

DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 1-400 [7.1]

Lead Drafter: Langford
Co-Drafters: Inlender, Kornberg, Tuft
Meeting Date: March 31 – April 1, 2016

I. CURRENT CALIFORNIA RULE

Rule 1-400 Advertising and Solicitation

- (A) For purposes of this rule, “communication” means any message or offer made by or on behalf of a member concerning the availability for professional employment of a member or a law firm directed to any former, present, or prospective client, including but not limited to the following:
- (1) Any use of firm name, trade name, fictitious name, or other professional designation of such member or law firm; or
 - (2) Any stationery, letterhead, business card, sign, brochure, or other comparable written material describing such member, law firm, or lawyers; or
 - (3) Any advertisement (regardless of medium) of such member or law firm directed to the general public or any substantial portion thereof; or
 - (4) Any unsolicited correspondence from a member or law firm directed to any person or entity.
- (B) For purposes of this rule, a “solicitation” means any communication:
- (1) Concerning the availability for professional employment of a member or a law firm in which a significant motive is pecuniary gain; and
 - (2) Which is:
 - (a) delivered in person or by telephone, or
 - (b) directed by any means to a person known to the sender to be represented by counsel in a matter which is a subject of the communication.
- (C) A solicitation shall not be made by or on behalf of a member or law firm to a prospective client with whom the member or law firm has no family or prior professional relationship, unless the solicitation is protected from abridgment by the Constitution of the United States or by the Constitution of the State of California. A solicitation to a former or present client in the discharge of a member’s or law firm’s professional duties is not prohibited.
- (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

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- which is false, deceptive, or which tends to confuse, deceive, or mislead the public; or
- (3) Omit to state any fact necessary to make the statements made, in the light of circumstances under which they are made, not misleading to the public; or
 - (4) Fail to indicate clearly, expressly, or by context, that it is a communication or solicitation, as the case may be; or
 - (5) Be transmitted in any manner which involves intrusion, coercion, duress, compulsion, intimidation, threats, or vexatious or harassing conduct.
 - (6) State that a member is a “certified specialist” unless the member holds a current certificate as a specialist issued by the Board of Legal Specialization, or any other entity accredited by the State Bar to designate specialists pursuant to standards adopted by the Board of Governors, and states the complete name of the entity which granted certification.
- (E) The Board of Governors of the State Bar shall formulate and adopt standards as to communications which will be presumed to violate this rule 1-400. The standards shall only be used as presumptions affecting the burden of proof in disciplinary proceedings involving alleged violations of these rules. “Presumption affecting the burden of proof” means that presumption defined in Evidence Code sections 605 and 606. Such standards formulated and adopted by the Board, as from time to time amended, shall be effective and binding on all members.
- (F) A member shall retain for two years a true and correct copy or recording of any communication made by written or electronic media. Upon written request, the member shall make any such copy or recording available to the State Bar, and, if requested, shall provide to the State Bar evidence to support any factual or objective claim contained in the communication.

Standards:

Pursuant to rule 1-400(E) the Board of Governors of the State Bar has adopted the following standards, effective May 27, 1989, unless noted otherwise, as forms of “communication” defined in rule 1-400(A) which are presumed to be in violation of rule 1-400:

- (1) A “communication” which contains guarantees, warranties, or predictions regarding the result of the representation.
- (2) A “communication” which contains testimonials about or endorsements of a member unless such communication also contains an express disclaimer such as “this testimonial or endorsement does not constitute a guarantee, warranty, or prediction regarding the outcome of

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your legal matter.”

(3) A “communication” which is delivered to a potential client whom the member knows or should reasonably know is in such a physical, emotional, or mental state that he or she would not be expected to exercise reasonable judgment as to the retention of counsel.

(4) A “communication” which is transmitted at the scene of an accident or at or en route to a hospital, emergency care center, or other health care facility.

