

June 9, 2010 McCurdy E-mail to KEM, cc Chair, Vice-Chairs & Staff:

Kevin,

Attached is a comprehensive assignment table that lists all of the rules for which you are the lead drafter, along with the names of your codrafters. This message addresses your assignments for the June 25 & 26, 2010 meeting. To minimize email traffic and potential confusion, this message will be copied to your codrafters only after all of the lead drafter assignment messages have been sent.

ASSIGNMENT SUBMISSION DEADLINE: The assignment submission deadline for all assignments is **5:00 pm on Wednesday, June, 16, 2010.**

As mentioned at the June 4 meeting, the agenda for the Commission's June 25 & 26 meeting will involve final action on all of the rules recommended for adoption as well as those not recommended for adoption. This means that there are 85 items that require action. To alleviate some of the burden on Commission members, rules that either receive no comments at all or only comments in support will be prepared by staff and will be acted upon en masse by the Commission through the use of a consent agenda. At present, there are about 45 items that fall into this category.

This message provides the assignment background materials for the assignments listed below for which you are the lead drafter, and which are not being handled by staff as anticipated consent agenda items. The materials attached to this message are a staff prepared draft Public Commenter Chart synopsising all comments/testimony received to date & the current clean draft of a rule as posted for public comment. Consistent with the consent agenda plan, we are only providing assignment materials for those rules that have received a comment in opposition, or a comment stating an "Agree if Modified" position. Your assignment is to review these comments and to prepare a Public Commenter Chart with recommended Commission responses. If the drafters conclude that any revisions to a rule are warranted based on comments received, then a revised draft rule should be prepared. (Note: Where a drafting team decides not to recommend any revisions to a rule, that drafting team recommendation will be included in a second category of consent agenda items for action at the June 25 & 26 meeting.)

If revisions to a rule are recommended, then an updated Dashboard, Introduction, and Model Rule comparison chart also should be prepared to complete the rule package for Board submission. As soon as you or your drafting team determines that it will be recommending revisions to an assigned rule, please promptly inform staff and provide us with your revised Rule. We will create a new Model Rule redline version and middle column of the comparison chart, and provide you with the Word version of that document and any other necessary documents (Dashboard, etc . . .). Please contact us for this assistance once you or your team has determined that a revised rule will be recommended.

Because the comment period deadline of June 15th has not arrived, we may be updating your assignments. For example, a rule that presently has received no comments might receive an opposition comment prior to the June 15th comment deadline and, in that case, we would alert you with an email and provide you with the relevant background materials.

LIST OF ASSIGNED RULES (As explained above, these are rules that presently have received a comment in opposition or a comment stating an "Agree if Modified" position):

- 1.6 (Agenda Item III.I)
- 1.7 (Agenda Item III.J) Co-Lead w/Kehr
- 1.18 (Agenda Item III.FF)
- 7.1 (Agenda Item III.MMM)
- 7.2 (Agenda Item III.NNN)
- 7.3 (Agenda Item III.OOO)
- 7.4 (Agenda Item III.PPP)

Please note: The clean Word version of each rule is imbedded in the attached “Clean Version” PDF for each rule. You will see it and be able to open it when you open and view the PDF file.

Use the following link to the Proposed Rules page to find a copy of the Discussion Draft materials for all of the proposed rules as circulating for public comment:

www.calbar.org/proposedrules

Use the following link to review the full text of public comment letters or transcripts of the public hearings:

<http://sites.google.com/site/commentsrrc/>

Please don't hesitate to contact us with any questions you have.

Attached:

