of including the name of a lawyer or law firm and the lawyer's or law firm's office address in any advertisement also applies to a group of lawyers that engages in cooperative advertising. Comment [8] includes a reference to California Business & Professions Code § 6155(h), which relates to lawyers jointly advertising their services.</p> <p>Comment [9] also includes a cross-reference to California Business & Professions Code § 6159.1, concerning the requirement to retain any advertisement for a period of one year. Notwithstanding the inclusion of this cross-reference, the Commission has followed the ABA in recommending the removal of the requirement to retain for a period of two years a copy of "any communication made by written or electronic media," currently found in CRPC 1-400(F). The Commission has also voted to recommend that the State Bar seek the repeal of section 6159.1 and, if the Legislature agrees, the cross-reference to section 6159.1 will be removed. See proposed Rule 7.1, Introduction.</p>

Rule 7.2 Advertising

(Comparison of the Current Proposed Rule to the initial Public Comment Draft)

- (a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through any ~~medium~~written, recorded or electronic media, including public media.
- (b) A lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may
- (1) pay the reasonable costs of advertisements or communications permitted by this Rule;
 - (2) pay the usual charges of a legal services plan or a qualified lawyer referral service. A qualified lawyer referral service is a lawyer referral service established, sponsored and operated in accordance with the State Bar of California's minimum standards for a lawyer referral service in California;
 - (3) pay for a law practice in accordance with Rule ~~1.17~~1.17; and
 - (4) refer clients to another lawyer or non-lawyer pursuant to an agreement not otherwise prohibited under these Rules that provides for the other person to refer clients or customers to the lawyer, if
 - (i) the reciprocal referral agreement is not exclusive, and
 - (ii) the client is informed of the existence and nature of the agreement.
- (5) offer or give a gift or gratuity to any person or entity having made a recommendation resulting in the employment of the lawyer or the lawyer's law firm, provided that the gift or gratuity was not offered or given in consideration of any promise, agreement, or understanding that such a gift or gratuity would be forthcoming or that referrals would be made or encouraged in the future.
- (c) Any communication made pursuant to this Rule shall include the name and office address of at least one lawyer or law firm responsible for its content.

COMMENT

~~[1]~~ ~~[RESERVED]~~

[1] To assist the public in obtaining legal services, lawyers should be allowed to make known their services not only through reputation but also through advertising. The public's need to know about legal services is particularly acute in the case of persons of moderate means who have not made extensive use of legal services. Lawyers must be aware, however, that advertising by them entails the risk of practices that are misleading or overreaching.

[2] This Rule permits public dissemination of information concerning a lawyer's name or firm name, address and telephone number; the kinds of services the lawyer will undertake; the basis on which the lawyer's fees are determined, including prices for specific services and payment

and credit arrangements; a lawyer's foreign language ability; names of references and, with their consent, names of clients regularly represented; and other information that might invite the attention of those seeking legal assistance.

- [3] This Rule permits advertising by electronic media, including but not limited to television, radio and the Internet. But see Rule 7.3(a) concerning real-time electronic communications with prospective clients.
- [4] Neither this Rule nor Rule 7.3 ~~is intended to prohibit~~ prohibits communications authorized by law, such as court-approved class action notices.

Paying Others to Recommend a Lawyer

- [5] ~~Notwithstanding Rule 1-320(C)'s general prohibition on a lawyer giving or promising anything of value to a representative of a communication medium in return~~ Lawyers are not permitted to pay others for publicity of the lawyer, paragraph channeling professional work. Paragraph (b)(1), however, allows a lawyer to pay for advertising and communications permitted by this Rule, including ~~but not limited to~~ the costs of print directory listings, on-line directory listings, newspaper ads, television and radio airtime, domain-name registrations, sponsorship fees, banner ads, and group advertising. A lawyer may also compensate employees, agents and vendors who are engaged to provide marketing or client-development services, such as publicists, public-relations personnel, business-development staff and website designers. See Rule 5.3 for the duties of lawyers and law firms with respect to the conduct of nonlawyers who prepare marketing materials for them.

