

COMMISSION PROVISIONAL REPORT AND RECOMMENDATION: RULE 7.1 [1-400]

Commission Drafting Team Information

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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 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 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 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. FINAL VOTES BY THE COMMISSION AND THE BOARD

Commission:

Date of Vote: January 20 & 21, 2017

Action: Recommend Board Adoption of Proposed Rule 7.1 [1-400]

Vote: 15 (yes) – 0 (no) – 0 (abstain)

Board:

Date of Vote: March 10, 2017

Action: Board Adoption of Proposed Rule 7.1 [1-400]

Vote: X (yes) – X (no) – X (abstain)

III. COMMISSION'S PROPOSED RULE 7.1 (CLEAN)

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.

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

Rule 7.1 [1-400] ~~Advertising and Solicitation~~ 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 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.~~
- (Ga) 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.~~ 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.
- (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.~~
- (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.~~

CommentStandards:

[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.*

~~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."~~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.

~~(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)~~[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.~~

~~(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 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 “[5] This Rule prohibits a lawyer from making a communication” which that states or implies that a member the lawyer is able to provide legal services in a language other than English unless the member lawyer can actually provide legal services in such that 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.~~

[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.

~~(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. COMMISSION’S PROPOSED RULE (REDLINE TO MODEL RULE 7.1)

Rule 7.1 ~~Communication~~[1-400] Communications Concerning ~~a~~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 ~~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 §§ 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. ~~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 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).

[23] ~~Truthful~~ 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 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 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.

[34] ~~An advertisement~~ 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. ~~The inclusion of an 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.~~

[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.

~~[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.~~

VI. RULE HISTORY

a. 1979 Rule¹

In 1977, the United States Supreme Court handed down its decision in *Bates v. State Bar of Arizona* (1977) 433 U.S. 350 [97 S.Ct. 2691]. This decision held that publication of advertisements by attorneys containing objective information about attorneys (e.g., names, addresses, hours, prices of routine services, and factual information about fees presented in a non-misleading manner) could not be constitutionally prohibited. The Court noted, however, that some regulation as to time, place, manner, quality claims, in person solicitation, and similar matters was proper, and that false, deceptive or misleading advertising could be prohibited.

In response to the *Bates* decision and following consideration of a report of a Special Committee on Lawyer Advertising and Solicitation, the Board adopted and filed a proposal with the California Supreme Court on November 28, 1978. This filing included a request to repeal the then current rule 2-101 and to adopt a new substantially revised rule 2-101. Proposed rule 2-101 was amended by the Court and was adopted by order of the Supreme Court, effective April 1, 1979.

Rule 2-101 Professional Employment

This rule is adopted to foster and encourage the free flow of truthful and responsible information to assist the public in recognizing legal problems and in making informed choices of legal counsel.

Accordingly, a member of the State Bar may seek professional employment from a former, present or potential client by any means consistent with these rules.

(A) A “communication” is a message concerning the availability for professional employment of a member or a member’s firm. A “communication” made by or on behalf of a member shall not:

(1) Contain any untrue statement; or

¹ See “Final Report and Recommendation of the Special Committee on Lawyer Advertising and Solicitation,” November 1978.

- (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 the 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
 - (5) State that a member is a certified specialist unless the member holds a current certificate as a specialist issued by the California Board of Legal Specialization pursuant to a plan for specialization approved by the Supreme Court; or
 - (6) Be transmitted in any manner which involves intrusion, coercion, duress, compulsion, intimidation, threats or vexatious or harassing conduct.
- (B) No solicitation or "communication" seeking professional employment from a potential client for pecuniary gain shall be delivered by a member or a member's agent in person or by telephone to the potential client, nor shall a solicitation or "communication" specifically directed to a particular potential client regarding that potential client's particular case or matter and seeking professional employment for pecuniary gain be delivered by any other means, unless the solicitation or "communication" is protected from abridgment by the Constitution of the United States or by the Constitution of the State of California. A potential client includes a former or present client.