(5) A “communication,” except professional announcements, seeking professional employment for pecuniary gain, which is transmitted by mail or equivalent means which does not bear the word “Advertisement,” “Newsletter” or words of similar import in 12 point print on the first page. If such communication, including firm brochures, newsletters, recent legal development advisories, and similar materials, is transmitted in an envelope, the envelope shall bear the word “Advertisement,” “Newsletter” or words of similar import on the outside thereof.

(6) A “communication” in the form of a firm name, trade name, fictitious name, or other professional designation which states or implies a relationship between any member in private practice and a government agency or instrumentality or a public or non-profit legal services organization.

(7) A “communication” in the form of a firm name, trade name, fictitious name, or other professional designation which states or implies that a member has a relationship to any other lawyer or a law firm as a partner or associate, or officer or shareholder pursuant to Business and Professions Code sections 6160-6172 unless such relationship in fact exists.

(8) A “communication” which states or implies that a member or law firm is “of counsel” to another lawyer or a law firm unless the former has a relationship with the latter (other than as a partner or associate, or officer or shareholder pursuant to Business and Professions Code sections 6160-6172) which is close, personal, continuous, and regular.

(9) A “communication” in the form of a firm name, trade name, fictitious name, or other professional designation used by a member or law firm in private practice which differs materially from any other such designation used by such member or law firm at the same time in the same community.

(10) A “communication” which implies that the member or law firm is participating in a lawyer referral service which has been certified by the State Bar of California or as having satisfied the Minimum Standards for Lawyer Referral Services in California, when that is not the case.

(11) (Repealed. See rule 1-400(D)(6) for the operative language on this subject.)

(12) A “communication,” except professional announcements, in the form of an advertisement primarily directed to seeking professional employment primarily for pecuniary gain transmitted to the general public or any substantial portion thereof by mail or equivalent means or by means

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of television, radio, newspaper, magazine or other form of commercial mass media which does not state the name of the member responsible for the communication. When the communication is made on behalf of a law firm, the communication shall state the name of at least one member responsible for it.

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

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

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

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

II. DRAFTING TEAM’S RECOMMENDATION AND VOTE

There was consensus among the drafting team members to recommend a proposed amended rule as set forth below in Section III.

This recommendation followed the Commission’s action at the January 22 – 23, 2016 meeting at which there was a consensus to direct the drafting team to begin with the Model Rules rather than Rule 1-400. In addition, regarding the lawyer advertising standards adopted by the Board of Trustees pursuant to Rule 1-400(E), following discussion at the January 22 – 23, 2016 meeting, it was understood that the Commission would remain open to considering any proposal or alternative proposals submitted by the drafting team for deleting, retaining or revising the standards.

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III. PROPOSED RULE (CLEAN)

Rule 7.1 Communications Concerning A Lawyer's Services

- (a) A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains an untrue statement, or a material misrepresentation of fact or law, or omits a fact necessary to make the communication considered as a whole not materially misleading.
- (b) The Board of Trustees of the State Bar may formulate and adopt standards as to communications that will be presumed to violate Rule 7.1, 7.2, 7.3, 7.4 or 7.5. The standards shall only be used as presumptions affecting the burden of proof in disciplinary proceedings involving alleged violations of these Rules. "Presumption affecting the burden of proof" means that presumption defined in Evidence Code sections 605 and 606. Such standards formulated and adopted by the Board, as from time to time amended, shall be effective and binding on all lawyers.

Comment

[1] This Rule governs all communications of any type whatsoever about a lawyer's services, including advertising permitted by Rule 7.2. A communication includes any message or offer made by or on behalf of a lawyer concerning the availability for professional employment of a lawyer or a lawyer's law firm directed to any person.

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

[3] This Rule prohibits truthful statements that are misleading. A truthful statement is misleading if it omits a fact necessary to make the lawyer's communication considered as a whole not materially misleading. A truthful statement is also misleading if it is presented in a manner that creates a substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable factual foundation. Any communication that states or implies "no fee without recovery" is also misleading unless the communication also expressly discloses whether or not the client will be liable for costs.

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

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comparison can be substantiated. An appropriate disclaimer or qualifying language often avoids creating unjustified expectations.

