

**COMMISSION PROVISIONAL REPORT AND RECOMMENDATION
RULE 7.3 [1-400(B), (C), (D)(5) and Stds. (3), (4), (5)]**

Commission Drafting Team Information

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I. RELEVANT EXCERPTS FROM CURRENT CALIFORNIA RULE 1-400

Rule 1-400 Advertising and Solicitation [(B), (C), (D)(5) & Stds. (3), (4), (5)]

* * *

(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:

* * *

- (5) Be transmitted in any manner which involves intrusion, coercion, duress, compulsion, intimidation, threats, or vexatious or harassing conduct.

* * *

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:

* * *

(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.

II. FINAL VOTES BY THE COMMISSION AND THE BOARD

Commission:

Date of Vote: October 21 & 22, 2016

Action: Recommend Board Adoption of Proposed Rule 7.3

Vote: 15 (yes) – 0 (no) – 0 (abstain)

Board:

Date of Vote: November 17, 2016

Action: Board Adoption of Proposed Rule 7.3

Vote: 14 (yes) – 0 (no) – 0 (abstain)

III. PROPOSED RULE 7.3 (CLEAN)

Rule 1-400 [7.3] Solicitation of Clients

(a) A lawyer shall not by in-person, live telephone or real-time electronic contact solicit professional employment when a significant motive for doing so is the lawyer's pecuniary gain, unless the person contacted:

(1) is a lawyer; or

(2) has a family, close personal, or prior professional relationship with the lawyer.

- (b) A lawyer shall not solicit professional employment by written, recorded or electronic communication or by in-person, telephone or real-time electronic contact even when not otherwise prohibited by paragraph (a), if:
 - (1) the person being solicited has made known to the lawyer a desire not to be solicited by the lawyer; or
 - (2) the solicitation is transmitted in any manner which involves intrusion, coercion, duress or harassment.
- (c) Every written, recorded or electronic communication from a lawyer soliciting professional employment from any person known to be in need of legal services in a particular matter shall include the word “Advertisement” or words of similar import on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communication, unless the recipient of the communication is a person specified in paragraphs (a)(1) or (a)(2), or unless it is apparent from the context that the communication is an advertisement.
- (d) Notwithstanding the prohibitions in paragraph (a), a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses in-person, live telephone or real-time electronic contact to solicit memberships or subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.
- (e) As used in this Rule, the terms “solicitation” and “solicit” refer to an oral or written targeted communication initiated by or on behalf of the lawyer that is directed to a specific person and that offers to provide, or can reasonably be understood as offering to provide, legal services.

Comment

[1] A lawyer’s communication does not constitute a solicitation if it is directed to the general public, such as through a billboard, an Internet banner advertisement, a website or a television commercial, or if it is in response to a request for information or is automatically generated in response to Internet searches.

[2] Paragraph (a) does not apply to situations in which the lawyer is motivated by considerations other than the lawyer’s pecuniary gain. Therefore, paragraph (a) does not prohibit a lawyer from participating in constitutionally protected activities of bona fide public or charitable legal-service organizations, or bona fide political, social, civic, fraternal, employee or trade organizations whose purposes include providing or recommending legal services to its members or beneficiaries. See, e.g., *In re Primus* (1978) 436 U.S. 412 [98 S.Ct. 1893].

[3] This Rule does not prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a bona fide group or prepaid legal plan for their members, insureds, beneficiaries or other third parties for the

purpose of informing such entities of the availability of and details concerning the plan or arrangement which the lawyer or lawyer's firm* is willing to offer.

[4] Lawyers who participate in a legal service plan as permitted under paragraph (d) must comply with Rules 7.1, 7.2, and 7.3(b). See also Rules 5.4 and 8.4(a).

IV. COMMISSION'S PROPOSED RULE 7.3 (REDLINE TO CURRENT CALIFORNIA RULE 1-400(B), (C) & (D)(5) AND STANDARDS (3), (4) & (5))

Rule 1-400 ~~Advertising~~[7.3] Solicitation of Clients

(a) A lawyer shall not by in-person,* live telephone or real-time electronic contact solicit professional employment when a significant motive for doing so is the lawyer's pecuniary gain, unless the person contacted:

~~(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 lawyer; or~~

~~(a2) delivered in person or by telephone, or~~has a family, close personal, or prior professional relationship with the lawyer.

