

PROPOSED NEW RULE 7.1 (Formerly Rule 1-400 Advertising and Solicitation)

At its October 8, 2004 meeting, the Commission tentatively approved proposed new rule 7.1 (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 7.1; (2) a redline/strikeout version of the proposed rule comparing it to Model Rule 7.1; (3) explanatory notes; (4) concepts considered but not recommended; and (5) excerpts from the Commission's May 7 & 8, 2004, July 9, 2004, August 27 & 28, 2004, and October 8, 2004 meeting summaries.

Proposed New Rule 7.1 (Formerly Rule 1-400) – Clean Version

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

Rule 7.1. Communications Concerning the Availability of Legal Services

- (a) For purposes of this chapter, "communication" means any message or offer made by or on behalf of a lawyer concerning the availability for professional employment of a lawyer or a lawyer's law firm directed to any former, present, or prospective client, including but not limited to the following:
- (1) Any use of firm name, trade name, fictitious name, or other professional designation of such lawyer or law firm; or
 - (2) Any stationery, letterhead, business card, sign, brochure, domain name, Internet web page or web site, e-mail, other material sent or posted by electronic transmission, or other writing describing such lawyer or law firm; or
 - (3) Any advertisement (regardless of medium) of such lawyer or law firm directed to the general public or any substantial portion thereof; or
 - (4) Any unsolicited correspondence, electronic transmission, or other writing from a lawyer or law firm directed to any person or entity.
- (b) A lawyer shall not make a false or misleading communication as defined herein.

- (c) A communication is false or misleading if it:
 - (1) Contains any untrue statement; or
 - (2) Contains any misrepresentation of fact or law; or
 - (3) Contains any matter, or presents or arranges any matter in a manner or format which is false, deceptive, or which confuses, deceives, or misleads the public; or
 - (4) Omits to state any fact necessary to make the statements made, in the light of circumstances under which they are made, not misleading to the public.

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

- (e) Pursuant to rule 7.1(d), the Board of Governors has adopted the following standards related to rule 7.1(b):
 - (1) A "communication" which contains guarantees, warranties, or predictions regarding the result of the representation.
 - (2) A "communication" which contains testimonials about or endorsements of a member unless such communication also contains an express disclaimer such as "this testimonial or endorsement does not constitute a guarantee, warranty, or prediction regarding the outcome of your legal matter."
 - (3) A "communication" which contains a dramatization unless such communication contains a disclaimer which states "this is a dramatization" or words of similar import.
 - (4) A "communication" which states or implies "no fee without recovery" unless such communication also expressly discloses whether or not the client will be liable for costs.

- (5) A “communication” which states or implies that a member is able to provide legal services in a language other than English unless the member can actually provide legal services in such language or the communication also states in the language of the communication (a) the employment title of the person who speaks such language and (b) that the person is not a member of the State Bar of California, if that is the case.
- (6) An unsolicited “communication” transmitted to the general public or any substantial portion thereof primarily directed to seeking professional employment primarily for pecuniary gain which sets forth a specific fee or range of fees for a particular service where, in fact, the member charges a greater fee than advertised in such communication within a period of 90 days following dissemination of such communication, unless such communication expressly specifies a shorter period of time regarding the advertised fee. Where the communication is published in the classified or “yellow pages” section of telephone, business or legal directories or in other media not published more frequently than once a year, the member shall conform to the advertised fee for a period of one year from initial publication, unless such communication expressly specifies a shorter period of time regarding the advertised fee.

Comment

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

[2] Rule 7.1 is also intended to prohibit truthful statements that are misleading. A truthful statement is misleading if it omits a fact necessary to make the lawyer's communication considered as a whole not materially misleading.

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

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

[4] As used in paragraph (a), "writing" means any writing as defined in the Evidence Code.

[5] The list of communications under (a)(1) – (a)(4) of this rule is not intended to be inclusive. For example, a lawyer's intentionally misleading use of metatags to divert a prospective client to the web site of the lawyer or the lawyer's law firm would also be prohibited under this rule.