Notwithstanding the foregoing, nothing in this subdivision (B) shall limit or negate the continuing professional duties of a member or a member's firm to former or present clients, or a member's right to respond to inquiries from potential clients.

- (C) A member or member's firm shall not solicit or accept professional employment offered or obtained through the acts of an agent, runner or capper, which acts would be in violation of law, or which, if performed by a member of the State Bar, would be in violation of subdivisions (A) or (B) of this rule 2-101.
- (D) The Board of Governors of the State Bar shall formulate and adopt standards as to what "communications" will be presumed to violate subdivisions (A) or (B) of this rule 2-101. The standards shall have effect exclusively in disciplinary proceedings involving alleged violations of these rules as presumptions affecting the burden of proof. "Presumption affecting the burden of proof" means that presumption

defined in Evidence Code sections 605 and 606. The standards formulated and adopted by the Board, as from time to time amended, shall be effective and binding on members of the State Bar.

- (E) The member shall retain for one year a true and correct copy or recording of any "communication" made by written or electronic media pertaining to the member or the member's firm. Upon written request, the member or the member's firm shall make any such copy or recording available to the State Bar, and, if requested, shall provide to the State Bar the evidence of the facts upon which any factual or objective claims contained in the "communication" are based.

In addition, the Board unanimously recommended the adoption of four initial standards governing lawyer advertising and solicitation, as authorized by proposed rule 2-101(D), two of which identify prohibited solicitations (whether or not they are made for an attorney's pecuniary gain). The initial standards were:

A "communication" is presumed to violate rule 2-101, Rules of Professional Conduct if it:

- (1) Contains guarantees, warranties or predictions regarding the result of legal action; or
- (2) Contains testimonials about or endorsements of a member; or
- (3) Is delivered in person or by telephone to a potential client who 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; or
- (4) Is transmitted at the scene of an accident or at or en route to a hospital, emergency care center or other health care facility.

The preamble to rule 2-101 is the embodiment of the Committee's intent to foster and encourage responsible information to assist the public in making informed choices of legal counsel. It recognized that attorney advertising legitimately serves in assisting the profession in its obligation to make legal services fully available and in teaching the public to recognize legal problems and the help which attorneys can provide. All types of media were permitted for attorney advertising communications except as specifically prohibited in paragraph (B).

Subdivision (A) included a broad definition of "communication" which included all advertisements and other information released which notified the public about an attorney's availability for professional employment.

Even though the Supreme Court has extended First Amendment protection to commercial speech, this protection does not encompass false, deceptive or misleading advertising, since the benefits of commercial speech in facilitating informed choices by

consumers accrue only if the advertisements are truthful. This includes attorney advertising. (See *Bates v. State Bar of Arizona*, *supra*, 433 U.S. at 350, 383.)

The language of rule 2-101(B)(1) – (4) was similar to language found in other statutory requirements for fair and full disclosure, and prohibitions on false, deceptive or misleading advertising. (See Bus. & Prof. Code § 17500.)

Subdivision (A)(5) was added to prohibit an attorney from using the designation "certified specialist" or "recognized specialist" unless he or she is in fact certified as a specialist by the California Board of Legal Specialization. The use of the term "specialist" with respect to a field of law in which the Board of Legal Specialization conducts a specialization program may be misleading if an attorney is not Board certified.

Subdivision (B), which prohibited all in person and telephoned solicitations of potential clients by attorneys seeking employment, specifically addressed situations in which the public could be subject to risks of invasions of privacy, high-pressure salesmanship, undue influence, overreaching, misleading and deceptive practices, divided loyalties, inadequate representation and other breaches of fiduciary duties. Only communications seeking employment that are transmitted orally were prohibited. Thus, mass mailings and posters were permissible, as well as written solicitations addressed to a particular client seeking employment for a specific matter. The purpose of this proposal was to protect the potential client, who can choose to contact the attorney or not, without the immediate pressure to act which is inherent in personal encounters.

