

Proposed Rule 7.1 [RPC 1-400] “Communications Concerning Availability of Legal Services”

(Draft #7, 5/30/09)

Summary: Proposed Rule 7.1 sets out the general prohibition on a lawyer making false and misleading communications concerning the availability of legal services and largely carries forward the definition of “communication” in current rule 1-400(A). It also carries forward several Standards from rule 1-400 that create a presumption that the rules in the 7 series have been violated.

Comparison with ABA Counterpart

Rule	Comment
<input type="checkbox"/> ABA Model Rule substantially adopted	<input checked="" 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 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

Statute

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 10

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:

Very Controversial – Explanation:

Moderately Controversial – Explanation:

Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed* Rule 7.1 Communications Concerning the Availability of Legal Services

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. 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, Draft 7 (5/30/09)

INTRODUCTION (continued):

3. Proposed Rule 7.1 entails the basic concept addressed in Model Rule 7.1: the prohibition on a lawyer making false and misleading communications concerning the availability of legal services.
4. However, proposed Rule 7.1 diverges from the Model Rule in a number of ways, including:
 - (i) it retains a definition of “communication” from current rule 1-400, updated to recognize changes occasioned by Internet usage (see paragraph (a));
 - (ii) it expands on the Model Rule’s definition of “false and misleading” communication (see paragraph (c));
 - (iii) it prohibits “any” misrepresentation of fact or law, and not just material misrepresentations (see paragraph (c)(2));
 - (iv) it retains a provision authorizing the Board to formulate and adopt standards designating certain communications that will be presumed violations of the Rule, and retains some of the standards presently found in current rule 1-400 (see paragraph (d)). The Office of the Chief Trial Counsel requested retention of these standards, and the Commission agrees.
5. The Commission recommends retaining for the most part the Comment to Model Rule 7.1, revised to conform to proposed changes to the Rule.
6. *Other Definitions.* The Commission does not recommend carrying forward other definitions from current rule 1-400 (e.g., “solicitation”) or including definitions currently found in the Business & Professions Code (e.g., “advertisement,” found in § 6157(c)). The regulation of advertising is now relatively well-settled and these definitions, originally drafted in the early stages of the regulation of lawyer advertising and solicitation to provide guidance to lawyers on precisely what kinds of communication were regulated, are no longer necessary.

INTRODUCTION:

7. *Retention of Marketing Materials.* Both current rule 1-400(F) and previous versions of the Model Rules contain a requirement that a lawyer retain, for two years, a copy of any communication the lawyer had made in electronic or written media. The Commission agrees with the ABA Ethics 2000 Commission that the requirement “has become increasingly burdensome, and such records are seldom used for disciplinary purposes,” (ABA Ethics 2000 Reporters Explanation of Changes, Rule 7.2), and so recommends that the retention requirement not be retained. However, the Commission notes that if this recommendation is accepted, Bus. & Prof. Code § 6159.1, which requires the retention of advertisements for a period of one year, should be repealed. Because it is necessary for Rule 7.1 and Bus. & Prof. Code § 6159.1 to be consistent, the potential alternative to a change in the statute would be for Rule 7.1 to require a one-year period of retention, but the Commission does not favor that alternative.

8. *Variations 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 align="center"><u>ABA Model Rule</u> Rule 7.1 Communications Concerning A Lawyer's Services</p>	<p align="center"><u>Commission's Proposed Rule*</u> Rule 7.1 Communications Concerning A Lawyer's <u>the Availability of Legal</u> Services</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p>(a) <u>For purposes of Rules 7.1 through 7.5, "communication" means any message or offer made by or on behalf of a lawyer concerning the availability for professional employment of a lawyer or a lawyer's law firm directed to any former, present, or prospective client, including but not limited to the following:</u></p> <p>(1) <u>Any use of firm name, trade name, fictitious name, or other professional designation of such lawyer or law firm; or</u></p> <p>(2) <u>Any stationery, letterhead, business card, sign, brochure, domain name, Internet web page or web site, e-mail, other material sent or posted by electronic transmission, or other writing describing such lawyer or law firm; or</u></p> <p>(3) <u>Any advertisement (regardless of medium) of such lawyer or law firm directed to the general public or any substantial portion thereof; or</u></p>	<p>Title of Rule. The substitution in the title of the phrase "the Availability of Legal Services" for "a Lawyer's Services" is intended to convey that proposed Rule 7.1 regulates only those instances when a lawyer or law firm communicates to prospective clients their availability to provide legal services.</p> <p>Paragraph (a). Paragraph (a) defines the term "communication," and imports paragraph (A) of current rule 1-400 into Rule 7.1, with some revisions. The Commission determined that a definition of communication, updated to address new forms of communication, is warranted in order to enhance client protection by reducing the risk of uncertainty as to what this Rule covers; the Model Rule has no such definition. The listing in subparagraphs (a)(1) – (4) of the kinds of communication covered by the Rule is not exclusive.</p> <p>Subparagraph (a)(1). Is identical to current rule 1-400(A)(1), except that "lawyer" is substituted for "member."</p> <p>Subparagraph (a)(2). The phrase, "domain name, Internet web page or web site, e-mail, other material sent or posted by electronic transmission," has been substituted for "or other comparable written material" in rule 1-400(A)(2) in order to provide guidance on the kinds of communication, including those commonly found on the Internet, that are regulated under Chapter 7 of the Proposed Rules.</p> <p>Subparagraph (a)(3) is identical to current rule 1-400(A)(3), except that "lawyer" is substituted for "member."</p>

* Proposed Rule, Draft 7 (5/30/09). Redline/strikeout showing changes to the ABA Model Rule
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<p align="center"><u>ABA Model Rule</u> Rule 7.1 Communications Concerning A Lawyer's Services</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 7.1 Communications Concerning A Lawyer's <u>the Availability of Legal</u> Services</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p><u>(4) Any unsolicited correspondence, electronic transmission, or other writing from a lawyer or law firm directed to any person or entity.</u></p>	<p><i>Subparagraph (a)(4).</i> The phrase “electronic transmission, or other writing” has been added to subparagraph (4) to conform its construction to revised subparagraph (2).</p>
		<p><i>Paragraphs (b) and (c) – Introduction.</i> The two sentences that comprise Model Rule 7.1 have been divided into two separate paragraphs. Because the concepts contained in those two sentences are distinct, the Commission believes that readers of the Rule will more easily grasp their different meanings by placing them in different paragraphs: The first sentence contains the operative prohibition and states generally what kind of conduct is prohibited (making “a false or misleading communication”); the second sentence defines with specificity the prohibited conduct.</p>
<p>A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services.</p>	<p><u>(b)</u> A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services <u>as defined herein.</u></p>	<p><u>Paragraph (b).</u> Paragraph (b) largely tracks the first sentence of Model Rule 7.1. However, the phrase “about a lawyer's or the lawyer's services” in Model Rule 7.1 has been replaced by the phrase “as defined herein,” as that limitation is now contained in paragraph (a), which defines the term “communication.”</p>
<p>A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.</p>	<p><u>(c)</u> A communication is false or misleading if it:</p>	<p><u>Paragraph (c).</u> Paragraph (c) is largely derived from current rule 1-400(D) and identifies with greater specificity than the second sentence of Model Rule 7.1 when a communication is false or misleading.</p>

