

Proposed Rule 7.4 [RPC]

“Communication of Fields of Practice and Specialization”

(Draft #7, 5/31/09)

Summary: Proposed Rule 7.4 is the fourth of five proposed rules regulating lawyer marketing that track the Model Rule structure. Rule 7.4 sets out basic rules governing the communication of a lawyer’s fields of practice and claims to specialization.

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

Primary Factors Considered

Existing California Law

Rule	RPC 1-400.
Statute	Bus. & Prof. Code §§ 6157 et seq.
Case law	

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

Montana Rule 7.4(a). See language added to proposed Rule 7.4(a).

Other Primary Factor(s)

Rule Revision Commission Action/Vote to Recommend Rule Adoption

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

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

Vote (see tally below)

Favor Rule as Recommended for Adoption 9

Opposed Rule as Recommended for Adoption 1

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 7.4* Communication of Fields of Practice and Specialization

October 2009

(Draft rule following initial round of public comment.)

INTRODUCTION:

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.

Rule 7.1 sets out the general prohibition on a lawyer making false and misleading communications concerning the availability of legal services. Rule 7.2 specifically addresses advertising, a subset of communication, and typically involves communications directed at the general public. Rule 7.3 is concerned with regulating various means by which a lawyer seeking to market his or her services might make direct contact with a prospective client. **Rule 7.4 sets out basic rules governing the communication of a lawyer's fields of practice and claims to specialization.** Rule 7.5 does the same as rule 7.4 for the use of firm names and letterheads. The Commission, however, declines at this time to recommend Model Rule 7.6, which is intended to regulate political contributions made by lawyers to obtain legal work with government entities or to achieve an appointment as a judge. The Commission is still studying the feasibility of a rule analogous to Model Rule 7.6.

* Proposed Rule 7.4, Draft 7 (5/31/09).

INTRODUCTION (Continued):

Proposed Rule 7.4 includes the basic concepts contained in Model Rule 7.4, with minor revisions: a provision permitting the communication of a lawyer's field of practice, (paragraph (a)); provisions permitting patent and admiralty lawyers to communicate the fact that they practice in those areas, (paragraphs (b) and (c)); and a provision limiting a claim of specialization, (paragraph (d)). The latter provision has been substantially revised to conform to the specifics of the California regulatory landscape.

The Commission does not recommend the adoption of the comments to Model Rule 7.4 because the provisions of proposed Rule 7.4 are self-explanatory and do not require comment to clarify them further.

Variation in Other Jurisdictions. There is a wide range of variation among jurisdictions in their approach to regulating lawyer advertising and solicitation. States that have diverged widely from the Model Rules include smaller jurisdictions such as the District of Columbia, Kentucky, Mississippi and Iowa, and larger states, such as Florida, New York, and Texas. Unlike these states that have either eliminated or added to marketing restrictions in the Model Rules, the Commission recommends keeping the same basic concepts found in the Model Rules, revised only to clarify or to address unique aspects of the California statutory and regulatory landscape.

<p align="center"><u>ABA Model Rule</u> Rule 7.4 Communication of Fields of Practice and Specialization</p>	<p align="center"><u>Commission's Proposed Rule*</u> Rule 7.4 Communication of Fields of Practice and Specialization</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>(a) A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law.</p>	<p>(a) A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law. <u>A lawyer may also communicate that his or her practice is limited to or concentrated in a particular field of law, subject to the requirements of Rule 7.1.</u></p>	<p><u>Paragraph (a)</u> is based on Model Rule 7.4(a), which provides that a lawyer may communicate that the lawyer does or does not practice in particular fields of law. A sentence has been added that provides a lawyer may engage in a common practice among lawyers who market their availability – communicating that the lawyer's practice is limited to or concentrated in a particular field of law – so long as the communication does not imply an expertise in the field so as to be false or misleading under Rule 7.1.</p>
<p>(b) A lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation "Patent Attorney" or a substantially similar designation.</p>	<p>(b) A lawyer admitted<u>registered</u> to engage in patent practice <u>patent law</u> before the United States Patent and Trademark Office may use the designation "Patent Attorney" or a substantially similar designation.</p>	<p><u>Paragraph (b)</u> is based on Model Rule 7.4(b). The language has been modified to reflect accurately that a lawyer who is authorized to practice patent law before the Patent and Trademark Office is "registered to practice patent law" there, and is not "admitted" to practice there.</p>
<p>(c) A lawyer engaged in Admiralty practice may use the designation "Admiralty," "Proctor in Admiralty" or a substantially similar designation.</p>	<p>(c) A lawyer engaged in Admiralty practice may use the designation "Admiralty," "Proctor in Admiralty" or a substantially similar designation.</p>	<p><u>Paragraph (c)</u> is identical to Model Rule 7.4(c), which recognizes a long historical tradition of maritime law in federal courts and permits a lawyer to communicate that the lawyer is engaged in Admiralty practice.</p>
<p>(d) A lawyer shall not state or imply that a lawyer is certified as a specialist in a particular field of law, unless:</p> <p>(1) the lawyer has been certified as a specialist by an organization that has</p>	<p>(d) A lawyer shall not state or imply that a<u>the</u> lawyer is certified as a specialist in a particular field of law, unless:</p> <p>(1) the lawyer has been<u>is</u> certified as a specialist by an organization that has</p>	<p><u>Paragraph (d)</u> is based on Model Rule 7.4(c), but subparagraph (d)(1) has been revised to state the specific regulatory framework for specialization in California. Similar language may be found in current rule 1-400(D)(6). The language of the Model Rule was never intended as "model language" to be adopted by all jurisdictions, but simply as a template. The Model Rule language</p>