Subdivision (C) also stated that the broad permission provided to attorneys to advertise (and to pay for legitimate support service such as advertising) does not extend to solicitation activities of agents, runners or cappers, which are prohibited by law. (Bus. & Prof. Code §§ 6150 et. seq.; *Hutchins v. Superior Court* (1976) 61 Cal.App.3d 77.)

Subdivision (D) and the standards operate together to further the state's legitimate interest in regulating attorney conduct and assuring that a free flow of truthful, nondeceptive information flows from attorneys to the members of the public. The standards supply a test which can be used by consumers as well as by attorneys to judge the honesty of attorney advertising, and which can be promptly altered and amended to meet the demonstrated needs of the public and the Bar.

The Standards were drawn from statutory and decisional law, previous Rules of Professional Conduct, disciplinary cases, actual attorney advertisements, rules adopted in other jurisdictions, and regulation of other advertising subject matters. Standard (1) prohibits a communication that contains guarantees, warranties or predictions because such claims are inherently deceptive and misleading because past performance of an attorney is no indication of future performance and because no lawyer can guarantee the results of any legal action. Standard (2) prohibits testimonials or endorsements, as recognized and condemned by the California Supreme Court. (See, *Jacoby v. State Bar* (1977) 19 Cal.3d 359, 373, and *Belli v. State Bar* (1974) 10 Cal.3d 824, 837-838.) Standard (3) and Standard (4) protects the public from overreaching when they are

particularly vulnerable. Standard (4) in particular is aimed at “ambulance chasers” and will aid in the enforcement of the prohibition on in person solicitation.

The requirement to maintain a copy of any advertisement under subdivision (E) assures that there is a record of all representations made by an attorney to which both the consumer and the State Bar can refer to if the truthfulness of an advertisement is ever questioned. Subdivision (E) also requires the attorney to provide the State Bar, upon request, proof of the facts upon which claims contained in the advertisements are based. The purpose of this requirement was to simplify enforcement of the rules regulating attorney commercial speech.

b. 1989 Rule²

In 1989, rule 2-101 was renumbered as rule 1-400 and renamed “Advertising and Solicitation.” The preamble was deleted and former 2-101(A) became 1-400(D). The new paragraph (A) was intended to define the specific types of “communications” to be regulated by the rule. In addition to a generic definition very similar to that found in the former rule 2-101(A), paragraph (A) contained four specific categories of communication sought to be regulated.

(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.

The new paragraph (B) defined solicitation as a communication concerning professional employment for pecuniary gain, made in person or by telephone, which is initiated by or on behalf of the lawyer or law firm. Paragraph (B) also included in the definition of solicitation communications initiated by the member directed by any means to a person

² See “Request That The Supreme Court Of California Approve Amendments To The Rules Of Professional Conduct Of The State Bar Of California, And Memorandum And Supporting Documents In Explanation,” Bar Misc. No. 5626, December 1987.

known to the sender to be represented by counsel in a matter which is a subject of the communication. This express prohibition was new and was intended to prevent interference with an already existing attorney-client relationship. A client would not be prevented from seeking a "second-opinion" on their matter because the proposed rule only prohibited contacts initiated by the attorney.

(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.

The new paragraph (C) prohibited such communications unless the lawyer has a family or prior professional relationship with the potential client. The former rule 2-101(B) also prohibited in person or telephone contacts with potential clients, but had no exception for those prospective clients who have a family or prior professional relationship with the attorney. The exception to the ban on in person and telephone contacts was proposed because the potential for overreaching feared with in person or telephone contacts was perceived to be greatly reduced when a family member or former client is involved. Paragraph (C) included a new provision intended to clarify the inapplicability of the rule to contacts with present or former clients where such solicitations are in discharge of a member's continuing professional duties (e.g., alerting an estate planning client of a change in tax laws and offering to rewrite his or her will).