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	<p>(1) <u>Contains any untrue statement; or</u></p>	<p><i>Subparagraphs (c)(1), (3) and (4)</i> are identical to subparagraphs (1), (2) and (3) of current rule 1-400(D), respectively.¹ Subparagraphs (c)(1), (3) and (4) add clarity as to precisely what is prohibited by the operative language of proposed Rule 7.1(b).</p>
	<p>(2) <u>Contains a material misrepresentation of fact or law; or</u></p>	<p><i>Subparagraph (c)(2)</i> adopts verbatim part of the second sentence to Model Rule 7.1.</p>
	<p>(3) <u>Contains any matter, or presents or arranges any matter in a manner or format that is false, deceptive, or that confuses, deceives, or misleads the public; or</u></p>	<p><i>Subparagraph (c)(3)</i> is identical to current rule 1-400(D)(2).</p>
	<p>(4) <u>Omits to state any a-</u>fact necessary to make the statements <u>made, considered as a whole in the light of circumstances under which they are made,</u> not materially misleading.</p>	<p><i>Subparagraph (c)(4)</i> is identical to current rule 1-400(D)(3). It is similar in concept to the second sentence of Model Rule 7.1.</p>

¹ The concepts found in subsections (4), (5) and (6) of rule 1-400(D) have been moved to other rules in the Chapter 7 series of proposed Rules. The concepts now found in rule 1-400(D)(4) and (5) may now be found in proposed Rules 7.3(c) and 7.3(b)(2), respectively. See proposed Rule 7.3 for a further discussion of these concepts. The language formerly appearing in rule 1-400(D)(6) may now be found in proposed Rule 7.4(d).

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	<p>(d) <u>The Board of Governors of the State Bar may formulate and adopt standards as to communications that will be presumed to violate Rule 7.1, 7.2, 7.3, 7.4 or 7.5. The standards shall only be used as presumptions affecting the burden of proof in disciplinary proceedings involving alleged violations of these rules. "Presumption affecting the burden of proof" means that presumption defined in Evidence Code sections 605 and 606. Such standards formulated and adopted by the Board, as from time to time amended, shall be effective and binding on all lawyers.</u></p>	<p>Paragraph (d) retains, with minor revisions, current rule 1-400(E), which authorizes the Board of Governors of the State Bar of California to promulgate standards that may be used as presumptions affecting which party has the burden of proof in disciplinary proceedings. The word "shall" in current rule 1-400(E) has been changed to "may," as the Board's authority to promulgate any standards beyond those already extant is discretionary.</p>

<p align="center">ABA Model Rule Rule 7.1 Communications Concerning A Lawyer's Services Comment</p>	<p align="center">Commission's Proposed Rule* Rule 7.1 Communications Concerning the Availability of Legal Services Comment</p>	<p align="center">Explanation of Changes to the ABA Model Rule</p>
<p>[1] This Rule governs all communications about a lawyer's services, including advertising permitted by Rule 7.2. Whatever means are used to make known a lawyer's services, statements about them must be truthful.</p>	<p>[1] This Rule governs all communications about a lawyer's<u>the availability of legal</u> services <u>from lawyers and law firms</u>, including advertising permitted by Rule 7.2. Whatever means are used to make known a lawyer's services, statements about them must be truthful. <u>The requirement of truthfulness in a communication under this Rule includes representations about the law.</u></p>	<p>Comment [1] is based on Model Rule 7.1, cmt. [1]. Similar to the title, comment [1] emphasizes that proposed Rule 7.1 governs all communications "about the availability of legal services from lawyers and law firms."</p> <p>The Commission added the last sentence of the comment to stress that the Rule also governs representations about the law in covered communications. See Explanation of Changes, paragraph (c)(2).</p>
<p>[2] Truthful statements that are misleading are also prohibited by this Rule. A truthful statement is misleading if it omits a fact necessary to make the lawyer's communication considered as a whole not materially misleading. A truthful statement is also misleading if there is a substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable factual foundation.</p>	<p>[2] Truthful<u>This Rule prohibits truthful</u> statements that are misleading are also prohibited by this Rule. A truthful statement is misleading if it omits a fact necessary to make the lawyer's communication considered as a whole not materially misleading. A truthful statement is also misleading if there is a substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable factual foundation.</p>	<p>Comment [2] is based on Model Rule 7.1, cmt. [2]. The changes to the first sentence are made to conform to California Rule style. See, e.g., Bryan A. Garner, GUIDELINES FOR DRAFTING AND EDITING COURT RULES (1996). No change in substance is intended.</p> <p>The second and third sentences of comment [2] are identical to the second and third sentences of Model Rule 7.1, cmt. [2].</p>
<p>[3] An advertisement that truthfully reports a lawyer's achievements on behalf of clients or former clients may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference</p>	<p>[3] An advertisement that truthfully reports a lawyer's achievements on behalf of clients or former clients may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference</p>	<p>Comment [3] is nearly identical to Model Rule 7.1, cmt. [3]. The only change to the Model Rule comment entails revising the last sentence as follows: "The inclusion of an appropriate disclaimer or qualifying language may avoid creating unjustified expectations or otherwise misleading a prospective client." The foregoing revision is intended to address the concern that the language in</p>

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<p align="center"><u>ABA Model Rule</u> Rule 7.1 Communications Concerning A Lawyer's Services Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 7.1 Communications Concerning the Availability of Legal Services Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>to the specific factual and legal circumstances of each client's case. Similarly, an unsubstantiated comparison of the lawyer's services or fees with the services or fees of other lawyers may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison can be substantiated. The inclusion of an appropriate disclaimer or qualifying language may preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead a prospective client.</p>	<p>to the specific factual and legal circumstances of each client's case. Similarly, an unsubstantiated comparison of the lawyer's services or fees with the services or fees of other lawyers may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison can be substantiated. The inclusion of an appropriate disclaimer or qualifying language may preclude a finding that a statement is likely to create <u>avoid creating</u> unjustified expectations or otherwise mislead <u>misleading</u> a prospective client.</p>	<p>comment [3] might be construed to suggest that a disclaimer is a panacea for any misstatement or misrepresentation, intended or otherwise.</p>
	<p><u>[4] As used in paragraph (a), "writing" means any writing as defined in the Evidence Code.</u></p>	<p>Comment [4] has no counterpart in Model Rule 7.1. Comment [4] is intended to provide lawyers with a convenient cross-reference to the meaning of "writing" as used in the Rule. See also current rule 3-310(A)(3).</p>
	<p><u>[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.</u></p>	<p>Comment [5] has no counterpart in Model Rule 7.1. Comment [5] is intended to avoid the misapprehension that the list of communications in subparagraphs (a)(1) – (4) was intended to be exclusive, and gives an example of a type of communication not expressly listed (metatag) that nevertheless would be regulated under the Rule.</p>
<p>[4] See also Rule 8.4(e) for the prohibition against stating or implying an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law.</p>	<p>[4] See also Rule 8.4(e) for the prohibition against stating or implying an ability to influence improperly a government agency or official or to achieve results by means that violate the <u>these</u> Rules of Professional Conduct or other law.</p>	<p>Comment [6] is identical to Model Rule 7.1, cmt. [4], which provides a cross-reference to Rule 8.4(e). Placing the prohibition against such statements in Rule 8.4(e) emphasizes that the prohibition is not limited to statements made in connection with the marketing of legal services. See ABA Ethics 2000 Reporter's Explanation of Changes.</p>