[OPTION 1] [5] This Rule prohibits a lawyer from making a communication that states or implies that the lawyer is able to provide legal services in a language other than English unless the lawyer can actually provide legal services in that language or the communication also states in the language of the communication (i) the employment title of the person who speaks such language and (ii) that the person is not a member of the State Bar of California, if that is true.

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

[OPTION 2] Standard

Pursuant to paragraph (b), the Board of Trustees has adopted the following standard related to paragraph (a) of this Rule:

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

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

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

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

- ~~(1) Any use of firm name, trade name, fictitious name, or other professional designation of such member or law firm; or~~
- ~~(2) Any stationery, letterhead, business card, sign, brochure, or other comparable written material describing such member, law firm, or lawyers; or~~
- ~~(3) Any advertisement (regardless of medium) of such member or law firm directed to the general public or any substantial portion thereof; or~~
- ~~(4) Any unsolicited correspondence from a member or law firm directed to any~~

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~~person or entity.~~

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

~~(1) Concerning the availability for professional employment of a member or a law firm in which a significant motive is pecuniary gain; and~~

~~(2) Which is:~~

~~(a) delivered in person or by telephone, or~~

~~(b) directed by any means to a person known to the sender to be represented by counsel in a matter which is a subject of the communication.~~

~~(C) A solicitation shall not be made by or on behalf of a member or law firm to a prospective client with whom the member or law firm has no family or prior professional relationship, unless the solicitation is protected from abridgment by the Constitution of the United States or by the Constitution of the State of California. A solicitation to a former or present client in the discharge of a member’s or law firm’s professional duties is not prohibited.~~

~~(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.~~

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- (a) lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains an untrue statement, or a material misrepresentation of fact or law, or omits a fact necessary to make the communication considered as a whole not materially misleading.
- (Eb) The Board of ~~Governors~~Trustees of the State Bar ~~shall~~may formulate and adopt standards as to communications ~~which~~that will be presumed to violate ~~this rule 1-400 Rule 7.1, 7.2, 7.3, 7.4 or 7.5.~~ The standards shall only be used as presumptions affecting the burden of proof in disciplinary proceedings involving alleged violations of these ~~rules~~Rules. "Presumption affecting the burden of proof" means that presumption defined in Evidence Code sections 605 and 606. Such standards formulated and adopted by the Board, as from time to time amended, shall be effective and binding on all ~~members~~lawyers.
- ~~(F) A member shall retain for two years a true and correct copy or recording of any communication made by written or electronic media. Upon written request, the member shall make any such copy or recording available to the State Bar, and, if requested, shall provide to the State Bar evidence to support any factual or objective claim contained in the communication.~~

Standards:Comment

[1] This Rule governs all communications of any type whatsoever about a lawyer's services, including advertising permitted by Rule 7.2. A communication includes any message or offer made by or on behalf of a lawyer concerning the availability for professional employment of a lawyer or a lawyer's law firm directed to any person.

~~Pursuant to rule 1-400(E) the Board of Governors of the State Bar has adopted the following standards, effective May 27, 1989, unless noted otherwise, as forms of "communication" defined in rule 1-400(A) which are presumed to be in violation of rule 1-400:~~

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

~~(2) A "communication" which contains testimonials about or endorsements of a member unless such communication also that contains an express disclaimer such as "this testimonial or endorsement does not constitute a guarantee, warranty, or prediction regarding the outcome of your legal matter."~~of the result of a particular representation is considered to be a false or misleading communication under this Rule. See also, Business & Professions Code § 6157.2(a).

~~(3) A "communication" which is delivered to a potential client whom the member knows or should reasonably know is in such a physical, emotional, or mental state that he or she would not be expected to exercise reasonable judgment as to the retention of counsel.~~

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[3] This Rule prohibits truthful statements that are misleading. A truthful statement is misleading if it omits a fact necessary to make the lawyer's communication considered as a whole not materially misleading. A truthful statement is also misleading if it is presented in a manner that creates a substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable factual foundation. For example, a communication that states or implies "no fee without recovery" is misleading unless the communication expressly discloses whether or not the client will be liable for costs.

