AGENDA MATERIALS FOR

III.D. Rule 1-400 [7.1 – 7.5]
(Advertising and Solicitation)

- Executive Summary, Draft 2.2 (01/04/16)
- Langford Memo, Draft 1.1 (12/7/15)
- Tuft Memo (12/29/15)
- Attachments:
  - Current Rule 1-400
  - RRC1 Proposed Rules 7.1 to 7.5
  - ABA Model Rules 7.1 to 7.6
  - Assignment Document

MEMORANDUM
RE: EXECUTIVE SUMMARY ON RULE 1-400
JANUARY, 2016

The drafting team for Rule 1-400 (Advertising) met via telephone conference to discuss the Commission's options with regard to the Rule. The consensus was that it would be better to have uniformity with the ABA structure (i.e., similar numbering, i.e., "Rule 7.x") so that lawyers at least know where to look in our Rules to locate a particular advertising issue. However, before proceeding with the detailed drafting of a proposed rule or rules, the drafting team has decided to ask the Commission to consider and resolve two overarching issues and provide the drafting team with guidance on how to proceed.

Issue 1: Which Advertising Rule Approach To Recommend? The drafting team requests that the Commission weigh and determine which of the three alternative approaches that the drafting team has identified the Commission should recommend:

1) Retain rule 1-400 as it currently is in California, i.e., making the global changes (e.g., "lawyer" for "member," etc.) that the Commission already supports and renumbering it 7.1. This means a single rule with all of the advertising concepts in one place, and with the standards intact, or revised to eliminate certain of the standards as suggested by OCTC. Note that OCTC has changed their position on which presumptions they would eliminate since they last commented on RRC1's proposal in 2010, when it approved the elimination of about half of the current standards. They now want most of the standards retained in the Rule.

2) Take the RRC1 approach, which would retain much of the substance of current rule 1-400 (e.g., definition of "communication" and expanded definition of communications that are false or misleading) but adopt the ABA Model Rule structure (i.e., addressing different marketing concepts in several distinct rules: advertising, solicitation, specialization and firm names & letterheads) and numbering (i.e., Rules 7.1 through 7.5). I call it the RRC1 "mash-up" approach and I don't use the term derogatorily. This approach would retain about half of the California standards as standards, with most of the remaining standard concepts put in the black letter or comments of the several rules.

3) Recommend adoption of the ABA Model Rule approach both in concept (several distinct rules) and numbering. This keeps to the idea of national uniformity, although in truth, there is little national uniformity in lawyer advertising rules. States seem to want to "go their own way." This means that there would be no advertising standards as found in current rule 1-400.

Issue 2: Should the Standards in Current Rule 1-400 Be Retained in Whole or In Part, or Deleted? In considering the different approaches, the Commission should also consider whether or how the Standards to current rule 1-400 should be treated. The drafting team, with input provided by OCTC, discussed whether the Standards should

be kept or deleted. Team members Carol Langford and Mark Tuft have submitted memos stating their positions with regard to the current standards. The drafting team submits to the Commission the issue whether the presumptions in the Standards should be retained and, if yes, whether all of the presumptions should be retained.

Carol Langford believes that if the Commission were to recommend that the standards be eliminated, then the State Bar will likely need to form a separate task force or Commission to focus on lawyer marketing. Current rule 1-400 is a complex Rule that incorporates concepts of constitutional law. The marketing regulatory structure in California also includes provisions of the Business & Professions Code that specifically address advertising. Further, lawyer marketing can involve conduct that poses a great potential to harm the public. Harm to the public means the legislature and Supreme Court will examine any Rule change closely.

Carol Langford also believes that the Supreme Court of California will be concerned with any changes to rule 1-400 that would entirely delete standards designed to protect the public.