* Proposed Rule, Draft 7 (5/31/09). Redline/strikeout showing changes to the ABA Model Rule

<p align="center"><u>ABA Model Rule</u></p> <p align="center">Rule 7.4 Communication of Fields of Practice and Specialization</p>	<p align="center"><u>Commission's Proposed Rule*</u></p> <p align="center">Rule 7.4 Communication of Fields of Practice and Specialization</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>been approved by an appropriate state authority or that has been accredited by the American Bar Association; and</p> <p>(2) the name of the certifying organization is clearly identified in the communication.</p>	<p>been approved by an appropriate state authority <u>the Board of Legal Specialization, or that has been any other entity</u> accredited by the American<u>State Bar Association</u> to designate specialists pursuant to standards adopted by the Board of Governors; and</p> <p>(2) the name of the certifying organization is clearly identified in the communication.</p>	<p>recognizes that some jurisdictions' specialization "authority" resides with a state supreme court entity, while other jurisdictions' specialization "authority" is delegated to that jurisdiction's bar or an independent specialization body.</p> <p>The revision in the introductory paragraph of paragraph (d) – changing "a lawyer" to "the lawyer," – is intended to clarify that a lawyer may not state that he or she is certified as a specialist and is in keeping with rule drafting style. No change in substance is intended.</p> <p><i>Minority.</i> A minority of the Commission disagrees with the substitution of language specific to the California regulatory framework in paragraph (d)(1), arguing that Proposed paragraph (d)(1) is unduly restrictive. The minority takes the position that a lawyer who truthfully states on his or her letterhead that he or she has been accredited as a specialist in another state, or by a bona fide accrediting organization that may not be designated as such by the State Bar, is not guilty of any deception. Such conduct should not be prohibited.</p>

<p align="center"><u>ABA Model Rule</u></p> <p align="center">Rule 7.4 Direct Communication of Fields of Practice and Specialization Comment</p>	<p align="center"><u>Commission's Proposed Rule*</u></p> <p align="center">Rule 7.4 Direct Communication of Fields of Practice and Specialization Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>[1] Paragraph (a) of this Rule permits a lawyer to indicate areas of practice in communications about the lawyer's services. If a lawyer practices only in certain fields, or will not accept matters except in a specified field or fields, the lawyer is permitted to so indicate. A lawyer is generally permitted to state that the lawyer is a "specialist," practices a "specialty," or "specializes in" particular fields, but such communications are subject to the "false and misleading" standard applied in Rule 7.1 to communications concerning a lawyer's services.</p>	<p>[1] Paragraph (a) of this Rule permits a lawyer to indicate areas of practice in communications about the lawyer's services. If a lawyer practices only in certain fields, or will not accept matters except in a specified field or fields, the lawyer is permitted to so indicate. A lawyer is generally permitted to state that the lawyer is a "specialist," practices a "specialty," or "specializes in" particular fields, but such communications are subject to the "false and misleading" standard applied in Rule 7.1 to communications concerning a lawyer's services</p>	<p>The Commission determined that the provisions of Rule 7.4 are self-explanatory and do not require comment to clarify them further. Accordingly, the Commission does not recommend adoption of the comments to Model Rule 7.4.</p>
<p>[2] Paragraph (b) recognizes the long-established policy of the Patent and Trademark Office for the designation of lawyers practicing before the Office. Paragraph (c) recognizes that designation of Admiralty practice has a long historical tradition associated with maritime commerce and the federal courts.</p>	<p>[2] Paragraph (b) recognizes the long-established policy of the Patent and Trademark Office for the designation of lawyers practicing before the Office. Paragraph (c) recognizes that designation of Admiralty practice has a long historical tradition associated with maritime commerce and the federal courts.</p>	<p>See Explanation of Changes, Comment [1].</p>