~~(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.~~

(b) A lawyer shall not solicit professional employment by written, recorded or electronic communication or by in-person, telephone or real-time electronic contact even when not otherwise prohibited by paragraph (a), if:

(1) the person* being solicited has made known* to the lawyer a desire not to be solicited by the lawyer; or

~~(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:~~

* * * * *

- (52) ~~Be the solicitation is~~ transmitted in any manner which involves intrusion, coercion, duress, ~~compulsion, intimidation, threats, or vexatious or harassing conduct~~ or harassment.

* * * * *

- (c) ~~(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.~~ Every written, recorded or electronic communication from a lawyer soliciting professional employment from any person* known* to be in need of legal services in a particular matter shall include the word “Advertisement” or words of similar import on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communication, unless the recipient of the communication is a person* specified in paragraphs (a)(1) or (a)(2), or unless it is apparent from the context that the communication is an advertisement.
- (d) Notwithstanding the prohibitions in paragraph (a), a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses in-person, live telephone or real-time electronic contact to solicit memberships or subscriptions for the plan from persons* who are not known* to need legal services in a particular matter covered by the plan.
- (e) As used in this Rule, the terms “solicitation” and “solicit” refer to an oral or written* targeted communication initiated by or on behalf of the lawyer that is directed to a specific person* and that offers to provide, or can reasonably* be understood as offering to provide, legal services.

Standards:Comment

~~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:~~

- (3)[1] ~~A “lawyer’s 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.~~ does not constitute a solicitation if it is directed to the general public, such as through a billboard, an Internet banner advertisement, a website or a television commercial, or if it is in response to a request for information or is automatically generated in response to Internet searches.

~~(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.~~

[2] Paragraph (a) does not apply to situations in which the lawyer is motivated by considerations other than the lawyer’s pecuniary gain. Therefore, paragraph (a) does not prohibit a lawyer from participating in constitutionally protected activities of bona fide public or charitable legal-service organizations, or bona fide political, social, civic, fraternal, employee or trade organizations whose purposes include providing or recommending legal services to its members or beneficiaries. See, e.g., *In re Primus* (1978) 436 U.S. 412 [98 S.Ct. 1893].

[3] This Rule does not prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a bona fide group or prepaid legal plan for their members, insureds, beneficiaries or other third parties for the purpose of informing such entities of the availability of and details concerning the plan or arrangement which the lawyer or lawyer’s firm* is willing to offer.

[4] Lawyers who participate in a legal service plan as permitted under paragraph (d) must comply with Rules 7.1, 7.2, and 7.3(b). See also Rules 5.4 and 8.4(a).

V. COMMISSION’S PROPOSED RULE (REDLINE TO MODEL RULE 7.3)

Rule 7.3 [1-400] Solicitation of Clients

(a) A lawyer shall not by in-person, live telephone or real-time electronic contact solicit professional employment when a significant motive for ~~the lawyer’s~~ doing so is the lawyer’s pecuniary gain, unless the person contacted:

- (1) is a lawyer; or
- (2) has a family, close personal, or prior professional relationship with the lawyer.

(b) A lawyer shall not solicit professional employment by written, recorded or electronic communication or by in-person, telephone or real-time electronic contact even when not otherwise prohibited by paragraph (a), if:

- (1) the ~~target of the solicitation~~ person being solicited has made known to the lawyer a desire not to be solicited by the lawyer; or
- (2) the solicitation is transmitted in any manner which involves intrusion, coercion, duress or harassment.

(c) Every written, recorded or electronic communication from a lawyer soliciting professional employment from ~~anyone~~ any person known to be in need of legal services in a particular matter shall include the ~~words “Advertising Material”~~ word “Advertisement” or words of similar import on the outside envelope, if any, and at

the beginning and ending of any recorded or electronic communication, unless the recipient of the communication is a person specified in paragraphs (a)(1) or (a)(2), or unless it is apparent from the context that the communication is an advertisement.

- (d) Notwithstanding the prohibitions in paragraph (a), a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses in-person ~~or, live~~ telephone or real-time electronic contact to solicit memberships or subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.

Comment

- ~~[1]-~~ A(e) As used in this Rule, the terms “solicitation-is-a” and “solicit” refer to an oral or written targeted communication initiated by or on behalf of the lawyer that is directed to a specific person and that offers to provide, or can reasonably be understood as offering to provide, legal services.

