

PROPOSED NEW RULE 7.2 (Formerly Rule 1-400 Advertising and Solicitation)

At its October 8, 2004 meeting, the Commission tentatively approved proposed new rule 7.2 (formerly rule 1-400). This proposal has not been considered or approved by the Board of Governors of the State Bar of California. Tentative approval means that the proposed new rule will not be the subject of further amendments until such time as the Chair places the rule on the Commission's agenda for consideration of transmission to the Board of Governors Committee on Regulation, Admissions and Discipline with a request that the Board Committee authorize a public comment distribution of the proposed new rule. (Note: At its October 8, 2004 meeting, the Commission voted to adopt, for purposes of drafting, the numbering and organization system of the ABA Model Rules of Professional Conduct. However, the decision to adopt the Model Rules numbering system should not be taken to mean that the substance of the rules or even the organization within any given rule will be identical to a Model Rule counterpart.)

This document provides the following resources: (1) the text of proposed new rule 7.2; (2) a redline/strikeout version of the proposed rule comparing it to Model Rule 7.2; (3) explanatory notes; (4) concepts considered but not recommended; and (5) excerpts from the Commission's July 9, 2004, August 27 & 28, 2004, and October 8, 2004 meeting summaries.

Proposed New Rule 7.2 (Formerly Rule 1-400) – Clean Version

(As approved at the Commission's October 8, 2004 meeting.)

Rule 7.2. Advertising

- (a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through written, recorded or electronic communication, including public media.
- (b) A lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may
 - (1) pay the reasonable costs of advertisements or communications permitted by this Rule;
 - (2) pay the usual charges of a legal services plan or a qualified lawyer referral service. A qualified lawyer referral service is a lawyer referral service established, sponsored and operated in accordance with the State Bar of California's minimum standards for a lawyer referral service in California;
 - (3) pay for a law practice in accordance with Rule 1.17; and
 - (4) refer clients to another lawyer or non-lawyer pursuant to an agreement not otherwise prohibited under these Rules that provides for the other person to refer clients or customers to the lawyer, if
 - (i) the reciprocal referral agreement is not exclusive, and
 - (ii) the client is informed of the existence and nature of the agreement.

- (c) Any communication made pursuant to this rule shall include the name and office address of at least one lawyer or law firm responsible for its content.

Comments

[1] [RESERVED]

[2] Rule 7.2 permits public dissemination of information concerning a lawyer's name or firm name, address and telephone number; the kinds of services the lawyer will undertake; the basis on which the lawyer's fees are determined, including prices for specific services and payment and credit arrangements; a lawyer's foreign language ability; names of references and, with their consent, names of clients regularly represented; and other information that might invite the attention of those seeking legal assistance.

[3] Rule 7.2 permits advertising by electronic media, including but not limited to television, radio and the Internet. *But see* Rule 7.3(a) concerning real-time electronic communications with prospective clients.

[4] Neither rule 7.2 nor rule 7.3 is intended to prohibit communications authorized by law.

Paying Others to Recommend a Lawyer

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

[6] Subparagraph (b)(2) is intended to permit a lawyer to pay the usual charges of a group or pre-paid legal service plan exempt from registration under Business & Professions Code, section 6155(c). Subparagraph (b)(2) is also intended to permit a lawyer to pay the usual charges of a qualified lawyer referral service established, sponsored and operated in accordance with the State Bar of California's minimum standards for a lawyer referral service in California. See Business & Professions Code, section 6155, and rules and regulations pursuant thereto. See *also* Rule 5.4(b)(4) [1-310X(b)(4)].

[7] A lawyer who accepts assignments or referrals from a legal service plan or referrals from a lawyer referral service must act reasonably to assure that the activities of the plan or service are compatible with the lawyer's professional obligations. See Rules 5.3 and 5.4. Legal service plans and lawyer referral services may communicate with prospective clients, but such communication must be in conformity with these Rules. Thus, advertising must not be false or misleading, as would be the case if the communications of a group advertising program or a group legal services plan would mislead prospective clients to think that it was a lawyer referral service sponsored by a state agency or bar association. Nor could the lawyer allow in-person, telephonic, or real-time contacts that would violate Rule 7.3.

[8] Subparagraph (b)(4) permits a lawyer to make referrals to another, in return for the undertaking of that person to refer clients or customers to the lawyer. Such reciprocal referral arrangements must not interfere with the lawyer's professional judgment as to making referrals or as to providing substantive legal services. See Rule 5.4(d) [1-310X(d)]. A lawyer does not violate subparagraph (b)(4) of this Rule by agreeing to refer clients or customers to another, so long as the reciprocal referral agreement is not exclusive and the client is informed of the referral agreement. See *also* Rule 2-200(B). Conflicts of interest created by arrangements made pursuant to subparagraph (b)(4) are governed by Rule [3-310]. Reciprocal referral agreements should not be of indefinite duration and should be reviewed periodically to determine whether they comply with these Rules. Rule 7.2 is not intended to restrict referrals or divisions of revenues or net income among lawyers within law firms comprised of multiple entities.

