

DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 7.4 [1-400(D)(6)]

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

I. CURRENT CALIFORNIA RULE

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

* * * * *

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

* * * * *

- (6) State that a member is a “certified specialist” unless the member holds a current certificate as a specialist issued by the Board of Legal Specialization, or any other entity accredited by the State Bar to designate specialists pursuant to standards adopted by the Board of Trustees, and states the complete name of the entity which granted certification.

II. 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. The vote was 3-1 in favor of making the recommendation.

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.

III. PROPOSED RULE 7.4 (CLEAN)

Rule 7.4 Communications 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, subject to the requirements of rule 7.1.
- (b) A lawyer shall not state or imply that the lawyer is certified as a specialist in a particular field of law, unless:
- (1) the lawyer is currently certified as a specialist by the Board of Legal Specialization, or any other entity accredited by the State Bar to designate specialists pursuant to standards adopted by the Board of Trustees; and
- (2) the name of the certifying organization is clearly identified in the communication.

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

Rule ~~1-400(D)(6)~~ 7.4 [Specialization Provision] Communications 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, subject to the requirements of rule 7.1.
- (b) A lawyer shall not state or imply that the lawyer is certified as a specialist in a particular field of law, unless:
 - (1) the lawyer is currently certified as a specialist by the Board of Legal Specialization, or any other entity accredited by the State Bar to designate specialists pursuant to standards adopted by the Board of Trustees; and
 - (2) the name of the certifying organization is clearly identified in the communication.
- ~~(D) A communication or solicitation (as defined herein) shall not:~~
 - ~~(6) State that a member is a "certified specialist" unless the member holds a current certificate as a specialist issued by the Board of Legal Specialization, or any other entity accredited by the State Bar to designate specialists pursuant to standards adopted by the Board of Trustees, and states the complete name of the entity which granted certification.~~

V. PROPOSED RULE (REDLINE TO MODEL RULE 7.4)

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 communicate that his or her practice is limited to or concentrated in a particular field of law, subject to the requirements of rule 7.1.
- ~~(b) A lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation "Patent Attorney" or a substantially similar designation.~~
- ~~(c) A lawyer engaged in Admiralty practice may use the designation "Admiralty," "Proctor in Admiralty" or a substantially similar designation.~~
- (b)(d) A lawyer shall not state or imply that a lawyer is certified as a specialist in a particular field of law, unless:
 - (1) the lawyer is currently ~~has been~~ certified as a specialist by the Board of Legal Specialization, or any other entity accredited by the State Bar to designate

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specialists pursuant to standards adopted by the Board of Trustees; an organization that has been Approved by an appropriate state authority or that has been accredited by the American Bar Association; 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 the designation of Admiralty practice has a long historical tradition associated with maritime commerce and the federal courts.~~

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

VI. OCTC / STATE BAR COURT COMMENTS

• JAYNE KIM, OCTC, Date:

A comment on current rule 1-400 is anticipated.

There were no prior OCTC comments that recommended revisions specific to the issue of communications concerning specialization or field of practice limitations. The prior OCTC comments below are general advertising comments.

• RUSSELL WEINER, OCTC, 6/15/2010:

1. OCTC is not sure this rule is necessary but has no objection.

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- **MIKE NISPEROS, OCTC, 9/27/2001:** OCTC provided the following comment on rule 1-400:

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

Add the following language:

(A) ...

(2) Any stationary, 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.

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

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

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_7_4.pdf
- Eight states have adopted Model Rule 7.4 verbatim.¹ Twenty-three states have adopted a slightly modified version of Model Rule 7.4.² Seventeen states have adopted a version

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

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of the rule that is substantially different to Model Rule 7.4.³ Three jurisdictions do not have a version of the Model Rule 7.4.⁴

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

A. Concepts Accepted (Pros and Cons):

1. Recommend adoption of ABA Model Rule 7.4(a), as modified. ABA Model Rule 7.4(a) permits a lawyer to communicate that the lawyer does or does not practice in particular fields of law. Similar to the first Commission, a sentence has been added that provides a lawyer may engage in a common practice among lawyers who market their availability by communicating that the lawyer's practice is limited to or concentrated in a particular field of law.
 - Pros: Permitting a lawyer to indicate his or her area of practice, or state that he or she will not accept matters except in a specific field, in communications about the lawyer's services will help educate consumers about the legal services offered by a lawyer. The statements permitted by this rule remain subject to proposed rule 7.1, which prohibits false or misleading communications. In addition, see Business and Professions Code § 6158.2(b).⁵
 - Cons: Paragraph (a) states a permissive standard rather than a disciplinary standard. Moreover, to the extent the permitted conduct described in paragraph (a) is false or misleading, it is addressed in proposed rule 7.1.
2. Recommend adoption of Model Rule 7.4(d), as modified, as proposed rule 7.4(b). Paragraph (b)(1) has been modified to state the specific regulatory framework for specialization in California. Similar language can be found in current rule 1-400(D)(6).

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

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

⁴ The three jurisdictions are: District of Columbia, Oregon, and Texas.

⁵ Business and Professions Code § 6158.2(b):

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

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

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- Pros: Paragraph (b) carries forward the substance of the current California rule addressing the requirements for when a lawyer wishes to advertise as a “certified specialist.” Because this type of designation signifies an advanced degree of knowledge and experience, stating in a rule of professional conduct what is required in order to hold oneself out as a “certified specialist” helps protect the public from being misled. In addition, the language proposed explicitly refers to a lawyer being “currently certified” and this affords public protection against a lawyer who might otherwise erroneously believe it is proper to rely upon a prior certificate that has lapsed due to a failure to renew or has been revoked or is no longer valid for any other reason.
- Cons: The activity described in paragraph (d) is addressed in proposed rule 7.1. Moreover, the language is too narrow. For example, it is possible for a lawyer who is certified as a specialist in another jurisdiction to truthfully state that he or she is a specialist certified by an entity accredited in that jurisdiction. But because the other jurisdiction’s entity was not accredited by the State Bar of California, such statement would violate the rule.