<p align="center"><u>ABA Model Rule</u> Rule 7.1 Communications Concerning A Lawyer's Services Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 7.1 Communications Concerning the Availability of Legal Services Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p><u>Standards</u></p> <p><u>Pursuant to paragraph (d), the Board of Governors has adopted the following standards related to paragraph (b) of this Rule:</u></p>	<p>Pursuant to proposed Rule 7.1(d), the Board of Governors has authority to “formulate and adopt standards as to communications that will be presumed to violate Rule 7.1, 7.2, 7.3, 7.4 or 7.5.” This provision is a carryover from current rule 1-400(E). The Commission recommends that current standards (1), (2), (13), (14), (15) and (16) be retained in paragraph (e) as standards (1), (2), (3), (4), (5) and (6), respectively. The Commission has made this recommendation on the advice of the Office of Chief Trial Counsel of the State Bar of California (“OCTC”) that deleting these standards would make prosecution difficult were the conduct proscribed under those standards to occur. After reviewing these current standards, the Commission concluded that no such dilution of the effect of the Rule would be appropriate, and it therefore recommends their retention.</p> <p>In addition, on the recommendation of OCTC, several of the current standards have been deleted. They are current standards (3), (4), (7) and (9). OCTC’s position is that they simply set forth conduct which is untruthful, deceptive or misleading in and of itself, and that a violation of the Rule can still be shown because the conduct violates proscriptions set out in Rule 7.1(b), 7.3(a) or 7.3(b).</p> <p>Further, the concepts in several of the current standards have been retained either as part of another rule or as part of the Discussion to another rule. They are:</p> <ul style="list-style-type: none"> (i) current standard (5), which has been retained as proposed Rule 7.3(c), with modifications to conform it to the language of Model Rule 7.3(c); (ii) current standard (6), which has been retained, with modifications, as proposed Rule 7.5(a);

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		<p>(iii) current standard (8), which has been retained largely intact as proposed Rule 7.5(d) and the second sentence of proposed Rule 7.5, cmt. [2];</p> <p>(iv) current standard (10), which has been retained, with slight modifications, as proposed Rule 7.2(b)(2); and</p> <p>(v) current standard (12), which has been retained as proposed Rule 7.2(c), with modifications to conform it to the language of Model Rule 7.2(c).</p> <p>Finally, note that standard (11) previously had been repealed, effective June 1, 1997. Its operative language was inserted as current rule 1-400(D)(6), and that language may now be found in proposed Rule 7.4(d).</p>
	<p>(1) A "communication" that contains guarantees, warranties, or predictions regarding the result of the representation.</p>	<p>Current rule 1-400, Standard (1).</p>
	<p>(2) A "communication" that contains testimonials about or endorsements of a lawyer unless such communication also contains an express disclaimer such as "this testimonial or endorsement does not constitute a guarantee, warranty, or prediction regarding the outcome of your legal matter."</p>	<p>Current rule 1-400, Standard (2), with "lawyer" substituted for "member."</p>

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	<p>(3) <u>A "communication" that contains a dramatization unless such communication contains a disclaimer that states "this is a dramatization" or words of similar import.</u></p>	<p>Current rule 1-400, Standard (13).</p>
	<p>(4) <u>A "communication" that states or implies "no fee without recovery" unless such communication also expressly discloses whether or not the client will be liable for costs.</u></p>	<p>Current rule 1-400, Standard (14).</p>
	<p>(5) <u>A "communication" that states or implies that a lawyer is able to provide legal services in a language other than English unless the lawyer can actually provide legal services in such language or the communication also states in the language of the communication (a) the employment title of the person who speaks such language and (b) that the person is not a member of the State Bar of California, if that is the case.</u></p>	<p>Current rule 1-400, Standard (15), with "lawyer" substituted for "member."</p>
	<p>(6) <u>An unsolicited "communication" transmitted to the general public or any substantial portion thereof primarily directed to seeking professional employment primarily for pecuniary gain that sets forth a specific fee or range of fees for a particular service where, in fact, the lawyer charges a greater fee than advertised in such communication within a period of 90 days</u></p>	<p>Current rule 1-400, Standard (16).</p>

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	<p><u>following dissemination of such communication, unless such communication expressly specifies a shorter period of time regarding the advertised fee. Where the communication is published in the classified or "yellow pages" section of telephone, business or legal directories or in other media not published more frequently than once a year, the lawyer shall conform to the advertised fee for a period of one year from initial publication, unless such communication expressly specifies a shorter period of time regarding the advertised fee.</u></p>	

Rule 7.1 Communications Concerning the Availability of Legal Services

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

- (a) For purposes of Rules 7.1 through 7.5, “communication” means any message or offer made by or on behalf of a lawyer concerning the availability for professional employment of a lawyer or a lawyer’s law firm directed to any former, present, or prospective client, including but not limited to the following:
- (1) Any use of firm name, trade name, fictitious name, or other professional designation of such lawyer or law firm; or
 - (2) Any stationery, letterhead, business card, sign, brochure, domain name, Internet web page or web site, e-mail, other material sent or posted by electronic transmission, or other writing describing such lawyer or law firm; or
 - (3) Any advertisement (regardless of medium) of such lawyer or law firm directed to the general public or any substantial portion thereof; or
 - (4) Any unsolicited correspondence, electronic transmission, or other writing from a lawyer or law firm directed to any person or entity.
- (b) A lawyer shall not make a false or misleading communication as defined herein.
- (c) A communication is false or misleading if it:
- (1) Contains any untrue statement; or
 - (2) Contains ~~any~~ material misrepresentation of fact or law; or
 - (3) Contains any matter, or presents or arranges any matter in a manner or format ~~which~~that is false, deceptive, or ~~which~~that confuses, deceives, or misleads the public; or
 - (4) Omits to state any fact necessary to make the statements made, in the light of circumstances under which they are made, not materially misleading ~~to the public~~.
- (d) The Board of Governors of the State Bar may formulate and adopt standards as to communications ~~which~~that will be presumed to violate Rule 7.1, 7.2, 7.3, 7.4 or 7.5. The standards shall only be used as presumptions affecting the burden of proof in disciplinary proceedings involving alleged violations of these ~~rules~~Rules. “Presumption affecting the burden of proof” means that presumption defined in Evidence Code sections 605 and 606. Such standards formulated and adopted by the Board, as from time to time amended, shall be effective and binding on all lawyers.

COMMENT

- [1] This Rule governs all communications about the availability of legal services from lawyers and law firms, including advertising permitted by Rule 7.2. Whatever means are used to make known a lawyer’s services, statements about them must be truthful. The requirement of truthfulness in a communication under this Rule includes representations about the law.

