

**Rule 7.1 [1-400] Communications Concerning A Lawyer's Services
(Commission's Proposed Rule Adopted on March 31 – April 1, 2016
– Clean Version)**

- (a) A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains an untrue statement, or a material misrepresentation of fact or law, or omits a fact necessary to make the communication considered as a whole not materially misleading.
- (b) The Board of Trustees 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 §§ 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 of any type whatsoever about the lawyer or the lawyer's services, including advertising permitted by Rule 7.2. A communication includes 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 person.*

[2] A communication that contains an express guarantee or warranty of the result of a particular representation is a false or misleading communication under this Rule. See also, Business and Professions Code § 6157.2(a).

[3] 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 it is presented in a manner that creates 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. Any communication that states or implies "no fee without recovery" is also misleading unless the communication also expressly discloses whether or not the client will be liable for costs.

[4] A communication that truthfully reports a lawyer's achievements on behalf of clients or former clients, or a testimonial about or endorsement of the lawyer, 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. An appropriate disclaimer or qualifying language often avoids creating unjustified expectations.

[5] This Rule prohibits a lawyer from making a communication that states or implies that the lawyer is able to provide legal services in a language other than English unless the lawyer can actually provide legal services in that language or the communication also states in the language of the communication the employment title of the person* who speaks such language.

[6] Rules 7.1 through 7.5 are not the sole basis for regulating communications concerning a lawyer's services. See, e.g., Business and Professions Code §§ 6150 – 6159.2 and 17000 et. seq. Other state or federal laws may also apply.

PROPOSED RULES OF PROFESSIONAL CONDUCT 7.1, 7.2, 7.3, 7.4 & 7.5
(Current Rule 1-400)
Advertising and Solicitation

EXECUTIVE SUMMARY

The Commission for the Revision of the Rules of Professional Conduct (“Commission”) has evaluated current rule 1-400 (Advertising and Solicitation) in accordance with the Commission Charter, with a focus on the function of the rule as a disciplinary standard, and with the understanding that the rule comments should be included only when necessary to explain a rule and not for providing aspirational guidance. In addition, the Commission considered the national standard of the American Bar Association (“ABA”) counterparts to rule 1-400, which comprise a series of rules that are intended to regulate the commercial speech of lawyers: Model Rules 7.1 (Communication Concerning A Lawyer’s Services), 7.2 (Advertising), 7.3 (Solicitation of Clients), 7.4 (Communication of Fields of Practice and Specialization), and 7.5 (Firm Names and Letterheads).

The result of the Commission’s evaluation is a three-fold recommendation for implementing:

- (1) The Model Rules’ framework of having separate rules that regulate different aspects of lawyers’ commercial speech:

Proposed Rule **7.1** sets out the general prohibition against a lawyer making false and misleading communications concerning the availability of legal services.

Proposed Rule **7.2** will specifically address advertising, a subset of communication.

Proposed Rule **7.3** will regulate marketing of legal services through direct contact with a potential client either by real-time communication such as delivered in-person or by telephone, or by directly targeting a person known to be in need of specific legal services.

Proposed Rule **7.4** will regulate the communication of a lawyer's fields of practice and claims to specialization.

Proposed Rule **7.5** will regulate the use of firm names and trade names.

- (2) The retention of the Board’s authority to adopt advertising standards provided for in current rule 1-400(E). Amendments to the Board’s standards, including the repeal of a standard, require only Board action; however, many of the Commission’s changes to the advertising rules themselves are integral to what is being recommended for the Board adopted standards. Although the Commission is recommending the repeal of all of the existing standards, many of the concepts addressed in the standards are retained and relocated to either the black letter or the comments of the proposed rules.

- (3) The elimination of the requirement that a lawyer retain for two years a copy of any advertisement or other communication regarding legal services.

The five proposed rules were adopted by the Commission during its March 31-April 1, 2016 meeting for submission to the Board of Trustees for public comment authorization. A final recommended rule will follow the public comment process.

1. Recommendation of the ABA Model Rule Advertising & Solicitation Framework.

The partitioning of current rule 1-400 into several rules corresponding to Model Rule counterparts is recommended because advertising of legal services and the solicitation of potential clients is an area of lawyer regulation where greater national uniformity would be helpful to the public, practicing lawyers, and the courts. The current widespread use of the Internet by lawyers and law firms to market their services and the trend in most jurisdictions, including California, toward permitting some form of multijurisdictional practice, warrants such national uniformity. In addition, a degree of uniformity should follow from the fact that all jurisdictions are bound by the constitutional commercial speech doctrine when seeking to regulate lawyer advertising and solicitation.

2. Recommendation to repeal or relocate the current Standards into the black letter or comments of the relevant proposed rule but to retain current rule 1-400(E), which authorizes the Board to promulgate Standards.

The standards are not necessary to regulate inherently false and deceptive advertising. The Commission reviewed each of the standards and determined that most fell into that category. Further, as presently framed, the presumptions force lawyers to prove a negative. They thus create a lack of predictability with respect to how a particular bar regulator might view a given advertisement. The standards also create a risk of inconsistent enforcement and an unchecked opportunity to improperly regulate "taste" and "professionalism" in the name of "misleading" advertisements. In the absence of deception or illegal activities, regulations concerning the content of advertisements are constitutionally permitted only if they are narrowly drawn to advance a substantial governmental interest. *Central Hudson Gas & Elec. v. Pub. Serv. Comm'n*, 447 U.S. 557 (1980); *Alexander v. Cahill*, 598 F.3d 79 (2d Cir. 2010) (state's ban on "advertising techniques" that are no more than potentially misleading are unconstitutionally broad).

