

## COMMISSION PROVISIONAL REPORT AND RECOMMENDATION: RULE 7.5 [1-400]

### Commission Drafting Team Information

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### **I. RELEVANT EXCERPTS FROM CURRENT CALIFORNIA RULE 1-400**

There is no current California rule that specifically addresses the subject matter of Model Rule 7.5, from which proposed Rule 7.5 (“Firm Names and Trade Names”) is derived. However, the topic is addressed in both the black letter text of, and Standards to, current rule 1-400. Rule 1-400(A) provides in relevant part:

- (A)<sup>1</sup> For purposes of this rule, “communication” means any message or offer made by or on behalf of a member concerning the availability for professional employment of a member or a law firm directed to any former, present, or prospective client, including but not limited to the following:
- (1) Any use of *firm name, trade name*, fictitious name, or *other professional designation* of such member or law firm; or
  - (2) Any *stationery, letterhead*, business card, sign, brochure, or other comparable written material describing such member, law firm, or lawyers; or (Emphasis added)

\* \* \*

In addition, Standards (6) through (9) of rule 1-400 provide that the following communications “are presumed to be in violation of rule 1-400”:

- (6) A “communication” in the form of a firm name, trade name, fictitious name, or other professional designation which states or implies a relationship between any member in private practice and a government agency or instrumentality or a public or non-profit legal services organization.

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<sup>1</sup> California rule 1-400(D) states that such communications shall not:

- (1) Contain any untrue statement; or
- (2) Contain any matter, or present or arrange any matter in a manner or format which is false, deceptive, or which tends to confuse, deceive, or mislead the public; or
- (3) Omit to state any fact necessary to make the statements made, in the light of circumstances under which they are made, not misleading to the public . . .

(7) A “communication” in the form of a firm name, trade name, fictitious name, or other professional designation which states or implies that a member has a relationship to any other lawyer or a law firm as a partner or associate, or officer or shareholder pursuant to Business and Professions Code sections 6160-6172 unless such relationship in fact exists.

(8) A “communication” which states or implies that a member or law firm is “of counsel” to another lawyer or a law firm unless the former has a relationship with the latter (other than as a partner or associate, or officer or shareholder pursuant to Business and Professions Code sections 6160-6172) which is close, personal, continuous, and regular.

(9) A “communication” in the form of a firm name, trade name, fictitious name, or other professional designation used by a member or law firm in private practice which differs materially from any other such designation used by such member or law firm at the same time in the same community.

## **II. FINAL VOTES BY THE COMMISSION AND THE BOARD**

### **Commission:**

Date of Vote: October 21 & 22, 2016

Action: Recommend Board Adoption of Proposed Rule 7.5

Vote: 15 (yes) – 0 (no) – 0 (abstain)

### **Board:**

Date of Vote: November 17, 2016

Action: Board Adoption of Proposed Rule 7.5

Vote: 14 (yes) – 0 (no) – 0 (abstain)

## **III. COMMISSION’S PROPOSED RULE 7.5 (CLEAN)**

### **Rule 7.5 [1-400] Firm Names and Trade Names**

- (a) A lawyer shall not use a firm\* name, trade name or other professional designation that violates Rule 7.1.
- (b) A lawyer in private practice shall not use a firm\* name, trade name or other professional designation that states or implies a relationship with a government agency or with a public or charitable legal services organization, or otherwise violates Rule 7.1.
- (c) A lawyer shall not state or imply that the lawyer practices in or has a professional relationship with a law firm\* or other organization unless that is the fact.

## Comment

The term “other professional designation” includes, but is not limited to, logos, letterheads, URLs, and signature blocks.

### IV. COMMISSION’S PROPOSED RULE 7.5 (REDLINE TO MODEL RULE 7.5)

#### Rule 7.5 [1-400] Firm Names and ~~Letterheads~~Trade Names

- (a) A lawyer shall not use a firm\* name, ~~letterhead~~trade name or other professional designation that violates Rule 7.1.
- ~~(b)~~ (b) A ~~trade name may be used by a~~ lawyer in private practice ~~if it does not imply a connection shall not use a firm\* name, trade name or other professional designation that states or implies a relationship~~ with a government agency or with a public or charitable legal services organization ~~and is not, or~~ otherwise ~~in violation of~~violates Rule 7.1.
- ~~(b)~~ A law firm with offices in more than one jurisdiction may use the same ~~name or other professional designation in each jurisdiction, but identification of the lawyers in an office of the firm shall indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located.~~
- ~~(c)~~ The name of a lawyer holding a public office shall not be used in the name of a law firm, or in communications on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.
- ~~(dc)~~ (d) ~~Lawyers may~~A lawyer shall not state or imply that ~~they practice in a partnership~~the lawyer practices in or has a professional relationship with a law firm\* or other organization ~~only when~~unless that is the fact.

