

## **PROPOSED NEW RULE 7.4 (Formerly Rule 1-400 Advertising and Solicitation)**

At its October 8, 2004 meeting, the Commission tentatively approved proposed new rule 7.4 (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 7.4; (2) a redline/strikeout version of the proposed rule comparing it to Model Rule 7.3; (3) explanatory notes; (4) concepts considered but not recommended; and (5) excerpts from the Commission's July 9, 2004 and August 27 & 28, 2004 meeting summaries.

### **Proposed New Rule 7.4 (Formerly Rule 1-400) – Clean Version**

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

#### **Rule 7.4. 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. A lawyer may also communicate that his or her practice is limited to or concentrated in a particular field of law, if such communication does not imply an unwarranted expertise in the field so as to be false or misleading under Rule 7.1.
- (b) A lawyer registered to practice patent law before the United States Patent and Trademark Office may use the designation "Patent Attorney" or a substantially similar designation;
- (c) A lawyer engaged in Admiralty practice may use the designation "Admiralty," "Proctor in Admiralty" or a substantially similar designation.
- (d) A lawyer shall not state or imply that the lawyer is a certified specialist in a particular field of law, unless:
  - (1) the lawyer 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
  - (2) the name of the certifying organization is clearly identified in the communication.

## **Proposed New Rule 7.4 Comparison to ABA Model Rule 7.4**

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

### **Rule 7.4~~+~~ 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. A lawyer may also communicate that his or her practice is limited to or concentrated in a particular field of law, if such communication does not imply an unwarranted expertise in the field so as to be false or misleading under Rule 7.1.
- (b) A lawyer ~~admitted~~registered to ~~engage in practice~~ patent ~~practice~~law before the United States Patent and Trademark Office may use the designation "Patent Attorney" or a substantially similar designation;-
- (c) A lawyer engaged in Admiralty practice may use the designation "Admiralty," "Proctor in Admiralty" or a substantially similar designation.
- (d) A lawyer shall not state or imply that ~~a~~the lawyer is a certified ~~as a~~ specialist in a particular field of law, unless:
- (1) the lawyer ~~has been certified~~holds a current certificate as a specialist ~~by an organization that has been approved by an appropriate state authority or that has been issued by the Board of Legal Specialization, or any other entity~~ accredited by the ~~American Bar Association~~State Bar to designate specialists pursuant to standards adopted by the Board of Governors; and
  - (2) the name of the certifying organization is clearly identified in the communication.

### **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.~~

## Explanatory Notes

### *Introductory Note:*

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

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

### *Title:*

The rule title chosen for this new rule reflects the fact that the format and content of the rule has drawn upon Model Rule 7.4 (entitled "Communication of Fields of Practice and Specialization") This rule sets out basic rules governing the communication to the public of a lawyer's fields of practice and claims to specialization.

### *Text:*

1. Paragraph (a) is based upon paragraph (a) of Model Rule 7.4, which provides that a lawyer may communicate that the lawyer does or does not practice in particular fields of law. A sentence has been added that provides a lawyer may communicate that the lawyer's practice is limited to or concentrated in a particular field of law, so long as the communication does not imply an expertise in the field so as to be false or misleading under Rule 7.1.
2. Paragraph (b) is based upon paragraph (b) of Model Rule 7.4. The language has been modified to reflect accurately that a lawyer who is authorized to practice patent law before the Patent and Trademark Office is "registered to practice patent law" there, and is not "admitted" to practice there.
3. Paragraph (c) is identical to paragraph (c) of Model Rule 7.4, which recognizes a long historical tradition of maritime law in federal courts and permits a lawyer to communicate that the lawyer is engaged in Admiralty practice.
4. Paragraph (d) is based upon paragraph (d) of Model Rule 7.4, but has been revised to reflect the current regulatory framework for specialization in California. Similar language may be found in current CRPC 1-400(D)(6). The revisions in the introductory paragraph of paragraph (d) – changing "a lawyer" to "the lawyer," and substituting "is a certified specialist" for "is certified as a specialist" – are stylistic only. No change in substance was intended.

*Comment:*

The Commission determined that the provisions of rule 7.4 are self-explanatory and do not require comment to elaborate upon them further. Accordingly, the Commission is not recommending adoption of the comments to Model Rule 7.4.

*Concepts Considered but Rejected or Postponed for Future Consideration:*

Not applicable.

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

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

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

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Next discussed was proposed rule 7.4. A question arose about the need for provisions (b) and (c). There was consensus that these traditional provisions should be included in these rules. A motion was made to change the language regarding patent lawyers to "registered to practice before the Patent Office. . ." The motion carried with a Commission vote of 9 yes, 1 no, and 0 abstentions.

A motion was made to change "certified as a specialist" to "certified specialist" in 7.4(d). This change was agreed by consensus. A motion was made to change "a member" to "he or she" in 7.4 (d) and carried with a vote of 8 yes, 2 no, and 0 abstentions.

Another question was raised as to whether the Commission should change "the member" in 7.4(a) to "he or she" so that the rule will read as follows: "A member may communicate the fact that he or she does or does not practice in particular fields of law." This may not work because there will be two contiguous disjunctive constructs ("he or she" and "does or does not"). No vote or discussion was taken on the matter.

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

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

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

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Next, the Commission turned to proposed rule 7.4. The Commission considered a motion to modify proposed rule 7.4(a) and 7.4(d) by replacing the phrase "he or she" with the word "lawyer." The motion passed by a vote of 4 yes, 0 no, 3 abstain.

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