Comment

~~[1]~~ ~~In contrast, a~~ lawyer’s communication ~~typically~~ does not constitute a solicitation if it is directed to the general public, such as through a billboard, an Internet banner advertisement, a website or a television commercial, or if it is in response to a request for information or is automatically generated in response to Internet searches.

~~[2]- There is a potential for abuse when a solicitation involves direct in-person, live telephone or real-time electronic contact by a lawyer with someone known to need legal services. These forms of contact subject a person to the private importuning of the trained advocate in a direct interpersonal encounter. The person, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult fully to evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer’s presence and insistence upon being retained immediately. The situation is fraught with the possibility of undue influence, intimidation, and over-reaching.~~

~~[3]- This potential for abuse inherent in direct in-person, live telephone or real-time electronic solicitation justifies its prohibition, particularly since lawyers have alternative means of conveying necessary information to those who may be in need of legal services. In particular, communications can be mailed or transmitted by email or other electronic means that do not involve real-time contact and do not violate other laws governing solicitations. These forms of communications and solicitations make it possible for the public to be informed about the need for legal services, and about the qualifications of available lawyers and law firms, without subjecting the public to direct in-person, telephone or real-time electronic persuasion that may overwhelm a person’s judgment.~~

~~[4]- The use of general advertising and written, recorded or electronic communications to transmit information from lawyer to the public, rather than direct~~

~~in-person, live telephone or real-time electronic contact, will help to assure that the information flows cleanly as well as freely. The contents of advertisements and communications permitted under Rule 7.2 can be permanently recorded so that they cannot be disputed and may be shared with others who know the lawyer. This potential for informal review is itself likely to help guard against statements and claims that might constitute false and misleading communications, in violation of Rule 7.1. The contents of direct in-person, live telephone or real-time electronic contact can be disputed and may not be subject to third-party scrutiny. Consequently, they are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false and misleading.~~

~~[52] There is far less likelihood that a lawyer would engage in abusive practices against a former client, or a person with whom the lawyer has a close personal or family relationship, or in~~Paragraph (a) does not apply to ~~situations in which the lawyer is motivated by considerations other than the lawyer's pecuniary gain. Nor is there a serious potential for abuse when the person contacted is a lawyer. Consequently, the general prohibition in Rule 7.3(a) and the requirements of Rule 7.3(c) are not applicable in those situations. Also~~ Therefore~~, paragraph (a) is~~does ~~not intended to~~ prohibit a lawyer from participating in constitutionally protected activities of bona fide public or charitable ~~legal-service~~legal-service organizations, or bona fide political, social, civic, fraternal, employee or trade organizations whose purposes include providing or recommending legal services to ~~their~~its members or beneficiaries. See, e.g., In re Primus (1978) 436 U.S. 412.

~~[6]– But even permitted forms of solicitation can be abused. Thus, any solicitation which contains information which is false or misleading within the meaning of Rule 7.1, which involves coercion, duress or harassment within the meaning of Rule 7.3(b)(2), or which involves contact with someone who has made known to the lawyer a desire not to be solicited by the lawyer within the meaning of Rule 7.3(b)(1) is prohibited. Moreover, if after sending a letter or other communication as permitted by Rule 7.2 the lawyer receives no response, any further effort to communicate with the recipient of the communication may violate the provisions of Rule 7.3(b).~~

~~[73] This Rule is~~does ~~not intended to~~ prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a bona fide group or prepaid legal plan for their members, insureds, beneficiaries or other third parties for the purpose of informing such entities of the availability of and details concerning the plan or arrangement which the lawyer or ~~lawyer's~~lawyer's firm is willing to offer. ~~This form of communication is not directed to people who are seeking legal services for themselves. Rather, it is usually addressed to an individual acting in a fiduciary capacity seeking a supplier of legal services for others who may, if they choose, become prospective clients of the lawyer. Under these circumstances, the activity which the lawyer undertakes in communicating with such representatives and the type of information transmitted to the individual are functionally similar to and serve the same purpose as advertising permitted under Rule 7.2.~~

[4] Lawyers who participate in a legal service plan as permitted under paragraph (d) must comply with Rules 7.1, 7.2 and 7.3(b). See also Rules 5.4 and 8.4(a).