- [6] Paragraph (b)(2) ~~is intended to permit~~ permits a lawyer to pay the usual charges of a group or pre-paid legal service plan exempt from registration under Business & Professions Code, section 6155(c). Paragraph (b)(2) ~~is also intended to permit~~ permits a lawyer to pay the usual charges of a qualified lawyer referral service established, sponsored and operated in accordance with the State Bar of California's minimum standards for a lawyer referral service in California. See Business & Professions Code, section 6155, and rules and regulations pursuant thereto. See also Rule ~~{5.4(a)(4)}~~.
- [7] A lawyer who accepts assignments or referrals from a legal service plan or referrals from a lawyer referral service must act reasonably to assure that the activities of the plan or service are compatible with the lawyer's professional obligations. See Rules 5.3 and ~~{5.4}~~. Legal service plans and lawyer referral services may communicate with prospective clients, but such communication must be in conformity with these Rules. Thus, advertising must not be false or misleading, as would be the case if the communications of a group advertising program or a group legal services plan would mislead prospective clients to think that it was a lawyer referral service sponsored by a state agency or bar association. Nor could the lawyer allow in-person, telephonic, or real-time contacts that would violate Rule 7.3.
- [8] Paragraph (b)(4) permits a lawyer to make referrals to another, in return for the undertaking of that person to refer clients or customers to the lawyer. Such reciprocal referral arrangements must not interfere with the lawyer's professional judgment as to making referrals or as to providing substantive legal services. See Rule ~~{5.4 (c)}~~. A lawyer does not violate paragraph (b)(4) of this Rule by agreeing to refer clients or customers to another, so long as the reciprocal referral agreement is not exclusive and the client is informed of the referral agreement. ~~See also Rule 1.5.1(b).~~ Conflicts of interest created by arrangements made pursuant to paragraph (b)(4) are governed by

Rule ~~[re: conflicts of interest]~~1.7. Reciprocal referral agreements should not be of indefinite duration and should be reviewed periodically to determine whether they comply with these Rules. This Rule is does not ~~intended to~~ restrict referrals or divisions of revenues or net income among lawyers within a law firm comprised of multiple entities. ~~Divisions~~A division of fees between or among lawyers not in the same law firm is governed by Rule 1.5.1.

Required information in advertisements

- [9] Paragraph (c) also applies to a group of lawyers that engages in cooperative advertising. Any such communication made pursuant to this Rule shall include the name and office address of at least one member of the group responsible for its content. See also Business & Professions Code, section 6155, ~~subdivision~~ (h). See also Business & Professions Code, section 6159.1, concerning the requirement to retain any advertisement for one year.

Rule 7.2 Advertising
(Commission's Proposed Rule – Clean Version)

- (a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through any written, recorded or electronic media, including public media.
- (b) A lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may
 - (1) pay the reasonable costs of advertisements or communications permitted by this Rule;
 - (2) pay the usual charges of a legal services plan or a qualified lawyer referral service. A qualified lawyer referral service is a lawyer referral service established, sponsored and operated in accordance with the State Bar of California's minimum standards for a lawyer referral service in California;
 - (3) pay for a law practice in accordance with Rule 1.17; and
 - (4) refer clients to another lawyer or non-lawyer pursuant to an agreement not otherwise prohibited under these Rules that provides for the other person to refer clients or customers to the lawyer, if
 - (i) the reciprocal referral agreement is not exclusive, and
 - (ii) the client is informed of the existence and nature of the agreement.
- (5) offer or give a gift or gratuity to any person or entity having made a recommendation resulting in the employment of the lawyer or the lawyer's law firm, provided that the gift or gratuity was not offered or given in consideration of any promise, agreement, or understanding that such a gift or gratuity would be forthcoming or that referrals would be made or encouraged in the future.
- (c) Any communication made pursuant to this Rule shall include the name and office address of at least one lawyer or law firm responsible for its content.

