

COMMISSION PROVISIONAL REPORT AND RECOMMENDATION: RULE 7.2 [1-400]

Commission Drafting Team Information

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I. RELEVANT EXCERPTS FROM CURRENT CALIFORNIA RULES 1-400, 1-320 & 2-200

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:

* * *

- (3) Any advertisement (regardless of medium) of such member or law firm directed to the general public or any substantial portion thereof; or

* * *

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.”

* * *

- (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.

* * *

(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.

Rule 1-320 Financial Arrangements with Non-Lawyers

(A) Neither a member nor a law firm shall directly or indirectly share legal fees with a person who is not a lawyer, except that:

* * *

(4) A member may pay a prescribed registration, referral, or participation fee to a lawyer referral service established, sponsored, and operated in accordance with the State Bar of California's Minimum Standards for a Lawyer Referral Service in California.

(B) A member shall not compensate, give, or promise anything of value to any person or entity for the purpose of recommending or securing employment of the

member or the member's law firm by a client, or as a reward for having made a recommendation resulting in employment of the member or the member's law firm by a client. A member's offering of or giving a gift or gratuity to any person or entity having made a recommendation resulting in the employment of the member or the member's law firm shall not of itself violate this rule, provided that the gift or gratuity was not offered or given in consideration of any promise, agreement, or understanding that such a gift or gratuity would be forthcoming or that referrals would be made or encouraged in the future.

- (C) A member shall not compensate, give, or promise anything of value to any representative of the press, radio, television, or other communication medium in anticipation of or in return for publicity of the member, the law firm, or any other member as such in a news item, but the incidental provision of food or beverage shall not of itself violate this rule.

Discussion:

Rule 1-320(C) is not intended to preclude compensation to the communications media in exchange for advertising the member's or law firm's availability for professional employment.

Rule 2-200 Financial Arrangements Among Lawyers

* * *

- (B) Except as permitted in paragraph (A) of this rule or rule 2-300, a member shall not compensate, give, or promise anything of value to any lawyer for the purpose of recommending or securing employment of the member or the member's law firm by a client, or as a reward for having made a recommendation resulting in employment of the member or the member's law firm by a client. A member's offering of or giving a gift or gratuity to any lawyer who has made a recommendation resulting in the employment of the member or the member's law firm shall not of itself violate this rule, provided that the gift or gratuity was not offered in consideration of any promise, agreement, or understanding that such a gift or gratuity would be forthcoming or that referrals would be made or encouraged in the future.

II. FINAL VOTES BY THE COMMISSION AND THE BOARD

Commission:

Date of Vote: October 21 & 22, 2016

Action: Recommend Board Adoption of Proposed Rule 7.2 [1-400]

Vote: 15 (yes) – 0 (no) – 0 (abstain)

Board:

Date of Vote: November 17, 2016

Action: Board Adoption of Proposed Rule 7.2 [1-400]

Vote: 14 (yes) – 0 (no) – 0 (abstain)

III. COMMISSION'S PROPOSED RULE 7.2 (CLEAN)

Rule 7.2 [1-400] Advertising

- (a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through any written, recorded or electronic means of communication, including public media.
- (b) A lawyer shall not compensate, promise or give anything of value to a person or entity for the purpose of recommending or securing the services of the lawyer or the lawyer's law firm,* except that a lawyer may:
 - (1) pay the reasonable* costs of advertisements or communications permitted by this Rule;
 - (2) pay the usual charges of a legal services plan or a qualified lawyer referral service. A qualified lawyer referral service is a lawyer referral service established, sponsored and operated in accordance with the State Bar of California's Minimum Standards for a Lawyer Referral Service in California;
 - (3) pay for a law practice in accordance with Rule 1.17;
 - (4) refer clients to another lawyer or a nonlawyer professional pursuant to an arrangement not otherwise prohibited under these Rules or the State Bar Act that provides for the other person* to refer clients or customers to the lawyer, if
 - (i) the reciprocal referral arrangement is not exclusive, and
 - (ii) the client is informed of the existence and nature of the arrangement;
 - (5) offer or give a gift or gratuity to a person* or entity having made a recommendation resulting in the employment of the lawyer or the lawyer's law firm,* provided that the gift or gratuity was not offered or given in consideration of any promise, agreement, or understanding that such a gift or gratuity would be forthcoming or that referrals would be made or encouraged in the future.
- (c) Any communication made pursuant to this Rule shall include the name and address of at least one lawyer or law firm* responsible for its content.