~~[8] The requirement in Rule 7.3(c) that certain communications be marked “Advertising Material” does not apply to communications sent in response to requests of potential clients or their spokespersons or sponsors. General announcements by lawyers, including changes in personnel or office location, do not constitute communications soliciting professional employment from a client known to be in need of legal services within the meaning of this Rule.~~

~~[9] Paragraph (d) of this Rule permits a lawyer to participate with an organization which uses personal contact to solicit members for its group or prepaid legal service plan, provided that the personal contact is not undertaken by any lawyer who would be a provider of legal services through the plan. The organization must not be owned by or directed (whether as manager or otherwise) by any lawyer or law firm that participates in the plan. For example, paragraph (d) would not permit a lawyer to create an organization controlled directly or indirectly by the lawyer and use the organization for the in-person or telephone solicitation of legal employment of the lawyer through memberships in the plan or otherwise. The communication permitted by these organizations also must not be directed to a person known to need legal services in a particular matter, but is to be designed to inform potential plan members generally of another means of affordable legal services. Lawyers who participate in a legal service plan must reasonably assure that the plan sponsors are in compliance with Rules 7.1, 7.2 and 7.3(b). See 8.4(a).~~

VI. RULE HISTORY

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

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 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 the Comments to this rule.
- **State Bar Court:** No comments were received from State Bar Court.

VIII. PUBLIC COMMENTS & PUBLIC HEARING TESTIMONY

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

IX. RELATED CALIFORNIA LAW AND ABA MODEL RULE ADOPTIONS

Model Rule 7.3. The ABA Comparison Chart, entitled “Variations of the ABA Model Rules of Professional Conduct, Rule 7.3: 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_3.authcheckdam.pdf
- Seven jurisdictions have adopted Model Rule 7.3 verbatim.¹ Fourteen jurisdictions have adopted a slightly modified version of Model Rule 7.3.² Twenty-nine jurisdictions have adopted a version of the rule that is substantially different from Model Rule 7.3.³ One jurisdiction does not have a version of the Model Rule 7.3.⁴

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

A. Concepts Accepted (Pros and Cons):

1. Recommend adoption of Model Rule 7.3, as modified.

¹ The seven jurisdictions are: Delaware, Idaho, Illinois, Iowa, Kansas, New Mexico, and Wyoming.

² The fourteen jurisdictions are: Alabama, Alaska, Maryland, Minnesota, Mississippi, Montana, Nebraska, North Dakota, Oklahoma, South Dakota, Utah, Vermont, West Virginia, and Wisconsin.

³ The twenty-nine jurisdictions are: Arizona, Arkansas, California, Colorado, Connecticut, Florida, Georgia, Hawaii, Indiana, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Missouri, Nevada, New Hampshire, New Jersey, New York, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Virginia, and Washington.

⁴ The jurisdiction is the District of Columbia. Although D.C. does not have a rule numbered 7.3, the concept of Model Rule 7.3 (direct communication with a person known to be in need of legal services) is found in D.C. Rule 7.3(b), (d), (e) and (f). D.C. Rule 7.3(b) provides:

(b) A lawyer shall not seek by in-person contact, employment (or employment of a partner or associate) by a nonlawyer who has not sought the lawyer’s advice regarding employment of a lawyer, if:

- (1) The solicitation involves use of a statement or claim that is false or misleading, within the meaning of paragraph (a);
- (2) The solicitation involves the use of coercion, duress or harassment; or
- (3) The potential client is apparently in a physical or mental condition which would make it unlikely that the potential client could exercise reasonable, considered judgment as to the selection of a lawyer.

- Pros: Model Rule 7.3 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 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 the recently-revised Model Rule title, "Solicitation of Clients".

- Pros: The title accurately describes the principal application of the rule: the prohibition of real-time (in-person, live telephone or electronic) communications with clients, which are traditionally understood to be "solicitations". Further, the former Model Rule 7.3 title ("Direct Contact with Prospective Clients") needed to be changed because "prospective client" is a

defined term in Model Rule 1.18 and its use in Rule 7.3 would be inaccurate and confusing.⁵