Nevertheless, although the Commission's review led it to conclude that none of the current standards should be retained as standards, it determined that proposed rule 7.1 should carry forward current rule 1-400(E), the standard enabling provision, in the event future developments in communications or law practice might warrant the promulgation of standard to regulate lawyer conduct.

3. Recommendation to eliminate the record-keeping requirement. Following the lead of most jurisdictions in the country and the ABA itself, the Commission recommends eliminating the two-year record-keeping requirement in current rule 1-400(F). The ABA Ethics 2000 Commission explained the rationale:

"The requirement that a lawyer retain copies of all advertisements for two years has become increasingly burdensome, and such records are seldom used for disciplinary purposes. Thus the Commission, with the concurrence of the ABA Commission on Responsibility in Client Development, is recommending elimination of the requirement that records of advertising be retained for two years." (See ABA Reporter's Explanation of Changes, Rule 7.2(b).)

The Commission also notes that because a "web page" is an electronic communication, (see State Bar Formal Ethics Op. 2001-155), it would be extraordinarily burdensome to require a lawyer to retain copies of each web page given how often the information on web pages are changed, and how often web pages are deleted. Nevertheless, the Commission also notes that even with the deletion of the requirement in rule 1-400(F), a one-year retention requirement would remain in Business and Professions Code section 6159.1. To address this discrepancy, the rule submission to the Supreme Court should include a note to this effect and recommend

that, with the Supreme Court's approval, the State Bar approach the legislature with a recommendation to delete that requirement.

A description of each of the proposed rules follows.

Rules 7.1 (Communication Concerning A Lawyer's Services)

As noted, proposed Rule 7.1 sets out the general prohibition against a lawyer making false and misleading communications concerning a lawyer's availability for legal services.

Paragraph (a) carries forward the basic concept in current rule 1-400(D) by prohibiting false or misleading communications and providing an explanation of when a communication is false or misleading. (Compare rule 1-400(D)(1) – (4).)

Paragraph (b) carries forward the enabling provision in current rule 1-400(E) authorizing the Board to formulate and adopt advertising standards. (See discussion at recommendation 2, above.) The current rule provides that the Board "shall" adopt standards but given the comprehensive revisions recommended for the advertising rules, the Commission is recommending that the enabling provision be revised to be a permissive as opposed to mandatory provision (e.g., that the Board "may" formulate and adopt standards).

There are six comments. Comment [1] explains the breadth of the concept of lawyer "communication" about a lawyer's services and is consistent with the similar concept in current rule 1-400(A). Comment [2] carries forward the concept found in current rule 1-400(E), Standard No. 1, which explains that guarantees and warranties are false or misleading under the Rule. Comment [3] provides specific examples of how certain communications are misleading although true, thus providing insight into how the rule should be applied. Comment [4] provides similar guidance by focusing lawyers on the concept of reasonable, as opposed to unjustified, client expectations in evaluating whether a communication violates the rule. Comment [5] carries forward the concept in current Standard No. 15 regarding communications that promote a lawyer's or firm's facility with a foreign language. A lawyer's communication of a foreign language ability is helpful information to a consumer in choosing a lawyer, but it can also mislead a potential client who has expectations that a lawyer, as opposed to a non-lawyer, possesses the foreign language ability. Comment [6] provides cross-references to other law, including Bus. & Prof. §§ 6157 to 6159.2 and 17000 et seq., that regulate lawyer commercial speech. As can be seen, all of the comments provide interpretative guidance or clarify how the rule should be applied.

Rule 7.2 (Advertising)

As noted, proposed Rule 7.2 will specifically address advertising, a subset of communication.

Paragraph (a), derived from MR 7.2(a) as modified, permits lawyers to advertise to the general public their services through any written, recorded or electronic media, provided the advertisement does not violate proposed Rule 7.1 (prohibition on false or misleading communications) or 7.3 (prohibition on in-person, live telephone or real-time electronic communications). The addition to MR 7.2(a) language of the terms "any" and "means of" are intended to signal that the different modes of communication listed (written, recorded and electronic) are expansive and not limited to currently existing technologies.

Paragraph (b) prohibits a lawyer from paying a person for recommending the lawyer's services except in the enumerated circumstances set forth in subparagraphs (b)(1) through (b)(5). Subparagraph (b)(1) carries forward current rule 1-320's Discussion paragraph, which does not "preclude compensation to the communications media in exchange for advertising the member's or law firm's availability for professional employment." The term "reasonable" was added to modify "costs" to ensure such advertising costs do not amount to impermissible fee sharing with a nonlawyer. Subparagraph (b)(2) clarifies that payment of "usual charges" to a qualified lawyer referral service is not the impermissible sharing of fees with a nonlawyer. Subparagraph (b)(3) carries forward the exception in current rule 2-200(B). Subparagraph (b)(4) has no counterpart in the California Rules. However, permitting reciprocal referral arrangements recognizes a common mechanism by which clients are paired with lawyers or nonlawyer professionals. Because these arrangements are permitted only so long as they are not exclusive and the client is made aware of them, public protection is preserved. Subparagraph (b)(5) carries forward the substance of the second sentence of current rules 2-200(B) and 3-120(B), which permit such gifts to lawyers and nonlawyers, respectively.

Paragraph (c), derived from Model Rule 7.2(c), as modified, requires the name and address of at least one lawyer responsible for the advertisement's content. It carries forward the concept in current Standard No. 12.