* Proposed Rule 7.4, Draft 7 (5/31/09). Redline/strikeout showing changes to the ABA Model Rule

<p align="center"><u>ABA Model Rule</u></p> <p align="center">Rule 7.4 Direct Communication of Fields of Practice and Specialization Comment</p>	<p align="center"><u>Commission's Proposed Rule*</u></p> <p align="center">Rule 7.4 Direct Communication of Fields of Practice and Specialization Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>[3] Paragraph (d) permits a lawyer to state that the lawyer is certified as a specialist in a field of law if such certification is granted by an organization approved by an appropriate state authority or accredited by the American Bar Association or another organization, such as a state bar association, that has been approved by the state authority to accredit organizations that certify lawyers as specialists. Certification signifies that an objective entity has recognized an advanced degree of knowledge and experience in the specialty area greater than is suggested by general licensure to practice law. Certifying organizations may be expected to apply standards of experience, knowledge and proficiency to insure that a lawyer's recognition as a specialist is meaningful and reliable. In order to insure that consumers can obtain access to useful information about an organization granting certification, the name of the certifying organization must be included in any communication regarding the certification.</p>	<p>[3] Paragraph (d) permits a lawyer to state that the lawyer is certified as a specialist in a field of law if such certification is granted by an organization approved by an appropriate state authority or accredited by the American Bar Association or another organization, such as a state bar association, that has been approved by the state authority to accredit organizations that certify lawyers as specialists. Certification signifies that an objective entity has recognized an advanced degree of knowledge and experience in the specialty area greater than is suggested by general licensure to practice law. Certifying organizations may be expected to apply standards of experience, knowledge and proficiency to insure that a lawyer's recognition as a specialist is meaningful and reliable. In order to insure that consumers can obtain access to useful information about an organization granting certification, the name of the certifying organization must be included in any communication regarding the certification.</p>	<p>See Explanation of Changes, Comment [1].</p>

Rule 7.4 Communication of Fields of Practice and Specialization

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

- (a) A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law. A lawyer may also communicate that his or her practice is limited to or concentrated in a particular field of law, ~~if such communication does not imply an unwarranted expertise in the field so as~~subject to ~~be false or misleading under~~the requirements of Rule 7.1.
- (b) A lawyer registered to practice patent law before the United States Patent and Trademark Office may use the designation “Patent Attorney” or a substantially similar designation;
- (c) A lawyer engaged in Admiralty practice may use the designation “Admiralty,” “Proctor in Admiralty” or a substantially similar designation.
- (d) A lawyer shall not state or imply that the lawyer is ~~a~~-certified as a specialist in a particular field of law, unless:
 - (1) the lawyer ~~holds a current certificate~~is certified 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
 - (2) the name of the certifying organization is clearly identified in the communication.

Rule 7.4 Communication of Fields of Practice and Specialization
(Commission's Proposed Rule – Clean Version)

- (a) A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law. A lawyer may also communicate that his or her practice is limited to or concentrated in a particular field of law, subject to the requirements of Rule 7.1.
- (b) A lawyer registered to practice patent law before the United States Patent and Trademark Office may use the designation "Patent Attorney" or a substantially similar designation;
- (c) A lawyer engaged in Admiralty practice may use the designation "Admiralty," "Proctor in Admiralty" or a substantially similar designation.
- (d) A lawyer shall not state or imply that the lawyer is certified as a specialist in a particular field of law, unless:
 - (1) the lawyer is certified as a specialist 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
 - (2) the name of the certifying organization is clearly identified in the communication.