[6] See *also* Rule 8.4(e) for the prohibition against stating or implying an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law.

Proposed New Rule 7.1 Comparison to ABA Model Rule 7.1

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

Rule 7.1. Communications Concerning ~~a Lawyer's~~ the Availability of Legal Services

- (a) For purposes of this chapter, "communication" means any message or offer made by or on behalf of a lawyer concerning the availability for professional employment of a lawyer or a lawyer's law firm directed to any former, present, or prospective client, including but not limited to the following:
- (1) Any use of firm name, trade name, fictitious name, or other professional designation of such lawyer or law firm; or
 - (2) Any stationery, letterhead, business card, sign, brochure, domain name, Internet web page or web site, e-mail, other material sent or posted by electronic transmission, or other writing describing such lawyer or law firm; or
 - (3) Any advertisement (regardless of medium) of such lawyer or law firm directed to the general public or any substantial portion thereof; or
 - (4) Any unsolicited correspondence, electronic transmission, or other writing from a lawyer or law firm directed to any person or entity.
- (b) A lawyer shall not make a false or misleading communication ~~about the lawyer or the lawyer's services.~~ as defined herein.
- (c) A communication is false or misleading if it ~~contains:~~
- (1) Contains any material untrue statement; or
 - (2) Contains any misrepresentation of fact or law, ~~or omits a,~~ or
 - (3) Contains any matter, or presents or arranges any matter in a manner or format which is false, deceptive, or which confuses, deceives, or misleads the public; or
 - (4) Omits to state any fact necessary to make the ~~statement considered as a whole not materially misleading.~~ statements made, in the light of circumstances under which they are made, not misleading to the public.

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

(e) Pursuant to rule 7.1(d), the Board of Governors has adopted the following standards related to rule 7.1(b):

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

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

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

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

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

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

Comment

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

[2] ~~Rule 7.1 is also intended to prohibit t~~Truthful statements that are misleading~~are also prohibited by this Rule.~~ A truthful statement is misleading if it omits a fact necessary to make the lawyer's communication considered as a whole not materially misleading. ~~A truthful statement is also misleading if there is a substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable factual foundation.~~

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

appropriate disclaimer or qualifying language may ~~preclude a finding that a statement is likely to create~~avoid creating unjustified expectations or otherwise ~~mislead~~misleading a prospective client.

[4] As used in paragraph (a), "writing" means any writing as defined in the Evidence Code.

[5] The list of communications under (a)(1) – (a)(4) of this rule is not intended to be inclusive. For example, a lawyer's intentionally misleading use of metatags to divert a prospective client to the web site of the lawyer or the lawyer's law firm would also be prohibited under this rule.

[6] See *also* Rule 8.4(e) for the prohibition against stating or implying an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law.

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 the basic content of the rule has drawn upon Model Rule 7.1 (entitled "Communications Concerning a Lawyer's Services") of the American Bar Association's Model Rules of Professional Conduct. The substitution in the title of the phrase "the Availability of Legal Services" for "a Lawyer's Services" is intended to convey that proposed Rule 7.1 regulates only those instances when a lawyer or law firm communicates to prospective clients their availability to provide legal services. See *also* proposed rule 7.1, Comment [1]. 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 7.1 contains the general prohibition on false or misleading communications. 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.

Text:

1. Paragraph (a) defines the term "communication," and imports paragraph (A) of current California Rule of Professional Conduct 1-400 ("CRPC 1-400" or "rule 1-400") into rule 7.1, with some revisions. Paragraph (A) of rule 1-400 provides:

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

- (1) Any use of firm name, trade name, fictitious name, or other professional designation of such member or law firm; or
- (2) Any stationery, letterhead, business card, sign, brochure, or other comparable written material describing such member, law firm, or lawyers; or

- (3) Any advertisement (regardless of medium) of such member or law firm directed to the general public or any substantial portion thereof; or
- (4) Any unsolicited correspondence from a member or law firm directed to any person or entity.”