COMMENT

- [1] To assist the public in obtaining legal services, lawyers should be allowed to make known their services not only through reputation but also through advertising. The public's need to know about legal services is particularly acute in the case of persons of moderate means who have not made extensive use of legal services. Lawyers must be aware, however, that advertising by them entails the risk of practices that are misleading or overreaching.
- [2] This Rule permits public dissemination of information concerning a lawyer's name or firm name, address and telephone number; the kinds of services the lawyer will undertake; the basis on which the lawyer's fees are determined, including prices for specific services and payment and credit arrangements; a lawyer's foreign language ability; names of references and, with their consent, names of clients regularly

represented; and other information that might invite the attention of those seeking legal assistance.

- [3] This Rule permits advertising by electronic media, including but not limited to television, radio and the Internet. But see Rule 7.3(a) concerning real-time electronic communications with prospective clients.
- [4] Neither this Rule nor Rule 7.3 prohibits communications authorized by law, such as court-approved class action notices.

Paying Others to Recommend a Lawyer

- [5] Lawyers are not permitted to pay others for channeling professional work. Paragraph (b)(1), however, allows a lawyer to pay for advertising and communications permitted by this Rule, including the costs of print directory listings, on-line directory listings, newspaper ads, television and radio airtime, domain-name registrations, sponsorship fees, banner ads, and group advertising. A lawyer may also compensate employees, agents and vendors who are engaged to provide marketing or client-development services, such as publicists, public-relations personnel, business-development staff and website designers. See Rule 5.3 for the duties of lawyers and law firms with respect to the conduct of nonlawyers who prepare marketing materials for them.
- [6] Paragraph (b)(2) permits a lawyer to pay the usual charges of a group or pre-paid legal service plan exempt from registration under Business and Professions Code section 6155(c). Paragraph (b)(2) permits a lawyer to pay the usual charges of a qualified lawyer referral service established, sponsored and operated in accordance with the State Bar

of California's minimum standards for a lawyer referral service in California. See Business and Professions Code, section 6155, and rules and regulations pursuant thereto. See also Rule 5.4(a)(4).

- [7] A lawyer who accepts assignments or referrals from a legal service plan or referrals from a lawyer referral service must act reasonably to assure that the activities of the plan or service are compatible with the lawyer's professional obligations. See Rules 5.3 and 5.4. Legal service plans and lawyer referral services may communicate with prospective clients, but such communication must be in conformity with these Rules. Thus, advertising must not be false or misleading, as would be the case if the communications of a group advertising program or a group legal services plan would mislead prospective clients to think that it was a lawyer referral service sponsored by a state agency or bar association. Nor could the lawyer allow in-person, telephonic, or real-time contacts that would violate Rule 7.3.
- [8] Paragraph (b)(4) permits a lawyer to make referrals to another, in return for the undertaking of that person to refer clients or customers to the lawyer. Such reciprocal referral arrangements must not interfere with the lawyer's professional judgment as to making referrals or as to providing substantive legal services. See Rule 5.4 (c). A lawyer does not violate paragraph (b)(4) of this Rule by agreeing to refer clients or customers to another, so long as the reciprocal referral agreement is not exclusive and the client is informed of the referral agreement. Conflicts of interest created by arrangements made pursuant to paragraph (b)(4) are governed by Rule 1.7. Reciprocal referral agreements should not be of indefinite duration and should be reviewed periodically to determine whether they comply with these Rules. This Rule does not restrict referrals or divisions of revenues or net income among lawyers within a law firm comprised of multiple

entities. A division of fees between or among lawyers not in the same law firm is governed by Rule 1.5.1.

Required information in advertisements

- [9] Paragraph (c) also applies to a group of lawyers that engages in cooperative advertising. Any such communication made pursuant to this Rule shall include the name and office address of at least one member of the group responsible for its content. See also Business and Professions Code section 6155(h). See also Business and Professions Code section 6159.1, concerning the requirement to retain any advertisement for one year.