- [2] ~~This Rule 7.1 is also intended to prohibit~~ prohibits truthful statements that are misleading. A truthful statement is misleading if it omits a fact necessary to make the lawyer's communication considered as a whole not materially misleading. A truthful statement is also misleading if there is a substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable factual foundation.
- [3] An advertisement that truthfully reports a lawyer's achievements on behalf of clients or former clients may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case. Similarly, an unsubstantiated comparison of the lawyer's services or fees with the services or fees of other lawyers may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison can be substantiated. The inclusion of an appropriate disclaimer or qualifying

Standards

Pursuant to ~~Rule 7.1~~ paragraph (d), the Board of Governors has adopted the following standards related to paragraph (b) of this Rule:

- (1) A "communication" ~~which~~ that contains guarantees, warranties, or predictions regarding the result of the representation.
- (2) A "communication" ~~which~~ that contains testimonials about or endorsements of a lawyer unless such communication also contains an express disclaimer such as "this testimonial or endorsement does not constitute a guarantee, warranty, or prediction regarding the outcome of your legal matter."

language may avoid creating unjustified expectations or otherwise misleading a prospective client.

- [4] As used in paragraph (a), "writing" means any writing as defined in the Evidence Code.
- [5] The list of communications under paragraphs (a)(1) through (a)(4) of this Rule is not ~~intended to be~~ 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.
- [6] See also Rule 8.4(e) for the prohibition against stating or implying an ability to influence improperly a government agency or official or to achieve results by means that violate ~~the~~ these Rules of Professional ~~Conduct~~ or other law.
- (3) A "communication" ~~which~~ that contains a dramatization unless such communication contains a disclaimer ~~which~~ that states "this is a dramatization" or words of similar import.
- (4) A "communication" ~~which~~ that states or implies "no fee without recovery" unless such communication also expressly discloses whether or not the client will be liable for costs.
- (5) A "communication" ~~which~~ that states or implies that a lawyer is able to provide legal services in a language other than English unless the lawyer can actually provide legal services in such language or the communication also states in the language of the communication (a) the employment title of the person who speaks such language and (b) that the person is not a member of the State Bar of California, if that is the case.

- (6) An unsolicited “communication” transmitted to the general public or any substantial portion thereof primarily directed to seeking professional employment primarily for pecuniary gain ~~which~~that sets forth a specific fee or range of fees for a particular service where, in fact, the lawyer charges a greater fee than advertised in such communication within a period of 90 days following dissemination of such communication, unless such communication expressly specifies a shorter period of time regarding the advertised fee. Where the communication is published in the classified or “yellow pages” section of telephone, business or legal directories or in other media not published more frequently than once a year, the lawyer shall conform to the advertised fee for a period of one year from initial publication, unless such communication expressly specifies a shorter period of time regarding the advertised fee.

Rule ~~1-400 Advertising and Solicitation~~ 7.1 Communications Concerning the Availability of Legal Services

(Comparison of the Current Proposed Rule to Current California Rule)

~~(A)~~ (a) For purposes of ~~this rule~~ Rules 7.1 through 7.5, "communication" means any message or offer made by or on behalf of a ~~member~~ lawyer concerning the availability for professional employment of a ~~member~~ lawyer or a lawyer's law firm directed to any former, present, or prospective client, including but not limited to the following:

- ~~(1)~~ (1) Any use of firm name, trade name, fictitious name, or other professional designation of such ~~member~~ lawyer or law firm; or
- ~~(2)~~ (2) Any stationery, letterhead, business card, sign, brochure, domain name, Internet web page or web site, e-mail, other material sent or posted by electronic transmission, or other ~~comparable written material~~ writing describing such ~~member, lawyer or~~ lawyer or law firm, ~~or lawyers;~~ or
- ~~(3)~~ (3) Any advertisement (regardless of medium) of such ~~member~~ lawyer or law firm directed to the general public or any substantial portion thereof; or
- ~~(4)~~ (4) Any unsolicited correspondence, electronic transmission, or other writing from a ~~member~~ lawyer or law firm directed to any person or entity.

~~(B) For purposes of this rule, a "solicitation" means any communication:~~

(b) A lawyer shall not make a false or misleading communication as defined herein.

~~(1) Concerning the availability for professional employment of a member or a law firm in which a significant motive is pecuniary gain; and~~

~~(2) Which is:~~

~~(a) delivered in person or by telephone; or~~

~~(b) directed by any means to a person known to the sender to be represented by counsel in a matter which is a subject of the communication.~~

~~(C) A solicitation shall not be made by or on behalf of a member or law firm to a prospective client with whom the member or law firm has no family or prior professional relationship, unless the solicitation is protected from abridgment by the Constitution of the United States or by the Constitution of the State of California. A solicitation to a former or present client in the discharge of a member's or law firm's professional duties is not prohibited.~~

~~(D)~~ (c) A communication is false or ~~a solicitation (as defined herein)~~ shall ~~not~~ misleading if it:

~~(1) Contain~~ (1) Contains any untrue statement; or

(2) Contains a material misrepresentation of fact or law; or

~~(2) Contain~~ (3) Contains any matter, or ~~present~~ presents or ~~arrange~~ arranges any matter in a manner or format ~~which~~ that is false,

deceptive, or ~~which tends to confuse~~that confuses, ~~deceived~~deceives, or ~~mislead~~misleads the public; or

~~(3) Omit~~ (4) Omits to state any fact necessary to make the statements made, in the light of circumstances under which they are made, not materially misleading ~~to the public; or,~~

~~(4) Fail to indicate clearly, expressly, or by context, that it is a communication or solicitation, as the case may be; or~~

~~(5) Be transmitted in any manner which involves intrusion, coercion, duress, compulsion, intimidation, threats, or vexatious or harassing conduct.~~

~~(6) State that a member is a "certified specialist" unless the member holds a current certificate as a specialist issued by the Board of Legal Specialization, or any other entity accredited by the State Bar to designate specialists pursuant to standards adopted by the Board of Governors, and states the complete name of the entity which granted certification.~~

~~(E)~~ (d) The Board of Governors of the State Bar ~~shall~~may formulate and adopt standards as to communications ~~which~~that will be presumed to violate ~~this rule 1-400~~Rule 7.1, 7.2, 7.3, 7.4 or 7.5. The standards shall only be used as presumptions affecting the burden of proof in disciplinary proceedings involving alleged violations of these ~~rules~~Rules. "Presumption affecting the burden of proof" means that presumption defined in Evidence Code sections 605 and 606. Such standards formulated and adopted by the Board, as from time to time amended, shall be effective and binding on all ~~members~~lawyers.

~~(F) 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.~~COMMENT

[1] This Rule governs all communications about the availability of legal services from lawyers and law firms, including advertising permitted by Rule 7.2. Whatever means are used to make known a lawyer's services, statements about them must be truthful. The requirement of truthfulness in a communication under this Rule includes representations about the law.

~~*[Publisher's Note: Former rule 1-400 (D)(6) repealed by order of the Supreme Court effective November 30, 1992. New rule 1-400 (D)(6) added by order of the Supreme Court effective June 1, 1997.]*~~

[2] This Rule prohibits truthful statements that are misleading. A truthful statement is misleading if it omits a fact necessary to make the lawyer's communication considered as a whole not materially misleading. A truthful statement is also misleading if there is a substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable factual foundation.