- RRC - PubCom - 06-25 & 06-26-10 Meeting Assignments - MOHR - DFT1 (06-09-10).pdf
- RRC - [1-18] - Public Comment Chart - By Commenter - XDFT1 (04-22-10).doc
- RRC - 1-400 [7-2] - Public Comment Chart - By Commenter - XDFT2 (05-21-10)2.doc
- RRC - 3-310 [1-7] - Public Comment Chart - By Commenter - XDFT2.2 (05-24-10)RLK-KEM22.doc
- RRC - 3-100 [1-6] - Public Comment Chart - By Commenter - XDFT1 (04-22-10).doc
- RRC - 1-400 [7-1] - Public Comment Chart - By Commenter - XDFT1 (04-22-10).doc
- RRC - 1-400 [7-3] - Public Comment Chart - By Commenter - XDFT1 (04-22-10).doc
- RRC - 1-400 [7-4] - Public Comment Chart - By Commenter - XDFT1 (04-22-10).doc
- RRC - [1-18] - Rule - ALTB (No Screen) - PCD [2] (05-15-10) - CLEAN-LAND.pdf
- RRC - [1-18] - Rule - ALTB (No Screen) - PCD [2] (05-15-10) - CLEAN-LAND.doc
- RRC - 1-400 [7-4] - Rule - PCD [7] (05-31-09) - CLEAN-LAND.pdf
- RRC - 1-400 [7-4] - Rule - PCD [7] (05-31-09) - CLEAN-LAND.doc
- RRC - 3-100 [1-6] - Rule - ALT - PCD [12.1] (02-28-10).pdf
- RRC - 3-100 [1-6] - Rule - ALT - PCD [12.1] (02-28-10).doc
- RRC - 3-100 [1-6] - Rule - ALT - PCD [12.1] (02-28-10) - CLEAN-LAND.pdf
- RRC - 1-400 [7-1] - Rule - PCD [7] (05-30-09) - CLEAN-LAND.pdf
- RRC - 1-400 [7-1] - Rule - PCD [7] (05-30-09) - CLEAN-LAND.doc
- RRC - 1-400 [7-2] - Rule - PCD [8] (10-01-09) - CLEAN-LAND.pdf
- RRC - 1-400 [7-2] - Rule - PCD [8] (10-01-09) - CLEAN-LAND.pdf
- RRC - 1-400 [7-3] - Rule - PCD [8] (10-02-09) - CLEAN-LAND.pdf
- RRC - 1-400 [7-3] - Rule - PCD [8] (10-02-09) - CLEAN-LAND.doc

June 13, 2010 KEM E-mail to Drafters (Julien & Ruvolo), cc Difuntorum, McCurdy & Lee:

I've attached the following public comment charts, with responses to the comments received through last Friday. Revisions I've made are highlighted in yellow.

1. III.MMM. Rule 7.1, XDFT2 (6/11/10). Only change from the version staff circulated is add response that no response is required for the COPRAC comment. San Diego has simply resubmitted its comment from the initial public comment period. I see no reason to revise the RRC's response to the S.D. submission.
2. III.NNN. Rule 7.2, XDFT2 (5/21/10). This is the draft circulated for the 6/4/10 meeting. Myles Berman's comment was discussed. However, as the Commission defeated a motion to delete 7.2(c) address requirement, (see 6/4/10 KEM Meeting Notes, III.NNN., at paragraph 1A), there is no reason to change the response to Mr. Berman's submission.
3. III.OOO. Rule 7.3, XDFT2 (6/11/10). As with the other rules, San Diego has simply resubmitted its comment from the initial public comment period. I see no reason to revise the RRC's response to the S.D. submission. The only change from the chart version staff circulated on 6/9/10 is to add "The commenter" at the beginning of the last paragraph of the next to last column.
4. III.PPP. Rule 7.4, XDFT2 (6/11/10). As with the other rules, San Diego has simply resubmitted its comment from the initial public comment period. I see no reason to revise the RRC's response to the S.D. submission. The only change from the chart version staff circulated on 6/9/10 is to add "No response required" as the Commission response to the COPRAC submission and the clause, "for the reasons stated by the commenter" in the second paragraph of the RRC response.

Finally, given our responses to the submitted public comment, I do not recommend any further changes to the Rules themselves.

Please let me know if you have any questions. Thanks,

Kevin

Attached:

RRC - 1-400 [7-1] - Public Comment Chart - By Commenter - XDFT2 (06-11-10).doc
RRC - 1-400 [7-2] - Public Comment Chart - By Commenter - XDFT2 (05-21-10).doc
RRC - 1-400 [7-3] - Public Comment Chart - By Commenter - XDFT2 (06-11-10).doc
RRC - 1-400 [7-4] - Public Comment Chart - By Commenter - XDFT2 (06-11-10).doc

June 14, 2010 Ruvolo E-mail to KEM, cc Julien & Staff:

This looks good to me.

June 14, 2010 McCurdy E-mail to KEM, cc Chair, Vice-Chairs & Staff:

Kevin,

A new comment in opposition or recommending modifications has been received for the following rule and an updated commenter table is attached. The comment compilation for this rule is attached, and has also been uploaded to the Google site (<http://sites.google.com/site/commentsrrc/byrule>). Please review the assignment instructions described in my earlier message below.