Mark Tuft favors Alternative 3, i.e., structuring the advertising rules based on Model Rules 7.1-7.5 with minor variations to conform to California law. He believes that the advent of the Internet has rendered the current California advertising regime obsolete and that the Rules need to be revised to better pair regulation with the realities of the marketplace. He also takes the position that the Model Rule approach eliminates the need for most of the rule 1-400 standards. At a minimum, he notes that the regulation of advertising on the one hand, and the regulation of solicitation and targeted communications, should be addressed in separate rules and not conflated as they are in current rule 1-400.

MEMORANDUM

TO: RULES REVISION COMMISSION
FM: CAROL LANGFORD
RE: LEGAL ADVERTISING
DATE: JANUARY 2015

The Drafting Team for Rule 1-400 (the advertising Rule) consisting of Carol Langford, Mark Tuft and Howard Kornberg met via telephone conference to determine if we could come to a consensus about changes we believe should be made to the Rule. As we discussed the various options, we found that we could not go forward with drafting a Rule until we have a vote from the Commission on how they would like us to proceed, as discussed more fully below. We also determined that the Commission would need a memorandum on the issues that arise with this Rule prior to voting on how to go forward with the Rule in order to make a more educated vote.

RULE 1-400 HISTORY

Before I discuss the Commission's options, it is important to understand the nature and history of this Rule. The Rule is attached as Exhibit A. Rule 1-400 as adopted in 1983 (the current Rule) uses the "false and misleading" approach as discussed in the *Bates v. Arizona*, 433 U.S. 350 (1977) case. The Rule first defines what communications and solicitations are, and then states what a lawyer should not do with regard to each. The Rule then states that the Board of Governors has adopted "standards" that are presumed to be in violation of Rule 1-400. These standards, also called "presumptions," are rebuttable but they do shift the burden from the State Bar to the lawyer to show that the lawyer has not violated the Rule. They assist in the enforcement of the Rule and have no effect in any other court or context.

Note that this Rule when adopted was different from the ABA Model Code 2-101 series of advertising rules which required lawyers to advertise in a "dignified manner" and listed out what a lawyer can and should do to comply. Despite the success of the Code some lawyers felt that the ABA had not progressed enough in articulating a modern set of standards. Thus, in 1977, only eight years after passage of the Code, the ABA formed another Rules Commission. The Model Rule series of advertising rules that resulted turned the Model Code on its head and stated all the things that a lawyer should not do when advertising.

Our Rule 1-400 is more similar to the newer ABA Model Rule series, even though we capture all advertising prohibitions in one Rule. Arguably, since our Rule is a disciplinary rule, it should give guidance and have standards that explain what a lawyer should not do. However others, including the Association of Professional Responsibility Lawyers ("APRL") comprised mainly of legal malpractice defense lawyers and State Bar defense lawyers, have recently contended in a written report that advertising rules and standards across the country go too far and are not helpful in an age of modern technology. They argue that a simple "false and misleading" standard alone should cover all advertising violations, and that the presumptive

nature of the standards might violate the First Amendment. The APRL report is attached as Exhibit B. Note that it discusses advertising, but not solicitation. While I am skeptical of the APRL report, Mr. Tuft and Mr. Kornberg from my Rule drafting team support its conclusions. They favor dispensing with the standards entirely in favor of a broad "false and misleading" standard for any form of advertising.

The Supreme Court's Charge to the Commission

I, as team leader, believe the APRL report fails to make a convincing case for wholesale changes to the current rule. The APRL report's recommendation would give less guidance to lawyers and the public about conduct that historically has been found to include areas of abuse and confusion. First, my notes show that our charge from the Supreme Court was not to change Rules unless we could make them better, clearer, and more in conformity with the law. *There has not been a single case in California or elsewhere that has held that California Rule 1-400 is unconstitutional, and it has been in effect 22 years.* California's unique use of standards that shift the burden to respondent attorneys has been used in the State Bar Court without constitutional challenge. (See *In the Matter of Respondent V, 3 Cal. State Bar Ct. Rptr. 442 (1995); see also the concurring Opinion by Judge Norian and Jude Stovitz.*) Nor has any court found them to be unclear or unworkable.