Required information in advertisements

[9] Paragraph (c) also applies to a group of lawyers that engages in cooperative advertising. Any such communication made pursuant to Rule 7.2 shall include the name and office address of at least one member of the group responsible for its content. See *also* Business & Professions Code, section 6155, subdivision (h). See *also* Business & Professions Code, section 6159.1, concerning the requirement to retain any advertisement for one year.

Proposed New Rule 7.2 Comparison to ABA Model Rule 7.2

(Underlined text is proposed addition; strike-through text is proposed deletion.)

Rule 7.2⁺: Advertising

- (a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through written, recorded or electronic communication, including public media.
- (b) A lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may
- (1) pay the reasonable costs of advertisements or communications permitted by this Rule;
 - (2) pay the usual charges of a legal services plan or a ~~not-for-profit or~~ qualified lawyer referral service. A qualified lawyer referral service is a lawyer referral service ~~that has been approved by an appropriate regulatory authority; and~~ established, sponsored and operated in accordance with the State Bar of California's minimum standards for a lawyer referral service in California;
 - (3) pay for a law practice in accordance with Rule 1.17; and
 - (4) refer clients to another lawyer or ~~a nonlawyer professional~~ non-lawyer pursuant to an agreement not otherwise prohibited under these Rules that provides for the other person to refer clients or customers to the lawyer, if
 - (i) the reciprocal referral agreement is not exclusive, and
 - (ii) the client is informed of the existence and nature of the agreement.
- (c) Any communication made pursuant to this rule shall include the name and office address of at least one lawyer or law firm responsible for its content.

Comments

[1] [RESERVED] ~~To assist the public in obtaining legal services, lawyers should be allowed to make known their services not only through reputation but also through organized information campaigns~~

~~in the form of advertising. Advertising involves an active quest for clients, contrary to the tradition that a lawyer should not seek clientele. However, the public's need to know about legal services can be fulfilled in part through advertising. This need is particularly acute in the case of persons of moderate means who have not made extensive use of legal services. The interest in expanding public information about legal services ought to prevail over considerations of tradition. Nevertheless, advertising by lawyers entails the risk of practices that are misleading or overreaching.~~

[2] ~~This Rule~~ Rule 7.2 permits public dissemination of information concerning a lawyer's name or firm name, address and telephone number; the kinds of services the lawyer will undertake; the basis on which the lawyer's fees are determined, including prices for specific services and payment and credit arrangements; a lawyer's foreign language ability; names of references and, with their consent, names of clients regularly represented; and other information that might invite the attention of those seeking legal assistance.

[3] ~~Questions of effectiveness and taste in advertising are matters of speculation and subjective judgment. Some jurisdictions have had extensive prohibitions against television advertising, against advertising going beyond specified facts about a lawyer, or against "undignified" advertising. Television is now one of the most powerful media for getting information to the public, particularly persons of low and moderate income; prohibiting television advertising, therefore, would impede the flow of information about legal services to many sectors of the public. Limiting the information that may be advertised has a similar effect and assumes that the bar can accurately forecast the kind of information that the public would regard as relevant. Similarly,~~ Rule 7.2 permits advertising by electronic media, such as the Internet, can be an important source of information about legal services, and lawful communication by electronic mail is permitted by this Rule. But see Rule 7.3(a) for the prohibition against the solicitation of a prospective client through a including but not limited to television, radio and the Internet. But see Rule 7.3(a) concerning real-time electronic exchange that is not initiated by the communications with prospective clients.

[4] Neither ~~this R~~rule 7.2 nor ~~R~~rule 7.3 is intended to prohibits communications authorized by law, ~~such as notice to members of a class in class action litigation.~~