B. Concepts Rejected (Pros and Cons):

1. Whether to include ABA Model Rule 7.4(b) permitting use of the designation “Patent Attorney” or a substantially similar designation.
 - Pros: ABA Model Rule 7.4(b)’s language is permissive and the example contained therein is adequately addressed by proposed rule 7.4(a). Any use of such designations would remain subject to rule 7.1.
 - Cons: This permitted designation has long been recognized in the profession. Its deletion from a rule that is plainly derived from the Model Rule might suggest that California does not permit the designation.
2. Whether to include ABA Model Rule 7.4(c) permitting use of the designation “Admiralty,” “Proctor in Admiralty” or a substantially similar designation.
 - Pros: ABA Model Rule 7.4(c)’s language is permissive and the example contained therein is adequately addressed by proposed rule 7.4(a). Any use of such designations would remain subject to rule 7.1.
 - Cons: This permitted designation has long been recognized in the profession. Its deletion from a rule that is plainly derived from the Model Rule might suggest that California does not permit the designation.
3. Whether to include any of the Comments to ABA Model Rule 7.4.
 - Pros: The provisions of proposed rule 7.4 are self-explanatory and do not require a Comment to clarify them further.
 - Cons: None identified.

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

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

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D. Non-Substantive Changes to the Current Rule:

1. Substitute the term “lawyer” for “member”.
 - Pros: The current Rules’ use of “member” departs from the approach taken in the rules in every other jurisdiction, all of which use the term lawyer. The Rules apply to all non-members practicing law in the State of California by virtue of a special or temporary admission. For example, those eligible to practice pro hac vice or as military counsel. (See e.g. rules 9.40, 9.41, 9.42, 9.43, 9.44, 9.45, 9.46, 9.47, and 9.48 of the California Rules of Court.)
 - Cons: Retaining “member” would carry forward a term that has been in use in the California Rules for decades.
2. Change the rule number to conform to the ABA Model rules numbering and formatting (e.g., lower case letters).
 - Pros: It will facilitate the ability of lawyers from other jurisdictions who are authorized by various Rules of Court to practice in California to find the California rule corresponding to their jurisdiction’s rule, thus permitting ease of determining whether California imposes different duties. It will also facilitate the ability of California lawyers to research case law and ethics opinions that address corresponding rules in other jurisdictions, which would be of assistance in complying with duties, particularly when California does not have such authority interpreting the California rule. As to the “Con” that there is a large body of case law that cites to the current rule numbers, the rule numbering was drastically changed in 1989 and there has been no apparent adverse effect. A similar change in rule numbering of the Rules of Court was implemented in 2007, also with no apparent adverse effect.
 - Cons: There is a large body of case law that cites to the current rule numbers and California lawyers are presumed to be familiar with that numbering system.

E. Alternatives Considered:

The consensus of the drafting team is to recommend the proposed rule as written in Section III., above. In reaching this recommendation, the drafting team considered the following three alternatives. None of the alternatives garnered the support of a majority of the drafting team.

1. Alternative 1

Rule 7.4 Communications of Specialization

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

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

This alternative is materially different from the team’s proposed rule because it is silent on the issue of whether a lawyer may communicate limitations on field of practice. Compare Business

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and Professions Code § 6158.2(b) that expressly addresses this issue for purposes of electronic media advertising by lawyers.

2. Alternative 2

Rule 7.4 Communications of Specialization

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

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

Comment

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

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

3. Alternative 3

Do not adopt a rule addressing fields of practice or specialization. One member of the drafting team advocated that this rule is not necessary and redundant because this conduct is already addressed by proposed rule 7.1 and the State Bar Act in section 6158.2(b).

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

IX. OPEN ISSUES/CONCEPTS FOR THE COMMISSION TO CONSIDER

There are no open issues for the Commission's consideration.

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X. COMMENTS FROM DRAFTING TEAM MEMBERS OR OTHER COMMISSION MEMBERS	
<p>Langford</p> <ul style="list-style-type: none"> ▪ [Date]: Email Comment <p>Inlender</p> <ul style="list-style-type: none"> ▪ [Date]: Email Comment <p>Kornberg</p> <ul style="list-style-type: none"> ▪ [Date]: Email Comment <p>Tuft</p> <ul style="list-style-type: none"> ▪ [Date]: Email Comment 	
XI. RECOMMENDATION AND PROPOSED COMMISSION RESOLUTION	
<p>Recommendation:</p> <p>That the Commission recommend that the Board of Trustees of the State Bar of California adopt proposed amended rule 7.4 [1-400(D)(6)] in the form attached to this Report and Recommendation.</p> <p>Proposed Resolution:</p> <p>RESOLVED: That the Commission for the Revision of the Rules of Professional Conduct recommends that the Board of Trustees adopt proposed amended rule 7.4 [1-400(D)(6)] in the form attached to this Report and Recommendation.</p>	
XII. DISSENTING POSITION(S)	
None.	
XIII. FINAL COMMISSION VOTE/ACTION	
<p>Date of Vote:</p> <p>Action:</p> <p>Vote: X (yes) – X (no) – X (abstain)</p>	