This Rule was reviewed in 1993 by Erwin Chemerinsky, the leading California and national authority on constitutional law known to all on this Commission. He supported Rule 1-400 and found nothing unconstitutional in it. He did quibble with the "certified specialist" language of standard 11 which was later repealed in 1997 by the California Supreme Court. I am certain that Mr. Chemerinsky would have been very critical of Rule 1-400 had he thought it was unconstitutional. See Erwin Chemerinsky's comments attached as Exhibit C.

But long before Mr. Chemerinsky looked at the Rule Kurt Melchior in 1978 discussed the standards in a report he authored at that time. In footnote 31 of his report, attached as Exhibit D, he describes the intent of the standards as defined by Evidence Code section 605 - to support a public policy. Here they support the policy of protecting the public from harm caused by deceptive advertising, because they make it known and clear to the public what lawyers cannot do.

In footnote 32 Mr. Melchior likens our Rule to those of the Federal Trade Commission (FTC). The FTC has the power to compel advertisers to provide substantiation for advertising statements which may be deceptive - just like our standards - citing to 15 U.S.C.A. sections 41-46, and 47-48. While the FTC section numbers may have changed, their substance is the same now but in Title 51. The FTC can still require an advertiser to answer to an alleged "misleading" complaint as a preliminary step in enforcement. So they can, for example, tell an advertiser to cease and desist or they can send a notice to correct a misrepresentation. An example would be if a car is advertised to be "eco-friendly" and it has not passed an emissions test. The FTC could demand the public know this, before any trial on whether the statement was false or misleading.

An example in our Rule 1-400 that is similar to FTC law would be standard five requiring a lawyer to put "Advertisement" on an envelope in a targeted mailing, such as to homeowners losing their home to foreclosure. That standard is there because those notices were found to inspire fear in the recipient. Thus, if a lawyer doesn't put "Advertisement" on the envelope, she

has to tell the Bar why it is not misleading to fail to comply. The standard merely creates a presumption that the lawyer has violated the Rule, shifting the burden to the lawyer to show it does not mislead; again similar to FTC regulations.

The FTC itself is active in challenging statutes that propose or promulgate questionable rules. (See list compiled by the ABA Center on Professional Responsibility posted at: http://www.americanbar.org/groups/professionalresponsibility/resources/professionalism/professionalism ethics in lawyer advertising/FTC lawyerAd.html.) **It is very telling that California is not listed as a state challenged by the FTC for having Rule 1-400 and the advertising standards.**

Why shouldn't we have a presumption of over-reaching when lawyers warn potential clients of a catastrophe - clients who might not understand the law and their rights? The Commissions in 1978, 1983 and RRC1 all had this in mind when they conceived and reviewed the Rule, and did not take out the presumptions, although some were made comments.

Note that many states have "Bar guidelines" similar to our advertising standards, and some states require that advertisements be pre-approved by their Bar (not a requirement in California).

OCTC Input

Prior to writing this memorandum I sought the input of Ms. Jayne Kim, the Chief Trial Counsel of the State Bar. Specifically, I asked her whether she would agree to Rule 1-400 being changed to eliminate the standards. I also asked her what particular standards she thought could be eliminated in the current Rule, as unnecessary to enforcement. Last, I asked her why the State Bar wanted to keep the standards.

Her response was enlightening. First, she said that there were standards which were not needed because the conduct involved was in and of itself deceptive. She was willing to not protest us dropping standards (3) (when a communication is delivered to someone without the ability to exercise reasonable judgment because of infirmity, mental illness, and the like), standard (9) (where a lawyer uses a name or designation which differs materially from that used at the same time in the same community) and standard (10) (the improper calling yourself or your firm a lawyer referral service).

However, she made it clear that she absolutely wants the remaining standards to be kept in. From her perspective, OCTC values the standards as they serve multiple purposes such as to:

- provide guidance to attorneys to avoid potential violations
- educate the general public about what types of conduct may violate an attorney's ethical duties and
- assist OCTC in evaluation and resolution of complaints involving attorney advertising matters at the intake level.