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.

The phrase “or other comparable written material” in rule 1-400(A)(2) has been replaced by the phrase, “domain name, Internet web page or web site, e-mail, other material sent or posted by electronic transmission, or other writing” to provide guidance on the kinds of communication that are regulated under this chapter. Finally, the phrase “electronic transmission, or other writing” has been added to subparagraph (4) to conform its construction to revised subparagraph (2). The listing in subparagraphs (a)(1) – (4) of the kinds of communication that are intended to be covered by the rule is not intended to be exclusive. See Comment [5]. Paragraph (a) has no counterpart in Model Rule 7.1.

2. The two sentences of Model Rule 7.1 have been divided into two separate paragraphs – paragraphs (b) and (c) – because the concepts contained in the two sentences are distinct: The first sentence contains the operative prohibition and states generally what kind of conduct is prohibited (making “a false or misleading communication”); the second sentence defines with specificity the prohibited conduct. Paragraph (b) largely tracks the first sentence of Model Rule 7.1. However, the phrase “about a lawyer’s or the lawyer’s services” in Model Rule 7.1 has been replaced by the phrase “as defined herein,” as that limitation is now contained in paragraph (a), which defines the term “communication.”
3. Paragraph (c) identifies with greater specificity than the second sentence of Model Rule 7.1 when a communication is false or misleading. Subparagraphs (c)(1), (3) and (4) are nearly identical to subparagraphs (1), (2) and (3) of current rule 1-400(D), which provides:

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

- (1) Contain any untrue statement; or
- (2) Contain any matter, or present or arrange any matter in a manner or format which is false, deceptive, or which tends to confuse, deceive, or mislead the public; or
- (3) Omit to state any fact necessary to make the statements made, in the light of circumstances under which they are made, not misleading to the public; or
- (4) Fail to indicate clearly, expressly, or by context, that it is a communication or solicitation, as the case may be; or
- (5) Be transmitted in any manner which involves intrusion, coercion, duress, compulsion, intimidation, threats, or vexatious or harassing conduct.
- (6) State that a member is a “certified specialist” unless the member holds a current certificate as a specialist issued by the Board of Legal Specialization, or any other entity accredited by the State Bar to designate specialists pursuant to standards adopted by the Board of Governors, and states the complete name of the entity which granted certification.”

It was noted during the Commission’s deliberations that subparagraphs (c)(1), (3) and (4) added clarity as to precisely what is prohibited by the operative language of proposed Rule 7.1(b). Subparagraph (c)(2) has been added to emphasize that misrepresentations of law in communications about legal services are also regulated under proposed Rule 7.1. See, e.g., *People v. Morse* (Cal.App. 1993) 21 Cal.App.4th 259 [25 Cal.Rptr.2d 816]. It was noted that often, an advertisement will accurately describe the lawyer and the services that are available but will

mislead as to the relevant facts and/or law in order to inspire an erroneous belief that such services are necessary or beneficial. Lawyers should not be permitted to overstate or understate the consequences of failing to hire the lawyer.

Rule 1-400(D) concepts now addressed in other rules. CRPC 1-400(D)(4)-(6) have not been included in proposed rule 7.1. The concepts now found in rule 1-400(D)(4) and (5) may now be found in proposed rules 7.3(c) and 7.3(b)(2), respectively. See “Proposed New Rule 7.3 (Formerly Rule 1-400 Advertising and Solicitation),” Explanatory Notes, for a further discussion of these concepts. The language formerly appearing in rule 1-400(D)(6) may now be found in proposed rule 7.4(d). See below.