There are four comments that provide interpretative guidance or clarify how the rule should be applied. Comment [1] provides interpretive guidance on the kinds of information that would generally not be false or misleading by providing a non-exhaustive list of permissible information. The comment's last sentence carries forward the substance of rule 1-400, Standard No. 16 regarding misleading fee information. Comment [2] clarifies that neither Rule 7.2 nor 7.3 [Solicitation of Clients] prohibits court-approved class action notices, a common form of communication with respect to the provision of legal services. Comment [3] provides interpretive guidance by clarifying that a lawyer may not only compensate media outlets that publish or air the lawyer's advertisements, but also may retain and compensate employees or outside contractors to assist in the marketing the lawyer's services, subject to proposed Rule 5.3 (Responsibilities Regarding Nonlawyer Assistants). Comment [4] clarifies how the rule should be applied to reciprocal referral arrangements, as permitted under subparagraph (b)(4), specifically focusing on the concept that such arrangements must not compromise a lawyer's independent professional judgment.

Rule 7.3 (Solicitation of Clients)

As noted, proposed Rule 7.3 will regulate marketing of legal services through direct contact with a potential client either by real-time communication such as delivered in-person or by telephone, or by directly targeting a person known to be in need of specific legal services through other means, e.g., letter, email, text, etc. It carries forward concepts that are found in current rule 1-400(B), (C), (D)(5) and Standard Nos. 3, 4 and 5.

Paragraph (a), derived from MR 7.3(a), carries forward the concept of current rule 1-400(C), which contains the basic prohibition against what is traditionally understood to constitute improper "solicitation" of legal business by a lawyer engaging in real-time communication with potential clients. The concern is the ability of lawyers to employ their "skills in the persuasive arts" to overreach and convince a person in need of legal services to retain the lawyer without the person having had time to reflect on this important decision. The provision thus eliminates the opportunity for a lawyer to engage in real-time (i.e., contemporaneous and interactive) communication with a potential client. The term "real-time electronic contact" has been added

from Model Rule 7.3 because the same concerns regarding in-person or live telephone communications applies to real-time electronic contact such as communications in a chat room or by instant messaging. The two exceptions to such solicitations are included because there is significantly less concern of overreaching when the solicitation target is another lawyer or has an existing relationship with the soliciting lawyer.

Paragraph (b), derived from MR 7.3(b), is a codification of *Shapiro v. Kentucky Bar Ass'n* (1988) 486 U.S. 466, in which the Supreme Court held that a state could not absolutely prohibit direct targeted mailings. The provision, however, recognizes that there are instances in which even any kind of communication with a client, including those permitted under Rule 7.2, are prohibited. Such circumstances include when the person being solicited has made known to the lawyer a desire not to be contacted or when the solicitation by the lawyer “is transmitted in any manner which involves intrusion, coercion, duress or harassment.” The latter situation largely carries forward the prohibition in current rule 1-400(D)(5). The Commission, however, determined that additional language in the latter provision, i.e., “compulsion,” “intimidation,” “threats” and “vexatious conduct,” are subsumed in the four recommended terms: “intrusion, coercion, duress and harassment.”

Paragraph (c), derived from MR 7.3(c), largely carries forward current rule 1-400, Standard No. 5, and requires that every written, recorded or electronic communication from a lawyer seeking professional employment from a person known to be in need of legal services in a particular matter, i.e., direct targeted communications, must include the words “Advertising Material” or words of similar import. The provision is intended to avoid members of the public being misled into believing that a lawyer’s solicitation is an official document that requires their response.

Paragraph (d), derived from MR 7.3(d), would permit a lawyer to participate in a pre-paid or group legal service plan even if the plan engages in real-time solicitation to recruit members. Such plans hold promise for improving access to justice. Further, unlike a lawyer’s solicitation of a potential client for a particular matter where there exists a substantial concern for overreaching by the lawyer, there is little if any concern if the plan itself engages in in-person, live telephone or real-time electronic contact to solicit members in the organization.

Paragraph (e), derived in part from MR 7.3, cmt. [1], has been added to the black letter to clarify that a solicitation covered by this Rule: (i) can be oral, (paragraph (a)) or written (paragraph (b)); and (ii) is a communication initiated by or on behalf of the lawyer. The first point is important because the traditional concept of a “solicitation” is of a “live” oral communication in-person or by phone. The second point is an important reminder that a lawyer cannot avoid the application of the rule by acting through a surrogate, e.g., runner or capper.

There are four comments that provide interpretative guidance or clarify how the rule should be applied. Comment [1] clarifies that a communication to the general public or in response to an inquiry is not a solicitation. Comment [2] provides an important clarification that a lawyer acting pro bono on behalf of a bona fide public or charitable legal services organization is not precluded under paragraph (a) from real-time solicitation of a potential plaintiff with standing to challenge an unfair law, e.g., school desegregation laws. This clarification can contribute to access to justice by alerting lawyers that real-time solicitations under conditions present in the cited Supreme Court opinion, *In re Primus*, are not prohibited. Comment [3] clarifies the application of paragraph (d). Comment [4] clarifies that regardless of whether the lawyer is providing services under the auspices of a permitted legal services plan, the lawyer must comply with the cited rules.

Savings Clause. In addition to the foregoing recommended adoptions, the Commission recommends the deletion of the savings clause in current rule 1-400(C) (“unless the solicitation is protected from abridgment by the Constitution of the United States or by the Constitution of the State of California.”) The clause was added to the original California advertising rule in 1978 following the Supreme Court’s decision in *Bates v. State Bar of Arizona*, when it was uncertain the extent to which limitations placed on lawyer commercial speech could survive Constitutional challenge. The clause’s continued vitality is questionable at best. Through its decisions in the decades since *Bates*, the Supreme Court has repeatedly held that a state’s regulation of a lawyer’s initiation of in-person or telephonic contact with a member of the public does not violate the First Amendment. The Commission concluded that the clause is no longer necessary.