- Cons: The ABA Ethics 20/20 Commission revised the rule title in 2012. However, the title is underinclusive. Although paragraph (a) addresses real-time, interactive communications, paragraph (b) also prohibits non-real-time direct marketing communications under certain conditions. The former Model Rule title (“Direct Contact with Prospective Clients”) more accurately conveys the content of the Rule.
3. Recommend adoption of Model Rule 7.3(a), introductory clause, as modified. Proposed paragraph (a) contains the basic prohibition against what is traditionally understood to constitute improper solicitation of legal business by a lawyer engaging in real-time communication with potential clients. The concern is the ability of lawyers to employ their “skills in the persuasive arts” to overreach and convince a person in need of legal services to retain the lawyer without the person having had time to reflect on the decision. The provision eliminates the opportunity for a lawyer to engage in real-time (i.e., contemporaneous and interactive) communication with a potential client. The only modification to MR 7.3(a) is to delete the first instance of “the lawyer’s,” which is unnecessary.
- Pros: Adopting paragraph (a) nearly verbatim will bring California in line with nearly every other jurisdiction in the country regarding the limitations on solicitation. The proposed rule will not change the law in California. However, unlike the current rule that requires a lawyer to apply two separate provisions (a definition of “solicitation” in 1-400(B) and the prohibitory language in 1-400(C)), the ABA sentence is a clear statement of what conduct is prohibited.
 - Cons: There is no evidence that current rule 1-400(C), in conjunction with 1-400(B) and Standards (3), (4) and (5), does not provide an adequate basis for regulating improper solicitations of legal business.
4. In paragraph (a), include the phrase “real-time electronic contact” which would apply to real-time communications such as a chat room.
- Pros: The same situation that raises concerns about in-person or live telephone communications applies to real-time electronic contact such as communications in a chat room or by instant messaging. The fact that a person can sign or log off from a chat room does not render such communications harmless as a person can also hang up a phone, walk away or close the door.

⁵ In Rule 1.18, prospective client would be a person who consults with a lawyer for the purpose of retaining the lawyer or obtaining legal advice. As used in the advertising rules, “prospective client” means a member of the public who might potentially retain a lawyer, regardless of whether that person has consulted with the lawyer.

- Cons: The situations presented by in-person and live telephone communications on the one hand and real-time electronic contact on the other are not necessarily the same. Aside from the fact that it is much easier for a polite person to disengage from a conversation taking place in a chat room or by instant messaging, changes of tone or voice modulation, both of which are tools in a lawyer's persuasive toolbox, are not available when merely typing statements for viewing on a computer screen. Moreover, it is not possible to "talk over" the other person.
5. Recommend two exceptions to the application of proposed paragraph (a). Paragraph (a) has two exceptions, i.e., when the solicitation target (i) is another lawyer; or (ii) has a close family, close personal, or prior professional relationship with the lawyer.
- Pros: Inclusion of these exceptions is recommended because there is significantly less concern of overreaching when the solicitation target is another lawyer or has an existing relationship with the soliciting lawyer. Subparagraph (b) would carry forward current rule 1-400(C), which permits solicitation of persons with a family or prior professional relationship.⁶ The inclusion of "close personal" relationship is new and would encompass, for example, co-habitation relationships. It would bring the rule current by recognizing commonplace living situations.
 - Cons: The phrase "close personal" when used with respect to relationship is vague and overbroad.
6. Recommend adoption of Model Rule 7.2(b), as modified to include "intrusion." In *Shapero v. Kentucky Bar Ass'n* (1988) 486 U.S. 466, the Supreme Court held that a state could not absolutely prohibit direct targeted mailings.⁷ Paragraph (b) would prohibit direct targeted mailings in two situations: (i) where the person being solicited has made known to the lawyer a desire not to be contacted; or (ii) the solicitation is transmitted in a manner that involves "intrusion, coercion, duress or harassment." Paragraph (b) would also prohibit real-time solicitations notwithstanding that they might be permitted under paragraph (a)(1) if either of the two aforementioned situations exist. The first situation is new. The second

⁶ Current rule 1-400(C) provides:

(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.

⁷ A direct targeted mailing would be a letter or email sent "to potential clients known to face particular legal problems." 486 U.S. at 467.

situation (coercion, duress, harassment) would largely carry forward current rule 1-400(D)(5).