Comment

[1] This Rule permits public dissemination of accurate information concerning a lawyer and the lawyer's services, including for example, the lawyer's name or firm* name, the lawyer's contact information; the kinds of services the lawyer will undertake; the basis on which the lawyer's fees are determined, including prices for specific services and payment and credit arrangements; a lawyer's foreign language ability; names of references and, with their consent, names of clients regularly represented; and other information that might invite the attention of those seeking legal assistance. This Rule, however, prohibits the dissemination of false or misleading information, for example, an advertisement that sets forth a specific fee or range of fees for a particular service where, in fact, the lawyer charges or intends to charge a greater fee than that stated in the advertisement.

[2] Neither this Rule nor Rule 7.3 prohibits communications authorized by law, such as court-approved class action notices.

Paying Others to Recommend a Lawyer

[3] Paragraph (b)(1) permits a lawyer to compensate employees, agents and vendors who are engaged to provide marketing or client-development services, such as publicists, public-relations personnel, business-development staff and website designers. See Rule 5.3 for the duties of lawyers and law firms* with respect to supervising the conduct of nonlawyers who prepare marketing materials and provide client development services.

[4] Paragraph (b)(4) permits a lawyer to make referrals to another lawyer or nonlawyer professional, in return for the undertaking of that person* to refer clients or customers to the lawyer. Such reciprocal referral arrangements must not interfere with the lawyer's professional judgment as to making referrals or as to providing substantive legal services. See Rules 2.1 and 5.4(c). Conflicts of interest created by arrangements made pursuant to paragraph (b)(4) are governed by Rule 1.7. A division of fees between or among lawyers not in the same law firm* is governed by Rule 1.5.1.

IV. COMMISSION'S PROPOSED RULE 7.2 (REDLINE TO CURRENT CALIFORNIA RULES 1-400, 1-320 & 2-200)

Rule 7.2 Advertising

Proposed Rule 7.2(b) compared to current rule 1-320 (B), (C), (A)(4):

(a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through any written, recorded or electronic means of communication, including public media.

(Bb) A ~~member~~lawyer shall not compensate, promise or give, ~~or promise~~ anything of value to any person* or entity for the purpose of recommending or securing ~~employment of the member or the member's law firm by a client, or as a reward for having made a recommendation resulting in employment of the member or~~

~~the member's law firm by a client. A member's offering of or giving a gift or gratuity to any person or entity having made a recommendation resulting in the employment of the member or the member's law firm shall not of itself violate this rule, provided that the gift or gratuity was not offered or given in consideration of any promise, agreement, or understanding that such a gift or gratuity would be forthcoming or that referrals would be made or encouraged in the future.~~the services of the lawyer or the lawyer's law firm,* except that a lawyer may:

- (1) pay the reasonable* costs of advertisements or communications permitted by this Rule;
- ~~(G) A member shall not compensate, give, or promise anything of value to any representative of the press, radio, television, or other communication medium in anticipation of or in return for publicity of the member, the law firm, or any other member as such in a news item, but the incidental provision of food or beverage shall not of itself violate this rule.~~
- ~~(A) Neither a member nor a law firm shall directly or indirectly share legal fees with a person who is not a lawyer, except that:~~
 - ~~(42) A member may pay a prescribed registration,~~the usual charges of a legal services plan or a qualified lawyer referral,~~or participation fee to service. A qualified lawyer referral service is~~ a lawyer referral service established, sponsored, and operated in accordance with the State Bar of ~~California's~~California's Minimum Standards for a Lawyer Referral Service in California.;
 - (3) pay for a law practice in accordance with Rule 1.17;
 - (4) refer clients to another lawyer or a nonlawyer professional pursuant to an arrangement not otherwise prohibited under these Rules or the State Bar Act that provides for the other person* to refer clients or customers to the lawyer, if

Proposed Rule 7.2(b) compared to the 2nd sentence of current rule 2-200(B):

- (i) the reciprocal referral arrangement is not exclusive, and
- (ii) the client is informed of the existence and nature of the arrangement;
- ~~(B5) Except as permitted in paragraph (A) of this rule or rule 2-300, a member shall not compensate, give, or promise anything of value to any lawyer for the purpose of recommending or securing employment of the member or the member's law firm by a client, or as a reward for having made a recommendation resulting in employment of the member or the member's law firm by a client. A member's offering of or giving~~offer or give a gift or gratuity to ~~any lawyer who has~~a person* or entity having made a recommendation resulting in the employment of the ~~member~~lawyer or the

~~member's~~ lawyer's law firm* ~~shall not of itself violate this rule~~, provided that the gift or gratuity was not offered or given in consideration of any promise, agreement, or understanding that such a gift or gratuity would be forthcoming or that referrals would be made or encouraged in the future.