7.5 (Agenda Item III.QQQ)

The assignment deadline for these rules is the same as the earlier assignments -- **5:00 pm on Wednesday, June, 16, 2010.**

Attached:

RRC - 1-400 [7-5] - Public Comment Chart - By Commenter - XDFT1 (06-14-10).doc
RRC - 1-400 [7-5] - Public Comment Complete - REV (06-14-10).pdf

June 14, 2010 KEM E-mail to Drafters, cc Difuntorum, McCurdy & Lee re 7.5:

I've attached XDFT2 (6/14/10) of the Public Comment Chart for Rule 7.5, for which we have just received public comment requesting some changes. Please review my suggested responses to the OCBA submissions.

We need to submit by 5:00 p.m. on Wed, June 16, 2010. If you can give me your thoughts before then it will help as I have jury duty this week. Thanks,

Attached:

RRC - 1-400 [7-5] - Public Comment Chart - By Commenter - XDFT2 (06-14-10).doc

June 14, 2010 Ruvolo E-mail to KEM, cc Julien, Difuntorum, McCurdy & Lee re 7.5:

I agree with your proposed responses.

June 15, 2010 McCurdy E-mail to KEM, cc Chair, Vice-Chairs & Staff re 7.1 & 7.3:

Kevin,

Additional comments in opposition or recommending modifications have been received for the following rules previously assigned and updated commenter tables are attached. The comment compilations for these rules are attached, and have also been uploaded to the Google site (<http://sites.google.com/site/commentsrrc/byrule>). Please review the assignment instructions described in my earlier message below.

1.7 (Agenda Item III.J) Co-Lead w/Kehr (NOTE: We haven't added the synopsis for the Bradley Paulsen comment to the commenter chart yet, but will do so soon.)

7.1 (Agenda Item III.MMM)

7.3 (Agenda Item III.OOO)

If the drafters prepared and shared with staff an updated public commenter chart with proposed RRC responses, we have tried to use that version for this updated assignment.

Please note that the assignment deadline for these rules remains the same as previously stated -- 5:00 pm on Wednesday, June, 16, 2010.

Attached:

RRC - 1-400 [7-1] - Public Comment Chart - By Commenter - XDFT2.1 (06-15-10).doc
RRC - 1-400 [7-3] - Public Comment Chart - By Commenter - XDFT2.1 (06-15-10).doc
RRC - 3-310 [1-7] - Public Comment Complete - REV (06-15-10).pdf
RRC - 1-400 [7-1] - Public Comment Complete - REV (06-15-10).pdf
RRC - 1-400 [7-3] - Public Comment Complete - REV (06-15-10).pdf

June 15, 2010 KEM E-mail to Drafters, cc Staff re 7.1:

I've attached XDFT2.2 (6/15/10) of the Public Comment Chart for Rule 7.1, for which we have just received public comment requesting some changes. Please review my suggested responses to the OCBA submissions.

I've recommended that we remove the word "intentionally" from Comment [5] of the proposed Rule, which provides:

[5] The list of communications under paragraphs (a)(1) through (a)(4) of this Rule is not exclusive. For example, a lawyer's intentionally misleading use of metatags to divert a prospective client to the web site of the lawyer or the lawyer's law firm would also be prohibited under this Rule.

I thought that OCBA's point has merit and would make their suggested change.

We need to submit by 5:00 p.m. on Wed, June 16, 2010. If you can give me your thoughts before then it will help as I have jury duty this week.

Attached:

RRC - 1-400 [7-1] - Public Comment Chart - By Commenter - XDFT2.2 (06-15-10).doc

June 15, 2010 KEM E-mail to Drafters, cc Staff re 7.3:

I've attached XDFT2.2 (6/15/10) of the Public Comment Chart for Rule 7.3, for which we have just received public comment requesting some changes. Please review my suggested response to the OCBA submission.

We need to submit by 5:00 p.m. on Wed, June 16, 2010. If you can give me your thoughts before then it will help as I have jury duty this week.

Attached:

RRC - 1-400 [7-3] - Public Comment Chart - By Commenter - XDFT2.2 (06-15-10).doc

June 15, 2010 Difuntorum E-mail to RRC:

Commission Members:

More public comments keep arriving. Here's another one that you can begin addressing. It is from the State Bar Law Practice Management and Technology Section. The 9 rules addressed in the letter and the responsible lead drafters and codrafters are listed below. As previously emphasized, the question we need you to answer by the assignment deadline is whether the codrafters will be recommending rule revisions in response to the public comments received. Rules for which there are no recommended revisions will be placed on consent. –Randy D.