Paying Others to Recommend a Lawyer

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

[6] ~~A lawyer may pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service. A legal service plan is a prepaid or group legal service plan or a similar delivery system that assists prospective clients to secure legal representation. A lawyer referral service, on the other hand, is any organization that holds itself out to the public as a lawyer referral service. Such referral services are understood by laypersons to be consumer-oriented organizations that provide unbiased referrals to lawyers with appropriate experience in the subject matter of the representation and afford other client protections, such as complaint procedures or malpractice insurance requirements. Consequently, this Rule only permits~~ Subparagraph (b)(2) is intended to permit a lawyer to pay the usual charges of a ~~not-for-profit or qualified lawyer referral service. A group or pre-paid legal service plan exempt from registration under Business & Professions Code, section 6155(c). Subparagraph (b)(2) is also intended to permit a lawyer to pay the usual charges of a~~ qualified lawyer referral service ~~is one that is approved by an appropriate regulatory authority as affording adequate protections for prospective clients. See, e.g., the American Bar Association's Model Supreme Court Rules Governing Lawyer Referral Services and Model Lawyer Referral and Information Service Quality Assurance Act (requiring that organizations that are identified as~~ established, sponsored and operated in accordance with the State Bar of California's minimum standards for a lawyer referral service in California. See Business & Professions Code, section 6155, and rules and regulations pursuant thereto. See also Rule [5.4(b)(4) [1-310X(b)(4)]. ~~services (i) permit the participation of all lawyers who are licensed and eligible to practice in the jurisdiction and who meet reasonable objective eligibility requirements as may be established by the referral service for the protection of prospective clients;~~

~~(ii) require each participating lawyer to carry reasonably adequate malpractice insurance; (iii) act reasonably to assess client satisfaction and address client complaints; and (iv) do not refer prospective clients to lawyers who own, operate or are employed by the referral service.)~~

[7] A lawyer who accepts assignments or referrals from a legal service plan or referrals from a lawyer referral service must act reasonably to assure that the activities of the plan or service are compatible with the lawyer's professional obligations. See Rules 5.3 and 5.4. Legal service plans and lawyer referral services may communicate with prospective clients, but such communication must be in conformity with these Rules. Thus, advertising must not be false or misleading, as would be the case if the communications of a group advertising program or a group legal services plan would mislead prospective clients to think that it was a lawyer referral service sponsored by a state agency or bar association. Nor could the lawyer allow in-person, telephonic, or real-time contacts that would violate Rule 7.3.

[8] ~~A lawyer also may agree to refer clients to another lawyer or a nonlawyer professional~~ Subparagraph (b)(4) permits a lawyer to make referrals to another, in return for the undertaking of that person to refer clients or customers to the lawyer. Such reciprocal referral arrangements must not interfere with the lawyer's professional judgment as to making referrals or as to providing substantive legal services. ~~See Rules 2.1 and 5.4(c). Except as provided in Rule 1.5(e), a lawyer who receives referrals from a lawyer or nonlawyer professional must not pay anything solely for the referral, but the~~ See Rule 5.4(d) [1-310X(d)]. A lawyer does not violate ~~paragraph~~ subparagraph (b)(4) of this Rule by agreeing to refer clients or customers to ~~the other lawyer or nonlawyer professional~~ another, so long as the reciprocal referral agreement is not exclusive and the client is informed of the referral agreement. See also Rule 2-200(B). Conflicts of interest created by such arrangements made pursuant to subparagraph (b)(4) are governed by Rule ~~4[3-310].7.~~ Reciprocal referral agreements should not be of indefinite duration and should be reviewed periodically to determine whether they comply with these Rules. ~~This Rule does~~ 7.2 is not intended to restrict referrals or divisions of revenues or net income among lawyers within law firms comprised of multiple entities.

Required information in advertisements

[9] Paragraph (c) also applies to a group of lawyers that engages in cooperative advertising. Any such communication made pursuant to Rule 7.2 shall include the name and office address of at least one member of the group responsible for its content. See also Business & Professions Code, section 6155, subdivision (h). See also Business & Professions Code, section 6159.1, concerning the requirement to retain any advertisement for one year.

Explanatory Notes

Introductory Note:

At present, the marketing of legal services by lawyers is regulated in California through California Rule of Professional Conduct 1-400 and certain sections of the Business & Professions Code. (E.g., Bus. & Prof. Code, sections 6155, 6157 to 6159.2.) At its February 20, 2004 Meeting, however, the Commission voted to explore the possibility of adopting the framework, if not the entire substantive content and language, of the ABA Model Rules of Professional Conduct, Chapter 7, which takes a multi-rule approach to regulating the marketing of legal services. During the discussion leading to that vote, members of the Commission noted that the advertising of legal services and the solicitation of prospective clients is an area of lawyer regulation where national uniformity would be helpful to the courts, the public and practicing lawyers, particularly 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. Accordingly, after consideration of several drafts of proposed rules that used the Model Rules as templates, the Commission has approved tentative draft rules 7.1 to 7.5. In some instances, however, the Commission made substantive revisions and additions to the language of the Model Rules, which was generally intended to bring the rules in line with current California rules and statutes concerning the marketing of legal services.