4. Paragraph (d) retains, with minor revisions, current rule 1-400(E), which authorizes the Board of Governors of the State Bar of California to promulgate standards that may be used as presumptions affecting which party has the burden of proof in disciplinary proceedings. The word “shall” has been changed to “may,” as the Board’s authority to promulgate any standards beyond those already extant is discretionary.
5. Paragraph (e) is new and includes those standards that the Commission recommends be retained as standards. Specifically, it is recommended that current standards (1), (2), (13), (14), (15) and (16) be retained in paragraph (e) as standards (1), (2), (3), (4), (5) and (6), respectively. The Commission has made this recommendation on the advice of the Office of Chief Trial Counsel of the State Bar of California (“OCTC”) that deleting these standards would make prosecution difficult were the conduct proscribed under those standards to occur.

In addition, on the recommendation of OCTC, several of the current standards have been deleted. They are current standards (3), (4), (7) and (9). The OCTC’s position is that they simply set forth conduct which is untruthful, deceptive or misleading in and of itself, and that a violation of the rule can still be shown because the conduct violates proscriptions set out in rule 7.1(b), 7.3(a) or 7.3(b).

Finally, the concepts in several of the current standards have been retained either as part of another rule or as part of the Discussion to another rule. They are:

- (i) current standard (5), which has been retained as proposed rule 7.3(c), with modifications to conform it to the language of Model Rule 7.3(c);
- (ii) current standard (6), which has been retained, with modifications, as proposed rule 7.5(a);
- (iii) current standard (8), which has been retained largely intact as the second sentence of proposed rule 7.5, cmt. [2];
- (iv) current standard (10), which has been retained, with slight modifications, as proposed rule 7.2(b)(2); and
- (v) current standard (12), which has been retained as rule 7.2(c), with modifications to conform it to the language of Model Rule 7.2(c).

Note that standard (11) previously had been repealed, effective June 1, 1997. Its operative language was inserted as current rule 1-400(D)(6), and the language may now be found in proposed rule 7.4(d). See Text Explanatory Note 3, *above*.

Comment:

1. Comment [1] is based upon comment [1] to Model Rule 7.1. Similar to the title, comment [1] emphasizes that proposed rule 7.1 governs all communications “about the availability of legal services from lawyers and law firms.” In addition, the last sentence of the comment has been added to stress that the rule also governs representations about the law in covered communications.
2. Comment [2] is based upon comment [2] to Model Rule 7.1. The changes to the first sentence are simply stylistic. No change in substance was intended. The second sentence of comment [2] is identical to the second sentence of Model Rule 7.1, cmt. [2]. The last sentence of Model Rule 7.1, cmt. [2] was deleted as unnecessary.

3. Comment [3] is based upon comment [2] to Model Rule 7.1. The only change made to comment [3] was to revise the last sentence as follows: “The inclusion of an appropriate disclaimer or qualifying language may avoid preclude a finding that a statement is likely to create creating unjustified expectations or otherwise misleading a prospective client.” The foregoing revision is intended to address the concern that the language in comment [3] might be construed to suggest that a disclaimer is a panacea for any misstatement or misrepresentation, intended or otherwise.
4. Comment [4] has no counterpart in Model Rule 7.1. Comment [4] is intended to provide lawyers with a convenient cross-reference to the meaning of “writing” as used in the rule. See *also* current CRPC 3-310(A)(3).
5. Comment [5] has no counterpart in Model Rule 7.1. Comment [5] is intended to avoid the misapprehension that the list of communications in subparagraphs (a)(1) – (4) was intended to be exclusive, and gives an example of a type of communication not expressly listed (metatag) that nevertheless would be regulated under the rule.
6. Comment [6] is identical to comment [4] of Model Rule 7.1, which provides a cross-reference to rule 8.4(e), which provides that it is misconduct for a lawyer to: “(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law.” Before the ABA Ethics 2000 Commission’s revisions to the Model Rules, the second clause of rule 8.4(e) appeared as part of former Model Rule 7.1. The provision was moved to Model Rule 8.4(e) to emphasize that the prohibition is not limited to statements made in connection with the marketing of legal services. See ABA Ethics 2000 Reporter’s Explanation of Changes.