1.1 = VAPNEK (Peck, Ruvolo)
1.5 = VAPNEK (Ruvolo)
1.16 = KEHR (Foy, Melchior)
5.1 = TUFT (Martinez, Peck)
4.4 = MARTINEZ/TUFT
7.3 = MOHR (Julien, Ruvolo)
8.3 = KEHR (Peck, Tuft, Vapnek)
8.4.1 = PECK (Martinez)
8.5 = MELCHIOR (Lampert, Peck)

Attached:

RRC - 1-400 [7-3] - 06-15-10 LPMT [Hoffman] Comment.pdf
RRC - [4-4] - 06-15-10 LPMT [Hoffman] Comment.pdf
RRC - 1-310X [5-1] - 06-15-10 LPMT [Hoffman] Comment.pdf
RRC - 3-700 [1-16] - 06-15-10 LPMT [Hoffman] Comment.pdf
RRC - 3-110 [1-1] - 06-15-10 LPMT [Hoffman] Comment.pdf
RRC - 4-200 [1-5] - 06-15-10 LPMT [Hoffman] Comment.pdf
RRC - 1-100 [8-5] - 06-15-10 LPMT [Hoffman] Comment.pdf
RRC - 2-400 [8-4-1] - 06-15-10 LPMT [Hoffman] Comment.pdf
RRC - 1-120 [8-3] - 06-15-10 LPMT [Hoffman] Comment.pdf

June 16, 2010 Ruvolo E-mail to KEM, cc Drafters & Staff re 7.1:

I agree with your draft comments.

June 16, 2010 Ruvolo E-mail to KEM, cc Drafters & Staff re 7.3:

I agree with your additional comment to the Orange County committee.

June 16, 2010 McCurdy E-mail to KEM, cc Chair, Vice-Chairs & Staff:

Kevin,

It's finally your turn . . . you have exactly 40 minutes to complete this work J . . . I'm sure you're way ahead of me, but just in case . . .

**RRC – Rule 1-400 [7.1 – 7.6]
E-mails, etc. – Revised (6/21/2010)**

Additional comments in opposition or recommending modifications have been received for the following rules, and those **comments not previously sent to you** are attached here for your review. The Google site is also up-to-date (<http://sites.google.com/site/commentsrrc/byrule> .

- 1.6 (Agenda Item III.I) OCTC (sent with Randy's 6/15/10 e-mail)
- 1.7 (Agenda Item III.J) Co-Lead w/Kehr - OCTC; and Zitrin/Law Professors (sent with Randy's 6/15/10 e-mail)
- 1.8.2 (Agenda Item III.L) - OCTC (sent with Randy's 6/15/10 e-mail)
- 1.18 (Agenda Item III.FF) - 2 Comments: **COPRAC (attached)**; and OCTC (sent with Randy's 6/15/10 e-mail)
- 5.4 (Agenda Item III.DDD) OCTC (sent with Randy's 6/15/10 e-mail)
- 7.1 (Agenda Item III.MMM) OCTC (sent with Randy's 6/15/10 e-mail)
- 7.2 (Agenda Item III.NNN) OCTC (sent with Randy's 6/15/10 e-mail)
- 7.3 (Agenda Item III.OOO) OCTC; and Law Practice Management & Technology Section (sent with Randy's 6/15/10 e-mail)
- 7.5 (Agenda Item III.QQQ) OCTC (sent with Randy's 6/15/10 e-mail)

NOTE: As previously mentioned, the most important information needed for the assignment deadline and for preparing the agenda is the codrafters' decision as to whether revisions to a rule are being recommended. We need to know this in order to determine which rules will be consent items and which rules will not be consent items.

In reviewing public comments, although drafting RRC responses are important and need to be completed prior to the meeting, the primary information that must be submitted for the agenda are any and all proposed language changes to the rules. Please keep this mind when reviewing the public comments and when preparing your assignment submissions.

This message may include assignments for rules for which staff has not yet provided a draft commenter chart. We hope to provide any such charts as soon as possible, by a separate message.

Please note that the assignment deadline for these rules remains the same as previously stated -- **5:00 pm on Wednesday, June, 16, 2010.**

Attached:

RRC - [1-18] - 06-14-10 COPRAC Comment.pdf

June 17, 2010 Difuntorum E-mail to Drafters, cc Staff:

Rule 7.3 also has comments from OCTC (pasted below) and LPMT (in the attached compilation). Let us know if any revisions to rule are recommended in response to these comments.

Rule 7.3. Direct Contact with Prospective Clients.