Rule 7.1 sets out the general prohibition on a lawyer making false and misleading communications concerning the availability of legal services. Rule 7.2 specifically addresses advertising, a subset of communication. Rule 7.3 is concerned with regulating various means by which a lawyer seeking to market his or her services might make direct contact with a prospective client. Rule 7.4 sets out basic rules governing the communication of a lawyer's fields of practice and claims to specialization. Rule 7.5 does the same for the use of firm names and letterheads. The Commission, however, declined to recommend any rule analogous to 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.

Title:

The rule title chosen for this new rule reflects the fact that the format and content of the rule has drawn upon Model Rule 7.2 (entitled "Advertising") of the American Bar Association's Model Rules of Professional Conduct. Whereas former rule 1-400 addressed communications, advertising and solicitation in a single rule, the Model Rules address these different concepts in separate rules. Rule 7.2 addresses the concept of advertising which generally involves communications with the general public. Communications directed to a specific, targeted individual or group of individuals is addressed in Rule 7.3. Rule 7.1 contains the general prohibition on false or misleading communications. See above.

Text:

1. Paragraph (a) is identical to paragraph (a) of Model Rule 7.2. Model Rule 7.2(a) itself was revised by the ABA Ethics 2000 Commission through the deletion of references to specific types of public media (e.g., telephone directory, newspaper) and the addition of a reference to "electronic communications". The general reference to "public media" obviates the necessity of changing the Rule in the future to accommodate the next new public-communication technology. Moreover, a specific reference to the Internet has been added to Comment [3]. A reference to "electronic communications" was added in recognition that much of modern advertising is accomplished through such means. Specific examples of electronic communications have been added to Comment [3], with a cross-reference to the prohibition in Rule 7.3(a) of solicitation of clients through real-time electronic communications.

The word "lawyer" has been substituted for the word "member" in rules 7.1 through 7.5 to indicate that the rules are intended to apply not only to members of the State Bar of California, but also to other lawyers who may, where permitted by law, advertise their services in California. See, e.g., California Rule of Court 988 [Registered Foreign Legal Consultants] and the State Bar of California Registered Foreign Legal Consultant Rules and Regulations.

2. Paragraph (b) is modeled on paragraph (b) of ABA Model Rule 7.2 and provides four exceptions to the general prohibition against a lawyer giving anything of value to a person to recommend the

lawyer's services. Rule 7.2(b) is intended to strike a balance between loyalty to the client, which could be adversely affected by the payment of referral fees, and a lawyer's need to pay for the legitimate costs of marketing the lawyer's legal services.

Subparagraph (b)(1) is identical to Model Rule 7.2(b)(1) and permits payment of the "reasonable costs" of advertisements. Comment [5] gives examples of kinds of costs that may be expended. A similar exception may be found in current CRPC 1-320, Discussion.

Subparagraph (b)(2) is based upon Model Rule 7.2(b)(2), with modifications to conform the rule to the current regulatory landscape in California. The phrase "legal services" has been added to modify the word "plan" for clarity. The phrase "not-for-profit or" has been deleted because in California, a "qualified lawyer referral service" may be "not-for-profit" or "for-profit." The clause "established, sponsored and operated in accordance with the State Bar of California's minimum standards for a lawyer referral service in California" has been substituted to identify the specific regulatory mechanism in California. It replaces the more general clause in Model Rule 7.2 ("that has been approved by an appropriate regulatory authority.")

Subparagraph (b)(3) is identical to Model Rule 7.2(b)(3). In light of the Commission's decision to adopt for drafting purposes the Model Rule numbering and organization system, reference is made to Rule 1.17 (Sale of a Law Practice), rather than to rule 1.17's California counterpart, CRPC 2-300,.

Subparagraph (b)(4) is nearly identical to Model Rule 7.2(b)(4), except that the word "professional" has been deleted, with the intention that subparagraph (b)(4)'s exception for reciprocal referral agreements should apply not only to other lawyers and non-lawyer "professionals," but also to arrangements with any non-lawyer. The two qualifications to the exception – that the reciprocal referral arrangement is non-exclusive and that the client is informed of the arrangement – remain the same as in the Model Rule.

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

Comment:

1. Comment [1] has been reserved for possible future use. At its August 27 & 28, 2004 meeting, the Commission voted to delete Comment [1] to Model Rule 7.2 because the language and content was inconsistent with the usual style used and concepts addressed in the Discussion to California Rules of Professional Conduct. The Commission specifically rejected the following proposed language, which was a modification of Model Rule 7.2, cmt. [1]:

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

Comment [1] to Model Rule 7.2 provides:

“[1] To assist the public in obtaining legal services, lawyers should be allowed to make known their services not only through reputation but also through organized information campaigns in the form of advertising. Advertising involves an active quest for clients, contrary to the tradition that a lawyer should not seek clientele. However, the public's need to know about legal services can be fulfilled in part through advertising. This need is particularly acute in the case of persons of moderate means who have not made extensive use of legal services. The interest in expanding public information about legal services ought to prevail over considerations of tradition. Nevertheless, advertising by lawyers entails the risk of practices that are misleading or overreaching.”