Concepts Considered but Rejected or Postponed for Future Consideration:

1. *Materiality of misrepresentation.* One major difference between proposed California Rule 7.1 and Model Rule 7.1 is that the California rule is not limited to misrepresentations that are “material.” The rule was not so limited for a number of reasons: (1) certain sections of the Business & Professions Code, e.g., section 6157, do not contain a “material” limitation; (2) federal advertising statutes that proscribe misrepresentations are also not so limited; (3) even if not expressly stated in the rule, the weighing in a disciplinary proceeding of public/client harm caused by misleading advertising would necessarily reflect due consideration of whether the content at issue is “material;” and (4) a lawyer should not make mistatements, whether material or otherwise. The Commission specifically solicits comments from the public on this issue.
2. *Definitions.* With the exception of the definition of “communication” in paragraph (a), the Commission voted not to include definitions for “solicitation” (currently found in rule 1-400(B)), “advertise” (currently found in Bus. & Prof. Code, section 6157(c)), or “electronic medium” (currently found in Bus. & Prof. Code, section 6157(d)). It was noted that the regulation of advertising is now relatively well-settled and that these definitions, originally drafted in the early stages of the regulation of lawyer advertising and solicitation to provide guidance to lawyers on precisely what kinds of communication were regulated, are no longer necessary.
3. *Retention of communication requirement.* Both current rule 1-400(F) and previous versions of the Model Rules contain a requirement that a lawyer retain, for two years a copy of any communication the lawyer had made in electronic or written media. The Commission agrees with the ABA Ethics 2000 Commission that the requirement “has become increasingly burdensome, and such records are seldom used for disciplinary purposes,” (ABA Ethics 2000 Reporters Explanation of Changes, Rule 7.2), and recommends that the retention requirement not be retained. The Commission notes that if this recommendation is accepted, Bus. & Prof. Code, section 6159.1, which requires the retention of advertisements for a period of one year, should be repealed.

Excerpt from the Commission's May 7-8, 2004 Meeting Summary

* * * * *

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

The Commission considered a March 25, 2004 e-mail message from Mr. Mohr attaching a proposal for draft rules 7.0 through 7.6. The Commission referred to Mr. Mohr's explanatory endnotes in discussing the proposed rules. For the next redraft, there was consensus on the following points.

1. Do not have a separate definition rule.
2. Defer resolution of "lawyer" vs. "member" until rule 1-100 is revisited and use "member" for the time being.
3. Depart from the ABA by not using the modifier "material."

The co-drafters were assigned to redraft 7.1(a) with the discussion to continue at the next meeting by starting at note 11. Mr. Mohr volunteered to do research on the issue of "material" as a qualifier in other states rules.

Among the points raised during the discussion were the following.

1. RPC 1-400(D) includes a prohibition against intrusive conduct that needs to be covered.
2. Intrusive conduct can be covered in proposed rule 7.3 as the this type of conduct likely is a "direct contact" issue.
3. The attorney advertising provisions in the State Bar Act are not limited to "material" misrepresentations and the same holds for some other statutory advertising regulations.
4. Practically speaking, "materiality" as a factor is considered. Even if not expressly discussed, the weighing of public/client harm caused by misleading advertising reflects due consideration of whether content at issue is "material."
5. Consideration should be given to modifying the definitional limitation in the present draft that appears to restrict communications to only content that concerns "the member or the member's services". Often, an advertisement will accurately describe the member and the services that are available but will mislead as to the relevant facts and/or law in order to inspire an erroneous belief that such services are necessary or beneficial. Lawyers should not be permitted to overstate or understate the consequences of failing to hire the lawyer.

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

* * * * *

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.

In MR 7.1 the first issue discussed was the inclusion and positioning of the definition of "communication". On the one hand, it was felt that placement of a definition at the beginning of the rule would avoid confusion in interpreting the rule. On the other hand, it was noted that placement at the end of the rule would be consistent with the MR's format. A motion was made to move the definition of "communication" to the beginning of the rule. The motion carried with a commission vote of 6 yes, 2 no, and 1 abstention.