1. OCTC supports this rule, but finds most of the Comments more appropriate for treatises, law review articles, and ethics opinions. We support the last two sentences of Comment 8.

June 17, 2010 KEM E-mail to McCurdy, Difuntorum & Lee, cc Drafters & Chair:

I've attached revised XDFT2.4 (6/17/10) of the Public Comment Chart, which includes the comments of LPMT and a suggested response. Neither JoElla nor Nace has had an opportunity to address the latter response, but I have previously circulated versions of the public comment chart for their review.

I do not recommend any changes to the Rule.

Please let me know if you have any questions.

Attached:

RRC - 1-400 [7-3] - Public Comment Chart - By Commenter - XDFT2.4 (06-17-10).doc

June 17, 2010 Ruvolo E-mail to Drafters, Chair & Staff:

I agree with Kevin's comment.

June 17, 2010 KEM E-mail to McCurdy, Difuntorum & Lee, cc Drafters & Chair:

Earlier I sent you the materials on 7.3. Now I'm sending you the materials for the remaining rules in the "7 series" [1-400]:

1. III.MMM. 7.1

- a. Public Comment Chart, XDFT2.3 (6/16/10).
- b. Rule, Post-PCD [#8] (6/16/10), redline, compared to PCD [#7] (5/30/09). Deleted Comment [4], definition of writing, because it is already a defined term in 1.0.1(n), and renumbered the remaining comments to conform to the Model Rule numbering order.
- c. Rule, Post-PCD [#8] (6/16/10), clean landscape version.

2. III.NNN. 7.2

- a. Public Comment Chart, XDFT2.1 (6/16/10).

3. III.PPP. 7.4

- a. Public Comment Chart, XDFT2.1 (6/16/10).

4. III.QQQ. 7.5

- a. Public Comment Chart, XDFT2.1 (6/16/10).

**RRC – Rule 1-400 [7.1 – 7.6]
E-mails, etc. – Revised (6/21/2010)**

- b. Rule, Post-PCD [#8] (6/16/10), redline, compared to PCD [#7] (5/31/09). Sentence added to end of Comment [1] per request of OCTC.
- c. Rule, Post-PCD [#8] (6/16/10), clean landscape version.

Please let me know if you have any questions.

Attached:

RRC - 1-400 [7-1] - Public Comment Chart - By Commenter - XDFT2.3 (06-16-10).doc
RRC - 1-400 [7-1] - Rule - Post-PCD [8] (06-16-10) - Cf. to PCD [7] (05-30-09) - LAND.doc
RRC - 1-400 [7-1] - Rule - Post-PCD [8] (06-16-10) - CLEAN-LAND.doc
RRC - 1-400 [7-2] - Public Comment Chart - By Commenter - XDFT2.1 (06-16-10).doc
RRC - 1-400 [7-4] - Public Comment Chart - By Commenter - XDFT2.1 (06-16-10).doc
RRC - 1-400 [7-5] - Public Comment Chart - By Commenter - XDFT2.1 (06-16-10).doc
RRC - 1-400 [7-5] - Rule - Post-PCD [8] (06-16-10) - Cf. to PCD [7] (05-31-09) - LAND.doc
RRC - 1-400 [7-5] - Rule - Post-PCD [8] (06-16-10) - CLEAN-LAND.doc

June 21, 2010 McCurdy E-mail to KEM, cc Chair, Vice-Chairs & Staff:

Kevin,

This message provides a public commenter chart for every rule you are assigned as a lead or co-lead drafter. We have reconciled all of the comments received against each commenter chart and there should now be a synopsis for every comment received. However, there are a number of comments for which an RRC Response is needed. Please take a look at each table and fill in any missing RRC Responses.

Our goal is to send out a supplemental mailing providing a copy of all of the final or near-final commenter charts on Tuesday or Wednesday, for receipt prior to the meeting this week.

If possible, please provide us with any revised charts no later than 5:00 pm, Tuesday, June 22nd.

