

**Rule 7.4 [1-400(D)(6)] Communication of Fields of Practice and Specialization
(Commission's Proposed Rule Adopted on March 31 – April 1, 2016
– Clean Version)**

- (a) A lawyer shall not state that the lawyer is a certified specialist in a particular field of law, unless:
 - (1) the lawyer is currently certified as a specialist by the Board of Legal Specialization, or any other entity accredited by the State Bar to designate specialists pursuant to standards adopted by the Board of Trustees; and
 - (2) the name of the certifying organization is clearly identified in the communication.

- (b) Notwithstanding paragraph (a), a lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law. A lawyer may also communicate that his or her practice specializes in, is limited to, or is concentrated in a particular field of law, subject to the requirements of Rule 7.1.

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 7.4 [1-400(D)(6)] Communication of Fields of Practice
and Specialization ~~Provision~~
(Redline Comparison of the Proposed Rule to Current California Rule)**

~~*****~~

(~~D~~a) A ~~communication or solicitation (as defined herein) shall not~~ lawyer shall not state that the lawyer is a certified specialist in a particular field of law, unless:

~~*****~~

(~~6~~1) ~~State that a member is a~~ “the lawyer is currently certified ~~specialist” unless the member holds a current~~ specialist” unless the member holds a current ~~certificate~~ certificate as a specialist ~~issued~~ 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 Trustees;; ~~and states the complete name of the entity which granted certification.~~

(2) the name of the certifying organization is clearly identified in the communication.

(b) Notwithstanding paragraph (a), a lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law. A lawyer may also communicate that his or her practice specializes in, is limited to, or is concentrated in a particular field of law, subject to the requirements of Rule 7.1.

**COMMISSION PROVISIONAL REPORT AND RECOMMENDATION:
RULE 7.4 [1-400(D)(6)]**

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: June 6, 2016

I. RELEVANT EXCERPTS FROM CURRENT CALIFORNIA RULE 1-400

Rule 1-400(D)(6) [Specialization Provision]

* * * * *

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

* * * * *

- (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 Trustees, and states the complete name of the entity which granted certification.

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 proposed Rule.

III. COMMISSION’S PROPOSED RULE 7.4 (CLEAN)

Rule 7.4 [1-400] Communication of Fields of Practice and Specialization

- (a) A lawyer shall not state that the lawyer is a certified specialist in a particular field of law, unless:
- (1) the lawyer is currently certified as a specialist by the Board of Legal Specialization, or any other entity accredited by the State Bar to designate specialists pursuant to standards adopted by the Board of Trustees; and
 - (2) the name of the certifying organization is clearly identified in the communication.
- (b) Notwithstanding paragraph (a), a lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law. A lawyer may also communicate that his or her practice specializes in, is limited to, or is concentrated in a particular field of law, subject to the requirements of Rule 7.1.

**COMMISSION PROVISIONAL REPORT AND RECOMMENDATION:
RULE 7.4 [1-400(D)(6)]**

**IV. COMMISSION'S PROPOSED RULE 7.4
(REDLINE TO CURRENT CALIFORNIA RULE 1-400(D)(6))**

Rule ~~7.4~~ [1-400(D)(6)] Communication of Fields of Practice and Specialization ~~Provision~~

* * * * *

- (Da) A ~~communication or solicitation (as defined herein) shall not~~ lawyer shall not state that the lawyer is a certified specialist in a particular field of law, unless:

* * * * *

- (61) ~~State that a member is a~~ "the lawyer is currently certified ~~specialist"~~ 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 Trustees; ~~and states the complete name of the entity which granted certification.~~
- (2) the name of the certifying organization is clearly identified in the communication.
- (b) Notwithstanding paragraph (a), a lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law. A lawyer may also communicate that his or her practice specializes in, is limited to, or is concentrated in a particular field of law, subject to the requirements of Rule 7.1.

V. COMMISSION'S PROPOSED RULE 7.4 (REDLINE TO MODEL RULE 7.4)

Rule 7.4 [1-400] ~~Communication~~ Communication of Fields of Practice and Specialization

- (a) ~~A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law.~~
- (b) ~~A lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation "Patent Attorney" or a substantially similar designation.~~
- (c) ~~A lawyer engaged in Admiralty practice may use the designation "Admiralty," "Proctor in Admiralty" or a substantially similar designation.~~
- (da) A lawyer shall not state ~~or imply~~ that ~~a~~ the lawyer is a certified ~~as a~~ specialist in a particular field of law, unless:
- (1) the lawyer ~~has been~~ is currently certified as a specialist by ~~an organization that has been approved by an appropriate state authority or that has been~~ the Board of Legal Specialization, or any other entity accredited by the ~~American~~ State Bar ~~Association~~ to designate specialists pursuant to standards adopted by the Board

COMMISSION PROVISIONAL REPORT AND RECOMMENDATION: RULE 7.4 [1-400(D)(6)]

[of Trustees](#); and

(2) the name of the certifying organization is clearly identified in the communication.