~~(4) A "communication" which is transmitted at the scene of an accident or at or en route to a hospital, emergency care center, or other health care facility.~~

~~(5) A "communication," except professional announcements, seeking professional employment for pecuniary gain, which is transmitted by mail or equivalent means which does not bear the word "Advertisement," "Newsletter" or words of similar import in 12 point print on the first page. If such communication, including firm brochures, newsletters, recent legal development advisories, and similar materials, is transmitted in an envelope, the envelope shall bear the word "Advertisement," "Newsletter" or words of similar import on the outside thereof.~~

~~(6) A "communication" in the form of a firm name, trade name, fictitious name, or other professional designation which states or implies a relationship between any member in private practice and a government agency or instrumentality or a public or non-profit legal services organization.~~

~~(7)~~[4] A "communication" in the form of a firm name, trade name, fictitious name, or other professional designation which states or implies that a member has a relationship to any other lawyer or a law firm as a partner or associate, or officer or shareholder pursuant to Business and Professions Code sections 6160-6172 unless such relationship in fact exists. that truthfully reports a lawyer's achievements on behalf of clients or former clients, or a testimonial about or endorsement of the lawyer, may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case. Similarly, an unsubstantiated comparison of the lawyer's services or fees with the services or fees of other lawyers may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison can be substantiated. An appropriate disclaimer or qualifying language often avoids creating unjustified expectations.

~~(8) A "communication" which states or implies that a member or law firm is "of counsel" to another lawyer or a law firm unless the former has a relationship with the latter (other than as a partner or associate, or officer or shareholder pursuant to Business and Professions Code sections 6160-6172) which is close, personal, continuous, and regular.~~

[5] [OPTION 1] A communication that states or implies that a lawyer is able to provide legal services in a language other than English is prohibited under this Rule unless the lawyer can

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actually provide legal services in that language or the communication contains a statement in that language (i) identifying the employment title of the person who speaks such language and (ii) that the person is not a lawyer, if that is true.

~~(9) A “communication” in the form of a firm name, trade name, fictitious name, or other professional designation used by a member or law firm in private practice which differs materially from any other such designation used by such member or law firm at the same time in the same community.~~

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

~~(10) A “communication” which implies that the member or law firm is participating in a lawyer referral service which has been certified by the State Bar of California or as having satisfied the Minimum Standards for Lawyer Referral Services in California, when that is not the case.~~

~~(11) (Repealed. See rule 1-400(D)(6) for the operative language on this subject.)~~

~~(12) A “communication,” except professional announcements, in the form of an advertisement primarily directed to seeking professional employment primarily for pecuniary gain transmitted to the general public or any substantial portion thereof by mail or equivalent means or by means of television, radio, newspaper, magazine or other form of commercial mass media which does not state the name of the member responsible for the communication. When the communication is made on behalf of a law firm, the communication shall state the name of at least one member responsible for it.~~

~~(13) A “communication” which contains a dramatization unless such communication contains a disclaimer which states “this is a dramatization” or words of similar import.~~

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

Standards

Pursuant to paragraph (b), the Board of Trustees has adopted the following standard related to paragraph (a) of this Rule:

~~(451)~~ **[OPTION 2]** A “communication” ~~which~~that states or implies that a ~~member~~lawyer is able to provide legal services in a language other than English unless the ~~member~~lawyer can actually provide legal services in such language or the communication also states in the language of the communication ~~(a)~~(a) the employment title of the person who speaks such language and ~~(b)i)~~(b)i) that the person is not a member of the State Bar of California, if that is the case.