Rule 7.2: Advertising

STATE VARIATIONS

(The following is an excerpt from Regulation of Lawyers: Statutes and Standards (2009 Ed.)
by Steven Gillers, Roy D. Simon and Andrew M. Perlman.)

Arizona omits Rule 7.2(b)(4) (governing reciprocal referral agreements), and adds Rule 7.2(d), which sets forth detailed requirements for all advertisements containing information about legal fees. Arizona also adds Rule 7.2(e), which provides:

(e) ...If a law firm advertises on electronic media and a person appears purporting to be a lawyer, such person shall in fact be a lawyer employed full-time at the advertising law firm. If a law firm advertises a particular legal service on electronic media, and a lawyer appears as the person purporting to render the service, the lawyer appearing shall be the lawyer who will actually perform the service advertised unless the advertisement discloses that the service may be performed by other lawyers in the firm. Finally, Arizona adds Rule 7.2(f), which requires that certain information be “clear and conspicuous.”

Arkansas permits actors to be used in advertisements so long as they are identified by name and relationship to the advertising lawyer. Dramatizations are forbidden. Clients and former clients “shall not be used in any manner whatsoever in advertisements.”

California: Rule 1-320 provides, in pertinent part, as follows:

(A) Neither a member nor a law firm shall directly or indirectly share legal fees with a person who is not a lawyer, except that . . .

(4) A member may pay a prescribed registration, referral, or participation fee to a lawyer referral service established, sponsored, and operated in accordance with the State Bar of California's Minimum Standards for a Lawyer Referral Service in California.

(B) A member shall not compensate, give, or promise anything of value to any person or entity for the purpose of recommending or securing employment of the member or the member's law firm by a client, or as a reward for having made a recommendation resulting in employment of the member or the member's law firm by a client. A member's offering of or giving a gift or gratuity to any person or entity having made a recommendation resulting in the employment of the member or the member's law firm shall not of itself violate this rule, provided that the gift or gratuity was not offered or given in consideration of any

promise, agreement, or understanding that such a gift or gratuity would be forthcoming or that referrals would be made or encouraged in the future.

(C) A member shall not compensate, give, or promise anything of value to any representative of the press, radio, television, or other communication medium in anticipation of or in return for publicity of the member, the law firm, or any other member as such in a news item, but the incidental provision of food or beverage shall not of itself violate this rule.

Rule 1-400(F) provides:

(D) A member shall retain for two years a true and correct copy or recording of any communication made by written or electronic media. Upon written request, the member shall make any such copy or recording available to the State Bar, and, if requested, shall provide to the State Bar evidence to support any factual or objective claim contained in the communication.

The Standards adopted by the State Bar pursuant to Rule 1-400 provide that a communication is “presumed to be in violation of rule 1-400” if it “implies that the member or law firm is participating in a lawyer referral service which has been certified by the State Bar of California or as having satisfied the Minimum Standards for Lawyer Referral Services in California, when that is not the case.” Rule 1-600(B) provides that the State Bar’s Board of Governors “shall formulate and adopt Minimum Standards for Lawyer Referral Services, which . . . shall be binding on members.” Those standards are found after California Business & Professions Code §6155, which governs lawyer referral services.

Also relevant to ABA Model Rule 7.2 are Business & Professions Code §6129 (prohibiting lawyers from purchasing claims) and §§6157.1-6159.2 (governing lawyer advertising, especially in the electronic media).

Connecticut adds many paragraphs with no counterpart in ABA Model Rule 7.2 but omits ABA Model Rule 7.2(b)(4) (regarding reciprocal referral agreements).

District of Columbia omits ABA Model Rule 7.2, but D.C. Rule 7.1(c) provides that a lawyer “shall not knowingly assist an organization that furnishes or pays for legal services to others to promote the use of the lawyer’s services . . . as a private practitioner, if the promotional activity involves the use of coercion, duress, compulsion, intimidation, threats, or vexatious or harassing conduct.”