Rule 7.4: Communication of Fields of Practice and Specialization

STATE VARIATIONS

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

Arizona: The equivalent to Rule 74(d) permits lawyers to state or imply that they are specialists only if they are “certified by the Arizona Board of Legal Specialization” or by a “national entity” that the Board has recognized as having standards substantially the same as the Board’s standards.

California has no rule comparable to ABA Model Rule 7.4 in the California Rules of Professional Conduct, but California has developed an extensive program of specialty certification. To be eligible for certification, an attorney must be a member of the California State Bar in good standing and must (1) have spent at least 25 percent of his or her occupational time during the previous five years working in the area of law in which certification is sought, (2) pass a written exam tailored to the particular specialty field, (3) demonstrate a high level of experience in the specialty field by meeting specific task and experience requirements, (4) complete at least 45 hours of continuing legal education in the specialty field, and (5) be favorably evaluated by other attorneys and judges familiar with the attorney’s work. California offers specialty certification in eight areas of practice, including Appellate Law, Bankruptcy Law (both Personal and Small Business), Criminal Law, Estate Planning, Trust and Probate Law, Family Law, Immigration and Nationality Law, Taxation Law, and Workers’ Compensation Law. Each field has its own particular

requirement. For more information, including links to the Rules Governing the State Bar of California Program for Certifying Legal Specialists (most recently amended effective November 1, 2003) and the requirements for each specialty field, visit the California State Bar’s web site at www.calbar.org and enter “Legal Specialization” in the site’s search box.

Connecticut: Rule 7.4A(d) describes in some detail 27 different fields of law in which lawyers may be certified as specialists. Rule 7.4B concerns the appointment, powers, and duties of a Legal Specialization Screening Committee that evaluates certifying entities, and Rule 7.4C concerns applications for approval as a certifying entity.

District of Columbia omits ABA Model Rule 7.4.

Florida: Rule 4-7.2(c)(6) divides the rules regulating claims and disclaimers for specialty certification into three categories, depending on whether a lawyer is certified as a specialist by (A) the Florida Bar, (B) another state bar, or (C) an entity not connected with any state bar.

Georgia tracks the first sentence of ABA Model Rule 7.4 verbatim, but eliminates the rest of the ABA rule and instead states the following: “A lawyer who is a specialist in a particular field of law by experience, specialized training or

education, or is certified by a recognized and bona fide professional entity, may communicate such specialty or certification so long as the statement is not false or misleading.”

Illinois: Rule 7.4 requires that if a lawyer’s advertisement uses the terms “certified” “specialist,” or “expert,” then the terms (1) must be “truthful and verifiable and may not be misleading,” and (2) must state that “the Supreme Court of Illinois does not recognize certifications of specialties in the practice of law and that the certificate, award or recognition is not a requirement to practice law in Illinois.”

Iowa: Rule 7.4 contains a list of 71 distinct fields of practice that a lawyer may identify or describe in communications.

Louisiana: In the rules effective December 1, 2008, Louisiana addresses this issue in Rule 7.2(c)(5) and specifies that lawyers generally cannot state or imply that they are specialists or experts unless they fit within certain narrow exceptions identified in the rule.

Massachusetts: Rule 7.4(a) permits lawyers to hold themselves out as “specialists” if the holding out does not include a false or misleading communication. The rule defines “holding out” to include “(1) a statement that the lawyer concentrates in, specializes in, is certified in, has expertise in, or limits practice to a particular service, field, or area of law, (2) directory listings, including electronic, computer-accessed or other similar types of directory listings, by particular service, field, or area of law, and (3) any other association of the lawyers name with a particular service, field, or area of law.” Comment 3A to Rule 7.2 provides, in part, as follows:

Depending upon the topic or purpose of the newsgroup, bulletin board, or chat group, the posting might also constitute an association of the lawyer or law firm’s name with a particular service, field, or area of law amounting to a claim of specialization under Rule 7.4 and would therefore be subject to the restrictions of that rule.

Michigan: Rule 7.4 stops after the first sentence of ABA Model Rule 7.4.

Missouri: Rule 7.4 provides that a lawyer other than an admiralty or patent attorney shall not state or imply that the lawyer is a specialist “unless the communication contains a disclaimer that neither the Supreme Court of Missouri nor The Missouri Bar reviews or approves certifying organizations or specialist designations.”