Ms. Kim finds most helpful those standards that address issues of disclaimers, clarity and accuracy in advertising and reasonable time, place and manner restrictions. Ms. Kim wants the Rule standards to be kept in place so that the public can be adequately protected from harm.

In the previous Commission draft (RRC1) OCTC was willing to let go of standards 3,4,7,8,9, and 10. But it is important to understand the backdrop of the willingness to drop 7,8,

and 9. At that time, OCTC had a large backlog of unpursued complaints and advertising enforcement was reduced in favor of misappropriation of funds matters, unless there was a massive advertising fraud. Usually, a warning letter was given to the offending lawyer. They agreed to let go of those standards only because they were looking at it from the perspective of what the Rule might invite in terms of complaints that they would need to dispose of. If the complaint did not involve defrauding a senior into paying a lawyer for doing a declaration of homestead to avoid foreclosure or the like then it was swiftly dispensed with.

Not so anymore where the backlog has been reduced somewhat and the Bar justifiably views advertising violations as inciting public disregard of the Bar if they are not enforced. The recent audit of the Bar resulted in a critical report that ended by finding the Bar not protecting the public enough with their disciplinary system. They suggested the public might do a better job of disciplining lawyers.

The public - with no experience in law or the lawyer-client relationship - should not have to feel that they have to step in to discipline lawyers. Eating away at a Rule that protects the public will open that door.

Advertising: The Central Hudson case and it's progeny

There are many cases on advertising and solicitation both in the United States Supreme Court and in federal and state courts. Not a single one of those cases show a need to change our advertising rule. From this page to page 12 of this memorandum I will discuss the relevant cases on advertising and the cases that show there is no need to radically revise our Rule. From page 12 on I will discuss the other issues our team discussed and then advise you on what I believe to be the best next step in our drafting.

The "lodestar" case on advertising is *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980). There the Court laid out a four part test for determining when restrictions on commercial speech violate the First Amendment of the United States Constitution. (Note that this case has been around for 35 years and our advertising Rule has never been found in any court to have not passed *Central Hudson* muster.) The court in *Central Hudson* ruled that a regulation that completely banned an electric utility from advertising to promote the use of electricity violated the First and Fourteenth Amendments.

The Court set forth a four part analysis for whether an advertising ban is unconstitutional as follows: 1) Is the expression protected by the First Amendment? For speech to come within that provision, it must concern lawful activity and not be misleading. 2) Is the asserted governmental interest substantial? 3) Does the regulation directly advance the governmental interest asserted? and 4) Is the regulation more extensive than is necessary to serve that interest? *Id.* at 566.

Commercial speech however, is linked inextricably with the commercial arrangement it proposes, a holding in *Friedman v. Rogers,* 440 U.S. 1, 10, n. 9 (1979), so the state has an interest it. "For this reason, laws restricting commercial speech, unlike laws burdening other forms of protected expression, need only be tailored in a reasonable manner to serve a substantial state interest in order to survive First Amendment scrutiny." *Board of Trustees of State Univ. of New York v. Fox,* 492 U.S. 469 (1989); *Central Hudson*, supra, at 564. Note that states have generally an unfettered right to prohibit inherently or actually misleading

commercial speech. See, e.g., *Edenfield v. Fane*, 507 U.S. 761 at 769: "There is no question that the [the State's] interest in ensuring the accuracy of commercial information in the marketplace is substantial." In *Florida Bar v. Went For It*, 515 U.S. 618 (1995) the United States Supreme Court saw a substantial interest "in preventing the erosion of confidence in the [legal] profession." *Florida Bar*, 515 U.S. at 635.