Attached:

RRC - 3-100 [1-8-2] - Public Comment Chart - By Commenter - XDFT2 (06-21-10).doc (#)
RRC - 3-310 [1-7] - Public Comment Chart - By Commenter - XDFT3.3 (06-21-10)RLK-KEM-AT.doc (A)
RRC - [1-18] - Public Comment Chart - By Commenter - XDFT2.1 (06-21-10).doc
RRC - 1-310X [5-4] - Public Comment Chart - By Commenter - XDFT2 (06-21-10).doc (A,#)
RRC - 1-400 [7-1] - Public Comment Chart - By Commenter - XDFT2.3 (06-21-10).doc
RRC - 1-400 [7-2] - Public Comment Chart - By Commenter - XDFT2.1 (06-21-10).doc
RRC - 1-400 [7-3] - Public Comment Chart - By Commenter - XDFT2.4 (06-21-10).doc
RRC - 1-400 [7-4] - Public Comment Chart - By Commenter - XDFT2.1 (06-21-10).doc
RRC - 1-400 [7-5] - Public Comment Chart - By Commenter - XDFT2.1 (06-21-10).doc (A, R)
RRC - 3-100 [1-6] - Public Comment Chart - By Commenter - XDFT3.2 (06-21-10)KEM.doc

June 22, 2010 KEM E-mail to McCurdy re 1.7, 1.8.2, 5.4 & 7.5:

I've reviewed the charts you sent and updated them where necessary. Please substitute the following files for the files you sent me:

**RRC – Rule 1-400 [7.1 – 7.6]
E-mails, etc. – Revised (6/21/2010)**

RRC - 3-100 [1-8-2] - Public Comment Chart - By Commenter - XDFT2 (06-21-10).doc [Draft # should have been #2].

RRC - 3-310 [1-7] - Public Comment Chart - By Commenter - XDFT3.3 (06-21-10)RLK-KEM-AT2.doc [document you sent me was not alphabetized, which I've done; also note that I will review Bob's revisions to the chart and send in my responses later].

RRC - 1-310X [5-4] - Public Comment Chart - By Commenter - XDFT2 (06-21-10).doc [Draft # should have been #2 and it's been alphabetized].

RRC - 1-400 [7-5] - Public Comment Chart - By Commenter - XDFT2.3 (06-22-10).doc [Draft # should have been 2.3, also alphabetized and response to LACBA Access to Justice Committee].

June 21, 2010 Sapiro E-mail to RRC List:

I suggest that we reconsider the response to Orange County at page 67 of the agenda materials. They do not recommend deleting the standards. To the contrary, they recommend moving them into the rule itself. That would neither delete the standards nor dilute the effect of the standards.

June 22, 2010 Julien E-mail to KEM re 7.1:

I agree with your suggested response.

TOTAL = 4 Agree = 0
 Disagree = 0
 Modify = 3
 NI = 1

Rule 7.3. Direct Contact with Prospective Clients.
[Sorted by Commenter]

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
4	Law Practice Management Section ("LPMT") [William E. Hoffman]	M	Yes		<p>The Commenter believes that paragraph (a) indicates the State Bar "wants to muzzle lawyers from telling the truth directly to potential clients and from explaining how a lawyer's services might be of value to a particular member of the public." The commenter argues that the rule will have a chilling effect on First Amendment rights of lawyers and that Rule 7.3's savings clause "saves nothing." The commenter urges the State Bar to go beyond what is minimally required by the First Amendment.</p> <p>The Commenter also asserts that the provision overreaches and is "superfluous," using language that is hyperbolic and unnecessary.</p> <p>The Commenter proposes two alternative provisions:</p> <p>1. <u>Alternative #1</u> ("Preferred"):</p> <p>(a) A lawyer may by in person, live telephone or real time electronic contact solicit professional employment from a prospective client when a significant motive</p>	<p>The Commission declines to make either of the requested changes. The purported overreaching language the commenter complains of either closely tracks the language of the Model Rule or is carried forward from current rule 1-400. The Commission notes that this issue was squarely before the Commission during its deliberations. The Commission deliberated this issue extensively in e-mails and in a live meeting, and voted 7 to 2 (w/ one abstention) not to delete paragraph (a). The savings clause, "unless the communication is protected from abridgment by the Constitution of the United States or by the Constitution of the State of California," was added expressly to address the constitutional concerns. Finally, the Commission notes that the United States Supreme Court in <i>Edenfield v. Fane</i>, 507 U.S. 761, 113 S.Ct. 1792, 123 L.Ed.2d 543 (1993) stressed that lawyers, because of their special training and persuasive skills, cannot be compared to other professionals who are permitted to make in person solicitations of prospective clients. Absent further guidance from the Court, the Commission does not recommend diverging from the Model Rule standard.</p>

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

**Rule 7.3. Direct Contact with Prospective Clients.
[Sorted by Commenter]**

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					<p>for doing so is the lawyer's pecuniary gain, unless the communication is dishonest or misleading, or it involves intrusion, coercion, duress, compulsion, intimidation, threats, or vexatious or harassing conduct.</p> <p>2. <u>Alternative #2</u> ("Much less desirable")</p> <p>(a) A lawyer shall not by in person, live telephone or real-time electronic contact solicit professional employment from a prospective client when a significant motive for doing so is the lawyer's pecuniary gain, unless the communication is protected from abridgment by the Constitution of the United States or by the Constitution of the State of California, or unless the person contacted:</p> <ul style="list-style-type: none"> (1) is a lawyer; (2) has a family, close personal, or prior professional relationship with the lawyer; (3) has first contacted the lawyer; or (4) is an executive or senior manager of a prospective client. 	