2. Comment [2] is virtually identical to Comment [2] to Model Rule 7.2, the only change being the substitution of “Rule 7.2” for “This Rule” at the beginning of the comment to conform the language to the style of the California Rules of Professional Conduct. Comment [2] gives examples the kinds of information that a lawyer is allowed to disseminate to the public in advertising the lawyer's professional services. That the examples are not intended to be exclusive is indicated by the concluding clause, “and other information that might invite the attention of those seeking legal assistance.”

3. Comment [3], which addresses the same general subject matter as Comment [3] to Model Rule 7.2, provides specific examples of electronic communications that are permitted, including the Internet, with a cross-reference to the prohibition in Rule 7.3(a) of solicitation of clients through real-time electronic communications. Model Rule 7.2, cmt. [3] provides:

“[3] Questions of effectiveness and taste in advertising are matters of speculation and subjective judgment. Some jurisdictions have had extensive prohibitions against television advertising, against advertising going beyond specified facts about a lawyer, or against “undignified” advertising. Television is now one of the most powerful media for getting information to the public, particularly persons of low and moderate income; prohibiting television advertising, therefore, would impede the flow of information about legal services to many sectors of the public. Limiting the information that may be advertised has a similar effect and assumes that the bar can accurately forecast the kind of information that the public would regard as relevant. Similarly, electronic media, such as the Internet, can be an important source of information about legal services, and lawful communication by electronic mail is permitted by this Rule. But see Rule 7.3(a) for the prohibition against the solicitation of a prospective client through a real-time electronic exchange that is not initiated by the prospective client.”

4. Comment [4] provides that neither rule 7.2 nor rule 7.3 is intended to prohibit communications authorized by law. Based on comment [4] to Model Rule 7.2, Comment [4] inserts to the words “is intended to” to conform the language to the style of the California Rules of Professional Conduct. The Model Rule comment example of giving notice to members of a class in class action litigation was deleted.

5. Comment [5] is based on Comment [5] to Model Rule 7.2, which provides examples of advertising and communications for which payment is permitted under subparagraph (b)(1). The first sentence of the Model Rule comment has been deleted, and the introduction to the second sentence has been modified to include specific reference to the current provision in the California Rules of Professional Conduct, rule 1-320(C), that prohibits a lawyer from paying others to channel work to the lawyer. Rule 1-320(C) has been bracketed because if that rule is retained, its number will eventually change to conform with the Model Rule numbering and organization system. The phrase “but not limited to” has been added to emphasize that the examples provided are not exclusive. The remainder of comment [5] is identical to comment [5] to Model Rule 7.2, which provides that the payment may be made to persons who are engaged by the lawyer to provide marketing services, and includes a cross-reference to rule 5.3, which sets out the duties of lawyers in supervising the conduct of non-lawyers who provide marketing services to them.

6. Comment [6] addresses the same substantive concepts as does comment [6] to Model Rule 7.2, which elaborates on the exception contained in subparagraph (b)(2). However, the language of Model Rule 7.2, cmt. [6] has been replaced with language specific to the regulatory landscape for lawyer referral services in California.

7. Comment [7] is identical to Comment [7] to Model Rule 7.2. Comment [7] provides that a lawyer who accepts assignments from a legal service plan or lawyer referral service must act reasonably to assure that the plan's or service's conduct is compatible with the lawyer's professional obligations, for example, any communication the plan or service has with prospective clients must not be false or misleading, or involve in-person, telephonic or real-time contacts.
8. Comment [8] is based on Comment [8] to Model Rule 7.2, which elaborates on the exception to payment for referrals in subparagraph (b)(4), which permits reciprocal referral arrangements with lawyers and non-lawyers so long as those arrangements are not exclusive and the client or customer is informed of the arrangement. A cross-reference to proposed California Rule 5.4(d), which is the counterpart to Model Rule 5.3(c), has been included to emphasize that a lawyer may not permit the referring person to interfere with the lawyer's independent judgment. Reference is also made to current CRPC 2-200(B), which governs reciprocal referral arrangements among lawyers.
9. Comment [9] has no counterpart in Model Rule 7.2. The two sentences of Comment [9] emphasize that paragraph (c)'s requirement of including the name of a lawyer or law firm and the lawyer's or law firm's office address in any advertisement also applies to a group of lawyers that engages in cooperative advertising. Comment [9] includes a reference to California Business & Professions Code § 6155(h), which relates to lawyers jointly advertising their services.