[3] An advertisement that truthfully reports a lawyer's achievements on behalf of clients or former clients may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case. Similarly, an unsubstantiated comparison of the lawyer's services or fees with the services or fees of other lawyers may

be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison can be substantiated. The inclusion of an appropriate disclaimer or qualifying language may avoid creating unjustified expectations or otherwise misleading a prospective client.

- [4] As used in paragraph (a), "writing" means any writing as defined in the Evidence Code.
- [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.
- [6] See also Rule 8.4(e) for the prohibition against stating or implying an ability to influence improperly a government agency or official or to achieve results by means that violate these Rules or other law.

Standards:

~~Pursuant to rule 1-400(E) the Board of Governors of the State Bar has adopted the following standards, effective May 27, 1989, unless noted otherwise, as forms of "communication" defined in rule 1-400(A) which are presumed to be in violation of rule 1-400:~~

Pursuant to paragraph (d), the Board of Governors has adopted the following standards related to paragraph (b) of this Rule:

- ~~(1)~~ (1) A "communication" ~~which~~that contains guarantees, warranties, or predictions regarding the result of the representation.

- ~~(2)~~ (2) A "communication" ~~which~~that contains testimonials about or endorsements of a ~~member~~lawyer unless such communication also contains an express disclaimer such as "this testimonial or endorsement does not constitute a guarantee, warranty, or prediction regarding the outcome of your legal matter."

~~(3) A "communication" which is delivered to a potential client whom the member knows or should reasonably know is in such a physical, emotional, or mental state that he or she would not be expected to exercise reasonable judgment as to the retention of counsel.~~

~~(4) A "communication" which is transmitted at the scene of an accident or at or en route to a hospital, emergency care center, or other health care facility.~~

~~(5) A "communication," except professional announcements, seeking professional employment for pecuniary gain, which is transmitted by mail or equivalent means which does not bear the word "Advertisement," "Newsletter" or words of similar import in 12-point print on the first page. If such communication, including firm brochures, newsletters, recent legal development advisories, and similar materials, is transmitted in an envelope, the envelope shall bear the word "Advertisement," "Newsletter" or words of similar import on the outside thereof.~~

~~(6) A "communication" in the form of a firm name, trade name, fictitious name, or other professional designation which states or implies a relationship between any member in private practice and a government agency or instrumentality or a public or non-profit legal services organization.~~

~~(7) A "communication" in the form of a firm name, trade name, fictitious name, or other professional designation which states or implies that a member has a relationship to any other lawyer or a law firm as a partner or associate, or officer or shareholder pursuant to Business and Professions Code sections 6160-6172 unless such relationship in fact exists.~~

~~(8) A "communication" which states or implies that a member or law firm is "of counsel" to another lawyer or a law firm unless the former has a relationship with the latter (other than as a partner or associate, or officer or shareholder pursuant to Business and Professions Code sections 6160-6172) which is close, personal, continuous, and regular.~~

~~(9) A "communication" in the form of a firm name, trade name, fictitious name, or other professional designation used by a member or law firm in private practice which differs materially from any other such designation used by such member or law firm at the same time in the same community.~~

~~(10) A "communication" which 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.~~

~~(11) (Repealed. See rule 1-400(D)(6) for the operative language on this subject.)~~

~~(12) A "communication," except professional announcements, in the form of an advertisement primarily directed to seeking professional employment primarily for pecuniary gain transmitted to the general public or any substantial portion thereof by mail or equivalent means or by means of~~

~~television, radio, newspaper, magazine or other form of commercial mass media which does not state the name of the member responsible for the communication. When the communication is made on behalf of a law firm, the communication shall state the name of at least one member responsible for it.~~

~~(13)-(3)~~ A "communication" whichthat contains a dramatization unless such communication contains a disclaimer whichthat states "this is a dramatization" or words of similar import.

~~(13)-(4)~~ A "communication" whichthat states or implies "no fee without recovery" unless such communication also expressly discloses whether or not the client will be liable for costs.

~~(15)-(5)~~ A "communication" whichthat states or implies that a memberlawyer is able to provide legal services in a language other than English unless the memberlawyer can actually provide legal services in such language or the communication also states in the language of the communication (a) the employment title of the person who speaks such language and (b) that the person is not a member of the State Bar of California, if that is the case.

~~(16)-(6)~~ An unsolicited "communication" transmitted to the general public or any substantial portion thereof primarily directed to seeking professional employment primarily for pecuniary gain whichthat sets forth a specific fee or range of fees for a particular service where, in fact, the memberlawyer charges a greater fee than advertised in such communication within a period of 90 days following dissemination of such communication, unless such communication expressly specifies a shorter period of time regarding the advertised fee. Where the communication is published in the classified or "yellow pages" section

of telephone, business or legal directories or in other media not published more frequently than once a year, the ~~member~~lawyer shall conform to the advertised fee for a period of one year from initial publication, unless such communication expressly specifies a shorter period of time regarding the advertised fee. ~~(Amended by order of Supreme Court, operative September 14, 1992. Standard (5) amended by the Board of Governors, effective May 11, 1994. Standards (12)–(16) added by the Board of Governors, effective May 11, 1994. Standard (11) repealed June 1, 1997)~~

Rule 7.1 Communications Concerning the Availability of Legal Services
(Commission’s Proposed Rule – Clean Version)

- (a) For purposes of Rules 7.1 through 7.5, “communication” means any message or offer made by or on behalf of a lawyer concerning the availability for professional employment of a lawyer or a lawyer’s law firm directed to any former, present, or prospective client, including but not limited to the following:
- (1) Any use of firm name, trade name, fictitious name, or other professional designation of such lawyer or law firm; or
 - (2) Any stationery, letterhead, business card, sign, brochure, domain name, Internet web page or web site, e-mail, other material sent or posted by electronic transmission, or other writing describing such lawyer or law firm; or
 - (3) Any advertisement (regardless of medium) of such lawyer or law firm directed to the general public or any substantial portion thereof; or
 - (4) Any unsolicited correspondence, electronic transmission, or other writing from a lawyer or law firm directed to any person or entity.
- (b) A lawyer shall not make a false or misleading communication as defined herein.
- (c) A communication is false or misleading if it:
- (1) Contains any untrue statement; or
 - (2) Contains a material misrepresentation of fact or law; or
 - (3) Contains any matter, or presents or arranges any matter in a manner or format that is false, deceptive, or that confuses, deceives, or misleads the public; or
 - (4) Omits to state any fact necessary to make the statements made, in the light of circumstances under which they are made, not materially misleading.
- (d) The Board of Governors of the State Bar may formulate and adopt standards as to communications that will be presumed to violate Rule 7.1, 7.2, 7.3, 7.4 or 7.5. The standards shall only be used as presumptions affecting the burden of proof in disciplinary proceedings involving alleged violations of these Rules. “Presumption affecting the burden of proof” means that presumption defined in Evidence Code sections 605 and 606. Such standards formulated and adopted by the Board, as from time to time amended, shall be effective and binding on all lawyers.