Florida: Rule 4-7.1 permits attorneys to advertise through “computer-accessed communications” and through “recorded messages the public may access by dialing a telephone number.” Rule 4-7.4(b)(2) provides that “[e]very written communication disseminated by a lawyer referral service shall be accompanied by a written statement detailing the background, training, and experience of each lawyer to whom the recipient may be referred.” Rule 4-7.10 sets forth elaborate requirements for lawyer referral services. In addition, Chapter 8 of the Rules Regulating the Florida Bar sets forth extensive requirements for the operation of lawyer referral services by local bar associations, and no local bar association may operate a referral service absent express approval from the state bar.

Georgia moves Rule 7.2(b) and its Comment to Georgia Rule 7.3(c), and modifies and expands the exceptions in ABA Model Rule 7.2(c) regarding lawyer referral services.

Illinois prohibits giving anything of value for recommending “or having recommended” the lawyer’s services.

Iowa: Rule 7.2 does not govern communications between lawyers, but prohibits any “visual display” on television unless the same display would be “allowed in print”; prohibits “background sound” in electronic media; and expressly permits lawyers to communicate 14 items to the public provided if it is done “in a dignified style.” Rule 7.2 also imposes extensive limitations on advertising fee information; and requires any communication advising the institution of litigation to “disclose that the filing of a claim or suit solely to coerce a settlement or to harass another could be illegal and could render the person so filing liable for malicious prosecution or abuse of process.” In addition, borrowing from the ABA Model Code of Professional Responsibility, Iowa has a detailed rule (Rule 7.7) called “Recommendation of Professional Employment” and another (Rule 7.8) on “Suggestion of Need of Legal Services.”

Louisiana: In the rules effective December 1, 2008, Rule 7.2 is considerably more detailed than Model Rule 7.2. Among other variations, 7.2(c) prohibits any advertising that could be “false, misleading or deceptive” and includes a lengthy list of advertising methods that would violate the rule. The rule also contains many other restrictions, such as provisions related to how long a lawyer must honor an advertised fee and an unusual provision concerning the use of dual language advertisements. Finally, subject to some exceptions in Rule 7.8, Rule 7.7 requires lawyers to file their advertising with the Louisiana State Bar Association, which is charged with ensuring that advertising complies with the advertising rules.

Maryland: Among other variations, Maryland adds Rule 7.2(e), which provides that “[a]n advertisement or communication indicating that no fee will be charged in the absence of a recovery shall also disclose whether the client will be liable for any expenses,” and Rule 7.2(f), which requires lawyers, including those participating in an advertising group or lawyer referral service, to be “personally responsible for compliance with the provisions of Rules 7.1, 7.2, 7.3, 7.4, and 7.5.”

Massachusetts: Rule 7.2(a) adds that lawyers may advertise in “an electronic or computer accessed directory.” Comment 3A provides, in part, as follows:

The advertising and solicitation rules can generally be applied to computer-accessed or other similar types of communications by analogizing the communication to its hard-copy form. Thus, because it is not a communication directed to a specific recipient, a web site or home page would generally be considered advertising subject to this rule, rather than solicitation subject to Rule 7.3. . . .

Michigan: Rule 6.3(b) permits a lawyer to “participate in and pay the usual charges of a not-for-profit lawyer referral service that recommends legal services to the public” only if the referral service meets detailed requirements, including that the service:

(3) is open to all lawyers licensed and eligible to practice in this state who maintain an office within the geographical area served, and who:

(i) meet reasonable and objective requirements of experience . . . ;

(ii) pay reasonable registration and membership fees not to exceed an amount established by the State Bar to encourage widespread lawyer participation; and

(iii) maintain a policy of errors and omissions insurance, or provide proof of financial responsibility, in an amount at least equal to the minimum established by the State Bar.

(4) ensures that the combined fees and expenses charged a prospective client by a qualified service and a lawyer to whom the client is referred not exceed the total charges the client would have incurred had no referral service been involved. . . .