Current Rule 1-400(B)(2)(b). The Commission also recommends the deletion of current rule 1-400(B)(2)(b), which includes in that rule’s definition of “solicitation” a communication delivered in person or by telephone that is “(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.” In recommending its deletion, the Commission reasoned that although the conduct described in 1-400(B)(2)(b) might give rise to a civil remedy for tortious interference with a contractual relationship, the provision does not belong in a disciplinary rule. Moreover, there are potential First Amendment issues with retaining this prohibition.

Rule 7.4 (Communication of Fields of Practice and Specialization)

As noted, proposed Rule 7.4 will regulate the communication of a lawyer's fields of practice and claims to specialization. It carries forward concepts that are found in current rule 1-400(D)(6).

Paragraph (a), derived from MR 7.4(d), as modified, states the general prohibition against a lawyer claiming to be a “certified specialist” unless the lawyer has been so certified by the Board of Legal Specialization or any accrediting entity designated by the Board. Placing this provision first is a departure from the Model Rule paragraph order. However, in conformance with the general style format for disciplinary rules, the Commission concluded that this prohibitory provision should come first, followed by paragraph (b), which identifies statements a lawyer is permitted to make regarding limitations on the lawyer’s practice.

Paragraph (b), derived from MR 7.4(a), permits a lawyer to 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 by communicating that the lawyer’s practice specializes in, is limited to, or is concentrated in a particular field of law.

The Commission does not believe any comments are necessary to clarify the black letter of the proposed rule.

Recommended rejections of Model Rule provisions. The Commission does not recommend adoption of MR 7.4(b) or (c), both of which are statements regarding practice limitations or specializations that have been traditionally recognized (patent law in MR 7.4(b) and admiralty law in MR 7.4(c)), but which come within the more general permissive language of proposed paragraph (b).

Rule 7.5 (Firm Names and Trade Names)

As noted, proposed Rule 7.5 will regulate the use of firm names and trade names. It carries forward concepts in current rule 1-400(A), which identifies the kinds of communications the rule is intended to regulate, and Standard Nos. 6 through 9.

Paragraph (a) sets forth the general prohibition by clarifying that any use of a firm name, trade name or other professional designation is a “communication” within the meaning of proposed Rule 7.1(a) and, therefore must not be false or misleading. The Commission, however, recommends departing from both current rule 1-400 and MR 7.5 by eliminating the term “letterhead,” which is merely a subset of “professional designation” and has largely been supplanted by email signature blocks. (See also discussion re the single comment to this Rule.

Paragraph (b), derived from the second sentence of MR 7.5(a), as modified to be prohibitory rather than permissive, carries forward the concept in Standard No. 6 regarding communications that state or imply a relationship between a lawyer and a government agency.¹

Paragraph (c), derived from MR 7.5(d), as modified to be prohibitory rather than permissive, carries forward the concepts in Standard Nos. 7 and 8 that prohibit communications that state or imply a relationship between a lawyer and a law firm or other organization unless such a relationship exists.²

There is a single comment that provides an explanation of the scope of the term, “other professional designation,” which includes not only letterheads but also more recent law marketing innovations such as logos, URLs and signature blocks.

¹ Standard No. 6 provides the following is a presumed violation of rule 1-400:

(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.

² Standard Nos. 7 and 8 provide the following are presumed violations of rule 1-400:

(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 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.

Rule 7.1 [1-400] Advertising and Solicitation Communications Concerning A Lawyer's Services

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

- (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.~~
- (B) ~~For purposes of this rule, a "solicitation" means any communication:~~
- ~~(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.~~
- (Ca) ~~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.~~ lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains an untrue statement, or a material misrepresentation of fact or law, or omits a fact necessary to make the communication considered as a whole not materially misleading.
- (D) ~~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.~~
 - (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.~~
- (Eb) The Board of ~~Governors~~Trustees 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.~~

Standards:Comment

~~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:~~

[1] This Rule governs all communications of any type whatsoever about the lawyer or the lawyer's services, including advertising permitted by Rule 7.2. A communication includes 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 person.*

~~(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 that 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.”~~guarantee or warranty of the result of a particular representation is a false or misleading communication under this Rule. See also, Business and Professions Code § 6157.2(a).

{3} 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 it is presented in a manner that creates 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. Any communication that states or implies “no fee without recovery” is also misleading unless the communication also expressly discloses whether or not the client will be liable for costs.

~~(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)~~{4} 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. that truthfully reports a lawyer's achievements on behalf of

clients or former clients, or a testimonial about or endorsement of the lawyer, 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. An appropriate disclaimer or qualifying language often avoids creating unjustified expectations.

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

~~(14) A "communication" which 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 ~~"This Rule prohibits a lawyer from making a communication" which that~~ states or implies that ~~a member~~the lawyer is able to provide legal services in a language other than English unless the ~~member~~lawyer can actually provide legal services in ~~such that~~ 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] Rules 7.1 through 7.5 are not the sole basis for regulating communications concerning a lawyer's services. See, e.g., Business and Professions Code §§ 6150 – 6159.2 and 17000 et. seq. Other state or federal laws may also apply.

~~(16) An unsolicited "communication" transmitted to the general public or any substantial portion thereof primarily directed to seeking professional employment primarily for pecuniary gain which sets forth a specific fee or range of fees for a particular service where, in fact, the member 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 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.~~

COMMISSION PROVISIONAL REPORT AND RECOMMENDATION: RULE 7.1 [1-400]

Commission Drafting Team Information

Lead Drafter: Carol Langford

Co-Drafters: Tobi Inlender, Howard Kornberg, Mark Tuft

Meeting Date at which the Rule was Discussed: March 31 – April 1, 2016

Action Summary Approval Date: May 6, 2016

I. CURRENT CALIFORNIA RULE

Rule 1-400 Advertising and Solicitation

- (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.
- (B) For purposes of this rule, a “solicitation” means any communication:
- (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.