Proposed Rule 7.2(c) compared to current Rule 1-400, Standard (12):

- (c) (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. Any communication made pursuant to this Rule shall include the name and address of at least one lawyer or law firm* responsible for its content.

Comment

[1] This Rule permits public dissemination of accurate information concerning a lawyer and the lawyer's services, including for example, the lawyer's name or firm* name, the lawyer's contact information; the kinds of services the lawyer will undertake; the basis on which the lawyer's fees are determined, including prices for specific services and payment and credit arrangements; a lawyer's foreign language ability; names of references and, with their consent, names of clients regularly represented; and other information that might invite the attention of those seeking legal assistance. This Rule, however, prohibits the dissemination of false or misleading information, for example, an advertisement that sets forth a specific fee or range of fees for a particular service where, in fact, the lawyer charges or intends to charge a greater fee than that stated in the advertisement.

[2] Neither this Rule nor Rule 7.3 prohibits communications authorized by law, such as court-approved class action notices.

Paying Others to Recommend a Lawyer

[3] Paragraph (b)(1) permits a lawyer to compensate employees, agents and vendors who are engaged to provide marketing or client-development services, such as publicists, public-relations personnel, business-development staff and website designers. See Rule 5.3 for the duties of lawyers and law firms* with respect to supervising the conduct of nonlawyers who prepare marketing materials and provide client development services.

[4] Paragraph (b)(4) permits a lawyer to make referrals to another lawyer or nonlawyer professional, in return for the undertaking of that person* to refer clients or customers to the lawyer. Such reciprocal referral arrangements must not interfere with the lawyer's professional judgment as to making referrals or as to providing substantive legal services. See Rules 2.1 and 5.4(c). Conflicts of interest created by arrangements made pursuant

to paragraph (b)(4) are governed by Rule 1.7. A division of fees between or among lawyers not in the same law firm* is governed by Rule 1.5.1.

V. RULE HISTORY

See Rule 7.1 Report and Recommendation for Rule 1-400 rule history.

VI. 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 is concerned that with the proposal to make the current rule into several separate rules for communications, advertising, and solicitation for the same reasons expressed in its Comments to 7.1.
 2. If adopted, OCTC supports Comments 2, 3, and 4.
 3. OCTC is concerned that Comment 1 is unnecessary and merely repeats the rule.
- **State Bar Court:** No comments were received from State Bar Court.

VII. PUBLIC COMMENTS & PUBLIC HEARING TESTIMONY

Six comments were received. Three agreed with the proposed rule, and three, including the above comment from OCTC, agreed only if modified. A public comment synopsis table is provided at the end of this report.

VIII. RELATED CALIFORNIA LAW AND ABA MODEL RULE ADOPTIONS

Model Rule 7.2. The ABA Comparison Chart, entitled “Variations of the ABA Model Rules of Professional Conduct, Rule 7.2: Communication of Fields of Practice and Specialization,” revised December 16, 2015, is available at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_7_2.authcheckdam.pdf
- Six jurisdictions have adopted Model Rule 7.2 verbatim.¹ Fifteen jurisdictions have adopted a slightly modified version of Model Rule 7.2.² Twenty-eight jurisdictions

¹ The six jurisdictions are: Alaska, Iowa, Maine, Nebraska, West Virginia, and Wyoming.

² The fifteen jurisdictions are: Colorado, Delaware, Hawaii, Idaho, Illinois, Kansas, Massachusetts, Minnesota, New Hampshire, New Mexico, Oklahoma, Oregon, Vermont, Washington, and Wisconsin.

have adopted a version of the rule that is substantially different from Model Rule 7.2.”³ Two jurisdictions do not have a single rule counterpart to Model Rule 7.2.⁴

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

A. Concepts Accepted (Pros and Cons):

1. Recommend adoption of Model Rule 7.2, as modified.

- **Pros:** Model Rule 7.2 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 recommended because advertising of legal services and the solicitation of potential clients is an area of lawyer regulation where greater national uniformity would be helpful to the public, practicing lawyers, and the courts. The current widespread use of the Internet by

³ The twenty-eight jurisdictions are: Alabama, Arizona, Arkansas, California, Connecticut, Florida, Georgia, Indiana, Kentucky, Louisiana, Maryland, Michigan, Mississippi, Missouri, Montana, Nevada, New Jersey, New York, North Carolina, North Dakota, Ohio, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah and Virginia.