(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.

The restriction found in former rule 2-101(C) on situations in which someone other than the attorney does the soliciting for the attorney was not expressly included in the proposal because Business and Professions Code section 6150 et seq. already addressed the runner or capper aspect and proposed subdivisions (B) and (C) referred to communications initiated or made "by or on behalf of" the member or firm.

The regulation of solicitation of clients by mail found in former rule 2-101(B) was not included in the proposed rule 1-400. Mailed communications would be regulated by

proposed "Standard" (5), in addition to the regulations in paragraph (D) on the content of communications, which made such mailings presumptively violative of rule 1-400 unless the envelope bears an "advertising" notation to enable the recipient to distinguish such advertising from actual legal correspondence. The regulation of mailings found in former rule 2-101(B) was not included because any risk of intrusion and overreaching with mailings could be greatly reduced by requiring an advertising notation on the envelope and because the constitutionality of regulation of mailings such as that found in former rule 2-101 was in doubt.

As mentioned previously, paragraph (D) carried forward the regulations on the content of "communications" found in former rule 2-101(A).

(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; or
- (6) State that a member is a "certified specialist" unless the member holds a current certificate as a specialist issued by the California 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.

Paragraph (E) carried forward the concept of rule 2-101(D) in which the Board of Governors may formulate and adopt standards as to what "communications" will be presumed to violate the rule.

- (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.

Paragraph (F) carried forward the requirement of retaining a copy of any "communication" or recording made pertaining to the attorney from former rule 2-101(E), but the time for retention of such copies was extended from one to two years. This is consistent with the policy advocated by the American Bar Association in its Model Rule 7.2(b) and is better suited to serve the interest of the public and the State Bar in having a documentary basis for reviewing attorney conduct under this rule.

(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.

Standard (1) was amended slightly to encompass any guarantee etc., about any representation of a client rather than limiting the presumption to guarantees etc., concerning legal action.

Standard (2) continued the protection afforded by the former rule's Standard (2), which provided that communications which contain testimonials or endorsements violate the rule. However, this standard was amended to provide that such a communication would not be presumed to violate the rule if a disclaimer such as that quoted in the standard were included in the communication. Of course, such a communication could violate the rule even if a disclaimer is included (e.g. a communication containing a testimonial which included false statements).

The former rule's Standard (3) provided that communications delivered in person or by telephone to a potential client in such a physical, emotional or mental state that he or she would not be expected to exercise reasonable judgment are presumed to violate the rule. The proposed Standard (3) continued the presumption in the former Standard (3) and expanded it to protect the particularly vulnerable client irrespective of the method of communication and to provide a nexus between the standard and the knowledge of the member.

Standard (4) is identical to the former rule's Standard (4), which provided that communications transmitted at the scene of an accident or at or en route to a hospital is presumed to violate the rule.

Standard (5) provided that certain mailed communications are presumed to violate the rule if not identified as advertisements on the envelope. (See *Leoni v. State Bar* (1985) 39 Cal.3d 609, 627.) This is because an envelope bearing only the return address of a member or law firm without the advertisement disclaimer may cause the recipient to fear legal action. Mailings with the disclaimer protect the recipient from having to discern the commercial intent through content alone.

Standards (6) through (8) were included to clarify areas of concern which are frequently raised with respect to firm or trade names, and the use of the term "of counsel."

Standard (9) was added because multiple trade names may be misleading because each trade name used may imply to the public the existence of a separate and distinct entity.