Comment [9] also includes a cross-reference to California Business & Professions Code § 6159.1, concerning the requirement to retain any advertisement for a period of one year. Notwithstanding the inclusion of this cross-reference, it should be noted that the Commission has voted to recommend the removal of the requirement to retain for a period of two years a copy of "any communication made by written or electronic media," currently found in CRPC 1-400(F). The Commission has also voted to recommend that the State Bar seek the repeal of section 6159.1 and, if the legislature agrees, the cross-reference to section 6159.1 will be removed. See also Rule 7.1, *Concepts Considered but Rejected or Postponed for Future Consideration*, no. 3.

Concepts Considered but Rejected or Postponed for Future Consideration:

1. At its July 9, 2004 meeting, the Commission considered whether to exclude lawyers or law firms that engage in group advertising from the requirements of paragraph (c) that every advertisement include the name of a lawyer or law firm responsible for the advertisement and the office address of the responsible lawyer or law firm. The Commission, however, determined that the burden that may be imposed by requiring the inclusion of this information in a communication in which space may be at a premium is outweighed by the importance to the person viewing the advertisement and considering which lawyer to retain of being able to learn where the lawyer is located and the importance to the State Bar of being able to identify and contact the person responsible for a misleading or false advertisement.
2. At its October 8, 2004 meeting, the Commission considered whether the concepts in current rules 1-320(B) [concerning giving anything of value to any person or entity for recommending or securing the employment of the lawyer by a client], 1-320(C) [concerning compensating a representative of the press or other communication medium in return for publicity for the member] and 2-200(B) [concerning giving anything of value to another lawyer for recommending or securing the employment of the lawyer by a client] should be deemed subsumed in paragraphs (b)(1) and (b)(4) of Rule 7.2, and be repealed. The Commission declined to do so.

Excerpt from the Commission's July 9, 2004 Meeting Summary

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A. Consideration of Rule 1-400. Advertising and Solicitation

The Commission considered a May 29, 2004 e-mail message from Mr. Mohr presenting Draft 2 (5/28/04) of proposed advertising and solicitation rules patterned after MR 7.1 to 7.6. Following discussion, the Commission made various drafting decisions that are summarized below. For the next meeting, the co-drafters were asked to: (1) implement the drafting decisions discussed; (2) develop proposed discussion sections; and (3) provide a recommendation as to the handling of the RPC 1-400(E) advertising standards.

* * *

The second rule discussed was proposed rule 7.2. The Commission first addressed the proposal to make a cross reference in the discussion to the State Bar Act and to substitute in the recommended language that is found at endnote 28 of the agenda materials. There was no discussion on this motion and it carried with a vote of 6 yes, 0 no, and 3 abstentions.

In proposed rule 7.2 (b)(4) the term "nonmember professional" was used. The Commission discussed the qualifier "professional" in addressing the propriety of client referrals. Among the points raised during this discussion were the following:

1. This is an expansion of the advertising rule that will restrict the discussions of rules 2-200 and 1-320. These are reciprocal referral arrangements not just referrals to lawyers. This has a broader implication than just advertising.
2. This matter should not be in the advertising section at all because of the "pay to play" issues. This is a separate substantive subject.
3. Paragraph (b) is appropriate because paying for referrals is part of marketing legal services and lawyer advertising. As proposed by the co-drafters, a reciprocal referral agreement is fine so long as it is not exclusive and complies with other applicable rules. It is in the consumer's best interest to allow but regulate reciprocal referrals.
4. As drafted, the standard is misleading as it could be misread to suggest that it is acceptable to pay money for referrals.
5. The word "professional" limits the rule to certain kinds of people. Some non-professionals should be included that may not be allowed by this rule. What is considered professional in this context?
6. If the word "professional" is deleted, then it is unclear why the phrase "member or a non-member" is being used.
7. As a technical nit pick, the co-drafter's proposed rule language uses the word "client" but a person seeking legal advice is not yet a client. Rather, such persons are just people who may be seeking legal services.

A motion was made that paragraph (b) read: "A member shall not give anything of value for recommending the member's services except that a member may. . ." Subparagraph (b)(4) would read: "Make referrals pursuant to an agreement not otherwise prohibited under these rules that provides for another to refer clients or customers to the member if. . ." The motion carried with a commission vote of 7 yes, 0 no, and 2 abstentions.

A motion was then made to delete all of subparagraph (b)(2) from proposed rule 7.2. This motion failed with a vote of 5 yes, 5 no, and 0 abstentions. Another motion was made to change proposed rule 7.2 (b)(4)(ii) to say: "the member informs the client of the existence and nature of the agreement." It was observed that this seems like something that a lawyer would already do and it should not matter if the lawyer does this or if someone else informs the client. The motion failed with a vote of 3 yes, 5 no, and 0 abstentions. There was a motion to delete all of 7.2 (b)(4)(i). This motion also failed by a vote of 3 yes, 5 no, and 1 abstention.