COMMENT

- [1] This Rule governs all communications about the availability of legal services from lawyers and law firms, including advertising permitted by Rule 7.2. Whatever means are used to make known a lawyer’s services, statements about them must be truthful. The requirement of truthfulness in a communication under this Rule includes representations about the law.
- [2] This Rule prohibits truthful statements that are misleading. A truthful statement is misleading if it omits a fact necessary to make the

lawyer's communication considered as a whole not materially misleading. A truthful statement is also misleading if there is a substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable factual foundation.

- [3] An advertisement that truthfully reports a lawyer's achievements on behalf of clients or former clients may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case. Similarly, an unsubstantiated comparison of the lawyer's services or fees with the services or fees of other lawyers may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison can be substantiated. The inclusion of an appropriate disclaimer or qualifying language may avoid creating unjustified expectations or otherwise misleading a prospective client.
- [4] As used in paragraph (a), "writing" means any writing as defined in the Evidence Code.
- [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.
- [6] See also Rule 8.4(e) for the prohibition against stating or implying an ability to influence improperly a government agency or official or to achieve results by means that violate these Rules or other law.

Standards

Pursuant to paragraph (d), the Board of Governors has adopted the following standards related to paragraph (b) of this Rule:

- (1) A "communication" that contains guarantees, warranties, or predictions regarding the result of the representation.
- (2) A "communication" that contains testimonials about or endorsements of a lawyer unless such communication also contains an express disclaimer such as "this testimonial or endorsement does not constitute a guarantee, warranty, or prediction regarding the outcome of your legal matter."
- (3) A "communication" that contains a dramatization unless such communication contains a disclaimer that states "this is a dramatization" or words of similar import.
- (4) A "communication" that states or implies "no fee without recovery" unless such communication also expressly discloses whether or not the client will be liable for costs.
- (5) A "communication" that states or implies that a lawyer is able to provide legal services in a language other than English unless the lawyer can actually provide legal services in such language or the communication also states in the language of the communication (a) the employment title of the person who speaks such language and (b) that the person is not a member of the State Bar of California, if that is the case.

- (6) An unsolicited “communication” transmitted to the general public or any substantial portion thereof primarily directed to seeking professional employment primarily for pecuniary gain that sets forth a specific fee or range of fees for a particular service where, in fact, the lawyer charges a greater fee than advertised in such communication within a period of 90 days following dissemination of such communication, unless such communication expressly specifies a shorter period of time regarding the advertised fee. Where the communication is published in the classified or “yellow pages” section of telephone, business or legal directories or in other media not published more frequently than once a year, the lawyer shall conform to the advertised fee for a period of one year from initial publication, unless such communication expressly specifies a shorter period of time regarding the advertised fee.

Rule 7.1: Communications Concerning a Lawyer's Services

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.)

California: Rule 1-400 provides, in pertinent part, as follows:

(A) For purposes of this rule, "communication" means any message or offer made by or on behalf of a member concerning the availability for professional employment of a member or a law firm directed to any former, present, or prospective client, including but not limited to the following:

(1) Any use of firm name, trade name, fictitious name, or other professional designation of such member or law firm; or

(2) Any stationery, letterhead, business card, sign, brochure, or other comparable written material describing such member, law firm, or lawyers; or

(3) Any advertisement (regardless of medium) of such member or law firm directed to the general public or any substantial portion thereof; or

(4) Any unsolicited correspondence from a member or law firm directed to any person or entity....

(C) A communication or a solicitation (as defined herein) shall not:

(1) Contain any untrue statement; or

(2) Contain any matter, or present or arrange any matter in a manner or format which is false, deceptive, or which tends to confuse, deceive, or mislead the public; or

(3) Omit to state any fact necessary to make the statements made, in the light of circumstances under which they are made, not misleading to the public; or

(4) Fail to indicate clearly, expressly, or by context, that it is a communication or solicitation, as the case may be; or

(5) Be transmitted in any manner which involves intrusion, coercion, duress, compulsion, intimidation, threats, or vexatious or harassing conduct....

(E) The Board of Governors of the State Bar shall formulate and adopt standards as to communications which will be presumed to violate this rule 1-400. The standards shall only be used

as presumptions affecting the burden of proof in disciplinary proceedings involving alleged violations of these rules... Such standards... shall be effective and binding on all members.

The Standards adopted by the State Bar's Board of Governors pursuant to rule 1-400(E) are long and detailed. For example, Standards 1 and 2 provide that the following forms of communication "are presumed to be in violation of rule 1-400":

(1) A "communication" which contains guarantees, warranties, or predictions regarding the result of the representation.

(2) A "communication" which contains testimonials about or endorsements of a member unless such communication also contains an express disclaimer such as "this testimonial or endorsement does not constitute a guarantee, warranty, or prediction regarding the outcome of your legal matter."

See also Business & Professions Code §§6157-6159.2 (generally prohibiting "any false, misleading, or deceptive statement" in a lawyer advertisement; imposing detailed restrictions on advertisements containing dramatizations, impersonations, and spokespersons; and prohibiting various specific claims and techniques); California Labor Code §139.45 ("the Industrial Medical Council and the administrative director shall take particular care to preclude any advertisements with respect to industrial injuries or illnesses that are false or mislead the public with respect to workers' compensation. In promulgating rules with respect to advertising, the State Bar... shall also take particular care to achieve the same goal"); and California Labor

Code §5432 (requiring every advertisement soliciting workers' compensation clients to state conspicuously: "Making a false or fraudulent workers' compensation claim is a felony subject to up to 5 years in prison or a fine of up to \$50,000 or double the value of the fraud, whichever is greater, or by both imprisonment and fine").

Colorado: Colorado retains the pre-2002 version of ABA Model Rule 7.1(a) and adds the following paragraphs:

(b) No lawyer shall, directly or indirectly, pay all or a part of the cost of communications concerning a lawyer's services by a lawyer not in the same firm unless the communication discloses the name and address of the non-advertising lawyer, the relationship between the advertising lawyer and the non-advertising lawyer, and whether the advertising lawyer may refer any case received through the advertisement to the non-advertising lawyer.

(c) Unsolicited communications concerning a lawyer's services mailed to prospective clients shall be sent only by regular U.S. mail, not by registered mail or other forms of restricted delivery, and shall not resemble legal pleadings or other legal documents.

(d) Any communication that states or implies the client does not have to pay a fee if there is no recovery shall also disclose that the client may be liable for costs. This provision does not apply to communications that only state that contingent or percentage fee arrangements are available, or that only state the initial consultation is free.

District of Columbia: Rule 7.1(a) adds that a communication is false or misleading if it “[c]ontains an assertion about the lawyer or the lawyer's services that cannot be substantiated.”

Florida: Florida's lawyer advertising rules are more comprehensive and detailed than the ABA Model Rules of Professional Conduct or those in any other American jurisdiction. They are often revised and defy easy summary or comparison with the ABA rules. They address in depth the content of advertisements, electronic and computer advertising, referral services, and filing requirements. Some of the more noteworthy Florida advertising and solicitation provisions appear in Selected State Variations under other rules in Article 7.

Georgia generally tracks the pre-2002 version of ABA Model Rule 7.1, but adds special subparagraphs requiring that all advertisements mentioning contingent fees or stating “no fee unless you win or collect” or any similar phrase must also conspicuously present a disclaimer stating: “Court costs and other additional expenses of legal action usually must be paid by the client contingent fees are not permitted in all types of cases.”