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- (D) 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.
 - (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) 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. “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.
- (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.

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:

- (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

COMMISSION PROVISIONAL REPORT AND RECOMMENDATION: RULE 7.1 [1-400]

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

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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) A “communication” which contains a dramatization unless such communication contains a disclaimer which states “this is a dramatization” or words of similar import.

(14) A “communication” which states or implies “no fee without recovery” unless such communication also expressly discloses whether or not the client will be liable for costs.

(15) A “communication” which states or implies that a member is able to provide legal services in a language other than English unless the member 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) An unsolicited “communication” transmitted to the general public or any substantial portion thereof primarily directed to seeking professional employment primarily for pecuniary gain which sets forth a specific fee or range of fees for a particular service where, in fact, the member 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 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.

II. COMMISSION’S RECOMMENDATION AND VOTE

The Commission voted to recommend a proposed amended rule as set forth below in Section III.

At the Commission’s March 31 – April 1, 2016 meeting, all members present voted to recommend adoption of the rule, with the exception of Mr. Ham and Mr. Kehr.

III. COMMISSION’S PROPOSED RULE (CLEAN)

Rule 7.1 [1-400] Communications Concerning A Lawyer’s Services

- (a) A lawyer shall not make a false or misleading communication about the lawyer or the lawyer’s services. A communication is false or misleading if it contains an untrue statement, or a material misrepresentation of fact or law, or omits a fact necessary to make the communication considered as a whole not materially misleading.
- (b) The Board of Trustees 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

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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 §§ 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 of any type whatsoever about the lawyer or the lawyer’s services, including advertising permitted by Rule 7.2. A communication includes 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 person.*

[2] A communication that contains an express guarantee or warranty of the result of a particular representation is a false or misleading communication under this Rule. See also, Business and Professions Code § 6157.2(a).

[3] 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 it is presented in a manner that creates 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. Any communication that states or implies “no fee without recovery” is also misleading unless the communication also expressly discloses whether or not the client will be liable for costs.

[4] A communication that truthfully reports a lawyer’s achievements on behalf of clients or former clients, or a testimonial about or endorsement of the lawyer, 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. An appropriate disclaimer or qualifying language often avoids creating unjustified expectations.

[5] This Rule prohibits a lawyer from making a communication that states or implies that the lawyer is able to provide legal services in a language other than English unless the lawyer can actually provide legal services in that language or the communication also states in the language of the communication the employment title of the person* who speaks such language.

[6] Rules 7.1 through 7.5 are not the sole basis for regulating communications concerning a lawyer’s services. See, e.g., Business and Professions Code §§ 6150 – 6159.2 and 17000 et. seq. Other state or federal laws may also apply.

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IV. PROPOSED RULE (REDLINE TO CURRENT CALIFORNIA RULE 1-400)

Rule 7.1 [1-400] ~~Advertising and Solicitation~~ Communications Concerning A Lawyer's Services

- (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.~~
- (B) ~~For purposes of this rule, a "solicitation" means any communication:~~
- (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.~~
- (Ca) ~~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.~~ lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains an untrue statement, or a material misrepresentation of fact or law, or omits a fact necessary to make the communication considered as a whole not materially misleading.
- (D) ~~A communication or a solicitation (as defined herein) shall not:~~

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- ~~(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.~~
 - ~~(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**b**) The Board of ~~Governors~~Trustees 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.~~

~~Standards:~~Comment

~~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:~~

[1] This Rule governs all communications of any type whatsoever about the lawyer or the lawyer's services, including advertising permitted by Rule 7.2. A communication includes 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 person.*

~~(1) A "communication" which contains guarantees, warranties, or predictions regarding the~~

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~~result of the representation.~~

~~{2}~~ A “communication” ~~which contains testimonials about or endorsements of a member unless such communication also~~ that 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.” guarantee or warranty of the result of a particular representation is a false or misleading communication under this Rule. See also, Business and Professions Code § 6157.2(a).

[3] 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 it is presented in a manner that creates 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. Any communication that states or implies “no fee without recovery” is also misleading unless the communication also expressly discloses whether or not the client will be liable for costs.

~~(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)~~[4] 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. that truthfully reports a lawyer’s achievements on behalf of clients or former clients, or a testimonial about or endorsement of the lawyer, 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

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lead a reasonable* person* to conclude that the comparison can be substantiated. An appropriate disclaimer or qualifying language often avoids creating unjustified expectations.

~~(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) A “communication” which contains a dramatization unless such communication contains a disclaimer which states “this is a dramatization” or words of similar import.~~

~~(14) A “communication” which 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 “This Rule prohibits a lawyer from making a communication” which that states or implies that a member~~the lawyer~~ is able to provide legal services in a language other than English unless the member~~lawyer~~ can actually provide legal services in such~~that~~ 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] Rules 7.1 through 7.5 are not the sole basis for regulating communications concerning a lawyer’s services. See, e.g., Business and Professions Code §§ 6150 – 6159.2 and 17000 et. seq. Other state or federal laws may also apply.

~~(16) An unsolicited “communication” transmitted to the general public or any substantial portion thereof primarily directed to seeking professional employment primarily for pecuniary gain which sets forth a specific fee or range of fees for a particular service where, in fact, the~~

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~~member 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 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.~~

V. COMMISSION'S PROPOSED RULE (REDLINE TO MODEL RULE 7.1)

Rule 7.1— [1-400] CommunicationCommunications Concerning aA Lawyer's Services

- (a) A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains an untrue statement, or a material misrepresentation of fact or law, or omits a fact necessary to make the ~~statement~~ communication considered as a whole not materially misleading.
- (b) The Board of Trustees 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 of any type whatsoever about at the lawyer or the 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.~~ A communication includes 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 person.*

[2] A communication that contains an express guarantee or warranty of the result of a particular representation is a false or misleading communication under this Rule. See also, Business and Professions Code § 6157.2(a).