Under Rule 6.3(d), the State Bar or “any aggrieved person” may seek an injunction against violations of Rule 6.3(b), and if the injunction is granted, the petitioner shall be entitled to reasonable costs and attorney fees.

Missouri: Rule 7.2(a) adds permission to advertise “through direct mail advertising distributed generally to persons not known to need legal services of the kind provided by the lawyer in a particular matter.” Missouri omits ABA Model Rule 7.2(b)(4). Rule 7.2(d) provides that a lawyer may not “pay all or a part of the cost of an advertisement in the public media unless such advertisement discloses the name and address of the financing lawyer, the relationship between the advertising lawyer and the financing lawyer, and whether the advertising lawyer is likely to refer cases received through the advertisement to the financing lawyer.” In addition, Rules 7.2(f) and (g) require all advertisements (except

targeted letters and emails and advertisements limited to specified basic information such as name, address, and fields of practice) to state the following: “The choice of a lawyer is an important decision and should not be based solely upon advertisements.”

Nevada: Rule 7.2(b) provides, in part, as follows:

If a person appears as a lawyer in an advertisement for legal services . . . such person must be a member of the State Bar of Nevada . . . and must be the lawyer who will actually perform the service advertised or a lawyer associated with the law firm that is advertising. If a person appears in an advertisement as an employee of a lawyer or law firm, such person must be an actual employee of the lawyer or law firm whose services are advertised unless the advertisement discloses that such person is an actor. If an actor appears in any other role not prohibited by these Rules, the advertisement must disclose that such person is an actor.

Among other variations, Nevada Rule 7.2A requires lawyers to file all advertisements with the State Bar “within 15 days of first dissemination. . . .” Rule 7.2B(a) commands the State Bar to create “Standing Lawyer Advertising Advisory Committees . . . to review filings submitted under Rule 7.2A and to respond to written requests from an advertising lawyer or law firm voluntarily seeking an advance opinion regarding that lawyer’s compliance with the advertising rules.” Rule 7.2B(c) permits a lawyer or law firm to “file a written request with the state bar seeking an advance opinion on whether a proposed advertisement complies with these Rules.”

New Hampshire: Rule 7.2(b)(2) permits payment only to “an organization that is recognized by the Internal Revenue Service as exempt from taxation pursuant to Section 501(c)(3) of the Internal Revenue Code.” New Hampshire omits ABA Model Rule 7.2(b)(4) (governing reciprocal referral agreements).

New Jersey: Rule 7.3(c) adds that a lawyer in private practice "shall not knowingly assist an organization that furnishes or pays for legal services to others to promote the use of the lawyer's services" if the organization's promotional activity (1) uses false or misleading statements or claims, or (2) uses "coercion, duress, compulsion, intimidation, threats, unwarranted promises of benefits, over-reaching, or vexatious or harassing conduct." New Jersey regulates lawyer referral services in a lengthy Rule 7.3(e). New Jersey omits ABA Model Rule 7.2(b)(4) (governing reciprocal referral agreements).

To regulate broadcast advertising, New Jersey Rule 7.2(a) incorporates the following language taken verbatim from the New Jersey Supreme Court's opinion in *Felmeister & Isaacs*, 518 A.2d 188, 208 (1986):

...All advertisements shall be predominantly informational. No drawings, animations, dramatizations, music, or lyrics shall be used in connection with televised advertising. No advertisement shall rely in any way on techniques to obtain attention that depend upon absurdity and that demonstrate a clear and intentional lack of relevance to the selection of counsel; included in this category are all advertisements that contain any extreme portrayal of counsel exhibiting characteristics clearly unrelated to legal competence.