Courts following *Central Hudson* using its test have both supported legal advertising and struck it down. None of the cases that struck the advertising down involved advertising that contained language that was similar to the standards in California's advertising Rule. Not a single one. For example, in 1982 the Supreme Court in *In re RMJ* 455 U.S. 191 (1982) found that a lawyer who 1) listed in his advertisements areas of practice that included words like "personal injury" and "real estate" instead of "tort law" and "property law" and 2) listed where he was licensed was not misleading the public. They also found that the Missouri Rule involved that provided an absolute prohibition on the advertising of practice areas, where the lawyer is licensed and the mailing of announcements to the general public was unconstitutional. However, enforcing the lawyer's use of disclaimers was allowed.

This case does not even apply to our Rule. There is no standard in our Rule that disallows the listing of practice areas, the mailing of announcements to the general public and the listing of the jurisdictions where a lawyer is licensed.

Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985) came next and was a case of advertising "targeted" at a particular audience; here a woman who had used the Dalkon Shield. This case could be considered either an advertising or solicitation case or both. I include it here because it involved attorney Zauderer's print advertisement, placed in 36 newspapers throughout Ohio. While the ad specifically asked women "Did you use this IUD?" it provided information about the dangers of the Dalkon Shield in particular, and according to the Court garnered Zauderer 106 clients. However, it lacked any element of direct solicitation, as Justice White noted in reversing the reprimand in Ohio: "Because the appellant's statements regarding the Dalkon Shield were not false or deceptive, our decisions impose on the State the burden of establishing that prohibiting the use of such statements to solicit or obtain legal business directly advances a substantial governmental interest." *Zauderer* at p. 641.

Justice (?) White also directly addressed the issue of "dignity," which for so long had operated to govern attorney conduct:

> [A]lthough the State undoubtedly has a substantial interest in ensuring that its attorneys behave with dignity and decorum in the courtroom, we are unsure that [this] is an interest substantial enough to justify the abridgment of their First Amendment rights. … [T]he mere possibility that some members of the population might find advertising embarrassing or offensive cannot justify suppressing it. *Zauderer* at p. 648.

However, since Zauderer's ad said that clients would pay no fee unless they received money (that is, he charged a contingency fee), but *failed to say* that they might have to pay *costs*, this failure to disclose was misleading and thus subject to discipline. What the Court found to be problematic is exactly what our current standard 14 addresses.

Other cases that have discussed advertising in the Supreme Court include *Peel v.*

Attorney Registration & Disciplinary Comm'n, 496 U.S. 91 (1990). In that case attorney Peel put on his letterhead that he was certified by the National Board of Trial Advocacy. The Court supported Peel, holding the letterhead was neither actually nor inherently misleading because he was certified by them. We have no standard in our Rule that would prohibit that.

Ibanez v. Florida Board of Accountancy, 512 U.S. 136 (1994) involved an attorney who also was a CPA and a certified financial planner (CFP). Her plans to use these designations on her letterhead and business cards, as well as in her yellow pages advertising, ran afoul of the Florida Board of Accountancy (but not the State Bar). The Accountancy Board reprimanded her for "false, deceptive and misleading advertising." The Supreme Court reversed, finding Florida's position "entirely insubstantial." In a dissent Chief Justice Rehnquist and Justice O'Connor complained that the designated initials, particularly the little-known "CFP" might be inherently misleading. Our rule standards would permit her to designate herself as a CFP.

Milavetz, Gallop & Milavetz, P.A. v. United States, 559 U.S. 229 (2010) was primarily about the constitutionality of provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 that arose in a declaratory relief action filed by a bankruptcy law firm that wanted to find out, in advance, what it could and could not do in its advertisements. In her majority opinion Justice Sotomayor analyzed the *Zauderer* disclosure requirements in determining that the law firm had to make certain disclosures — that it was a "debt relief agency" under the act, and that their debt relief assistance could result in bankruptcy at a significant monetary cost to their clients — in order to avoid being misleading. None of the standards in Rule 1-400 would violate *Milavetz.*

Alexander v. Cahill, 598 F.3d 79 (2nd Cir. 2010) is another case that APRL cites as support for their argument that advertising standards should be eliminated. In *Alexander* Mr. Alexander, his firm, and a not-for-profit consumer rights organization called Public Citizen used broadcast media and print media to advertise. The ads contained dramatizations, testimonials, jingles, special effects and comical scenes, along with statements like "We are heavy hitters." The court found it would be improper to prohibit testimonials outright that were not inherently misleading.