- Pros: Proposed paragraph (b) carries forward current rule 1-400(D)(5) and provides an important limitation on the right of a lawyer to engage in direct targeted marketing of the lawyer's services. The addition of the provision in subparagraph (b)(1) prohibiting such marketing when the target has told the lawyer not to do so is also warranted, as any further communications arguably would be an intrusion on the person's privacy or would constitute harassment. Further, the addition of the term "Intrusion" in subparagraph (b)(2) to supplement the Model Rule's prohibited conduct of "coercion," "duress," and "harassment," provides public protection from overreaching lawyers. The Commission also recommends the deletion of other similar terms in current rule 1-400(D)(5) ["compulsion, intimidation, threats" and "vexatious conduct"] because it determined that the conduct described in those terms are already encompassed by recommended terms.
 - Cons: The new provision in subparagraph (b)(1) is not necessary, as it would already be covered by the prohibition on harassment in subparagraph (b)(2).
7. Recommend adoption of Model Rule 7.3(c). Proposed paragraph (c) largely carries forward current rule 1-400, Standard (5). It requires that every written, recorded or electronic communication from a lawyer seeking professional employment from a person known to be in need of legal services in a particular matter must include the word "Advertisement" or words of similar import. Modifications to the model rule provision include: (i) substitution of "any person" for "anyone"; (ii) insertion of the clause, "or words of similar import" [carried forward from Standard (5)]; and (iii) a clause at the end: "or unless it is apparent from the context that the communication is an advertisement."
- Pros: The provision carries forward the concept in current rule 1-400, Standard (5), which is intended to avoid members of the public from being misled into believing that a lawyer's solicitation is an official document that requires their response. Requiring the words "Advertising Material" on the envelope should permit recipients to discard the envelope without opening it if they are not interested in retaining the services of a lawyer. The addition of the ending clause to the effect that the context of the communication may obviate the need for the words recognizes that sometimes the purpose of the communication is obvious, e.g., if the lawyer's communication (e.g., a coupon for legal services) is sent with a packet including other coupon offers or a lawyer's communication is listed as a link in Google ads on a web page. Further, the addition of the clause "at the beginning and ending of any recorded or electronic communication" brings Standard (5) current by recognizing the prevalence of recorded and electronic communications in lawyer marketing today.

- Cons: The proposed paragraph does not include the requirement that the words “Advertising Material” must be in 12 point type. This requirement should be carried forward as including the words in 12 point type provides an absolute defense to an alleged violation of the rule.
8. Recommend adoption of Model Rule 7.3(d), as modified. Proposed paragraph (d) would permit a lawyer to participate in a pre-paid or group legal service plan even if the plan engages in real-time solicitation to recruit members.
- Pros: These plans hold promise for improving access to justice. Unlike a lawyer’s solicitation of a potential client for a particular matter where there exists a substantial concern for overreaching by the lawyer, there is little if any concern if the plan itself engages in in-person, live telephone or real-time electronic contact to solicit members in the organization. First, it is unlikely that a lawyer will be doing the solicitation on the plan’s behalf because a lawyer who participates in such plans is not permitted to own them. Second, the solicitation would generally not be of persons who are known to be in need of legal services. That is the purpose of pre-paid plans: to recruit members now with the understanding that legal services will be provided as part of the plan if the person might require them at some point in the future.
 - Cons: None identified.
9. Recommend adoption of paragraph (e), which provides a definition of “solicitation” for purposes of the rule. The proposed definition is derived in part from Model Rule 7.3, Cmt. [1].
- Pros: Paragraph (e)’s definition, in combination with Comment [1], clarifies that the rule is directed to regulating communications that are targeted to persons who are known to be in need of legal services as opposed to communications directed to the general public (e.g., billboard, website, etc.), which would come under proposed Rule 7.2. The definition and comment provide a straightforward distinction for when proposed Rule 7.3 should be applied as opposed to proposed Rule 7.2. Although there may be situations when rule 7.3 would apply to communications ostensibly directed to the general public (e.g., a billboard offer legal services near the site of a major accident), they do not justify qualifying the description of when rule 7.3 applies. In any event, most such examples will likely be directed marketing. For instance, the example used, a billboard near the scene of a major accident, is arguably not directed at the general public but at victims or relatives of victims of the accident.
 - Cons: None identified.
10. Recommend adoption of Comment [1], a modified version of Model Rule 7.3, cmt. [1].
- Pros: See “Pros” for paragraph (e), above.

- Cons: None identified.