New York: New York DR 2-101(C) forbids endorsements by current clients; paid endorsements without indicating the fact of compensation; portrayal of a judge; use of a “fictitious” law firm or firm name; use of actors or depictions of fictionalized events without disclosure; “techniques to obtain attention that demonstrate a clear and intentional lack of relevance to the selection of counsel, including the portrayal of lawyers exhibiting characteristics clearly unrelated to legal competence”; advertisements “made to resemble legal documents”; and use of “a nickname, moniker, motto, or trade name that implies an ability to obtain results in a matter.” (Several of these restrictions were held unconstitutional in *Alexander v. Catalano*, 2007 WL 2120024 (N.D.N.Y. 2007), but when we went to press, an appeal was fully briefed but still pending.)

New York DR 2-101(D) permits:

- (1) statements that are reasonably likely to create an expectation about results the lawyer can achieve;
- (2) statements that compare the lawyer's services with the services of other lawyers;
- (3) testimonials or endorsements of clients, where not prohibited by subdivision (c)(1) of this section, and of former clients; or
- (4) statements describing or characterizing the quality of the lawyer's or law firm's services.

However, DR 2-101(E) permits such statements only if they can be “factually supported” and the statements are

accompanied by the following disclaimer: "Prior results do not guarantee a similar outcome." DR 2-101(F) requires the notation "Attorney Advertising" on every "advertisement" (as that term is defined), including websites, other than advertisements in periodicals or on electronic media. E-mails must say "ATTORNEY ADVERTISING" in the subject line. DR 2-101(G) prohibits lawyers from using a "pop-up or pop-under advertisement" or "meta tags or other hidden computer codes" that would violate a disciplinary rule. The remainder of DR 2-101 mandates lengthy retention requirements for advertisements, computer-assisted communications, and web sites, and imposes extensive additional requirements when lawyers advertise fees.

DR 2-103(D) is comparable to ABA Model Rule 7.2(a). DR 1-107(C), which is comparable to ABA Model Rule 7.2(b)(4), provides that DR 1-107(A) (New York's complex strategic alliance rule) "shall not apply to relationships consisting solely of non-exclusive reciprocal referral agreements or understandings between a lawyer or law firm and a non-legal professional or non-legal professional service firm." DR 2-103(F) provides that a lawyer "may be recommended, employed or paid by, or may cooperate with" specified categories of legal offices, including certain legal aid or public defender offices, a lawyer referral service "operated, sponsored or approved by a bar association or authorized by law or court rule," or any "bona fide organization which recommends, furnishes or pays for legal services to its members or beneficiaries" provided the organization meets six detailed conditions (e.g., the organization "is not operated for the purpose of procuring legal work or financial benefit for any lawyer as a private practitioner outside of the legal services program of the organization").

North Carolina omits ABA Model Rule 7.2(b)(4) and adds an unusual Rule 7.2(d) that permits a lawyer to participate in a lawyer referral service only if the lawyer and the referral service satisfy seven specific conditions.

Ohio: Rule 7.2(b) deletes the ABA reference to a "qualified lawyer referral service" and substitutes a reference to the Ohio Supreme Court Rules governing lawyer referral services. Ohio also deletes ABA Model Rule 7.2(b)(4), thus effectively prohibiting reciprocal referral agreements between two lawyers or between a lawyer and a nonlawyer professional. Ohio adds Rule 7.2(d), which prohibits a lawyer from soliciting employment if the lawyer does not intend to participate in the matter but instead will refer the matter to other counsel.

Pennsylvania: Rule 7.2 differs significantly from ABA Model Rule 7.2. For example, Pennsylvania omits ABA Model Rule 7.2(b)(4) (governing reciprocal referral agreements). Pennsylvania Rule 7.2(j) provides that a lawyer shall not pay "any part of the costs of an advertisement by a lawyer not in the same firm" unless the advertisement discloses the name and principal office address of each lawyer paying for the advertisement and, "if any lawyer or law firm will receive referrals from the advertisement, the circumstances under which referrals will be made and the basis and criteria on which the referral system operates."

Pennsylvania also adds Rule 7.7, which forbids lawyers to accept referrals from a "lawyer referral service" (a defined term) "if the service engaged in communication with the public or direct contact with prospective clients in a manner that would violate the Rules of Professional Conduct if the communication or contact were made by the lawyer."