Paragraph (c) reads, "Any communication made pursuant to this rule shall include the name and office address of at least one member or law firm responsible for its content." A concern brought up in conjunction with this rule was cooperative advertising by independent lawyers. It was observed that it may be difficult to identify who is responsible when the ad comes from a group of lawyers who are engaged in joint advertising and that the ABA approach is to identify one firm that is involved with the ad. Among the points raised during this discussion were the following:

1. The problem with using only a telephone number is that it is hard to tell if it is local, especially with the use of 888 numbers and cell phones. This can be confusing to the public.
2. Basic information should be on the ads. The excuse of there being not enough "precious" space is not good enough.
3. If you have a name and a phone number you do not know where that person is, an address should be added. Home city is also not enough.
4. A bar number is not a good idea because an active member could live in another state. There is no guarantee that the member is local. Just having a State Bar number does not inform a consumer that they can call the State Bar to obtain more information. The approach of using a State Bar number is not consistent with the ABA approach.
5. The requirement should be limited to the official office address or the home office city. The State Bar should not become a directory for consumers finding lawyers.
6. The whole purpose of an advertisement is to help the person looking at the ad find the advertiser.
7. We should include the language of the ABA, which is to keep the office address of one member. Uniformity is needed. The cooperative is not unduly burdened because it is still able to decide which phone number to include.

A motion was made to accept proposed rule 7.2(c) as written. The motion carried with a vote of 10 yes, 0 no, 0 abstentions.

A motion was made to put the sentence: "where a group of lawyers engage in cooperative advertising, any communication made pursuant to this rule shall include the name and office address of at least one member of the group responsible for its content" into the rules itself. The motion failed with a vote of 1 yes, 9 no, 0 abstentions. Another motion was then made to add the above sentence to the discussion. This motion passed with a vote of 9 yes, 0 no, 1 abstention.

Excerpt from the Commission's August 27-28, 2004 Meeting Summary

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A. Consideration of Rule 1-400. Advertising and Solicitation

The Commission considered a Draft No. 3 of proposed amended advertising and solicitation rules patterned on the comparable Model Rules. The Commission also considered recommendations on the existing advertising standards adopted by the Board of Governors pursuant to RPC 1-400(E). Mr. Mohr presented the background of the current drafts.

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Next, the Chair called for discussion of a Commission member's recommendation that rule 7.2(b) (re prohibition on compensation for recommending a lawyer's services) be deleted as unnecessary. Among the points raised during the discussion were the following.

- (1) "Running & Capping" are arcane concepts. Many advertisements are presented in the form of news stories or editorials.
- (2) A literal reading of 7.2(b) would preclude typical rewards given to law firm "rainmakers."
- (3) The modern practice of strategic alliances is impacted by 7.2(b).

Following discussion, the Commission decided to retain 7.2(b) as modified to read “A member shall not give anything of value to a person for recommending the member’s services except that a member may. . .” (5 yes, 2 no, 2 abstain).

Next, the Chair called for discussion of endnote no. 20 (re 7.2(b)(4) and incorporating RPC’s 1-320(B) and 2-200(B)). Mr. Mohr presented the background of this issue explaining the overlap of the prohibitions. It was observed that the rules would be more user-friendly if similar topics were handled in one place. It was suggested that the real issue is the problem of negligent referral, and not compensation for referrals. After brief discussion, the Chair appointed a subcommittee (Mr. Ruvolo; Mr. Mohr; Mrs. Julien; and Mr. George) to consider 1-320(B)(C), 2-200(B), 7.2(b)(4); and submit a recommendation on whether the concepts should be consolidated.

Next, the Commission turned to the proposed rule 7.2 Discussion section paragraphs. Regarding proposed rule 7.2 Disc. [1], the Commission considered a motion to delete it because the language appeared inconsistent with the usual style of RPC discussion text. The motion to delete passed by a vote of 5 delete, 4 retain, and 1 abstain.

Regarding proposed rule 7.2 Disc. [2], in the absence of any objection, the Chair deemed the language approved.

Regarding proposed rule 7.2 Disc. [3], the Commission considered a motion to delete it as drafted. The motion to delete it passed by a vote of 7 yes, 1 no, 1 abstain. After this vote, the Commission considered a follow-up motion to revise the last sentence of this paragraph and add it back to the discussion section. The revised sentence would read: “Rule 7.2 permits advertising by electronic media, including but not limited to television, radio and the internet.” The motion to add this sentence passed by a vote of 5 yes, 2 no, and 1 abstain.