⁴ The two jurisdictions are: District of Columbia and Texas. Although the District of Columbia does not have a separate rule, Model Rule 7.2(b) has been imported into D.C. Rule 7.1(c), which provides:

(c) A lawyer shall not pay money or give anything of material value to a person (other than the lawyer's partner or employee) in exchange for recommending the lawyer's services except that a lawyer may:

- (1) Pay the reasonable costs of advertisements or communications permitted by this Rule;
- (2) Pay the usual and reasonable fees or dues charged by a legal service plan or a lawyer referral service;
- (3) Pay for a law practice in accordance with Rule 1.17; and
- (4) Refer clients to another lawyer or nonlawyer professional pursuant to an agreement not otherwise prohibited under these Rules that provides for the other person to refer clients or customers to the lawyer, if:
 - (A) The reciprocal agreement is not exclusive, and
 - (B) The client is informed of the existence and nature of the agreement.

Texas has imported some of the concepts of Model Rule 7.2(b) into Texas Rule 7.03 [Prohibited Solicitations and Payments]. Texas addresses the concepts in Model Rule 7.4(a) in much greater detail than the Model Rule in Texas Rule 7.04 [Advertisements in the Public Media].

lawyers and law firms to market their services and the trend in most jurisdictions, including California, toward permitting some form of multijurisdictional practice, warrants such national uniformity.

Proposed rule 7.1 sets out the general prohibition against a lawyer making false and misleading communications concerning the availability of legal services.

Proposed rule 7.2 will specifically address advertising, a subset of communication.

Proposed rule 7.3 will regulate marketing of legal services through direct contact with a potential client either by real-time communication such as delivered in-person or by telephone, or by directly targeting a person known to be in need of specific legal services.

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 trade names.

- 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 7.2(a), as modified, which permits lawyers to advertise to the general public their services through any written, recorded or electronic media, provided the advertisement does not violate proposed Rule 7.1 (prohibition on false or misleading communications) or 7.3 (prohibition on in-person, live telephone or real-time electronic communications).
 - Pros: Having a specific rule that governs communications intended for the general public will permit better understanding of a lawyer's duties as to those communications as opposed to directed marketing, which is governed by proposed Rule 7.3.

The modifications to MR 7.2(a) include the insertion of the terms "any" and "means of." These two additional words are intended to signal that the different modes of communication listed (written, recorded and electronic) are expansive and not limited to currently existing technologies.

- Cons: There is no evidence that current rule 1-400 does not effectively regulate lawyer advertising in California. In any event, a separate rule addressing advertising is not necessary as proposed Rule 7.1, which prohibits false and misleading communications regarding the marketing of legal services, together with Bus. & Prof. Code §§ 6157 et seq., adequately cover the field.

3. Recommend adoption of Model Rule 7.2(b), as modified, which prohibits a lawyer from paying a person for recommending the lawyer's services except in the enumerated circumstances.

- Pros: This provision incorporates in a single rule nearly identical provisions in current rules 2-200 and 1-320 which permit a lawyer to pay a gratuity to a person for recommending the lawyer, and also incorporates a Discussion section in 1-320 that permits a lawyer to pay for the cost of advertising. Proposed rule 7.2 is the logical place for those provisions. The Model Rule language in the introductory paragraph has been strengthened by carrying forward the 1-320/2-200 language that prohibits not only “giving” anything of value, but also compensating or promising anything of value. Further, the prohibition extends to payments, etc., made to a person *or entity* for recommending the lawyer's *law firm*.

With respect to the specific exceptions in the subparagraphs of (b):
(1) Subparagraph (b)(1) carries forward current rule 1-320's Discussion paragraph, which does not “preclude compensation to the communications media in exchange for advertising the member's or law firm's availability for professional employment.” The addition of “reasonable” to modify “costs” is appropriate to ensure that the compensation paid is for advertising and does not amount to impermissible fee sharing with a nonlawyer.

(2) Subparagraph (b)(2) clarifies that payment of “usual charges” to a qualified lawyer referral service is not the impermissible sharing of fees with a nonlawyer. The Model Rule language has been modified to more accurately describe the regulatory framework for lawyer referral services in California.