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~~(16) An unsolicited “communication” transmitted to the general public or any substantial portion thereof primarily directed to seeking professional employment primarily for pecuniary gain which sets forth a specific fee or range of fees for a particular service where, in fact, the member charges a greater fee than advertised in such communication within a period of 90 days following dissemination of such communication, unless such communication expressly specifies a shorter period of time regarding the advertised fee. Where the communication is published in the classified or “yellow pages” section of telephone, business or legal directories or in other media not published more frequently than once a year, the member shall conform to the advertised fee for a period of one year from initial publication, unless such communication expressly specifies a shorter period of time regarding the advertised fee.~~

V. PROPOSED RULE (REDLINE TO MODEL RULE 7.1)

Rule 7.1 Communications Concerning A ~~Lawyer's~~Lawyer's Services

- (a) A lawyer shall not make a false or misleading communication about the lawyer or the ~~lawyer's~~lawyer's services. A communication is false or misleading if it contains an untrue statement, or a material misrepresentation of fact or law, or omits a fact necessary to make the ~~statement~~communication considered as a whole not materially misleading.
- (b) The Board of Trustees of the State Bar may formulate and adopt standards as to communications that will be presumed to violate Rule 7.1, 7.2, 7.3, 7.4 or 7.5. The standards shall only be used as presumptions affecting the burden of proof in disciplinary proceedings involving alleged violations of these Rules. “Presumption affecting the burden of proof” means that presumption defined in Evidence Code sections 605 and 606. Such standards formulated and adopted by the Board, as from time to time amended, shall be effective and binding on all lawyers.

Comment

[1] This Rule governs all communications of any type whatsoever about a ~~lawyer's~~lawyer's services, including advertising permitted by Rule 7.2. ~~Whatever means are used to make known a lawyer's services, statements about them must be truthful.~~A communication includes any message or offer made by or on behalf of a lawyer concerning the availability for professional employment of a lawyer or a lawyer's law firm directed to any person.

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

[23] This Rule prohibits truthful statements that are misleading ~~are also prohibited by this Rule.~~ A truthful statement is misleading if it omits a fact necessary to make the ~~lawyer's~~lawyer's communication considered as a whole not materially misleading. A truthful statement is also misleading if ~~there is~~it is presented in a manner that creates a substantial likelihood that it will

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lead a reasonable person to formulate a specific conclusion about the lawyer or the ~~lawyer's~~lawyer's services for which there is no reasonable factual foundation. For example, a communication that states or implies "no fee without recovery" is misleading unless the communication expressly discloses whether or not the client will be liable for costs.

~~[34]~~ ~~An advertisement~~A communication that truthfully reports a ~~lawyer's~~lawyer's achievements on behalf of clients or former clients, ~~or a testimonial about or endorsement of the lawyer,~~ may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each ~~client's~~client's case. Similarly, an unsubstantiated comparison of the ~~lawyer's~~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~~often avoids creating unjustified expectations ~~or otherwise mislead the public.~~

~~[4] See also Rule 8.4(e) for the prohibition against stating or implying an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law~~

[5] [OPTION 1] A communication that states or implies that a lawyer is able to provide legal services in a language other than English is prohibited under this Rule unless the lawyer can actually provide legal services in that language or the communication contains a statement in that language (i) identifying the employment title of the person who speaks such language and (ii) that the person is not a lawyer, if that is true.

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

Standards

Pursuant to paragraph (b), the Board of Trustees has adopted the following standard related to paragraph (a) of this Rule:

(1) [OPTION 2] A "communication" that states or implies that a lawyer is able to provide legal services in a language other than English unless the lawyer can actually provide legal services in such language or the communication also states in the language of the communication (i) the employment title of the person who speaks such language and (ii) that the person is not a member of the State Bar of California, if that is the case.

VI. PUBLIC COMMENTS SUMMARY

- **Scott Garner, COPRAC, 6/16/2015:** Suggests modification of the advertising rule to closely resemble model rule to fill gaps in the current rule. Also suggest updating the Standards to

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address technological advances.

- **Lisa Wilbur, 5/4/2015:** Concerned with false advertising and the need for specific rules regarding the disclosure of entity status.