Our standard 2 permits testimonials with a disclosure that states that it is not a guarantee of performance. This would pass muster under *Alexander*, as the court found in that case testimonials that appear to suggest future results would be misleading. Alexander's wisps of smoke, electric currents and other theatrical aspects of his advertising were upheld; our Rule 1-400 would also allow them. His mottos were also upheld. In short, everything the *Alexander* court allowed, our Rule 1-400 would allow. The problem with the regulations in *Alexander* were that many of them simply went too far - way farther than our Rule 1-400.

Around the time of *Alexander* the 5th Circuit Court did uphold bans on nicknames, monikers, mottos or trade names that state or imply an ability to obtain results in *Public Citizen v. Louisiana Attorney Disciplinary Board*, 632 F. 3d 212 (5th Cir. 2011). The APRL Report at page 15 admits that the 5th Circuit departed from the 2nd Circuit by finding an important state interest and finding the ban narrowly tailored to meet that interest. In fact, the court applied the lower standard of rational basis review upon the requirement for disclaimers when communications contain a portrayal of a client by a non-client, or depict any scenes that are not authentic.

They did find that requiring disclosures that were conspicuous and of a certain format, size and visual/auditory display did not pass the rational basis test. Still our Rule 1-400 passes muster under this case; we only require that a letter say "Advertisement" or "Newsletter" in 12 point font on the first page in standard 5. The advertisements in *Public Citizen* involved broadcast media, and the requirements imposed both written and spoken restrictions on it - none of which we have in our Rule 1-400!

Next up was *Harrell v. Florida Bar*, 915 F. Supp 1285 (M.D. Florida 2011). Mr. Harrell challenged Florida restrictions on a variety of bases. First, he said that restrictions on language about the quality of services and statements that promise results were too vague to pass constitutional muster. He lost that argument.

He then said that prohibiting "manipulative" advertising was too vague. He was right on that, but note that our Rule 1-400 does not use that language anywhere. His argument that language that required that an ad must contain only "useful, factual information" (Rule 4-7.1 of the Florida Rules) also carried the day. We have no such language in our Rule. "Don't settle for less than you deserve" was upheld (our Rule would permit that, too) and the use of background sounds were permitted. Our Rule would permit those, too.

Shortly after the *Milavetz* case the Worby, Groner, Edelman & Napoli firm, principal liaison counsel for the victims of the 9-11 tragedy in the consolidated litigation formally known as *In re World Trade Center Disaster Site Litigation*, posted an advertisement in 2011 at a fundraiser for 9/11 firefighters and police showing a firefighter whose photo appeared before the quote "I was there." Apparently he *wasn't* there. The ad was a fake, and the 9/11 devastation shown in the photo was photo-shopped in.

Robert Kelley, who didn't know his photo was being used by Worby, was furious: "It's an insult to the Fire Department. It's an insult to all the families who lost people that day," he told the New York *Post*. When the Worby firm directed all calls to its ad agency, the agency spokesperson said that Kelley's image could be used for "really anything you want." The ad, however, was quickly pulled by Worby. All the more reason for disciplinary standards that clearly tell lawyers - and ad agencies - what not to do.

As for blogs, in February 2013 the Virginia Supreme Court decided the case of Horace F. Hunter, Richmond criminal defense lawyer and author of the blog "This Week in Richmond Criminal Defense" *Hunter v. Virginia State Bar ex rel Third Dist. Comm*. (2013) 285 Va. 485. Hunter authored a trademarked blog accessible from his law firm's website. The blog, which was not interactive, contained posts discussing a myriad of legal issues and cases although the overwhelming majority were posts about cases in which Hunter obtained favorable results for his clients. Hunter did not include disclaimers.