(3) Subparagraph (b)(3) carries forward the exception in current rule 2-200(B), which excepts from paragraph (b)'s prohibition payments made to purchase a law practice.

(4) Subparagraph (b)(4) has no counterpart in the California Rules. However, permitting reciprocal referral arrangements recognizes a common mechanism by which clients are paired with lawyers or nonlawyer professionals. Because these arrangements are permitted only so long as they are not exclusive and the client is made aware of them, public protection is preserved, as a lawyer would not be permitted to enter into an exclusive arrangement that might result in the client being referred to a nonlawyer professional simply because the lawyer will be compensated for the referral. Further, unlike RRC1's proposed subparagraph (b)(4), these arrangements track MR 7.2(b)(4) in providing that they may be made only with nonlawyer *professionals* to ensure client protection.

(5) Subparagraph (b)(5) carries forward the substance of the second sentence of current rule 2-200(B) and 3-120(B), which currently permit such gifts to lawyers and nonlawyers, respectively.

- Cons: Most of the provisions in paragraph (b) relate to payments to nonlawyers so they are more logically placed in a rule concerning financial arrangements with nonlawyers, i.e., proposed Rule 5.4 [1-320]. Subparagraphs (b)(4) and (b)(5) would also apply to lawyers; those provisions as they apply to lawyers would more logically be placed in the rule re fee divisions with other lawyers, proposed Rule 1.5.1 [2-200].
4. Recommend adoption of Model Rule 7.2(c), as modified, to require the name and address of at least one lawyer responsible for the advertisement's content.
- Pros: Paragraph (c) carries forward the concept in rule 1-400, Standard (12), which provides the following is a presumed violation of rule 1-400:

“(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. (Emphasis added).

The term “address” has been substituted for “office address” in the Model Rule because the provision of a link to an email address on a web page, which is considered an advertisement, (see State Bar Formal Ethics Op. 2001-155), should provide sufficient information for discipline enforcement if warranted.
 - Cons: If there is a requirement to provide an address, it should be the lawyer's physical office address. In deciding whether to retain a lawyer, a member of the public should have information on that lawyer's physical location. For example, a prospective client in Southern California might want to exclude any lawyers in Northern California because of the difficulty in arranging an in-person meeting.
5. Recommend adoption of Comment [1], a substantially shortened version of Model Rule 7.2, cmt. [2].
- Pros: The comment provides interpretive guidance on what kinds of information would generally not be false or misleading by providing a list of typical information that is included. The last sentence of the comment carries forward the substance of rule 1-400, Standard (16), providing an example of

fee information that, if included in an advertisement, would be a violation of the Rule.⁵

- Cons: The listing of permitted content is not necessary and is redundant, a similar list being found in Bus. & Prof. Code § 6158.2. If a list is viewed as necessary, a cross-reference to § 6158.2 would be preferable.
6. Recommend adoption of Comment [2], a modified version of Model Rule 7.2, cmt. [4], concerning class action notices.
- Pros: The comment clarifies that neither Rule 7.2 nor 7.3 [Solicitation of Clients] prohibits court-approved class action notices, a common form of communication with respect to the provision of legal services. There was discussion whether to place this provision in rule 7.3 rather than in this rule but, in the interests of national uniformity, the Commission recommends including it here.
 - Cons: None identified.
7. Recommend adoption of Comment [3], a substantially reduced version of Model Rule 7.2, cmt. [4], concerning payments for advertising pursuant to subparagraph (b)(1).
- Pros: The comment provides interpretive guidance by clarifying that a lawyer may not only compensate media outlets that publish or air the lawyer's advertisements, but also may retain and compensate employees or outside contractors to assist in the marketing the lawyer's or a law firm's services.
 - Cons: That a lawyer may retain such intermediaries to assist in the preparation of advertisements is implied in subparagraph (b)(1).

⁵ Current rule 1-400, Standard (16), provides that the following facts are presumed to violated rule 1-400:

(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.

The Commission determined that much of content of the second sentence of the standard, with its reference to "yellow pages" and "directories," to be antiquated and so does not recommend it being carried forward in the proposed Rule.

8. Recommend adoption of Comment [4], a substantially reduced version of Model Rule 7.2, cmt. [8], concerning reciprocal referral arrangements under subparagraph (b)(4).