[\(b\) Notwithstanding paragraph \(a\), a lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law. A lawyer may also communicate that his or her practice specializes in, is limited to, or is concentrated in a particular field of law, subject to the requirements of Rule 7.1.](#)

Comment

~~[1] Paragraph (a) of this Rule permits a lawyer to indicate areas of practice in communications about the lawyer's services. If a lawyer practices only in certain fields, or will not accept matters except in a specified field or fields, the lawyer is permitted to so indicate. A lawyer is generally permitted to state that the lawyer is a "specialist," practices a "specialty," or "specializes in" particular fields, but such communications are subject to the "false and misleading" standard applied in Rule 7.1 to communications concerning a lawyer's services.~~

~~[2] Paragraph (b) recognizes the long-established policy of the Patent and Trademark Office for the designation of lawyers practicing before the Office. Paragraph (c) recognizes that designation of Admiralty practice has a long historical tradition associated with maritime commerce and the federal courts.~~

~~[3] Paragraph (d) permits a lawyer to state that the lawyer is certified as a specialist in a field of law if such certification is granted by an organization approved by an appropriate state authority or accredited by the American Bar Association or another organization, such as a state bar association, that has been approved by the state authority to accredit organizations that certify lawyers as specialists. Certification signifies that an objective entity has recognized an advanced degree of knowledge and experience in the specialty area greater than is suggested by general licensure to practice law. Certifying organizations may be expected to apply standards of experience, knowledge and proficiency to insure that a lawyer's recognition as a specialist is meaningful and reliable. In order to insure that consumers can obtain access to useful information about an organization granting certification, the name of the certifying organization must be included in any communication regarding the certification.~~

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.

COMMISSION PROVISIONAL REPORT AND RECOMMENDATION: RULE 7.4 [1-400(D)(6)]

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

Rule 1-400: Advertising and Solicitation

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. (Standard 11 has been repealed.)

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.)

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)

Model Rule 7.4. The ABA Comparison Chart, entitled "Variations of the ABA Model Rules of Professional Conduct, Rule 7.4: Communication of Fields of Practice and Specialization," revised April 9, 2015, is available at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_7_4.pdf
- Eight jurisdictions have adopted Model Rule 7.4 verbatim.¹ Twenty-three jurisdictions have adopted a slightly modified version of Model Rule 7.4.² Eighteen jurisdictions have adopted a version of the rule that is substantially different from Model Rule 7.4.³ Two jurisdictions do not have a version of the Model Rule 7.4.⁴

¹ The eight states are: Delaware, Idaho, Kansas, Minnesota, Nebraska, New Mexico, Utah, and Wisconsin.

² The twenty-three states are: Arizona, Arkansas, Colorado, Connecticut, Hawaii, Indiana, Iowa, Kentucky, Maine, Michigan, Montana, New Jersey, New York, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Dakota, Vermont, Washington, West Virginia, and Wyoming.

³ The eighteen jurisdictions are: Alabama, Alaska, California, Florida, Georgia, Illinois, Louisiana, Maryland, Massachusetts, Mississippi, Missouri, Nevada, New Hampshire, North Carolina, South Carolina, Tennessee, Texas and Virginia.

COMMISSION PROVISIONAL REPORT AND RECOMMENDATION: RULE 7.4 [1-400(D)(6)]

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

A. Concepts Accepted (Pros and Cons):

1. Recommend adoption of Model Rule 7.3, as modified.

- Pros: Model Rule 7.3 is part of the recommended implementation of the Commission's vote at the February 19-20, 2016 meeting to adhere to the ABA Model Rule general framework for regulating lawyer advertising and solicitations for business by several separate 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.

- 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 7.4(d), as modified, as proposed rule 7.4(a).

Paragraph (a)(1) has been modified to state the specific regulatory framework for specialization in California. Similar language can be found in current rule 1-400(D)(6).

- Pros: Paragraph (a) carries forward the substance of the current California rule addressing the requirements for when a lawyer wishes to advertise as a "certified specialist." Because this type of designation signifies an advanced degree of knowledge and experience, stating in a rule of professional conduct what is required in order to hold oneself out as a "certified specialist" helps protect the public from being misled. In addition, the language proposed explicitly refers to a lawyer being "currently certified" and this affords public protection against a lawyer who might otherwise erroneously believe it is proper to rely upon a prior certificate that has

⁴ The two jurisdictions are: District of Columbia and Oregon.

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lapsed due to a failure to renew or has been revoked or is no longer valid for any other reason.

Note: The Commission recommends switching the order of Model Rule 7.4(a) and (d) to conform to the rule style of the proposed Rules under which the prohibition is stated first and any exceptions to that prohibition follow.

- **Cons:** The activity described in proposed paragraph (a) is addressed in proposed rule 7.1. Moreover, the language me too narrow. For example, it is possible for a lawyer who is certified as a specialist in another jurisdiction to truthfully state that he or she is a specialist certified by an entity accredited in that jurisdiction. But because the other jurisdiction's entity was not accredited by the State Bar of California, such statement would violate the rule.