Iowa has many rules on lawyer advertising. Its version of Rule 7.1 adds the following:

(b) A lawyer shall not communicate with the public using statements that are unverifiable. In addition, advertising permitted under these rules shall not rely on emotional appeal or contain any statement or claim relating to the quality of the lawyer's 32—s legal services.

Louisiana: In the rules effective December 1, 2008, Rule 7.1(a) identifies a non-exclusive list of advertising

methods that lawyers may use. Among other variations, Rule 7.1(c) explicitly exempts from the rules any advertising that is not “motivated by pecuniary gain.”

Mississippi: Rule 7.5(a) requires that a copy or recording of any lawyer advertisement to be published must be submitted to the Office of the General Counsel of the Mississippi Bar “prior to its first dissemination” unless exempted under an extensive list in Rule 7.5(b). If a lawyer submits a proposed advertisement 45 days before its dissemination, the lawyer may request an “advisory opinion.” If the Office of the General Counsel does not respond within 45 days, the advertisement will be “deemed approved,” but if the Office of General Counsel determines within the 45-day period that there is “reasonable doubt” that the advertisement complies with the rules, it may extend the 45-day period.

Missouri: Rule 7.1 adds that a communication is false or misleading if it:

(b) is likely to create an unjustified expectation about results the lawyer can achieve;

(c) proclaims results obtained on behalf of clients, such as the amount of a damage award or the lawyer's record in obtaining favorable verdicts or settlements, without stating that past results afford no guarantee of future results and that every case is different and must be judged on its own merits;

(d) states or implies that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other law;

(e) compares the quality of a lawyer's or a law firm's services with other lawyers' services, unless the comparison can be factually substantiated;

(f) advertises for a specific type of case concerning which the lawyer has neither experience nor competence;

(g) indicates an area of practice in which the lawyer routinely refers matters to other lawyers, without conspicuous identification of such fact;

(h) contains any paid testimonial about or endorsement of the lawyer, without conspicuous identification of the fact that payment has been made for the testimonial or endorsement;

(i) contains any simulated portrayal of a lawyer, client, victim, scene, or event without conspicuous identification of the fact that it is a simulation. . . .

Nevada: Among many other variations, Rule 7.1(d) adds that a communication is false or misleading if it "contains a testimonial or endorsement which violates any portion of this Rule."

In addition, Rule 1.4(c) requires every lawyer or law firm to "have available" a "Lawyer's Biographical Data Form" that must "be provided upon request of the State Bar or a client or prospective client. . . ." Rule 1.4(c) also specifies information that must be included in the form and included with every written advertisement, and it specifies other detailed information that must be provided to a client or prospective client upon request (such as a "good faith estimate of the number of jury trials tried to a verdict by the lawyer to the present date, identifying the court or courts").

These requirements are also reinforced in Rule 1.18(g) (relating to prospective clients).

New Jersey: Rule 7.1 prohibits a lawyer from making a false or misleading communication about the lawyer, the lawyer's services, or "any matter in which the lawyer has or seeks professional involvement." A communication is false or misleading under New Jersey Rule 7.1(a) if (among other things) it "(4) relates to legal fees other than" a specified list of permitted statements, including "the fee for an initial consultation," "fees for specifically described legal services, provided there is a reasonable disclosure of all relevant variables and considerations so that the statement would not be misunderstood or deceptive," and "specified hourly rates, provided the statement makes clear that the total charge will vary according to the number of hours devoted to the matter, and in relation to the varying hourly rates charged for the services of different individuals who may be assigned to the matter. . . ." Rule 7.1(b) makes it "unethical" for a lawyer to use an advertisement "known to have been disapproved by the Committee on Attorney Advertising, or one substantially the same as the one disapproved, until or unless modified or reversed by the Advertising Committee...."

New York: New York adds these definitions to its Code of Professional Responsibility:

(11) "Advertisement" means any public or private communication made by or on behalf of a lawyer or law firm about that lawyer or law firm's services, the primary purpose of which is for the retention of the lawyer or law firm. It does not include communications to existing clients or other lawyers.

(12) "Computer-accessed communication" means any communication made by or on behalf of a lawyer or law firm that is disseminated through the use of a computer or related electronic device, including, but not limited to, web sites, weblogs, search engines, electronic mail, banner advertisements, pop-up and pop-under advertisements, chat rooms, list servers, instant messaging, or other internet presences, and any attachments or links related thereto.

In addition, New York's definition of "solicitation" appears in DR 2-103(B).

New York DR 2-101(A) provides that a lawyer or law firm "shall not use or disseminate ... any advertisement that contains . . . statements or claims that are false, deceptive, or misleading." DR 2-101(B) lists numerous items (e.g., "legal and nonlegal education," "foreign language fluency," "fees for initial consultation," and "bona fide professional ratings") that it is ordinarily "proper" for an attorney to include in an advertisement. DR 2-101(C)-(P) impose additional restrictions and mandate various disclosures and disclaimers. Some of the restrictions were held unconstitutional in *Alexander v. Catalano*, 2007 WL 2120024 (N.D.N.Y. 2007), but when we went to press, the appeal was fully briefed but still pending.

North Carolina retains the subparagraphs that were deleted from the pre-2002 version of ABA Model Rule 7.1. North Carolina also adds a Rule 7.1(b) providing that a "dramatization depicting a fictional situation is misleading unless it . . . contains a conspicuous written or oral statement at the beginning and end of the communication, explaining that the communication contains a

dramatization and does not depict actual events or real persons."

Ohio: Rule 7.1 also prohibits a lawyer from making or using a "nonverifiable" communication about the lawyer or the lawyer's services.

Oregon: Rule 7.1 (a) contains a list of 12 specific items that may not appear in advertisements or may only appear under particular circumstances. Actors may be used if the communication "clearly and conspicuously discloses" that status.

Pennsylvania: Rule 7.1 tracks ABA Model Rule 7.1 verbatim—but Pennsylvania Rule 7.2 contains numerous restrictions designed to prevent false or misleading communications. For example, Rule 7.2 prohibits endorsements by any celebrity or public figure; prohibits lawyers from stating or implying that they are associated together in a law firm if that is not the case; prohibits any portrayal of a client by a non-client; and prohibits the use of "pictures, or persons, which are not actual or authentic, without a disclosure that such depiction is a dramatization." An unusual Rule 7.2(k) provides that "[i]f a lawyer or law firm advertises for a particular type of case that the lawyer or law firm ordinarily does not handle from intake through trial, that fact must be disclosed. A lawyer or law firm shall not advertise as a pretext to refer cases obtained from advertising to other lawyers."

South Carolina: Rule 7.2(f) prohibits lawyer advertisements that are "merely self-laudatory" or that "describe or characterize the quality of the lawyer's services;" but the provision does not apply to "information furnished to a prospective client at that person's request or to information supplied to existing clients."