VII. OCTC / STATE BAR COURT COMMENTS

A. Jayne Kim, OCTC, 10/27/2015:

Rule 1-400: Advertising and Solicitation

1. Rule 1-400 and its Standards 1, 2, 4-8 and 12-16, should be retained as currently written. The Standards serve multiple purposes, including providing guidance to the membership, educating the public, and assisting OCTC in evaluating and resolving complaints. OCTC often refers to the Standards when closing less serious advertising complaints with warning or resource letters. However, Standards 3, 9 and 10 describe conduct and situations clearly covered by the rule itself. Those Standards are not necessary. (Standard 11 has been repealed.)
2. The rule would be enhanced by requiring that members retain copies of their legal advertising for five years instead of the current two year period. This would be consistent with the rule of limitations for State Bar prosecutions. (See rule 5.21 of the Rules of Procedure.)
3. OCTC does not interpret Central Hudson Gas & Electric Corp v. Public Service Commission of N.Y. (1980) 447 US 557 as supporting an argument that all restrictions on advertising should be extinguished.

B. RUSSELL WEINER, OCTC, 6/15/2010:

Rule 7.1 Communications Concerning the Availability of Legal Services

1. OCTC supports this rule, but finds many of the Comments more appropriate for treatises, law review articles, and ethics opinions. We support the first sentence of comment 2. We believe Comment 4 should be in the rule. We would strike the second sentence of Comment 5.
2. OCTC supports the Standards attached to this rule.

C. MIKE NISPEROS, OCTC, 9/27/2001:

OCTC recommends that this rule be updated to specifically include e-mail, internet or other electronic transmissions.

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Add the following language:

(A) . . .

(2) Any stationery, letterhead, business card, sign, brochure, e-mail, internet web page or other written document sent by electronic transmission, or other comparable written material describing such member, law firm, or lawyers.

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

(1) Concerning the availability for professional employment of a member or a law firm in which a significant motive is pecuniary gain; and

(2) which is:

(a) delivered in person, by telephone, or through contemporaneous electronic transmission, or

(b) directed by any means to a person known to the sender to be represented by counsel in a matter which is a subject of the communication.

. . .

OCTC COMMENTS:

OCTC recommends that the rule include reference to e-mail and internet pages so that members are fully aware that these rules apply in those situations too. The Standards might also be changed to include a reference to these means of transmission.

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

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

The rule below provides an example of one jurisdiction’s adoption of Model Rule 7.1. This rule adopts the Model Rule verbatim. However, a majority of jurisdictions have adopted a rule that is substantially different.

Illinois Rule 7.1 Communications Concerning a Lawyer’s Services

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer’s services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

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

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_7_1.pdf
- Nineteen jurisdictions have adopted Model Rule 7.1 verbatim.¹ Thirty-two jurisdictions have adopted a version of the rule that is substantially different from Model Rule 7.1.²

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

A. Concepts Accepted (Pros and Cons):

1. Recommend adoption of Model Rule 7.1, as modified.

- **Pros:** Model Rule 7.1 is part of the drafting team's recommended implementation of the Commission's vote at the January 22 – 23, 2016 meeting to adhere to the ABA Model Rule general framework for regulating lawyer advertising and solicitations for business by several separate 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.

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

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

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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 letterheads.

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

- Cons: There is no evidence that current rule 1-400, when applied in conjunction with Business & Professions Code §§ 6157 et seq., does not provide an adequate basis for regulating the field of lawyer advertising.

2. Recommend adoption of Model Rule 7.1(a), as modified that serves as a general prohibition against false or misleading communications.

- Pros: A general prohibition coextensive with the commercial speech doctrine provides public protection by setting an enforceable standard for evaluating lawyer communications. Like current rule 1-400, the concept of a “communication” encompasses advertising as well as firm names and letterheads as subsets of communications and other rules address these subsets and refer back to rule 7.1.
- Cons: There is no evidence that current rule 1-400 does not effectively regulate lawyer advertising in California. Together with Bus. & Prof. Code §§ 6157 et seq., the existing regulatory scheme provides the State Bar with an array of useful tools for both guiding lawyer compliance and disciplining lawyers when necessary to protect the public.

3. Recommend adoption of Model Rule 7.1(b) to continue the authority granted to the State Bar Board of Trustees by the California Supreme Court that permits, but does not require, the Board to adopt standards as to communications that are presumed to violate the advertising rules.