## Comment

The term “other professional designation” includes, but is not limited to, logos, letterheads, URLs, and signature blocks.

~~[1] A firm may be designated by the names of all or some of its members, by the names of deceased members where there has been a continuing succession in the firm’s identity or by a trade name such as the “ABC Legal Clinic.” A lawyer or law firm may also be designated by a distinctive website address or comparable professional designation. Although the United States Supreme Court has held that legislation may prohibit the use of trade names in professional practice, use of such names in law practice is acceptable so long as it is not misleading. If a private firm uses a trade name that includes a geographical name such as “Springfield Legal Clinic,” an express disclaimer that it is a public legal aid agency may be required to avoid a misleading implication. It may be observed that any firm name including the name of a deceased partner is, strictly speaking, a trade name. The use of such names to designate law firms has proven a~~

~~useful means of identification. However, it is misleading to use the name of a lawyer not associated with the firm or a predecessor of the firm, or the name of a nonlawyer.~~

~~[2] With regard to paragraph (d), lawyers sharing office facilities, but who are not in fact associated with each other in a law firm, may not denominate themselves as, for example, "Smith and Jones," for that title suggests that they are practicing law together in a firm.~~

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

## **VII. PUBLIC COMMENTS & PUBLIC HEARING TESTIMONY**

Four comments, including the above comment from OCTC, were received. Three comments agreed with the proposed rule. One comment agreed only if modified. A public comment synopsis table, with the Commission's responses to each comment, is provided at the end of this report.

## **VIII. RELATED CALIFORNIA LAW AND ABA MODEL RULE ADOPTIONS**

**Model Rule 7.5** The ABA Comparison Chart, entitled "Variations of the ABA Model Rules of Professional Conduct, Rule 7.5: Firm Name and Letterheads," revised April 9, 2015, is available at:

- [http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/mrpc\\_7\\_5.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_7_5.pdf)
- Twenty-four jurisdictions have adopted Model Rule 7.5 verbatim.<sup>2</sup> Twenty jurisdictions have adopted a slightly modified version of Model Rule 7.5.<sup>3</sup> Seven

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<sup>2</sup> The twenty-four jurisdictions are: Arizona, Arkansas, Colorado, Connecticut, Delaware, District of Columbia, Idaho, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, New Mexico, Oklahoma, South Carolina, Tennessee, Utah, Vermont, Washington, West Virginia, Wisconsin, and Wyoming.

jurisdictions have adopted a version of the rule that is substantially different from Model Rule 7.5.”<sup>4</sup>

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

**A. Concepts Accepted (Pros and Cons):**

1. Recommend adoption of the first sentence of Model Rule 7.5(a) as proposed paragraph (a), but substitute “trade name” for the term “letterhead,” and make a similar change to the rule title.

- Pros: The provision clarifies that any use of a firm name, trade name or other professional designation is a “communication” within the meaning of proposed rule 7.1(a) and, therefore, may not be false or misleading. As a general prohibition concerning firm names, in part this carries forward current rule 1-400’s restrictions on firm names more specifically stated in Standard No. 9 (re misleading use of multiple names for the same law practice). The substitution of “trade name” for “letterhead” is intended to update the rules in recognition that in the age of the Internet and electronic communications, lawyers’ letterheads have fallen into disuse. See also discussion of the proposed comment to the rule.

- Cons: None identified.

2. Recommend adoption of the second sentence of Model Rule 7.5(a), as modified, as proposed paragraph (b). The second sentence of Model Rule 7.5(a) has been modified so that it is prohibitory rather than permissive. In addition, the phrase “states or” has been added to “implied” so that the phrase is used consistently in the rules. (see, 7.5(c) and 7.4(b)).

- Pros: Proposed paragraph(b) carries forward the concept that is found in current rule 1-400, Standard (6), which provides that the following communication is presumed to be in violation of rule 1-400:

(6) A “communication” in the form of a firm name, trade name, fictitious name, or other professional designation which states or implies a relationship between any member in private practice and a government agency or instrumentality or a public or non-profit legal services organization.

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<sup>3</sup> The twenty jurisdictions are: Alaska, Georgia, Hawaii, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New York, North Carolina, North Dakota, Oregon, Pennsylvania, Rhode Island, South Dakota, and Virginia.