Standard (10) was added after a great deal of comment regarding the problems created by members advertising as lawyer referral services when in fact there is only one member taking all the cases.

c. 1992 Rule³

In 1992, the only revisions made were to the Standards. Proposed amendments to Standard (5), which defines conduct presumptively in violation of rule 1-400, were intended to: 1) clarify the types of "communication" considered to be within the scope of the standard; and 2) to provide suggested examples of express identifying language to be placed on the outside of the envelope. Proposed amendments to Standards (7) and (8) clarified that both standards apply to a relationship with another "lawyer," as that term is defined in proposed rule 1-100(B)(3). The proposed amendments expanded the scope of these standards to encompass relationships with out-of-state and foreign-licensed attorneys. The proposed amendment to Standard (10) was for clarity only. No substantive change was intended.

d. 1993 Repeal of (D)(6)⁴

In June, 1990, the United States Supreme Court decided *Peel v. Attorney Reg. & Discipline Commission of Illinois* (1990) 496 U.S. 91 [110 L.Ed.2d 83, 110 S.Ct. 2281]. As stated by the Supreme Court, the issue presented by *Peel* was "whether a lawyer has a constitutional right, under the standards applicable to commercial speech, to advertise his or her certification as a trial specialist by NBTA." (*Peel v. Attorney Reg. & Discipline Commission of Illinois, supra*, 496 U.S. 91, 100.)

The Supreme Court reversed Mr. Peel's public censure on First Amendment grounds, stating:

A State may not, however, completely ban statements that are not actually or inherently misleading, such a certification as a specialist by a bone fide organization such as NBTA.

³ See "Request That The Supreme Court Of California Approve Amendments To The Rules Of Professional Conduct Of The State Bar Of California, And Memorandum And Supporting Documents In Explanation," Supreme Court File No. 24408, December 1991.

⁴ See "Request That The Supreme Court Of California Approve The Repeal of Rule 1-400(D)(6) and Approve Conforming Amendments to Rule 1-400(D)(5), Rules Of Professional Conduct Of The State Bar Of California And Memorandum And Supporting Documents In Explanation," Supreme Court File No. 26778, May 1992.

(*Peel v. Attorney Reg. & Discipline Commission of Illinois, supra*, 496 U.S. 91, 110.)

If Mr. Peel were a California lawyer, rule 1-400(D)(6) would prohibit him from noting on his letterhead the fact of his certification as a civil trial specialist by the NBTA. The then Board of Governors had serious concerns about this result and constitutionality of rule 1-400(D)(6) in light of the holding in *Peel*, and recommended repeal of the rule. In light of *Peel* and based on the recommendation of the Board of Governors of the State Bar, the Supreme Court repealed rule 1-400(D)(6), effective November 30, 1992. The general prohibitions on false, deceptive, or misleading advertising in rule 1-400(D)(1) – (5) would regulate the use of the phrase "certified specialist" in attorney advertising.

e. 1994 Amendment to Standard (5) and Addition of Standards (12) – (16)

In September 1992, State Bar of California President Harvey Saferstein created the Lawyer Advertising Task Force and directed it to study the issue of lawyer advertising in California. The Task Force was directed to review current lawyer advertising regulations and practices and, based upon its study, to recommend guidelines for ethical lawyer advertising that it deemed appropriate. The State Bar of California Lawyer Advertising Task Force recommended that, pursuant to rule 1-400, the State Bar amend Standard (5) and adopt five new advertising standards.

After consideration of the Task Force's report, the Board voted to adopt four of the five new advertising standards and amend Standard (5), effective May 11, 1994.

1. Amendment of Standard (5)

The proposed amended standard amended the first sentence of former Standard (5). It created a presumption of violation of rule 1-400 by a State Bar member whose communication (that seeks professional employment for pecuniary gain and which is transmitted by mail or equivalent means) does not bear the word "Advertisement" or "Newsletter" in 12 point print on the first page of the communication. The second sentence of the standard remained unchanged from current Standard (5).

Based on its study, the Task Force concluded that the public could be misled by mailed attorney communications, even where the envelope containing the communication bears the word "Advertisement" or "Newsletter" on the outside. A recipient of such communication may not notice such disclaimer on the outside of the envelope before withdrawing the communication and reading it. Particularly in the case of targeted mailings, a recipient could be misled into wrongly believing that he or she has a legal problem requiring immediate attention when, in fact, the legal cause of action and/or timing issue is questionable and the mailing is simply a solicitation for legal employment.