- Pros: The standards address longstanding problem areas that have been identified by the State Bar. They give guidance to lawyers and they are used by State Bar enforcement staff in minor misconduct matters involving, for example, warning letters and resource letters where complaints are closed following contact with a respondent lawyer. The standards have been cited by the State Bar Court Review Department (see *In the Matter of Respondent V* (1995) 3 Cal. State Bar Ct. Rptr. 442, 457.) The use of advertising standards as presumptions is also found in the State Bar Act (see Bus. & Prof. Code §§ 6158.1 and 6158.2). Although the drafting team is recommending changes to the existing standards (deleting some, moving others to the black letter or comments of the rules in the 7 series), the authority granted by the Supreme Court should be retained.
- Cons: The standards are not necessary to regulate inherently false and deceptive advertising. As presently framed, the presumptions force lawyers to have to prove a negative. They create a lack of predictability with respect to how a particular bar regulator will view a given advertisement. The standards also create a risk of inconsistent enforcement and an unchecked opportunity to regulate “taste” and

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"professionalism" in the name of "misleading" advertisements. In the absence of deception or illegal activities, regulations concerning the content of advertisements are constitutionally permitted only if they are narrowly drawn to advance a substantial governmental interest. *Cent. Hudson Gas & Elec. v. Pub. Serv. Comm'n*, 447 U.S. 557 (1980); *Alexander v. Cahill*, 598 F.3d. 79 (2d Cir. 2010) (state's ban on "advertising techniques" that are no more than potentially misleading are unconstitutionally broad). The standards are not "guidelines." The "standards shall only be used as presumptions affecting the burden of proof in disciplinary proceedings involving alleged violations of these rules" Rule 1-400(E). They are intended to serve no other purpose.

4. Recommend adoption of Comment [1], as a modified version of Model Rule 7.1, cmt. [1].
 - Pros: The comment explains the breadth of the concept of lawyer "communication" about a lawyer or the lawyer's services and is consistent with the similar concept in current rule 1-400(A). In addition, it makes clear that communications include messages made by or on behalf of a lawyer.
 - Cons: If the goal is to simplify the advertising rules, then a black letter statement of a general prohibition coextensive with the commercial speech standard is sufficient and comments are unnecessary and may pose a risk of diluting or expanding the general prohibition.
5. Recommend adoption of Comment [2] as a comment that has no counterpart in Model Rule 7.1 but carries forward a specific restriction found in current rule 1-400(E), Standard No. 1. The drafting team recommends deleting the standard concerning guarantees, warranties, or predictions but retaining the concept as Comment [2].
 - Pros: This change retains the longstanding prohibition of guarantees, warranties, or predictions concerning the result of a representation. It also eliminates the potentially risky suggestion in the current standard that a lawyer might be able to rebut the misleading character of such communications. In fact, the State Bar Act states an absolute prohibition on a guarantee or warranty (see Bus. & Prof. Code §§ 6157.2(a)).
 - Cons: This comment is merely an example, albeit a clear example, of a communication that violates the rule. It is unnecessary given the Commission's charter indicating that comments be used sparingly.
6. Recommend adoption of Comment [3], a modified version of Model Rule 7.1, cmt.[2]. The drafting team recommends including this comment to: (i) clarify that a truthful statement might nevertheless be presented in manner that is misleading, such as through a material omission; and (ii) move to the comments the guidance provided by existing Standard No. 14 regarding prohibited communications that state or imply "no fee without recovery."
 - Pros: This comment promotes compliance with the rule by explaining an important point found in lawyer advertising case law regarding the misleading presentation of truthful information. This comment also carries forward as a comment, the concept of

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existing Standard No. 14 that when a lawyer communicates that a client might not incur any legal fees, that communication must also address the issue of costs to avoid a misleading omission. (See Bus. & Prof. Code §§ 6157.2(d). See also *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio* (1985) 471 U.S. 626, 652-653 and current rule 1-400(D)(3). In addition, OCTC has commented in support of retaining Standard No. 14. (See above section VII.A, OCTC's 10/27/2015 letter.)