<sup>4</sup> The seven jurisdictions are: Alabama, California, Florida, Indiana, New Jersey, Ohio, and Texas.

In addition to making the second Model Rule sentence prohibitory, the Commission recommends assigning the provision its own paragraph to set apart this specific prohibition, which is intended to prevent misleading the public into believing a lawyer has relationships that will enhance that lawyer's ability to achieve satisfactory results in a legal representation..

- Cons: The activity described in paragraph (b) is already more generally addressed in proposed rule 7.1.
3. Recommend adoption of Model Rule 7.5(d), as modified, as proposed rule 7.5(c). The paragraph has been modified to make the clause prohibitory rather than permissive.
- Pros: Proposed paragraph (c) carries forward the concepts that are found in current rule 1-400, Standards (7) and (8), which provide that the following communications are presumed to be in violation of rule 1-400:

(7) A "communication" in the form of a firm name, trade name, fictitious name, or other professional designation which states or implies that a member has a relationship to any other lawyer or law firm as a partner or associate, or officer or shareholder pursuant to Business and Professions Code sections 6160-6172 unless such relationship in fact exists.

(8) A "communication" which states or implies that a member or law firm is "of counsel" to another lawyer or a law firm unless the former has a relationship with the latter (other than as a partner or associate, or officer or shareholder pursuant to Business and Professions Code sections 6160-6172) which is close, personal, continuous, and regular.

These are important prohibitions that are intended to prevent misleading the public into believing a lawyer has relationships that will enhance that lawyer's ability to achieve satisfactory results in a legal representation.

- Cons: The activity described in paragraph (c) is already more generally addressed in proposed rule 7.1.
4. Recommend adoption of the proposed comment, which explains the scope of the term "other professional designation."
- Pros: With the advent of the Internet, the means by which lawyers may designate themselves or their law firms has expanded well beyond the traditional letterhead. The proposed comment provides interpretative guidance concerning the rule's application by identifying various kinds of professional designations that are subject to the proposed rule.
  - Cons: None identified.

## B. Concepts Rejected (Pros and Cons):

1. Include ABA Model Rule 7.5(b), which requires law firms with offices in more than one jurisdiction to identify the jurisdictional limitations of lawyers in an office who are not licensed to practice in the jurisdiction where the office is located.
  - Pros: Although a failure to include an appropriate disclaimer about jurisdictions in which the lawyer is authorized to practice is a violation of rule 7.1(a) as being misleading, this rule should expressly state that specific requirement, particularly in light of the widespread adoption of Model Rule 7.4(b).
  - Cons: The provision is unnecessary because a failure to include an appropriate disclaimer about where a lawyer is authorized to practice would be inherently misleading under proposed rule 7.1(a).
2. Include ABA Model Rule 7.5(c) which prohibits using the name of a lawyer holding public office in the name of a law firm, or in communications on the its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the law firm.
  - Pros: Including this specific restriction should help lawyers avoid communications that state truthful facts but nevertheless might be difficult to present to the public in a manner that does not create unjustified expectations.
  - Cons: There is precedent for rejecting this rule. The first Commission included a counterpart to Model Rule 7.5(c) and the Board adopted it. However, after the Board's adoption of Rule 7.5(c), Legislative staff provided comment on the policy that would result from the proposed rule's implementation in California. Specifically, Legislative staff inquired as to whether the Model Rule has been applied in Model Rule jurisdictions as a complete ban and prior restraint on lawyer speech, as opposed to a standard that would be aligned with the commercial speech test for false, deceptive or misleading communications. It was observed that if the rule is susceptible to being applied as a ban, then that policy would be contrary to existing California law set by current rule 1-400 because the current rule prohibits a law firm name that includes the name of a lawyer holding public office *only if* that law firm name is a false, deceptive, misleading or confusing message concerning the availability of legal services. In addition, Legislative staff also observed that the language used in Rule 7.5(c) might be challenged as vague. In particular, there is concern about the undefined, yet critical, phrases "substantial period" and "not actively and regularly practicing."
3. Include the comments to ABA Model Rule 7.5.
  - Pros: Although the first Model Rule comment is largely expository, the second comment provides interpretative guidance regarding the rule's application to

office-sharing arrangements.

- Cons: The provisions of proposed rule 7.5 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. Although the proposed rule would create a new rule addressing the use of firm names and letterheads, none of these provisions would be a substantive change in the current law of California regarding the communication and use of firm names and letterheads.

### **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. COMMISSION RECOMMENDATION FOR BOARD ACTION**

##### **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.