The Task Force concluded that the proposed amended standard's additional minimal disclosure requirement would protect the public from being misled by requiring the

placement of the word "Advertisement" or "Newsletter" in 12 point print on the first page of an attorney communication. The amended standard helped clarify to the recipient of such a communication that the communication is, in fact, a solicitation for legal employment. The proposed new standard reads as follows:

(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.

2. Adoption of New Standard (12)

The proposed new standard would create a presumption of violation of rule 1-400 by a State Bar member who does not state his or her name and State Bar membership number in his or her communication. Where the communication is made on behalf of a law firm, the proposed standard would create a presumption of violation of rule 1-400 by each State Bar member of such law firm where the communication does not expressly include the name and State Bar membership number of at least one State Bar member responsible for the communication.

The Task Force rationale for this proposed standard is the same as that set forth in the proposed trade name standard above. This proposed standard would promote the availability of information to consumers and assist the State Bar in protecting the public from misleading attorney communications. The proposed new standard reads as follows:

(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.

3. Adoption of New Standard (13)

The proposed new standard would create a presumption of violation of rule 1-400 by a State Bar member who does not expressly disclose that his or her communication is a dramatization if, in fact, that is the case.

Based on its study, the Task Force concluded that advertisements containing dramatizations can be misleading to consumers of legal services. The proposed standard's minimal disclosure requirement would protect the public from wrongly believing that the characters or situations portrayed in an attorney's communication are real where, in fact, such characters are being played by actors or the situation portrayed is either fictitious, a reenactment or otherwise staged. The proposed new standard reads as follows:

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

4. Adoption of New Standard (14)

The proposed new standard would create a presumption of violation of rule 1-400 by a State Bar member whose communication states or implies "no fee without recovery" and who does not expressly disclose in such communication whether the client will be liable for the costs of the representation.

Although rule 4-210 of the California Rules of Professional Conduct (Payment of Personal or Business Expenses Incurred by or for a Client) allows State Bar members to advance and to accept ultimate responsibility for the legal costs of a client's representation, many attorneys will still hold the client ultimately responsible for such costs. Where an attorney's communication states or implies "no fee without recovery" in order to attract business, clients can be misled into believing that they will owe no money to the attorney if they are not successful in their underlying claim when, in fact, the attorney will charge them for reimbursement of legal costs advanced by the attorney.

Based on its study, the Task Force concluded that attorney communications including "no fee without recovery" claims are commonplace in California. The Task Force's study revealed that some attorneys will charge costs to clients in spite of such claims. The proposed standard's minimal disclosure requirement would protect the public from being misled by "no fee without recovery" communications by requiring that additional information be disclosed regarding client responsibility for legal costs. The proposed new standard reads as follows:

(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.

5. Adoption of New Standard (15)

The proposed new standard would create a presumption of violation of rule 1-400 by a State Bar member whose communication states or implies that legal services are available in a language other than English and whose communication does not also state the name and employment title of the person who speaks such language other

than English and expressly discloses in such language other than English that such person is the individual who speaks such language other than English.

Based on its study, the Task Force concluded that attorney communications including claims of non-English language representation (e.g., "Se Habla Espanol") are commonplace in California. Frequently, however, no attorney actually speaks the non-English language advertised, but instead relies on non-attorney employees to communicate directly with non-English speaking clients. Such clients can be misled into wrongly believing that they are or will be communicating with and/or represented by an attorney conversant in their non-English language.

The proposed standard's minimal disclosure requirement would protect the public from being misled by claims of non-English language representation where, in fact, no attorney in the law office actually speaks such non-English language. The proposed new standard reads as follows:

(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.

f. 1997 Repeal and Adoption of a New Rule 1-400(D)(6)

In April 1993, the Board Committee on Admissions and Competence concurred with the Board of Legal Specialization's recommendation to adopt a new rule 1-400(D)(6) and repeal Standard (11) but delayed the submission to the Board of Governors pending development of a plan for implementation of a program to approve certifying entities.

