

DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 7.5 [1-400]

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

I. CURRENT CALIFORNIA RULE

There is no California rule that corresponds to Model Rule 7.5, from which proposed Rule 7.5 ("Firm Names and Letterheads) is derived.¹

II. DRAFTING TEAM'S RECOMMENDATION AND VOTE

There was consensus among the drafting team members to recommend to recommend a proposed as set forth below in Section III. The vote was unanimous 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 the Commission would remain open to considering any proposal or alternative proposals submitted by the drafting team for deleting, retaining or revising the standards.

¹ Current California rule 1-400(A) states that for purposes of the rule, "communication" means any message or offer made by or on behalf of a member concerning the availability of employment directed to any former, present or prospective client. Such communications include, but are not limited to:

1-400(A)(1) Any use of firm name, trade name, fictitious name, or other professional designation of such member of law firm; or

1-400(A)(2) Any stationary, letterhead, business card, sign, brochure, or other comparable written material describing such member, law firm, or lawyers . . .

Current California rule 1-400(D) states that these communications shall not:

1-400(D)(1) Contain any untrue statement; or

1-400(D)(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

1-400(D)(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 . . .

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III. PROPOSED RULE 7.5 (CLEAN)

Rule 7.5 Firm Names and Letterheads

- (a) A lawyer shall not use a firm name, letterhead or other professional designation that violates Rule 7.1.
- (b) A lawyer in private practice shall not use a firm or trade name if it states or implies a relationship with a government agency or with a public or charitable legal services organization, or otherwise violates Rule 7.1.
- (c) A lawyer shall not state or imply that the lawyer practices in a partnership or other organization unless that is the fact.

IV. PROPOSED RULE (REDLINE TO MODEL RULE 7.5)

Rule 7.5 Firm Names and Letterheads

- (a) A lawyer shall not use a firm name, letterhead or other professional designation that violates Rule 7.1.
- (b) A ~~trade name may be used by a~~ lawyer in private practice ~~if it does not imply a connection~~ shall not use a firm or trade name if it states or implies a relationship with a government agency or with a public or charitable legal services organization ~~and is not, or~~ otherwise ~~in violation of~~ violates Rule 7.1.
- (b) ~~A law firm with offices in more than one jurisdiction may use the same name or other professional designation in each jurisdiction, but identification of the lawyers in an office of the firm shall indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located.~~
- (c) ~~The name of a lawyer holding a public office shall not be used in the name of a law firm, or in communications on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.~~
- (d) ~~Lawyers may~~ A Lawyer shall not state or imply that ~~they practice~~ the lawyer practices in a partnership or other organization ~~only when~~ unless that is the fact.

Comment

~~firm may be designated by the names of all or some of its members, by the names of deceased members where there has been a continuing succession in the firm's identity or by a trade name such as the "ABC Legal Clinic." A lawyer or law firm may also be designated by a distinctive website address or comparable professional designation. Although the United States Supreme Court has held that legislation may prohibit the use of trade names in professional practice, use of such names in law practice is acceptable so long as it is not misleading. If a private firm uses~~

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~~a trade name that includes a geographical name such as "Springfield Legal Clinic," an express disclaimer that it is a public legal aid agency may be required to avoid a misleading implication. It may be observed that any firm name including the name of a deceased partner is, strictly speaking, a trade name. The use of such names to designate law firms has proven a useful means of identification. However, it is misleading to use the name of a lawyer not associated with the firm or a predecessor of the firm, or the name of a nonlawyer.~~

~~[2] With regard to paragraph (d), lawyers sharing office facilities, but who are not in fact associated with each other in a law firm, may not denominate themselves as, for example, "Smith and Jones," for that title suggests that they are practicing law together in a firm.~~

V. OCTC / STATE BAR COURT COMMENTS

- **JAYNE KIM, OCTC, Date:**

RULE 1-400: ADVERTISING AND SOLICITATION

Rule 1-400 and its Standards 1, 2, 4-8 and 12-16, should be retained as currently written. The Standards serve multiple purposes, including providing guidance to the membership, educating the public, and assisting OCTC in evaluating and resolving complaints. OCTC often refers to the Standards when closing less serious advertising complaints with warning or resource letters. However, Standards 3, 9 and 10 describe conduct and situations clearly covered by the rule itself. Those Standards are not necessary. (Standard 11 has been repealed.)

The rule would be enhanced by requiring that members retain copies of their legal advertising for five years instead of the current two year period. This would be consistent with the rule of limitations for State Bar prosecutions. (See rule 5.21 of the Rules of Procedure.)

OCTC does not interpret Central Hudson Gas & Electric Corp v. Public Service Commission of N.Y. (1980) 447 US 557 as supporting an argument that all restrictions on advertising should be extinguished.

- **RUSSELL WEINER, OCTC, 6/15/2010:**

OCTC supports this rule. Comments 1 and 2 should be broken down into several comments so that the ideas do not get buried. Also, a Comment should refer attorneys to section 6132 of the Business and Profession Code regarding their duty to remove the names of disbarred and resigned attorneys from their law firms.

- **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.

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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.

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

Model Rule 7.5 The ABA Comparison Chart, entitled “Variations of the ABA Model Rules of Professional Conduct, Rule 7.5: Firm Name and Letterheads,” revised April 9, 2015, is available at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_7_5.pdf
- Twenty-four jurisdictions have adopted Model Rule 7.5 verbatim.² Eighteen states have adopted a slightly modified version of Model Rule 7.5.³ Nine states have adopted a version of the rule that is substantially different to Model Rule 7.5.⁴

² The twenty-four jurisdictions are: Arizona, Arkansas, Colorado, Connecticut, Delaware, District of Columbia, Idaho, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, New Mexico, Oklahoma, South Carolina, Tennessee, Utah, Vermont, Washington, West Virginia, Wisconsin, and Wyoming.