Nevada: Rule 7.4(d)(2)(iii) requires that any lawyer claiming to be a specialist “shall carry a minimum of \$500,000 in professional liability insurance, with the exception of lawyers who practice exclusively in public law.” Nevada also adds a Rule 7.4A to establish procedures for the State Bar Board of Governors to approve organizations that certify lawyers as specialists.

New Jersey: Rule 7.4(d) permits a lawyer to communicate that the lawyer has been certified as a specialist only if the lawyer states (among other things) that “the certification has been granted by the Supreme Court of New Jersey or by an organization that has been approved by the American Bar Association.” If the certification has been granted by an organization that has not been approved, or has been denied approval, by either the Supreme Court of New Jersey or the American Bar Association, “the absence or denial of such approval shall be clearly identified in each such communication by the lawyer.”

New York: DR 2-105 covers the same subject matter as ABA Model Rule 7.4, but DR 2-105(C)(1) provides that a lawyer who is “certified as a specialist in a particular area of law or law practice by a private organization approved for that purpose by the American Bar Association” may advertise the certification only if the lawyer identifies the certifying organization and “prominently” makes the following disclaimer: “The [name of the private certifying organization] is not affiliated with any governmental authority. Certification is not a requirement for the practice of law in the State of New York and does not necessarily indicate greater competence than other attorneys experienced in this field of law.” If the lawyer is certified as a specialist by an “authority having jurisdiction over specialization under the laws of another state” (rather than by an ABA-approved private organization), DR 2-105(C)(2) requires a slightly different disclaimer.

North Carolina relegates the substance of ABA Model Rule 7.4(b) (regarding patent and trademark practice) to a Comment and deletes Rule 7.4(c) (regarding admiralty practice).

Ohio: Rule 7.4(a) expressly adds that a lawyer may state that the lawyer “limits his or her practice to or concentrates in particular fields of law.” Rule 7.4(c) provides that a lawyer engaged in “trademark practice” may use the designation “Trademarks,” “Trademark Attorney,” or a substantially similar designation. “Ohio’s equivalent to ABA Model Rule 704(d)(1) applies if the lawyer has been certified as a specialist by an organization approved by the Supreme Court Commission on Certification of Attorneys as Specialists.”

Pennsylvania: Rule 7.4 permits lawyers to advertise that they are certified by organizations approved by the Supreme Court. The Supreme Court may approve an organization

upon recommendation of the State Bar Association if the court finds that advertising certification by the organization “will provide meaningful information, which is not false, misleading or deceptive, for use of the public in selecting or retaining a lawyer.” Certification must be available to all lawyers “who meet objective and consistently applied standards relevant to practice in the area of law to which the certification relates.”

Texas: Rule 7.04(b)(2) permits lawyers to advertise that they have been certified as specialists by the Texas Board of Legal Specialization or by an organization that has been:

accredited by the Texas Board of Legal Specialization as a bona fide organization that admits to membership or grants certification only on the basis of objective, exacting, publicly available standards (including high standards of individual character, conduct, and reputation) that are reasonably relevant to the special training or special competence that is implied and that are in excess of the level of training and competence generally required for admission to the Bar....

Virginia: Rule 7.4(d) permits a lawyer to communicate that the lawyer has been certified as a specialist by a particular organization if the communication “clearly states that there is no procedure in the Commonwealth of Virginia for approving certifying organizations.”

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

**Rule 7.4. Communication of Fields of Practice and Specialization.
 [Sorted by Commenter]**

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	Bufford, Hon. Samuel L. U.S. Bankruptcy Court Los Angeles	M	N	(d)	Hon. Samuel Bufford recommends that paragraph (d)(1) be rewritten to permit lawyers to be certified by national certification agencies such as the American Board of Certification.	The Commission did not make the change. It was not the intent of the Commission to prohibit certification by national organizations, but to permit such certification only by organizations that had been properly accredited by a lawyer regulatory organization. The language used in the public comment draft is taken from current rule 1-400(D)(6). Under guidelines established by the Board of Legal Specialization, even the ABA must be accredited by the State Bar Board. Further, the Model Rule language is not intended as “model language” to be adopted verbatim by the states, but simply a template. The Model Rule language recognizes that some jurisdictions’ specialization “authority” resides with a state supreme court entity, while other jurisdictions’ specialization “authority” is delegated to that jurisdiction’s state bar or an independent specialization body.
2	Los Angeles County Bar Association (Louisa Lau)	A	Y	Misc.	Approve the rule as drafted.	No response necessary.

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