In August 1995, having developed an implementation plan, the Board of Legal Specialization requested the Board Committee on Admissions and Competence to publish proposed rule 1-400(D)(6) again for public comment and also the repeal of rule 1-400(E), Standard (11). The reason for this request was twofold: (1) more than two years had elapsed since the end of the first comment period on the proposed rule; and (2) the language of the proposed rule had been revised to read "accredited" by the State Bar instead of "approved" to conform the rule to the language in the proposed accreditation standards. In addition, because existing rule 1-400(E), Standard (11), would need to be repealed in the event rule 1-400(D)(6) were approved, the concept contained in Standard (11) was incorporated by requiring a statement of the complete name of the entity which granted certification. The following was added by order of the Supreme Court, effective June 1, 1997:

(D) A communication or a 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 Governors, and states the complete name of the entity which granted certification.

VII. OCTC / STATE BAR COURT COMMENTS

- **Gregory Dresser, Office of Chief Trial Counsel, 9/27/2016**
(In response to 90-day public comment circulation):

1. OCTC believes that the current rule is working fine and does not need changes. OCTC is concerned with making the current rule into several separate rules for communications, advertising, and solicitation. The line between those concepts is blurry, overlaps, and it is often difficult for attorneys and OCTC to determine whether a communication is a communication, an advertisement, or a solicitation. In fact, proposed rule 7.2 requires that the advertising also be subject to the requirements of 7.1 and 7.3. OCTC believes a unitary rule is clearer, more understandable, and more enforceable. Further, by dividing the current rule into three rules, OCTC will have to unnecessarily charge violations of more rules.

2. OCTC is concerned with the elimination of all the presumptions in the current rule, including those that are also in the State Bar Act. (See Business and Professions Code sections 6158.1 and 6158.2.) Those presumptions, which are rebuttable, give great guidance and assistance to attorneys, OCTC, and the courts. (See e.g. In the Matter of Liberty (2016) Case No. 11-O-18778, Hearing Department Decision.) There is no reason to eliminate all of the presumptions. Further, eliminating them in the rule, while they are required in the State Bar Act, will create great confusion and issues for enforceability.

3. If adopted, OCTC supports the Comments to this rule.

- **Gregory Dresser, Office of Chief Trial Counsel, 1/9/2017**
(In response to 45-day public comment circulation):

1. OCTC believes the current rule is working fine and disagrees with separate rules for communications, advertising, and solicitation. A unitary rule is clearer and more enforceable.

2. OCTC believes there is no reason to eliminate presumptions.

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

VIII. RELATED CALIFORNIA LAW AND ABA MODEL RULE ADOPTIONS

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.

A. ABA Model Rule Adoptions

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.⁵ Thirty-two jurisdictions have adopted a version of the rule that is substantially different from Model Rule 7.1.”⁶

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 Commission's decision 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 preferable 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.

⁵ 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.

⁶ 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.

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.

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.

- 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 "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.

- 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 Commission 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 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.
 - 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. Recommend adoption of Comment [5] which carries forward a specific restriction found in current rule 1-400(E), Standard No. 15. 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.
- 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.)

- 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.

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

1. The Commission believes 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.

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 Commission considered retaining the California approach to the regulation of lawyer advertising and solicitation.

X. RECOMMENDATION AND PROPOSED BOARD RESOLUTION

Recommendation:

That the Board of Trustees of the State Bar of California adopt proposed Rule 7.1 [1-400] in the form attached to this Report and Recommendation.

Proposed Resolution:

RESOLVED: That the Board of Trustees of the State Bar of California adopts proposed Rule 7.1[1-400] in the form attached to this Report and Recommendation.