

**COMMISSION PROVISIONAL REPORT AND RECOMMENDATION:
RULE 7.4 [1-400(D)(6)]**

Commission Drafting Team Information

Lead Drafter: Carol Langford

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I. RELEVANT EXCERPTS FROM CURRENT CALIFORNIA RULE 1-400

Rule 1-400(D)(6) [Specialization Provision]

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(D) A communication or solicitation (as defined herein) shall not:

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- (6) State that a member is a “certified specialist” unless the member holds a current certificate as a specialist issued by the Board of Legal Specialization, or any other entity accredited by the State Bar to designate specialists pursuant to standards adopted by the Board of Trustees, and states the complete name of the entity which granted certification.

II. FINAL VOTES BY THE COMMISSION AND THE BOARD

Commission:

Date of Vote: October 21 & 22, 2016

Action: Recommend Board Adoption of Proposed Rule 7.4

Vote: 15 (yes) – 0 (no) – 0 (abstain)

Board:

Date of Vote: November 17, 2016

Action: Board Adoption of Proposed Rule 7.4

Vote: 14 (yes) – 0 (no) – 0 (abstain)

III. COMMISSION’S PROPOSED RULE 7.4 (CLEAN)

Rule 7.4 [1-400] Communication of Fields of Practice and Specialization

- (a) A lawyer shall not state that the lawyer is a certified specialist in a particular field of law, unless:
- (1) the lawyer is currently certified as a specialist by the Board of Legal Specialization, or any other entity accredited by the State Bar to designate specialists pursuant to standards adopted by the Board of Trustees; and

- (2) the name of the certifying organization is clearly identified in the communication.
- (b) Notwithstanding paragraph (a), a lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law. A lawyer may also communicate that his or her practice specializes in, is limited to, or is concentrated in a particular field of law, subject to the requirements of Rule 7.1.

IV. COMMISSION'S PROPOSED RULE 7.4
(REDLINE TO CURRENT CALIFORNIA RULE 1-400(D)(6))

Rule 7.4 [1-400(D)(6)] Communication of Fields of Practice and Specialization
Provision

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- (~~Da~~) A ~~communication or solicitation (as defined herein) shall not~~ lawyer shall not state that the lawyer is a certified specialist in a particular field of law, unless:

* * * * *

- (~~61~~) ~~State that a member is a "the lawyer is currently~~ certified specialist" unless the member holds a current — certificate as a specialist ~~issued~~ by the Board of Legal Specialization, or any other entity accredited by the State Bar to designate specialists pursuant to standards adopted by the Board of Trustees_; and ~~states the complete name of the entity which granted certification.~~
- (2) the name of the certifying organization is clearly identified in the communication.
- (b) Notwithstanding paragraph (a), a lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law. A lawyer may also communicate that his or her practice specializes in, is limited to, or is concentrated in a particular field of law, subject to the requirements of Rule 7.1.

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 questions whether this rule is necessary in light of rules 7.1, 7.2, and 7.3, but has no objection to the rule.
- **State Bar Court:** No comments were received from State Bar Court.

VII. PUBLIC COMMENTS & PUBLIC HEARING TESTIMONY

Four comments were received. One agreed with the proposed rule, two agreed only if modified, and one comment from OCTC did not indicate a position. A public comment synopsis table is provided at the end of this report.

VIII. RELATED CALIFORNIA LAW AND ABA MODEL RULE ADOPTIONS

Model Rule 7.4. The ABA Comparison Chart, entitled “Variations of the ABA Model Rules of Professional Conduct, Rule 7.4: Communication of Fields of Practice and Specialization,” revised April 9, 2015, is available at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_7_4.pdf
- Eight jurisdictions have adopted Model Rule 7.4 verbatim.¹ Twenty-three jurisdictions have adopted a slightly modified version of Model Rule 7.4.² Eighteen jurisdictions have adopted a version of the rule that is substantially different from Model Rule 7.4.³ Two jurisdictions do not have a version of the Model Rule 7.4.⁴

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

A. Concepts Accepted (Pros and Cons):

1. Recommend adoption of Model Rule 7.4, as modified.

- **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

¹ The eight states are: Delaware, Idaho, Kansas, Minnesota, Nebraska, New Mexico, Utah, and Wisconsin.

² The twenty-three states are: Arizona, Arkansas, Colorado, Connecticut, Hawaii, Indiana, Iowa, Kentucky, Maine, Michigan, Montana, New Jersey, New York, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Dakota, Vermont, Washington, West Virginia, and Wyoming.

³ The eighteen jurisdictions are: Alabama, Alaska, California, Florida, Georgia, Illinois, Louisiana, Maryland, Massachusetts, Mississippi, Missouri, Nevada, New Hampshire, North Carolina, South Carolina, Tennessee, Texas and Virginia.

⁴ The two jurisdictions are: District of Columbia and Oregon.

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 Model Rule 7.4(d), as modified, as proposed rule 7.4(a). Paragraph (a)(1) has been modified to state the specific regulatory framework for specialization in California. Similar language can be found in current rule 1-400(D)(6).
- Pros: Paragraph (a) carries forward the substance of the current California rule addressing the requirements for when a lawyer wishes to advertise as a “certified specialist.” Because this type of designation signifies an advanced degree of knowledge and experience, stating in a rule of professional conduct what is required in order to hold oneself out as a “certified specialist” helps protect the public from being misled. In addition, the language proposed explicitly refers to a lawyer being “currently certified” and this affords public protection against a lawyer who might otherwise erroneously believe it is proper to rely upon a prior certificate that has lapsed due to a failure to renew or has been revoked or is no longer valid for any other reason.

