

Rule 7.1 [1-400] 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 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 §§ 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 the lawyer or the 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 or warranty of the result of a particular representation is a false or misleading communication under this Rule. See also, Business and 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 comparison can be substantiated. An appropriate disclaimer or qualifying language often avoids creating unjustified expectations.

[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 the employment title of the person* who speaks such language.

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

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Synopsis of Public Comments

TOTAL = 6 **A = 5**
D = 0
M = 1
NI = 0

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response
X-2016-43-aq	Committee on Professional Responsibility and Conduct (COPRAC) (Baldwin) (8-12-16)	Y	M	(b)	7.1(b) should be deleted. There is no need for the standards at all as they are duplicative and that an attorney must prove a negative – that something is not misleading.	Although the Commission is not recommending any new Board adopted standards as part of its proposal for Rules 7.1 – 7.5, the enabling Court-granted authority in para. (b) that permits the Board to adopt standards is an important part of current Rule 1-400 because it facilitates the State Bar's ability to react proactively to specific advertising misconduct that might arise in the future. Board-adopted standards can be a preferred regulatory alternative to black letter rule changes or statutory regulation. In addition, if the Court itself views this regulatory strategy as no longer necessary, then paragraph (b) can be omitted by the Court with no impact to proposed Rules 7.1 – 7.5.
X-2016-66y	San Diego County Bar Association (SDCBA) (Riley) (9-15-16)	Y	M	7.1, (b), cmt. 1	1. Only false and misleading advertising should result in discipline. The rest of the concepts in the advertising rules should be addressed administratively.	1. The focus of proposed Rule 7.1 is the prohibition of false or misleading communications, and Rule 7.2 specifically addresses advertising to the general public. The Commission disagrees, however, that the other rules, which govern the special

¹ A = AGREE with proposed Rule D = DISAGREE with proposed Rule M = AGREE ONLY IF MODIFIED NI = NOT INDICATED

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					<p>2. Paragraph (b) should be eliminated as should the standards themselves. Cmt. 1's language "on behalf of a lawyer" needs to be clarified.</p>	<p>circumstances related to solicitation (7.3), specialization (7.4), and firm or trade names (7.5) do not raise concerns of public protection and should be relegated to administrative record-keeping.</p> <p>2. See response to COPRAC, X-2016-43-aq, above.</p>
X-2016-76t	Los Angeles County Bar Association (LACBA) (Schmid) (7-21-16)	Y	M	(a), cmt. 3	The term "untrue statement" should have a materiality requirement added such that an untrue statement of an immaterial fact is not a violation.	After further consideration, the Commission has deleted the term "untrue statement" as redundant because the concept described comes within the term "material misrepresentation of fact or law."
X-2016-104bf	State Bar of California, Office of Chief Trial Counsel (OCTC) (Dressler) (9-27-16)	Y	M		<p>1. OCTC disagrees with separate rules for communications, advertising, and solicitation. Unitary rule is clearer and more enforceable.</p> <p>2. No reason to eliminate presumptions.</p>	<p>1. The Commission continues to believe it is crucial, in light of multijurisdictional practice of law and communications over the Internet, that California move with other jurisdictions toward a national standard for the rules governing advertising and solicitation. Adopting the national approach will afford great public protection.</p> <p>2. The Commission continues to take the position that the</p>

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						<p>standards are not necessary to regulate inherently false and deceptive advertising. As presently framed, the presumptions force lawyers 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" 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. <i>Cent. Hudson Gas & Elec. v. Pub. Serv. Comm'n</i>, 447 U.S. 557 (1980); <i>Alexander v. Cahill</i>, 598 F.3d. 79 (2d Cir. 2010) (state's ban on "advertising techniques" that are no more than potentially misleading are unconstitutionally broad).</p> <p>Nevertheless, the Commission believes it essential that the Board's authority to promulgate standards be</p>

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						maintained in the event new technology or changes in the delivery of legal services warrant a new standard. Consequently, Rule 7.1(b) has been retained in the rule.
X-2016-120o	LGBT Bar Association of Los Angeles (King) (9-27-16)	Y	A	7.1	Supports the adoption of proposed Rule 7.1.	No response required.
Public Hearing	Responsive Law (Gordon, Tom) (Provided oral public hearing testimony on July 26, 2016. See page 46 of the public hearing transcript.)	Y	M	7.1	<p>Proposed rule too specific and hinders attorney ability to adapt to changing technology.</p> <p>Streamline the rule to make the primary prohibition false or misleading claims.</p>	By discontinuing California's unique approach to regulating advertising (current Rule 1-400) and moving to several rules that generally follow the Model Rule's structure and content, the Commission is recommending a mover toward a national standard that is important in light of the Internet and other technological advances. This approach also streamlines regulation of lawyer advertising by eliminating unnecessary specificity and facilitating innovation by lawyers who want to use new technologies for marketing. This change follows the lead of existing California ethics opinions that similarly contemplate the use of new technologies by lawyers (see, e.g., CA State Bar Formal Op. No. 2012-186). As just one example of streamlining, the

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						Commission is not recommending the continuation of current Rule 1-400(F)'s requirement to retain 'copies' of advertisements for two years. By discontinuing this requirement, a lawyer can consider using modern micro blogging social media website-based communications (such as Twitter) without being subject to an awkward rule requirement that the lawyer retain copies of advertisements (but see, Bus. & Prof. Code § 6159.1, which still includes a statutory advertisement retention standard.)