The second issue was the possible inclusion of the word "material" in proposed rule 7.1(b)(1) or (b)(2) (e.g., "any *material* untrue statement" (b)(1), or "any *material* misrepresentation of fact or law" (b)(2)). Among the points raised during this discussion were the following:

1. The word material should be added to avoid the possibility of disciplinary charges resulting from immaterial inaccuracies in lawyer advertisements.
2. The rules are used as a basis for imposing civil liability and this proposed rule should not expose lawyers to liability unless the misrepresentation is material.
3. The issue of materiality is a "can of worms" that, in concept, reaches other parts of the RPCs (i.e., misrepresentations to a tribunal). It is a slippery slope and it should be left out. If raised here it would set a precedent requiring the Commission to address materiality concerns in all other relevant parts in the rules.
4. There should be a concern not only for the lawyers who are charged, but also with the interest of the public. The rule is intended to protect the public and the word material would not make a big difference by blurring the line for false content in lawyer advertising.
5. Materiality is a element in the concept of civil fraud. In the context of advertising, it would not have the same meaning and would only cause confusion.
6. Section 6157.1 of the State Bar Act does not use the word material and we would be out of sync with the State Bar Act if we added it here.
7. If the purpose of the rule is to protect the public, then lawyers should tell the truth in all aspects of whatever communication is made. No degrees of falsity should be permitted.

Following this discussion, a motion was made to add the word "material" in Rule 7.1(b)(2) and failed by a vote of 2 yes, 6 no, 1 abstention.

The issue of the amount of time an attorney should keep an advertisement was addressed in proposed rule 7.1(d). It is currently at two years in RPC 1-400(F) but it was suggested that it be changed to either one year or deleted. Among the points raised during this discussion were the following:

1. The ABA removed its retention standard from the Model Rules, in part, in recognition of electronic and website advertising.
2. The OCTC might have input on whether the retention standard should be deleted.
3. Consistency with the State Bar Act that provides for a one-year retention period must be addressed
4. Even if the retention standard in RPC 1-400 and in the State Bar Act were deleted, the risk management advice would still be to retain copies of advertisements for some period of time.

Following this discussion, a motion was made to delete the current retention requirement in RPC 1-400 and to make a conforming recommendation that the State Bar seek the repeal of the State Bar Act retention period (B&P Code §6159). The motion carried with a vote of 6 yes, 1 no, 1 abstention.

In proposed rule 7.1(e)(1) the phrase "domain name" is used as a professional designation of a member or law firm. It was suggested that a domain name would not, in every instance, be a communication for purposes of the rule. It was also suggested that meta-tags be mentioned in the discussion. A motion was made to move "domain name" from (e)(1) to (e)(2) after "brochure." This motion carried with a vote of 6 yes, 0 no, and 1 abstention. Next, a motion was made to address meta-tags in a proposed rule discussion section. This motion also passed with a vote of 5 yes, 1 no, 1 abstention.

There was a proposal that a specific reference to the Evidence Code should be used in 7.1(e)(2). The rule would read "or any other writing as defined in Evidence Code §250" instead of "other comparable writing." In discussing this change, it was suggested that a reference to a specific Evidence Code section should not be used and, instead, use a general reference to the Evidence Code. A motion was made to have a general reference to the Evidence Code in 7.1(e)(2). The motion carried by a commission vote of 7 yes, 0 no, and 0 abstentions.

The last issue discussed in proposed rule 7.1 was the inconsistency with the terminology used in (e)(2) and (e)(4). The Commission agreed to let the co-drafters use their discretion in making these two subparagraphs consistent.

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

* * * * *

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

* * *

Next, starting with proposed rule 7.1, the Chair called for discussion of the issues raised by the co-drafters in the endnotes to Draft No. 3 and the issues raised by the e-mailed comments.