- Pros: Comment [4] cautions that any such arrangement must not interfere with the referring lawyer's independent professional judgment, a critical consideration when a lawyer refers a client, to whom the lawyer owes a fiduciary duty, to another professional for either legal or non-legal services. It also notes that a lawyer must be aware that a conflict of interest may arise and refers the lawyer to rule 1.7 regarding personal interest conflicts. Further, the comment notes that a fee division arrangement *between lawyers* is governed by proposed Rule 1.5.1, not Rule 7.2.
- Cons: None identified.

B. Concepts Rejected (Pros and Cons):

1. Retain Model Rule 7.2, Comments [1], [6] and [7] in some form.

- Pros: None identified.
- Cons: All of the listed comments are lengthy, discursive comments that do not provide guidance on interpreting the black letter or applying the rule:

MR 7.2, cmt. [1], provides the policy that underlies allowing and regulating, rather than prohibiting, lawyer advertising: public education about the availability of legal services.

MR 7.2, cmt. [6], is a lengthy discussion of subparagraph (b)(2) regarding the payment of the usual charges of a lawyer referral service which provides no insights into the rule's application. In any event, the blackletter does not need clarification.

MR 7.2, cmt. [7], discusses a lawyer's duties regarding a lawyer referral service or legal services plan that might provide the lawyer with a client referral. The duties are all in other rules. To the extent that these duties require explication, it is better done in those rules.

2. Include a comment to explain paragraph (c), requiring an advertisement to include the address of a lawyer responsible for the advertisement's content.

- Pros: It would be helpful to lawyers to clarify that the required "address" can be a physical address, an email address, or a web link to such an address.
- Cons: Paragraph (c) is sufficiently clear so that no clarification is necessary.

3. Retain the requirement in current rule 1-400(F), which requires lawyers to retain a copy of any written or electronic advertisement for a period of two years.

- Pros: Retaining such advertisements provide evidence of a violation or compliance with the rule.
- Cons: The ABA removed the one-year retention requirement in Model Rule 7.2 in 2001. The Ethics 2000 Commission explained the rationale: “The requirement that a lawyer retain copies of all advertisements for two years has become increasingly burdensome, and such records are seldom used for disciplinary purposes. Thus the Commission, with the concurrence of the ABA Commission on Responsibility in Client Development, is recommending elimination of the requirement that records of advertising be retained for two years.” (See ABA Reporter’s Explanation of Changes, Rule 7.2(b).)

The Commission also points out that because a “web page” is an electronic communication, (see State Bar Formal Ethics Op. 2001-155), the burden to retain copies of each web page would be extraordinarily burdensome given how often the information on web pages are changed, and how often web pages are deleted.

Note to Board: Please note, however, that even with the deletion of requirement in rule 1-400(F), a one-year retention requirement would remain in Bus. & Prof. Code § 6159.1. The rule submission to the Supreme Court should include a note to this effect and perhaps recommend that, with the Supreme Court’s approval, the State Bar approach the legislature with a recommendation to delete that requirement.

4. Retain current Rule 1-400, Standard (13), concerning dramatizations.

- Pros: Because use of dramatizations is a highly effective way to market services, many lawyers utilize them, so they should be expressly addressed in the Rules.
- Cons: The concern is with false or misleading dramatizations, which is adequately addressed in proposed Rule 7.1. Moreover, dramatizations are covered in Bus. & Prof. Code § 6158.1(b). There is no need to repeat that coverage in the Rule.

5. Retain current Rule 1-400, Standards (14) and (15) concerning, respectively, a communication that states “no fee, no recovery” and a communication that represents legal services can be provided in a language other than English.

- Pros: These are very common types of advertising that mislead the public.
- Cons: Because both of these standards are directed to misleading *communications*, they are better addressed in proposed Rule 7.1 concerning false or misleading communications, where the Commission has recommended their retention as either comments to the rule or as a standard.

This section identifies concepts the Commission considered before the rule was circulated for public comment. Other concepts considered by the Commission, together with the Commission's reasons for not recommending their inclusion in the rule, can be found in the Public Comment Synopsis Tables.

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

1. The only substantive change in the proposed Rule is subparagraph (b)(4), which would permit a lawyer, with notice to the client, to enter into a non-exclusive reciprocal referral arrangement with a nonlawyer. Such an arrangement with another lawyer, on the other would be permitted under current rule 2-200 [proposed Rule 1.5.1].

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 7.2 [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 7.2 [1-400] in the form attached to this Report and Recommendation.