11. Recommend adoption of Comment [2], a shortened version of Model Rule 7.3, Cmt. [5].

- Pros: Proposed Comment [2] provides an important clarification that a lawyer acting pro bono on behalf of a bona fide public or charitable legal services organization is not precluded under paragraph (a) from real-time solicitation of a potential plaintiff with standing to challenge an unfair law, e.g., school desegregation laws. In particular, the second sentence is an important clarification of the phrase: “when a significant motive for doing so is the lawyer’s pecuniary gain.” A shortened version of the first sentence of the Model Rule comment is included to place the second sentence in proper context. A citation to the Supreme Court’s *In re Primus* case, which distinguished such cases from those in which pecuniary gain is the primary motive for the solicitation, (see, e.g., *Ohralik v. Ohio State Bar Ass’n* (1978) 436 U.S. 447, a case decided the same day as *Primus*), is included as further clarification. This clarification can contribute to access to justice by alerting lawyers that real-time solicitations under conditions present in *Primus* are not prohibited.

- Cons: None identified.

12. Recommend adoption of Comment [3], a shortened version of Model Rule 7.3, Cmt. [7].

- Pros: Proposed comment [3] clarifies that a lawyer may directly contact representatives of organizations or groups that might be interested in establishing a group or prepaid legal service plan for its members. The concerns about overreaching are not present because the representatives act as a filter between the lawyer and those members of the public who actually might require legal services. Similar to comment [2], such communications can serve to increase access to justice.

- Cons: None identified.

13. Recommend adoption of Comment [4], derived from Model Rule 7.3, Cmt. [9], last sentence. The last sentence has been modified so as not to impose on a lawyer participating in such a plan a duty to “reasonably assure” the plan sponsors are complying with Rules 7.1, 7.2 and 7.3(b).

- Pros: The comment clarifies that regardless of whether the lawyer is providing services under the auspices of such a plan, the lawyer must comply with the cited rules. In addition to the Rules cited in the model rule comment, an additional reference is included to Rule 5.4, which regulates lawyer’s activities with nonlawyers.
- Cons: The provision should require that the lawyer make reasonable efforts to assure the plan is in compliance with the cited rules.

14. Recommend that Standards (3) and (4),⁸ both related to real-time communications with potential clients, not be carried forward.

- Pros: Both of these situations are clear violations of proposed Rule 7.3(a) or (b) and are not necessary as “presumptive” violations of the Rule. In fact, OCTC recognized this when it advised the first Commission that these particular Standards were no longer necessary.
- Cons: None identified.

B. Concepts Rejected (Pros and Cons):

1. Retain the savings clause in current rule 1-400(C) by carrying it forward in paragraph (a). Rule 1-400(C) provides:

“(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. (Emphasis added).

The issue is whether the italicized savings clause should be retained, as was done by first Commission.

- Pros: The first Commission explained its retention of the clause as follows:

“Paragraph (a) also adds the savings clause, “unless the communication is protected from abridgment by the Constitution of the United States or by the Constitution of the State of California,” language which is currently found in CRPC 1-400(C). It was suggested during Commission deliberations that the United States Supreme Court case, *Edenfield v. Fane* (1993) 507 U.S. 761, has arguably rendered prohibitions such as those found in Rule 7.3(a) constitutionally infirm and that the provision should be deleted. However, it was noted that this constitutional issue was one for the courts, not for the Commission, requiring a prediction of how a reviewing court might interpret the Rule. Nevertheless, it was determined that the constitutional issue would be adequately addressed and an “all or nothing” invalidation of the Rule

⁸ These standards provide the following situations are presumed violations of rule 1-400's prohibition on in-person or telephone communications with a potential client:

(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.

avoided by extending and including the savings clause that now appears in current CRPC 1-400(C).”