On endnote 9 (re proposed deletion of an advertisement retention requirement), it was reported that OCTC recommends maintaining a retention requirement to avoid an increase in investigative resources. A motion was made to maintain the retention requirement but there was no second. It was observed that the advent of real time electronic communication has rendered it problematic to apply a retention standard. As the motion to maintain a retention requirement received no second, the co-drafters proposal to delete the requirement was deemed approved. A motion was made to include a discussion section cross-reference to the statutory retention requirement and to recommend that the State Bar, with OCTC input, consider whether to seek a repeal of that requirement. This motion passed by a vote of: 7 yes, 1 no, 1 abstain.

Responding to Mr. Tuft's 8/16/04 comments and Mrs. Julien's comments on the endnotes, the Commission made the following drafting decisions: (1) change title to "Communications Concerning the Availability of Legal Services" (7 yes, 0 no, 2 abstain); (2) in 7.2(a)(2), change "written document" to "material" (6 yes, 0 no, 3 abstain); (3) in 7.2(a)(2) and (a)(4), delete "as defined in the Evidence Code" and address in discussion section (5 yes, 0 no, 4 abstain); (4) correct typo in (a)(2) by deleting the extra "or."

The Chair next called for a discussion of the use of the term "member" or "lawyer" in Draft 3 of the advertising rules. It was observed that the juxtaposition of "member" and "lawyer" in the advertising rules would be particularly confusing given the practice of interstate advertising that is likely to increase with MJP reforms. The co-drafters suggested that the term "lawyer" be used throughout the advertising rules (7.1 through 7.5) as a place holder drafting approach that will be revisited after the entire series of rules are tentatively approved. The Commission agreed to this approach (6 yes, 1 no, 2 abstain).

The Commission agreed to change proposed rule 7.1 Disc. [1] to read ". . . about the availability of services from lawyers and law firms. . . ." (5 yes, 2 no, 3 abstain)

The Commission agreed to delete the third sentence of proposed rule 7.1 Disc. [2] (4 yes, 3 no, 2 abstain).

By consensus, the Commission agreed to Mr. Tuft's recommendation no. 5 in his 8/16/04 e-mail message.

Regarding proposed rule 7.1 Disc. [3], the Commission decided to modify the last sentence to read "The inclusion of an appropriate disclaimer or qualifying language may avoid creating unjustified expectations or otherwise misleading a prospective client." (5 yes, 1 no, 3 abstain).

Regarding proposed rule 7.1 Disc. [4], by consensus, the Commission agreed with item no. 8 of Mr. Tuft's 8/16/04 e-mail (re statement that the list of communications is not intended to be inclusive).

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

* * * * *

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

* * *

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.

Regarding Endnote 1, by consensus the Commission agreed to use the term "lawyers" rather than "members" throughout this series of rules.

* * *

Next, the Chair called for discussion of the RPC 1-400(D)(6) Advertising Standards. Among the points raised during the discussion were the following:

(1) There is no objection to retaining the authority to adopt standards vested by the Supreme Court in the Board of Governors.

(2) The original intent of the standards was to enhance that part of RPC 1-400 that is proposed to be revised primarily as rule 7.1(d)

(3) The State Bar Office of Trial Counsel recommends maintaining standard numbers: 1, 2, 5, 6, 12, 13, 15, 16; and deleting standard numbers: 3, 4, 7, 8, 9, 10.

(4) Standard no. 5 should be addressed within proposed rule 7.3 and there should be no alteration of the burden of proof.

(5) Standard nos. 14 and 15 should be retained within proposed rule 7.1.

(6) Standard no. 12 can be retained within proposed rule 7.2(c).

(7) Standard nos. 9 and 10 should be retained within proposed rule 7.1.

Following discussion, the Commission considered a motion to authorize the codrafters to draft appropriate language for proposed rule 7.1 stating the handling of the standards as discussed for a mail ballot approval. This motion passed by a vote of 5 yes, 4 no and 2 abstain. Proposed rule 7.1(d) would read:

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

+++++

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."