[23] ~~Truthful~~ This Rule prohibits 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 it~~ is presented in a manner that creates 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. Any communication that states or implies "no fee without recovery" is also misleading unless the communication also expressly discloses whether or not the client will be liable for costs.

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~~[34]~~ ~~An advertisement~~ A communication that truthfully reports a lawyer's achievements on behalf of clients or former clients, or a testimonial about or endorsement of the lawyer, 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 An~~ appropriate disclaimer or qualifying language ~~may preclude a finding that a statement is likely to create~~ often avoids creating unjustified expectations ~~or otherwise mislead the public.~~

[5] This Rule prohibits a lawyer from making a communication that states or implies that the lawyer is able to provide legal services in a language other than English unless the lawyer can actually provide legal services in that language or the communication also states in the language of the communication the employment title of the person* who speaks such language.

[6] Rules 7.1 through 7.5 are not the sole basis for regulating communications concerning a lawyer's services. See, e.g., Business and Professions Code §§ 6150 – 6159.2 and 17000 et. seq. Other state or federal laws may also apply.

~~[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.~~

VI. OCTC / STATE BAR COURT COMMENTS

- **Jayne Kim, OCTC, 3/25/2016:**

Please see OCTC's October 27, 2015 comment.

OCTC opposes adopting ABA Model Rules 7.1 through 7.5. The Model Rules offer a different methodology for analyzing advertising violations, but do not provide any greater clarity or enforceability.

- **Jayne Kim, OCTC, 1/12/2016:**

See OCTC's October 2015 comment.

- **Jayne Kim, OCTC, 10/27/2015:**

Rule 1-400: Advertising and Solicitation

1. Rule 1-400 and its Standards 1, 2, 4-8 and 12-16, should be retained as currently written. The Standards serve multiple purposes, including providing guidance to the membership, educating the public, and assisting OCTC in evaluating and resolving complaints. OCTC often refers to the Standards when closing less serious advertising complaints with warning or resource letters. However, Standards 3, 9 and 10 describe conduct and situations clearly covered by the rule itself. Those Standards are not necessary.

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(Standard 11 has been repealed.)

2. The rule would be enhanced by requiring that members retain copies of their legal advertising for five years instead of the current two year period. This would be consistent with the rule of limitations for State Bar prosecutions. (See rule 5.21 of the Rules of Procedure.)
3. OCTC does not interpret *Central Hudson Gas & Electric Corp v. Public Service Commission of N.Y.* (1980) 447 US 557 as supporting an argument that all restrictions on advertising should be extinguished.

- **State Bar Court:** No comments received from State Bar Court.

VII. COMPARISON OF PROPOSED RULE TO APPROACHES IN OTHER JURISDICTIONS (NATIONAL BACKDROP)

The ABA State Adoption Chart for the ABA Model Rule 7.1, which is a direct counterpart to rule 1-400, is posted at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_7_1.pdf
- Nineteen jurisdictions have adopted Model Rule 7.1 verbatim.¹ Thirty-two jurisdictions have adopted a version of the rule that is substantially different from Model Rule 7.1.² Several of these latter jurisdictions adopt the first sentence of the Model Rule verbatim but elaborate on the meaning of “misleading,” which is defined in the second sentence of Model Rule 7.1.³

VIII. CONCEPTS ACCEPTED/REJECTED; CHANGES IN DUTIES; NON-SUBSTANTIVE CHANGES; ALTERNATIVES CONSIDERED

A. Concepts Accepted (Pros and Cons):

1. Recommend adoption of Model Rule 7.1, as modified.
 - Pros: Model Rule 7.1 is a part of the implementation of the Commission's vote at the January 22 – 23, 2016 meeting to adhere to the ABA Model Rule general framework for regulating lawyer advertising and solicitations for business by several separate

¹ The nineteen jurisdictions are: Arizona, Connecticut, Delaware, Illinois, Indiana, Iowa, Maine, Maryland, Massachusetts, Minnesota, Nebraska, Oklahoma, Oregon, Pennsylvania, Tennessee, Vermont, Washington, West Virginia, and Wyoming.

² The thirty-two jurisdictions are: Alabama, Alaska, Arkansas, California, Colorado, District of Columbia, Florida, Georgia, Hawaii, Idaho, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Rhode Island, South Carolina, South Dakota, Texas, Utah, Virginia, and Wisconsin.

³ Those jurisdictions include: Alaska, Hawaii, Idaho, Kansas, Missouri, Montana, Nevada, New Hampshire, New Jersey, North Carolina,

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rules, each of which addresses a general topic.

The partitioning of current rule 1-400 into several rules corresponding to Model Rule counterparts is recommended because advertising of legal services and the solicitation of potential clients is an area of lawyer regulation where greater national uniformity would be helpful to the public, practicing lawyers, and the courts. The current widespread use of the Internet by lawyers and law firms to market their services and the trend in most jurisdictions, including California, toward permitting some form of multijurisdictional practice, warrants such national uniformity.

Proposed rule 7.1 sets out the general prohibition against a lawyer making false and misleading communications concerning the availability of legal services.

Proposed rule 7.2 will specifically address advertising, a subset of communication.

Proposed rule 7.3 will regulate marketing of legal services through direct contact with a potential client either by real-time communication such as delivered in-person or by telephone, or by directly targeting a person known to be in need of specific legal services.