Regarding proposed rule 7.2 Disc. [4], the Commission considered a motion to delete it as drafted. This motion passed by a vote of 7 yes, 1 no, and 3 abstain. In follow-up, on the issue of direct contact under proposed rule 7.3, the Commission considered a motion to add a discussion section sentence stating: “Rule 7.3 is not intended to prohibit communications authorized by law.” By way of example, it was observed that: (1) *In re Primus* permits certain direct solicitation; and (2) RPC 3-700 authorizes, if not requires, a “leaving associate” to directly contact client’s of the associate’s soon-to-be former firm. This motion also passed by a vote of 7 yes, 1 no, and 3 abstain. In addition, the Chair asked Mr. Mohr, Mr. Melchior and Mr. Lamport to consider possible discussion language addressing court authorized notices sent by lawyers to persons who may be potential clients (i.e., a sentence stating: “a member who is directed by a court to send a notice, the content of which has been approved by the court, is not subject to discipline under the advertising rules”).

Regarding proposed rule 7.2 Disc. [5], by consensus the Commission agreed to revise the paragraph to read:

“Notwithstanding rule 1-320(C)’s general prohibition on a member giving or promising anything of value to a representative of a communication medium in return for publicity of the member, subparagraph (b)(1), allows a member to pay for advertising and communications permitted by this Rule, including but not limited to the costs of print directory listings, on-line directory listings, newspaper ads, . . .”

Regarding proposed rule 7.2 Disc. [6], by consensus the Commission agreed to include this language with the possible addition by the codrafters of a cross reference to joint lawyer advertising described in Bus. & Prof. Code §6155(h).

Regarding proposed rule 7.2 Disc. [7], by consensus the Commission agreed to include this language with the possible addition by the codrafters of a clarifying statement along the lines of the following: “where an organization or an entity advertises on behalf of a lawyer who is a member of such organization or entity, the lawyer should take reasonable efforts to assure that the advertising does not violate applicable rules.” This possible addition was prompted by comments about vicarious exposure to discipline in circumstances where a lawyer’s membership in an organization or entity does not afford that lawyer any control over the advertising conduct of the organization or entity. It also was observed that this

matter is covered in the case of lawyer referral services but may be regarded as unclear in group or prepaid legal plan scenarios.

Regarding proposed rule 7.2 Disc. [8], by consensus the Commission agreed to include this language.

Regarding proposed rule 7.2 Disc. [9], by consensus the Commission agreed to include this language with the possible addition by the codrafters of a cross reference to joint lawyer advertising described in Bus. & Prof. Code §6155(h).

Excerpt from the Commission's October 8, 2004 Meeting Summary

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A. Consideration of Rule 1-400. Advertising and Solicitation

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The Commission considered a September 22, 2004 message from Mr. Mohr providing a Draft 4 (clean and redline) of proposed rules 7.1 to 7.5 (revised RPC 1-400) and a document organizing the RPC 1-400(D)(6) Advertising Standards by rule. Mr. Mohr presented an overview of the proposal and referenced the endnotes for specific drafting issues. The Chair called for a discussion of each of the endnotes.

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Regarding Endnote 2, by consensus the Commission determined not to subsume within this series of rules, the RPC 1-320(B) and 2-200(B) concepts of prohibited compensation for client referrals. The Chair asked Mr. Lamport (lead on RPC 2-200) and Mr. Tuft (lead on proposed new rule 1-310X/Rule 5.4) to work together to develop a recommendation for handling these concepts (i.e., as possible stand-alone rules).

Regarding Endnote 3 (re "communications authorized by law"), by consensus the Commission deleted the last two sentences of Disc. [4] to proposed rule 7.2 to read: "Neither rule 7.2 nor rule 7.3 is intended to prohibit communications authorized by law."

Regarding Endnote 4, the Commission considered a motion to adopt Mr. Mohr's recommended revisions. This motion passed by a vote of 8 yes, 0 no, and 1 abstain. As revised, it would read: "Subparagraph (b)(2) is intended to permit a lawyer to pay the usual charges of a group or prepaid legal service plan exempt from registration under Business and Professions Code section 6155(c)."

Regarding Endnote 5 (re the statutory advertisement retention period under B&P sec. 6159.1, for purposes of posting on the website it was agreed that the Commission would indicate an intent to delete the presently included cross-reference if the statutory retention period is deleted.

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General information about the Commission, including: its charter; meeting schedule; and a member-staff roster is available at the State Bar of California website. Go to: www.calbar.ca.gov/ethics and access the link to the "Commission for the Revision of the Rules of Professional Conduct."