Virginia has divided the substance of ABA Model Rule 7.1 into two separate rules. Rule 7.1 applies to all “public communication,” defined as “all communication other than ‘in-person’ communication,” while Rule 7.2 applies only to “advertising.” Rule 7.1 generally tracks the pre-2002 version of ABA Model Rule 7.1, but adds that a communication is improper if it “states or implies that the outcome of a particular legal matter was not or will not be related to its facts or merits.” Rule 7.2 governs various specific types and styles of lawyer advertising. For example, Rule 7.2(a) provides that an advertisement violates Rule 7.1 if it “(1) contains an endorsement by a celebrity or public figure who is not a client of the firm without disclosure (i) of the fact that the speaker is not a client of the lawyer or the firm, and (ii) whether the speaker is being paid for the appearance or endorsement,” or “(2) contains a portrayal of a client by a non-client without disclosure that the depiction is a dramatization,” or:

(3) advertises specific or cumulative case results, without a disclaimer that (i) puts the case results in a context that is not misleading; (ii) states that case results depend upon a variety of factors unique to each case; and (iii) further states that case results do not guarantee or predict a similar result in any future case undertaken by the lawyer. The disclaimer shall precede the communication of the case results...

**Rule 7.1. Communications Concerning the Availability of Legal Services.
[Sorted by Commenter]**

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

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	Los Angeles County Bar Association Prof. Resp. & Ethics Comm. (Louisa Lau)	M	Y	(b)	Paragraph (b) should be revised as follows: "A lawyer shall not <u>intentionally</u> make a <u>materially</u> false or misleading communication as defined herein."	The Commission did not make the change. First, if "material" were added as a modifier, it should be to paragraph (c)'s subparagraphs (2) and (4). The "material" limitation has been added to those provisions. Second, to add "intentionally" would depart from the Model Rule and severely limit the reach of the Rule.
2	Orange Co. Bar Ass'n (Julie McCoy)	M	Y	(c)(3)	<p>1. Revise (c)(3) as follows: "(3) Contains any matter, or presents or arranges any matter in a manner or format which is false, or deceptive, or which <u>tends to</u> confuses, deceives, or misleads the public."</p> <p><u>Rationale:</u> Would return (c)(3) to language in current rule 1-400(D)(2); removing "tends to" would "heighten the bar for prosecution, and correspondingly lower the public protection the rule is designed to provide."</p> <p>2. Revise comment [1] as follows: "(1) A 'communication' which contains guarantees, warranties, or <u>unqualified</u> predictions regarding the result of the representation."</p> <p><u>Rationale:</u> OCBA is concerned that this standard will discourage lawyer's discussing the probability of success of a prospective client's case during the initial consultation.</p>	<p>1. The Commission did not make the change. The phrase "tends to" is imprecise. Either the ad confuses, deceives or misleads the public or it does not. Retaining the proposed language creates an objective standard.</p> <p>2. The Commission did not make the change. As this standard appears not to have prevented such communications in the last 20 years since the standard has been in effect, it would probably cause more trouble than it is worth to include this qualifier, forcing OCTC to litigate the meaning of "unqualified" in each case where the lawyer has given a "prediction" in an advertisement or solicitation.</p>

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

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

**Rule 7.1. Communications Concerning the Availability of Legal Services.
 [Sorted by Commenter]**

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
3	San Diego County Bar Association (Andrew S. Albert)	M	Y	(c)(3)	<p>Revise (c)(3) as follows: “(3) Contains any matter, or presents or arranges any matter in a manner or format which is false, or deceptive, or which <u>tends to</u> confuses, deceives, or misleads the public.”</p> <p>Rationale: Would return (c)(3) to language in current rule 1-400(D)(2); removing “tends to” would “heighten the bar for prosecution, and correspondingly lower the public protection the rule is designed to provide.”</p>	The Commission did not make the change. The phrase “tends to” is imprecise. Either the ad confuses, deceives or misleads the public or it does not. Retaining the proposed language creates an objective standard.
4	Towery, James E. Hoge Fenton Jones & Appel San Jose	M	N	(c)(4) Cmt. [3]	<p>Mr. Towery, on behalf of his client, Super Lawyers, a lawyer ranking service, is concerned that taken together, paragraph (c)(4) and comment [3] to proposed Rule 7.1 “might be read to prohibit a lawyer from reporting the truthful fact that she has received an AV rating from Martindale-Hubbell, or has been listed by publications, such as Best Lawyers in America or Super Lawyers, that conduct peer reviews and assess other achievements.” He recommends no change to paragraph (c)(4), but does recommend an additional comment that would provide:</p> <p>“Nothing in this Rule shall prohibit a lawyer or law firm from truthfully advertising ratings or assessments by bona fide independent entities, so long as the advertisement otherwise complies with this</p>	<p>The Commission did not make the change. The genesis of Mr. Towery’s letter was the New Jersey Committee on Lawyer Advertising Advisory Op. 39, that concluded advertising a lawyer’s inclusion in “SuperLawyers” and other similar periodicals “violate[s] the prohibition against advertisements that are comparative in nature, RPC 7.1(a)(3), or that are likely to create an unjustified expectation about results, RPC 7.1(a)(2).” The committee’s reasoning was based largely on New Jersey somewhat unique rules concerning comparison of lawyer services.</p> <p>That N.J. Supreme Court subsequently set aside Op. 39, concluding that “state bans on truthful, fact based claims in lawful advertising could be ruled unconstitutional when the state fails to establish that regulated claims are actually or inherently misleading.” See In re Opinion 39 of the Committee on Attorney Advertising (A-30/31/32-08), available at</p>

**Rule 7.1. Communications Concerning the Availability of Legal Services.
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					<p>Rule and the lawyer or law firm cannot influence the independent entity through financial contributions or other illegitimate means.”</p>	<p>http://www.superlawyers.com/pdf/opinions/A-30-08-Opinion-39-of-CAA.pdf</p> <p>The Court directed the NJ Advisory Committee on Attorney Advertising, the NY Advisory Committee on Professional Ethics, and the NJ Professional Responsibility Rules Committee to revise the relevant rules “to take into account the policy concerns expressed by the Rule while, at the same time, respecting legitimate commercial speech activities.”</p> <p>Further, it should also be noted that the ads have been approved in other jurisdictions (Arizona, Florida and Philadelphia) with appropriate disclaimers. See Henry Gottlieb, New Jersey Backs Super/Best Lawyer Ad Ban but Hints at Flexibility in Application, N.J. L.J. (11/17/2006), available at http://www.law.com/jsp/article.jsp?id=1163671529291</p> <p>Finally, proposed (c)(4) adequately covers the territory. Before discipline may be imposed, the ad must be misleading. If the designation is by a organization employing a genuine peer-review process, then it is not misleading. If it is obtained by payment or other “illicit” means, it would be misleading and subject to discipline. Further, proposed Comment [3] states in part:</p> <p>“Similarly, an unsubstantiated comparison of the lawyer’s services or fees with the services or fees of other lawyers may be misleading if</p>

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

Rule 7.1. Communications Concerning the Availability of Legal Services.
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No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
						<p>presented with such specificity as would lead a reasonable person to conclude that the comparison can be substantiated. The inclusion of an appropriate disclaimer or qualifying language may avoid creating unjustified expectations or otherwise misleading a prospective client.”</p> <p>As has been done in other jurisdictions, an appropriate disclaimer should allay the advertiser’s concerns that the ad might be viewed as misleading.</p> <p>In summary, neither a change to (c)(4) nor an elaborating comment appears necessary.</p>