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

A. Concepts Accepted (Pros and Cons):

1. Recommend adoption of the first sentence of Model Rule 7.5(a).
 - Pros: The provision clarifies that any use of a firm name, letterhead or other professional designation is a “communication” within the meaning of proposed rule 7.1(a) and, therefore, may not be false or misleading. As a general prohibition concerning firm names, in part this carries forward current rule 1-400’s restrictions on firm names more specifically stated in Standard No. 9 (re misleading use of multiple names for the same law practice).
Cons: None identified.
2. Recommend adoption of the second sentence of Model Rule 7.5(a), as modified, as proposed rule 7.5(b). The second sentence of Model Rule 7.5(a) has been modified so that it is prohibitory rather than permissive. In addition, the phrase “states or” has been added to “implied” so that the phrase is used consistently in the rules. (see, 7.5(c) and 7.4(b)).
 - Pros: Subparagraph (b) carries forward the concept that is found in current rule 1-400, Standard (6), which provides that the following communication is presumed to be in violation of rule 1-400:

(6) A “communication” in the form of a firm name, trade name, fictitious name, or other professional designation which states or implies a relationship between any member in private practice and a government agency or instrumentality or a public or non-profit legal services organization.
 - Cons: None identified.
3. Recommend adoption of Model Rule 7.5(d), as modified, as proposed rule 7.5(c). The paragraph has been modified to make the clause prohibitory rather than permissive.
 - Pros: Subparagraph (c) carries forward the concepts that are found in current rule 1-400, Standards (7) and (8), which provide that the following communications are presumed to be in violation of rule 1-400:

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

³ The eighteen states are: Alaska, Georgia, Hawaii, Iowa, Kansas, Kentucky, Louisiana, Montana, Nebraska, Nevada, New Hampshire, New York, North Carolina, North Dakota, Pennsylvania, Rhode Island, South Dakota, and Virginia.

⁴ The nine states are: Alabama, California, Florida, Indiana, Mississippi, New Jersey, Ohio, Oregon, and Texas.

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(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.

- Cons: The activity described in paragraph (c) is addressed in proposed rule 7.1.

B. Concepts Rejected (Pros and Cons):

1. Include ABA Model Rule 7.5(b), which requires law firms with offices in more than one jurisdiction to identify the jurisdictional limitations of lawyers in an office who are not licensed to practice in the jurisdiction where the office is located.
 - Pros: Although a failure to include an appropriate disclaimer about jurisdictions in which the lawyer is authorized to practice is a violation of rule 7.1(a), this rule should expressly state that specific requirement.
 - Cons: The provision is unnecessary because a failure to include an appropriate disclaimer about where a lawyer is authorized to practice would be inherently misleading under proposed rule 7.1(a).
2. Include ABA Model Rule 7.5(c) which prohibits using the name of a lawyer holding public office in the name of a law firm, or in communications on the its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the law firm.
 - Pros: Including this restriction would help lawyers avoid communications that state truthful facts but nevertheless might be difficult to present to the public in a manner that does not create unjustified expectations.
 - Cons: There is precedent for rejecting this rule. The first Commission included a counterpart to Model Rule 7.5(c) and the Board adopted it. However, after the Board’s adoption of Rule 7.5(c), Legislative staff provided comment on the policy that would result from the proposed rule’s implementation in California. Specifically, Legislative staff inquired as to whether the Model Rule has been applied in Model Rule jurisdictions as a complete ban and prior restraint on lawyer speech, as opposed to a standard that would be aligned with the commercial speech test for false, deceptive or misleading communications. It was observed that if the rule is susceptible to being applied as a ban, then that policy would be contrary to existing California law set by current rule 1-400 because the current rule prohibits a law firm name that includes the name of a lawyer holding public office *only if* that law firm name is a false, deceptive, misleading or confusing message concerning the availability of legal services. In addition, Legislative staff also observed that the language used in Rule 7.5(c) might be challenged as vague. In particular, there is concern about the undefined, yet critical, phrases “substantial period” and “not actively and regularly practicing.”
3. Include the Comments to ABA Model Rule 7.5.
 - Pros: None identified.
 - Cons: The provisions of proposed rule 7.5 are self-explanatory and do not require a Comment to clarify them further.

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

1. Although the proposed rule would create a new rule addressing the use of firm names and letterheads, none of these provisions would be a substantive change in the current law of California regarding the communication and use of firm names and letterheads.

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:

None.

VIII. OPEN ISSUES/CONCEPTS FOR THE COMMISSION TO CONSIDER

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

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IX. COMMENTS FROM DRAFTING TEAM MEMBERS OR OTHER COMMISSION MEMBERS

Langford

- [Date]: Email Comment

Inlender

- [Date]: Email Comment

Kornberg

- [Date]: Email Comment

Tuft

- [Date]: Email Comment

X. RECOMMENDATION AND PROPOSED COMMISSION RESOLUTION

Recommendation:

That the Commission recommend that the Board of Trustees of the State Bar of California adopt proposed rule 7.5 [1-400] 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 7.5 [1-400] in the form attached to this Report and Recommendation.

XI. DISSENTING POSITION(S)

None.

XII. FINAL COMMISSION VOTE/ACTION

Date of Vote:

Action:

Vote: X (yes) – X (no) – X (abstain)