Note: The Commission recommends switching the order of Model Rule 7.4(a) and (d) to conform to the rule style of the proposed Rules under which the prohibition is stated first and any exceptions to that prohibition follow.

- Cons: The activity described in proposed paragraph (a) is addressed in proposed rule 7.1. Moreover, the language me too narrow. For example, it is

possible for a lawyer who is certified as a specialist in another jurisdiction to truthfully state that he or she is a specialist certified by an entity accredited in that jurisdiction. But because the other jurisdiction's entity was not accredited by the State Bar of California, such statement would violate the rule.

3. Recommend adoption of ABA Model Rule 7.4(a), as modified, as paragraph (b) of the proposed Rule. ABA Model Rule 7.4(a) permits a lawyer to communicate that the lawyer does or does not practice in particular fields of law. Similar to the first Commission, a sentence has been added that provides a lawyer may engage in a common practice among lawyers who market their availability by communicating that the lawyer's practice is limited to or concentrated in a particular field of law.
 - Pros: Permitting a lawyer to indicate his or her area of practice, or state that he or she will not accept matters except in a specific field, in communications about the lawyer's services will help educate consumers about the legal services offered by a lawyer. The statements permitted by this rule remain subject to proposed rule 7.1, which prohibits false or misleading communications. In addition, see Business and Professions Code § 6158.2(b).⁵
 - Cons: Proposed paragraph (b) states a permissive standard rather than a disciplinary standard. Moreover, to the extent the permitted conduct described in paragraph (b) is false or misleading, it is addressed in proposed rule 7.1.

B. Concepts Rejected (Pros and Cons):

1. Recommend adoption of ABA Model Rule 7.4(b), which permits use of the designation "Patent Attorney" or a substantially similar designation.
 - Pros: This permitted designation has long been recognized in the profession. Its deletion from a rule that is plainly derived from the Model Rule might suggest that California does not permit the designation.
 - Cons: ABA Model Rule 7.4(b)'s language is permissive and the example contained therein is adequately addressed by proposed rule 7.4(a). Any use of such designations would remain subject to rule 7.1.

⁵ Business and Professions Code § 6158.2(b):

The following information shall be presumed to be in compliance with this article for purposes of advertising by electronic media, provided the message as a whole is not false, misleading, or deceptive:

(b) Fields of practice, limitation of practice, or specialization.

2. Recommend adoption of ABA Model Rule 7.4(c) permitting use of the designation “Admiralty,” “Proctor in Admiralty” or a substantially similar designation.
 - Pros: This permitted designation has long been recognized in the profession. Its deletion from a rule that is plainly derived from the Model Rule might suggest that California does not permit the designation.
 - Cons: ABA Model Rule 7.4(c)’s language is permissive and the example contained therein is adequately addressed by proposed rule 7.4(a). Any use of such designations would remain subject to rule 7.1.
3. Whether to include any of the Comments to ABA Model Rule 7.4.
 - Pros: The Model Rule comments provide helpful examples in interpreting and applying the Rule.
 - Cons: The provisions of proposed rule 7.4 are self-explanatory and do not require a Comment to clarify them further.

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. None of the proposed provisions would be a substantive change in the current law of California regarding the communication of fields of practice and specialization.

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.

In addition, the Commission was provided with the following three alternatives, which were considered by the drafting team assigned to consider Model Rule 7.4. However, no motion was made to recommend adoption of any of these alternatives.

1. **Alternative 1**

Rule 7.4 Communications of Specialization

A lawyer shall not state or imply that the lawyer is certified as a specialist in a particular field of law, unless:

- (a) the lawyer is currently certified as a specialist by the Board of Legal Specialization, or any other entity accredited by the State Bar to designate specialists pursuant to standards adopted by the Board of Trustees; and
- (b) the name of the certifying organization is clearly identified in the communication.

This alternative is materially different from the proposed rule because it is silent on the issue of whether a lawyer may communicate limitations on field of practice. Compare Business and Professions Code § 6158.2(b) that expressly addresses this issue for purposes of electronic media advertising by lawyers.

2. **Alternative 2**

Rule 7.4 Communications of Specialization

A lawyer shall not state or imply that the lawyer is certified as a specialist in a particular field of law, unless:

- (a) the lawyer is currently certified as a specialist by the Board of Legal Specialization, or any other entity accredited by the State Bar to designate specialists pursuant to standards adopted by the Board of Trustees; and
- (b) the name of the certifying organization is clearly identified in the communication.

Comment

[1] A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law. A lawyer may also communicate that his or her practice is limited to or concentrated in a particular field of law, subject to the requirements of rule 7.1.

This alternative is materially different from the proposed rule because it relegates to a comment the issue of whether a lawyer may communicate limitations on field of practice. Compare Business and Professions Code § 6158.2(b) which is black letter law on this issue in the context of electronic media advertising by lawyers.

3. **Alternative 3**

Do not adopt a rule addressing fields of practice or specialization. This rule is redundant and not necessary because the conduct is already addressed by proposed rule 7.1 and the State Bar Act in section 6158.2(b).

This alternative is materially different from the proposed rule because it would omit the existing regulation of the specialization issue in current rule 1-400(D)(6) and it would be silent on the issue of limitations of field of practice that has an analogous precedent in Business and Professions Code § 6158.2(b).

X. RECOMMENDATION AND PROPOSED BOARD RESOLUTION

Recommendation:

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

Proposed Resolution:

RESOLVED: That the Board of Trustees of the State Bar of California adopts proposed Rule 7.5 [1-400] in the form attached to this Report and Recommendation.