**Rule 7.3. Direct Contact with Prospective Clients.
[Sorted by Commenter]**

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
3	Office of Chief Trial Counsel ("OCTC")	M	Yes		<p>OCTC supports this rule, but finds most of the Comments more appropriate for treatises, law review articles, and ethics opinions.</p> <p>We support the last two sentences of Comment [8].</p>	<p>As the Commission has noted with respect to other Rules, the comments are an important part of the Rules modeled on the ABA Model Rules, providing clarification of the black letter and guidance to lawyers on how to be in compliance with their professional obligations.</p> <p>No response required.</p>
2	Orange County Bar Association	M	Yes	(b)(2)	<p>Proposed Rule 7.3(b)(2) prohibits a lawyer from soliciting professional employment from a prospective client where the solicitation "is transmitted in any manner which involves <i>intrusion</i>, compulsion intimidation, threats, or vexatious or harassing conduct" (emphasis added). The OCBA concurs with the minority comments of the Commission that the word "intrusion," which is not included in the corresponding ABA Model Rule, should be stricken from the rule because arguably any manner in which a lawyer solicits professional employment from a prospective client may be perceived as intrusive, and thus unfairly may subject that lawyer to unnecessary and unwarranted discipline.</p>	<p>The Commission believes that the prohibition on intrusive conduct by a lawyer in soliciting legal business provides important protection of the solicited client's privacy rights. This protection outweighs the commenter's concerns.</p>
1	San Diego County Bar Association	M	Yes	(c)	<p>The commenter believes that the revisions to paragraph (c), i.e., adding the phrase "or words of similar import" and the clause, "or unless it is apparent from the context that the</p>	<p>The Commission did not make the requested change. Paragraph (c) is identical to Model Rule 7.3(c), except for the addition of the phrase, "or words of similar import," and the concluding clause:</p>

**Rule 7.3. Direct Contact with Prospective Clients.
[Sorted by Commenter]**

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					<p>communication is an advertisement,” and deleting CRPC 1-400, standard (5)'s reference to “12-point print” together “may promote misleading advertisements” because it no longer requires the word “Advertisement” or words of similar import to be on the first page of the document that is sent/communicated to the prospective client. The result may be that the recipient will be unable to distinguish between an official document and an advertisement. SDCBA is also concerned that this will leave open what is an “apparent” advertising communication.</p> <p>The commenter believes the changes in the Rule regarding streamlining and modernizing the standards will result in greater clarity.</p>	<p>“or unless it is apparent from the context that the communication is an advertisement.” The Commission believes the Model Rule language, as revised, provides sufficient public protection. The phrase “or words of similar import” is from Standard (5) to current rule 1-400 and the concluding clause simply recognizes that it is usually apparent from the communication itself that the communication is an advertisement.</p> <p>No response required.</p>

Rule 7.3 Direct Contact with Prospective Clients
(Commission’s Proposed Rule – Clean Version)

- (a) A lawyer shall not by in person, live telephone or real-time electronic contact solicit professional employment from a prospective client when a significant motive for doing so is the lawyer's pecuniary gain, unless the communication is protected from abridgment by the Constitution of the United States or by the Constitution of the State of California, or unless the person contacted:
 - (1) is a lawyer; or
 - (2) has a family, close personal, or prior professional relationship with the lawyer.
- (b) A lawyer shall not solicit professional employment from a prospective client by written, recorded or electronic communication or by in person, telephone or real-time electronic contact even when not otherwise prohibited by paragraph (a), if:
 - (1) the prospective client has made known to the lawyer a desire not to be solicited by the lawyer; or
 - (2) the solicitation is transmitted in any manner which involves intrusion, coercion, duress, compulsion, intimidation, threats, or vexatious or harassing conduct.
- (c) Every written, recorded or electronic communication from a lawyer soliciting professional employment from a prospective client known to be in need of legal services in a particular matter shall include the words “Advertising Material” or words of similar import on the outside envelope, if any, and at the beginning and ending of any recorded or

electronic communication, unless the recipient of the communication is a person specified in paragraphs (a)(1) or (a)(2), or unless it is apparent from the context that the communication is an advertisement.