Proposed rule 7.4 will regulate the communication of a lawyer's fields of practice and claims to specialization.

Proposed rule 7.5 will regulate the use of firm names and trade names.

(See also 6/16/15 public comment from Scott Garner noted in section VI above. Mr. Garner expresses support for the Model Rules approach to advertising.)

- Cons: There is no evidence that current rule 1-400, when applied in conjunction with Business & Professions Code §§ 6157 et seq., does not provide an adequate basis for regulating the field of lawyer advertising.
2. Recommend adoption of Model Rule 7.1(a), as modified that serves as a general prohibition against false or misleading communications.
- Pros: A general prohibition coextensive with the commercial speech doctrine provides public protection by setting an enforceable standard for evaluating lawyer communications. Like current rule 1-400, the concept of a “communication” encompasses advertising as well as firm names and letterheads as subsets of communications and other rules address these subsets and refer back to rule 7.1.
 - Cons: There is no evidence that current rule 1-400 does not effectively regulate lawyer advertising in California. Together with Bus. & Prof. Code §§ 6157 et seq., the existing regulatory scheme provides the State Bar with an array of useful tools for both guiding lawyer compliance and disciplining lawyers when necessary to protect the public.
3. Recommend adoption of Model Rule 7.1(b) to continue the authority granted to the State Bar Board of Trustees by the California Supreme Court that permits, but does not require, the Board to adopt standards as to communications that are presumed to violate the advertising rules.
- Pros: The standards address longstanding problem areas that have been identified by the State Bar. They give guidance to lawyers and they are used by State Bar

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enforcement staff in minor misconduct matters involving, for example, warning letters and resource letters where complaints are closed following contact with a respondent lawyer. The standards have been cited by the State Bar Court Review Department (see *In the Matter of Respondent V* (1995) 3 Cal. State Bar Ct. Rptr. 442, 457.) The use of advertising standards as presumptions is also found in the State Bar Act (see Bus. & Prof. Code §§ 6158.1 and 6158.2). Although the Commission is recommending changes to the existing standards (deleting some, moving others to the black letter or comments of the rules in the 7 series), the authority granted by the Supreme Court should be retained.

- **Cons:** The standards are not necessary to regulate inherently false and deceptive advertising. As presently framed, the presumptions force lawyers to have to prove a negative. They create a lack of predictability with respect to how a particular bar regulator will view a given advertisement. The standards also create a risk of inconsistent enforcement and an unchecked opportunity to regulate "taste" and "professionalism" in the name of "misleading" advertisements. In the absence of deception or illegal activities, regulations concerning the content of advertisements are constitutionally permitted only if they are narrowly drawn to advance a substantial governmental interest. *Cent. Hudson Gas & Elec. v. Pub. Serv. Comm'n*, 447 U.S. 557 (1980); *Alexander v. Cahill*, 598 F.3d. 79 (2d Cir. 2010) (state's ban on "advertising techniques" that are no more than potentially misleading are unconstitutionally broad). The standards are not "guidelines." The "standards shall only be used as presumptions affecting the burden of proof in disciplinary proceedings involving alleged violations of these rules" Rule 1-400(E). They are intended to serve no other purpose.
4. Recommend adoption of Comment [1], as a modified version of Model Rule 7.1, cmt. [1].
- **Pros:** The comment explains the breadth of the concept of lawyer "communication" about a lawyer or the lawyer's services and is consistent with the similar concept in current rule 1-400(A). In addition, it makes clear that communications include messages made by or on behalf of a lawyer.
 - **Cons:** If the goal is to simplify the advertising rules, then a black letter statement of a general prohibition coextensive with the commercial speech standard is sufficient and comments are unnecessary and may pose a risk of diluting or expanding the general prohibition.
5. Recommend adoption of Comment [2] as a comment that has no counterpart in Model Rule 7.1 but carries forward a specific restriction found in current rule 1-400(E), Standard No. 1. The Commission recommends deleting the standard concerning guarantees, warranties, and predictions but retaining the concept as Comment [2].
- **Pros:** This change retains the longstanding prohibition of guarantees and warranties, but deletes the prohibition against predictions concerning the result of a representation. The Commission viewed the latter as too broad a prohibition; a lawyer's good faith assessment of a client's case might be viewed in retrospect as a violation of the rule. Comment [2] also eliminates the potentially risky suggestion in the current standard that a lawyer might be able to rebut the misleading character of such communications. In fact, the State Bar Act states an absolute prohibition on a

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- guarantee or warranty (see Bus. & Prof. Code §§ 6157.2(a)).
- Cons: This comment is merely an example, albeit a clear example, of a communication that violates the rule. It is unnecessary given the Commission's charter indicating that comments be used sparingly.
6. Recommend adoption of Comment [3], a modified version of Model Rule 7.1, cmt.[2]. The Commission recommends including this comment to: (i) clarify that a truthful statement might nevertheless be presented in manner that is misleading, such as through a material omission; and (ii) move to the comments the guidance provided by existing Standard No. 14 regarding prohibited communications that state or imply "no fee without recovery."
- Pros: This comment promotes compliance with the rule by explaining an important point found in lawyer advertising case law regarding the misleading presentation of truthful information. This comment also carries forward as a comment, the concept of existing Standard No. 14 that when a lawyer communicates that a client might not incur any legal fees, that communication must also address the issue of costs to avoid a misleading omission. (See Bus. & Prof. Code §§ 6157.2(d). See also *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio* (1985) 471 U.S. 626, 652-653 and current rule 1-400(D)(3). In addition, OCTC has commented in support of retaining Standard No. 14. (See above section VII.A, OCTC's 10/27/2015 letter.)
 - Cons: The general prohibition in paragraph (a) adequately addresses misleading statements and omission of material facts.
7. Recommend adoption of Comment [4], a modified version of Model Rule 7.1, cmt. [3]. This comment highlights the concept of reasonable v. unjustified client expectations in evaluating whether a communication violates the rule.
- Pros: This comment emphasizes that a lawyer should consider a proposed communication from the perspective of a consumer of legal services in order to evaluate the communication under the false, deceptive or misleading test.
 - Cons: This information, including an example, seems more appropriate for an ethics opinion.
8. Recommend adoption of Comment [5] to carry forward the concept of existing Standard No. 15 as a comment. Current Standard No. 15 addresses lawyer communications that hold out to the public an ability to provide legal services in a language other than English.
- Pros: A lawyer's communication of a foreign language ability is helpful information to a consumer in choosing an attorney, but it can also mislead a potential client who has expectations that a lawyer, as opposed to a non-lawyer, possesses the foreign language ability. This concept should be specifically addressed in the rule. (Compare Bus. & Prof. Code §§ 6158.2(o), stating that information concerning foreign language ability is permissible in electronic media advertising provided the message as a whole is not false, misleading or deceptive.)
 - Cons: None identified.