Rhode Island: Among other variations, Rhode Island has adopted Rule 7.2(f), which provides as follows:

(f) Any lawyer or law firm who advertises that his or her practice includes or concentrates in particular fields of law and then refers the majority of cases in those fields of law or of that type to another lawyer, law firm or group of lawyers shall clearly state the following disclaimer:

(1) "Most cases of this type are not handled by this firm, but are referred to other attorneys," or if applicable:

(2) "While this firm maintains joint responsibility, most cases of this type are referred to other attorneys for principal responsibility."

Tennessee adds Rule 7.6 (Intermediary Organizations), which provides that a lawyer shall not seek or accept a referral of a client or compensation for representing a client from an "intermediary organization" (a defined term) if the lawyer knows or reasonably should know that the organization (i) is owned or controlled by the lawyer or by a lawyer or law firm with which the lawyer is associated; (ii) is engaged in the unauthorized practice of law; or (iii) engages in marketing activities that are false, misleading, or otherwise prohibited; or (iv) has failed to register with the Board of Professional Responsibility or comply with the Board's requirements. In addition, Supreme Court Rule 44, entitled "Regulation of Lawyer Intermediary Organizations," sets forth the requirements that lawyer intermediary organizations must meet in order to do business in Tennessee under Rule 7.6.

Texas: Rule 7.02 forbids "false or misleading communication about the qualifications or the services of any lawyer or firm." In addition, Texas has adopted guidelines for advertising on the Internet, including a requirement that "homepages" be submitted for review.

Virginia: Rule 7.2(d) requires targeted written or e-mail communications to display the statement "ADVERTISING MATERIAL" on the first page in a specified type size. Registered mail and other forms of restricted delivery are forbidden. Lawyers who advertise or solicit by e-mail must tell recipients how to "notify the sender that they wish not to receive such communications in the future." But Rule 7.2(d) does not apply to any communication that is "directed to be sent by a court or tribunal, or otherwise required by law."

Wisconsin: Rule 7.2(b)(4) permits referrals pursuant to a nonexclusive reciprocal referral agreement between a lawyer and another lawyer or nonlawyer professional if "(ii) the client gives informed consent; (iii) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and (iv) information relating to representation of a client is protected. . . ."

TOTAL = 4 **Agree = 2**
Disagree = 0
Modify = 2
NI = 0

Rule 7.2. Advertising.
[Sorted by Commenter]

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	Feldman, Philip	M	N	Misc.	Mr. Feldman writes that “ABA Rule 7.2 and its comments make all needed pertinent points,” and that attempts to placate the Board of Governors (by retaining their authority to draft standards) and the legislature (by keeping “the remnants of 1-400” are both “misguided.” He also notes that B&P Code §§ 17001 et seq. do “not need a professional responsibility assist from the commission,” etc.	The Commission did not make any changes. No specific changes were requested. Mr. Feldman’s criticism goes to the Commission’s approach in adopting the Model Rule numbering system and framework while preserving some aspects of California rule 1-400, which was the result of extended, substantive deliberations.
2	Los Angeles County Bar Association (Louisa Lau)	A	Y	Misc.	Approves Rule as written.	No response required.
3	Orange Co. Bar Ass’n (Julie McCoy) Irvine	A	Y	Misc.	Supports Rule as written.	No response required.
4	San Diego Co. Bar Ass’n (Andrew S. Albert)	M	Y	Cmt. [6]	Requests that the ABA Model Rule definitions in Comment [6] for “legal services plan” and “lawyer referral service” be retained. SDCBA gives no reason for its request.	The Commission did not make the change. Comment [6] was revised to reflect the specific regulatory framework governing lawyer referral services in California. The definitions are not accurate within the California framework. See Bus. & Prof. Code § 6155.

¹ A = AGREE with proposed Rule D = DISAGREE with proposed Rule M = AGREE ONLY IF MODIFIED NI = NOT INDICATED