3. Recommend adoption of ABA Model Rule 7.4(a), as modified, as paragraph (b) of the proposed Rule. ABA Model Rule 7.4(a) permits a lawyer to communicate that the lawyer does or does not practice in particular fields of law. Similar to the first Commission, 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 is limited to or concentrated in a particular field of law.

Note: See ¶.1, above.

- **Pros:** Permitting a lawyer to indicate his or her area of practice, or state that he or she will not accept matters except in a specific field, in communications about the lawyer's services will help educate consumers about the legal services offered by a lawyer. The statements permitted by this rule remain subject to proposed rule 7.1, which prohibits false or misleading communications. In addition, see Business and Professions Code § 6158.2(b).⁵
- **Cons:** Proposed paragraph (b) states a permissive standard rather than a disciplinary standard. Moreover, to the extent the permitted conduct described in paragraph (b) is false or misleading, it is addressed in proposed rule 7.1.

B. Concepts Rejected (Pros and Cons):

1. Recommend adoption of ABA Model Rule 7.4(b), which permits use of the designation "Patent Attorney" or a substantially similar designation.

- **Pros:** This permitted designation has long been recognized in the profession. Its deletion from a rule that is plainly derived from the Model Rule might suggest that California does not permit the designation.
- **Cons:** ABA Model Rule 7.4(b)'s language is permissive and the example contained therein is adequately addressed by proposed rule 7.4(a). Any use of such

⁵ Business and Professions Code § 6158.2(b):

The following information shall be presumed to be in compliance with this article for purposes of advertising by electronic media, provided the message as a whole is not false, misleading, or deceptive:

- (b) Fields of practice, limitation of practice, or specialization.

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designations would remain subject to rule 7.1.

2. Recommend adoption of ABA Model Rule 7.4(c) permitting use of the designation “Admiralty,” “Proctor in Admiralty” or a substantially similar designation.
 - Pros: This permitted designation has long been recognized in the profession. Its deletion from a rule that is plainly derived from the Model Rule might suggest that California does not permit the designation.
 - Cons: ABA Model Rule 7.4(c)’s language is permissive and the example contained therein is adequately addressed by proposed rule 7.4(a). Any use of such designations would remain subject to rule 7.1.
3. Whether to include any of the Comments to ABA Model Rule 7.4.
 - Pros: The Model Rule comments provide helpful examples in interpreting and applying the Rule.
 - Cons: The provisions of proposed rule 7.4 are self-explanatory and do not require a Comment to clarify them further.

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

1. None of the proposed provisions would be a substantive change in the current law of California regarding the communication of fields of practice and specialization.

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 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

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California lawyers are presumed to be familiar with that numbering system.

E. Alternatives Considered:

The Commission was provided with the following three alternatives, which were considered by the drafting team assigned to consider Model Rule 7.4. However, no motion was made to recommend adoption of any of these alternatives.

1. Alternative 1

Rule 7.4 Communications of Specialization

A lawyer shall not state or imply that the lawyer is certified as a specialist in a particular field of law, unless:

- (a) the lawyer is currently certified as a specialist by the Board of Legal Specialization, or any other entity accredited by the State Bar to designate specialists pursuant to standards adopted by the Board of Trustees; and
- (b) the name of the certifying organization is clearly identified in the communication.

This alternative is materially different from the proposed rule because it is silent on the issue of whether a lawyer may communicate limitations on field of practice. Compare Business and Professions Code § 6158.2(b) that expressly addresses this issue for purposes of electronic media advertising by lawyers.

2. Alternative 2

Rule 7.4 Communications of Specialization

A lawyer shall not state or imply that the lawyer is certified as a specialist in a particular field of law, unless:

- (a) the lawyer is currently certified as a specialist by the Board of Legal Specialization, or any other entity accredited by the State Bar to designate specialists pursuant to standards adopted by the Board of Trustees; and
- (b) the name of the certifying organization is clearly identified in the communication.

Comment

[1] A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law. A lawyer may also communicate that his or her practice is limited to or concentrated in a particular field of law, subject to the requirements of rule 7.1.

This alternative is materially different from the proposed rule because it relegates to a comment the issue of whether a lawyer may communicate limitations on field of practice. Compare Business and Professions Code § 6158.2(b) which is black letter law on this issue in the context of electronic media advertising by lawyers.

3. Alternative 3

Do not adopt a rule addressing fields of practice or specialization. This rule is redundant and not necessary because the conduct is already addressed by proposed rule 7.1 and

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the State Bar Act in section 6158.2(b).

This alternative is materially different from the proposed rule because it would omit the existing regulation of the specialization issue in current rule 1-400(D)(6) and it would be silent on the issue of limitations of field of practice that has an analogous precedent in Business and Professions Code § 6158.2(b).

IX. COMMISSION RECOMMENDATION FOR BOARD ACTION

Recommendation:

That the Board of Trustees of the State Bar of California adopt proposed amended Rule 7.4 [1-400(D)(6)] 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 7.4 [1-400] as revised during the meeting

Vote: 15 (yes) – 0 (no) – 0 (abstain)