- (d) Notwithstanding the prohibitions in paragraph (a), a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses in person or telephone contact to solicit memberships or subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.

COMMENT

[1] There is a potential for abuse inherent in direct in person, live telephone or real-time electronic contact by a lawyer with a prospective client known to need legal services. These forms of contact between a lawyer and a prospective client subject the layperson to the private importuning of the trained advocate in a direct interpersonal encounter. The prospective client, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult fully to evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer's presence and insistence upon being retained immediately. The situation is fraught with the possibility of undue influence, intimidation, and over reaching.

[2] This potential for abuse inherent in direct in person, live telephone or real-time electronic solicitation of prospective clients justifies its prohibition, particularly since lawyer advertising and written and

recorded communication permitted under Rule 7.2 offer alternative means of conveying necessary information to those who may be in need of legal services. Advertising and written and recorded communications which may be mailed or autodialed make it possible for a prospective client to be informed about the need for legal services, and about the qualifications of available lawyers and law firms, without subjecting the prospective client to direct in person, telephone or real-time electronic persuasion that may overwhelm the client's judgment.

- [3] The use of general advertising and written, recorded or electronic communications to transmit information from a lawyer to prospective clients, rather than direct in person, live telephone or real-time electronic contact, will help to assure that the information flows cleanly as well as freely. The contents of advertisements and communications permitted under Rule 7.2 can be permanently recorded so that they cannot be disputed and may be shared with others who know the lawyer. This potential for informal review is itself likely to help guard against statements and claims that might constitute false and misleading communications, in violation of Rule 7.1.
- [4] There is far less likelihood that a lawyer would engage in abusive practices against an individual who is a former client, or with whom the lawyer has a close personal or family relationship, or in situations in which the lawyer is motivated by considerations other than the lawyer's pecuniary gain. Nor is there serious potential for abuse when the person contacted is a lawyer. Consequently, the general prohibition in paragraph (a) and the requirements of paragraph (c) are not applicable in those situations. Also, paragraph (a) is not intended to prohibit a lawyer from participating in constitutionally protected activities of bona fide public or charitable legal-service organizations, or bona fide

political, social, civic, fraternal, employee or trade organizations whose purposes include providing or recommending legal services to its members or beneficiaries.

- [5] Even permitted forms of solicitation can be abused. Thus, any solicitation which (i) contains information which is false or misleading within the meaning of Rule 7.1, (ii) is transmitted in any manner which involves intrusion, coercion, duress, compulsion, intimidation, threats, or vexatious or harassing conduct within the meaning of paragraph (b)(2), or (iii) involves contact with a prospective client who has made known to the lawyer a desire not to be solicited by the lawyer within the meaning of paragraph (b)(1).
- [6] This Rule does not prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a bona fide group or prepaid legal plan for their members, insureds, beneficiaries or other third parties for the purpose of informing such entities of the availability of and details concerning the plan or arrangement which the lawyer or lawyer's firm is willing to offer.
- [7] The requirement in paragraph (c) that certain communications be marked "Advertising Material" or with words of similar import does not apply to communications sent in response to requests of potential clients or their representatives. Paragraph (c) also does not apply to general announcements by lawyers, including but not limited to changes in personnel or office location, nor does it apply where it is apparent from the context that the communication is an advertisement.
- [8] Paragraph (d) of this Rule permits a lawyer to participate with an organization which uses personal contact to solicit members for its group or prepaid legal service plan, provided that the personal contact

is not undertaken by any lawyer who would be a provider of legal services through the plan. The organization must not be owned by or directed (whether as manager or otherwise) by any lawyer or law firm that participates in the plan. For example, paragraph (d) would not permit a lawyer to create an organization controlled directly or indirectly by the lawyer and use the organization for the in person or telephone solicitation of legal employment of the lawyer through memberships in the plan or otherwise. The communication permitted by these organizations also must not be directed to a person known to need legal services in a particular matter, but is to be designed to inform potential plan members generally of another means of affordable legal services. Lawyers who participate in a legal service plan must reasonably assure that the plan sponsors are in compliance with Rules 7.1, 7.2 and 7.3(b). See also Rules 5.4 and 8.4(a).