- Cons: The general prohibition in paragraph (a) adequately addresses misleading statements and omission of material facts.
7. Recommend adoption of Comment [4], a modified version of Model Rule 7.1, cmt. [3]. This comment highlights the concept of reasonable v. unjustified client expectations in evaluating whether a communication violates the rule.
- Pros: This comment emphasizes that a lawyer should consider a proposed communication from the perspective of a consumer of legal services in order to evaluate the communication under the false, deceptive or misleading test.
 - Cons: This information, including an example, seems more appropriate for an ethics opinion.
8. Alternative Options: Recommend adoption of Comment [5] to carry forward the concept of existing Standard No. 15 as a comment (Option 1) or keep it as a standard and renumber it as Standard No. 1 to Rule 7.1 (Option 2). Current Standard No. 15 addresses lawyer communications that hold out to the public an ability to provide legal services in a language other than English. The drafting team presents this as an open issue for the Commission's consideration of the two aforementioned options. (See open issues at Section X.)
- Pros: A lawyer's communication of a foreign language ability is helpful information to a consumer in choosing an attorney, but it can also mislead a potential client who has expectations that a lawyer, as opposed to a non-lawyer, possesses the foreign language ability. Whether as a comment or as a standard, the concept should be specifically addressed in the rule. (Compare Bus. & Prof. Code §§ 6158.2(o), stating that information concerning foreign language ability is permissible in electronic media advertising provided the message as a whole is not false, misleading or deceptive.)
 - Cons: None identified.
9. Recommend adoption of Comment [6] as a comment that has no counterpart in Model Rule 7.1 but provides information about other applicable law. This comment clarifies that the rules are not the only authorities regulating lawyer advertising, citing the State Bar Act and noting that federal laws might also apply.
- Pros: As a disciplinary rule, this comment alerts a lawyer to other applicable law. It promotes compliance because certain issues that do not appear in the rules are present in the State Bar Act, such as special regulations on advertisements for immigration services (see, e.g., Bus. & Prof. Code §§ 6157.5.)

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- Cons: None identified.

B. Concepts Rejected (Pros and Cons):

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

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

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

D. Non-Substantive Changes to the Current Rule:

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

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

E. Alternatives Considered:
None.

X. OPEN ISSUES/CONCEPTS FOR THE COMMISSION TO CONSIDER

1. Inclusion of a provision specifically addressing communications concerning foreign language ability. The drafting team did not reach consensus on how to include this concept in the proposed rule. The essential restriction is that a lawyer must be candid when stating this ability in order to avoid unfulfilled expectations. If the ability in a firm is possessed by a non-lawyer staff person rather than a lawyer, then that information is material and must not be omitted in the communication. Two alternative options are presented for the Commission's consideration. One option is to include this provision as Comment [5]. The other option is to retain it as a lawyer advertising standard. Currently, it is Standard No. 15 in rule 1-400 and, if retained, it would be renumbered it as Standard No. 1 to Rule 7.1. In addition, this topic is found in the State Bar Act in Business and Professions Code §§ 6158.2(o) stating that information concerning foreign language ability is permissible in electronic media advertising provided the message as a whole is not false, misleading or deceptive.

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XI. COMMENTS FROM DRAFTING TEAM MEMBERS OR OTHER COMMISSION MEMBERS

Langford

- None.

Inlender

- None.

Kornberg

- None.

Tuft

- None.

XII. RECOMMENDATION AND PROPOSED COMMISSION RESOLUTION

Recommendation:

That the Commission recommend that the Board of Trustees of the State Bar of California adopt proposed amended rule 1-400 [7.1] in the form attached to this report and recommendation.

Proposed Resolution:

RESOLVED: That the Commission for the Revision of the Rules of Professional Conduct recommends that the Board of Trustees adopt proposed amended rule 1-400 [7.1] in the form attached to this Report and Recommendation.

XIII. DISSENTING POSITION(S)

None.

XIV. FINAL COMMISSION VOTE/ACTION

Date of Vote:

Action:

Vote: X (yes) – X (no) – X (abstain)