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9. Recommend adoption of Comment [6] as a comment that has no counterpart in Model Rule 7.1 but provides information about other applicable law. This comment clarifies that the rules are not the only authorities regulating lawyer advertising, citing the State Bar Act and noting that federal laws might also apply.
 - Pros: As a disciplinary rule, this comment alerts a lawyer to other applicable law. It promotes compliance because certain issues that do not appear in the rules are present in the State Bar Act, such as special regulations on advertisements for immigration services (see, e.g., Bus. & Prof. Code §§ 6157.5.)
 - Cons: None identified.

B. Concepts Rejected (Pros and Cons):

1. Retain Model Rule 7.1, Comment [4] in some form. Model Rule 7.1 Comment [4] provides a cross reference to Model Rule 8.4(e) that prohibits a lawyer from stating or implying an ability to exert improper influence on an official or government agency.
 - Pros: The Commission is recommending adoption of a direct counterpart to Model Rule 8.4(e).
 - Cons: Although the Commission is recommending adoption of a direct counterpart to Model Rule 8.4(e), the Commission must take account of the Commission's charter indicating that comments be used sparingly.
2. Response to Initial Public Comments Noted in Section VI.
 - Scott Garner (6/16/15): Mr. Garner suggested updating the standards to reflect modern technology. The Commission is addressing technology but in the black letter or comments in various places in proposed rules 7.1 – 7.5 (see e.g., propose rule 7.3(a) that includes the concept of “real-time electronic contact”).
 - Lisa Wilbur (5/4/2015): Ms. Wilbur expressed concerns with false advertising and a possible need for specific rules regarding the disclosure of entity status. Although the Commission is not recommending a specific response to this concern in proposed rule 7.1, there is the general concept of misleading omissions addressed in Comment [3]. In addition, the Commission's proposed rule 7.5 addresses law firm names and trade names, and paragraph (c) of that rule states that: “A lawyer shall not state or imply that the lawyer practices in, or has a professional relationship with a law firm or other organization unless that is the fact.”

C. Changes in Duties/Substantive Changes to the Current Rule:

1. The Commission's position is that current rule 1-400 must be applied consistent with the commercial speech doctrine. Although rule 1-400 includes certain provisions that are more detailed statements of what constitutes a false, deceptive or misleading communication (see, e.g., rule 1-400(D)(4) regarding a communication that fails to indicate expressly or by context that it is a promotional message concerning legal services), the general prohibition is substantively the same as the proposed rule.

D. Non-Substantive Changes to the Current Rule:

1. Substitute the term “lawyer” for “member”.
 - Pros: The current Rules' use of “member” departs from the approach taken in the rules in every other jurisdiction, all of which use the term lawyer. The Rules apply to all non-members practicing law in the State of California by virtue of a special or

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temporary admission. For example, those eligible to practice pro hac vice or as military counsel. (See e.g. rules 9.40, 9.41, 9.42, 9.43, 9.44, 9.45, 9.46, 9.47, and 9.48 of the California Rules of Court.)

- Cons: Retaining “member” would carry forward a term that has been in use in the California Rules for decades.
2. Change the rule number to conform to the ABA Model rules numbering and formatting (e.g., lower case letters).
- Pros: It will facilitate the ability of lawyers from other jurisdictions who are authorized by various Rules of Court to practice in California to find the California rule corresponding to their jurisdiction’s rule, thus permitting ease of determining whether California imposes different duties. It will also facilitate the ability of California lawyers to research case law and ethics opinions that address corresponding rules in other jurisdictions, which would be of assistance in complying with duties, particularly when California does not have such authority interpreting the California rule. As to the “Con” that there is a large body of case law that cites to the current rule numbers, the rule numbering was drastically changed in 1989 and there has been no apparent adverse effect. A similar change in rule numbering of the Rules of Court was implemented in 2007, also with no apparent adverse effect.
 - Cons: There is a large body of case law that cites to the current rule numbers and California lawyers are presumed to be familiar with that numbering system.

E. Alternatives Considered:

None.

IX. COMMISSION RECOMMENDATION FOR BOARD ACTION

Recommendation:

That the Board of Trustees of the State Bar of California adopt proposed amended Rule 7.1 [1-400] in the form stated above for purposes of public comment authorization as a part of the Commission’s proposed comprehensive revisions to the Rule.

X. FINAL COMMISSION VOTE/ACTION

Date of Vote: March 31 – April 1, 2016

Action: Approve Rule 7.1 [1-400] as revised during the meeting.

Vote: 15 (yes) – 2 (no) – 0 (abstain)