- Cons: The clause was added to the original California advertising rule in 1978 following the Supreme Court’s decision in *Bates v. State Bar of Arizona*. It continued vitality is questionable at best. Through its decisions during the decades since *Bates*, the Supreme Court has repeatedly held that a state’s regulation of a lawyer’s initiation of in-person or telephonic contact with a member of the public does not violate the First Amendment. The first Commission’s reliance on *Edenfield* requires an exceedingly liberal extension of that case to suggest that it calls into question Rule 7.3. On the contrary, it suggests no such thing. Rather, in that case the Court stated that a state regulation prohibiting accountants from cold-calling customers was unconstitutional. However, the Court expressly distinguished lawyers and accountants, the latter not being “skilled in the persuasive arts.” In light of the Court’s reasoning, it is not likely that Rule 7.3(a), which places reasonable restrictions on lawyer’s solicitations of business, will be found unconstitutional any time soon. Finally, the argument that the first Commission made should have applied equally to its proposed Rules 7.1, 7.2, 7.4 and 7.5, yet no savings clause was included in the first Commission’s versions of those rules.
2. Permit solicitations of nonlawyer professionals. Some have argued that *Edenfield v. Fane*, discussed in paragraph B.1, above, stands for the proposition that lawyers may solicit business from nonlawyer professionals who are less likely to be subject to overreaching by a lawyer.
- Pros: The Court’s holding in *Edenfield* that CPA’s cannot be prohibited from cold-calling potential clients should be extended to permit lawyers to solicit business from nonlawyer professionals.
 - Cons: See “Cons” in paragraph B.1, above.
3. Include legal referral services as coming within the safe harbor provision in proposed Rule 7.2(b).
- Pros: For example, it is possible that a representative of a legal referral service might during a Law Day function, where real-time legal assistance is provided to members of the public participating in the function, direct a member of the public to a lawyer for further assistance. This activity could be viewed as coming within the prohibition of paragraph (a). Given the role that lawyer referral services play in access to justice, lawyer referral services should be included in paragraph (d).
 - Cons: Lawyer referral services do not come within the rule’s prohibition and so need not be included in the paragraph (d) safe harbor. It will be a member of the public who initiates the contact with a referral service by either coming to the function or otherwise contacting the service, so paragraph (a)’s

prohibition would not apply. Moreover, determining what constitutes a "referral" activity can be complicated; including the concept in this Rule could cause unintended consequences. The safe harbor is appropriately limited to prepaid or group legal service plans. (See paragraph A.8, above.)

4. Carry forward the prohibition in current rule 1-400(B)(2)(b), which includes in the definition of "solicitation" a communication delivered in person or by telephone that is "(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."

- Pros: The Commission has been directed in its consideration of a rule concept to start with the relevant current rule. There is no evidence that this provision is no longer needed. Five other jurisdictions have a similar provision: Connecticut, Missouri, Montana, Rhode Island and South Carolina.
- Cons: Although the conduct described in 1-400(B)(2)(b) might give rise to a civil remedy for tortious interference with a contractual relationship, it does not belong in a disciplinary rule. Moreover, there are potential First Amendment issues with retaining this prohibition.

5. Include Model Rule 7.3, Comments [2], [3], [4], [6], [8].

- Pros: Model Rule Comments [2] and [3] provide the underlying policy rationale for the rule (prevent overreaching by lawyers when engaging in real-time solicitation of employment) and thus will help interpret and apply the rule. Comment [4] explains why a lawyer's use of advertising media to the general public is preferable to in-person solicitation. The first sentence of Comment [6] states the reason for prohibitions in subparagraphs (1) and (2) of paragraph (b) (potential abuse of permitted conduct). Comment [8] purports to explain how paragraph (c) should be interpreted.
- Cons: The black letter is sufficiently clear so as to render the listed comments unnecessary. Comments [2] and [3], which provide the underlying policy rationale, are not necessary to interpret or apply the rule. Comment [4] may provide a further justification for the prohibition on solicitation but does not explain or provide guidance in applying the rule. Comment [6] largely restates the blackletter of paragraph (b). Comment [8] states the obvious about paragraph (c), which can be implied from the blackletter.

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 addition of subparagraph (a)(1) is a substantive change. (See VIII.A.5, above.)
2. The addition of “close personal” in subparagraph (a)(2) is a substantive change. (See VIII.A.5, above.)
3. The addition of the term “real-time electronic contact” is a substantive change. (See VIII.A.4, above.)
4. The addition of paragraph (b)(1) is a substantive change. (See VIII.A.6, above.)
5. The addition of paragraph (d) is a substantive change. (See VIII.A.8, above.)
6. The deletion of the savings clause in rule 1-400(C) is a substantive change. (See VIII.B.1, above.)
7. The deletion of a definition of “solicitation” is a substantive change. (See VIII.B., above.)
8. The deletion of the concept in rule 1-400(B)(2)(b) is a substantive change. (See VIII.B.4, above.)

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.

3. Deleting rule 1-400, Standards (3) and (4) are non-substantive changes. (See VIII.A.14, above.)

E. Alternatives Considered:

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

XI. RECOMMENDATION AND PROPOSED BOARD RESOLUTION

Recommendation:

That the Board of Trustees of the State Bar of California adopt proposed Rule 7.3 [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 7.3 [1-400] in the form attached to this Report and Recommendation.