As a result of Hunter's blog posts on his website the Virginia State Bar (VSB) launched an investigation. The VSB argued that he violated rules 7.1 and 7.2 because his blog posts discussing his criminal cases were inherently misleading because they lacked disclaimers. The VSB also asserted that Hunter violated the confidentiality rule by revealing information that could embarrass or likely be detrimental to his former clients by discussing their cases on his blog without their consent.

The court first determined that Hunter's blog posts discussing his cases were commercial speech, and then applied the *Central Hudson* test. The court did not find the blog posts to be inherently misleading but did conclude that they had the potential to be misleading

"because the public lacks sophistication concerning legal services … " Id. At p. 499 citing to *Bates v. State Bar of AZ* (1979), 433 U.S. 350, 383. While the states may place an absolute prohibition on inherently misleading advertising, they "may not place an absolute prohibition on certain types of potentially misleading information . . . if the information also may be presented in a way that is not deceptive." Id., citing to *In re R.M.J, supra,* 455 U.S. 191, 203 . Here, the VSB's own remedy of requiring Hunter to post disclaimers on his blog posts demonstrated that the information could be presented in a way that was not misleading or deceptive.

The court then examined whether the VSB has a substantial governmental interest in regulating blog posts. The court expressed concern that the public may lack the sophistication to discern misstatements as to the quality of a lawyer's services, and that therefore the VSB has a substantial governmental interest in protecting the public from blog statements that could lead the public to mistakenly believe that they will obtain the same great results if they were to hire Hunter.

They also allowed lawyers to post case results but required a disclaimer to explain to the public that no results are guaranteed. Disclaimers were found to directly advance the VSB's governmental interest and were not "not more extensive than is necessary to serve that interest." Id. at 501, citing *Central Hudson*, *supra*, 447 U.S. at 566.

Note that Hunter was publicly reprimanded and the Virginia Rules upheld. The importance of this case should not be underestimated. As the advertisement for an ABA video on advertising noted, "If your law firm has a blog and you have not paid attention to the matter of *Horace Hunter v. Virginia State Bar*, you want to participate in this ethics CLE that addresses what amounts to a case of first impression … ."

Case of first impression indeed. First, as both the majority and the dissent recognized, *Hunter* had to decide an issue that the Supreme Court had never addressed: whether *hybrid* political and commercial speech should be governed by the highest or the lower *Central Hudson* First Amendment scrutiny. Second, the court was on new ground in addressing the free-speech rights of what some call "blawgers," or lawyer-bloggers. Finally, *Hunter* also addressed client confidentiality issues, though the court gave this rather minimal attention. Note that the *Hunter* court itself, albeit with little analysis, let stand the Virginia rule requiring disclaimers to contain very specific details: font size and description, type face, even color of text - similar to our standards!

In the absence of Supreme Court involvement after the mid-1990s, many state bars made their advertising regulations more stringent. Some state courts have taken a narrower view of commercial free speech than the Supreme Court did in the 1980s and 1990s. Indiana, with several relatively restrictive court opinions, is one such state. *In re Keller*, 792 N.E. 2d 865 (Ind. 2003) involved a law firm's television commercial, complete with a celebrity voice, that had a script that called for the "insurance defense lawyer," upon learning that the Keller firm was opposing counsel, to say "Let's settle this one."

"No, let's not," said the state Supreme Court, which issued a public reprimand. Our standard 13 would allow a dramatization, but with a disclaimer that says that it is a dramatization.

New Jersey, another state with a history of restrictive regulation, held in 2006 that the phrase “Super Lawyer” was an impermissible and misleading marketing vehicle. Opinion 39, New Jersey Committee on Advertising, 2006.

While *Hunter* stands alone for the moment on blogging, other recent authorities have disagreed with the *Hunter* court as to what constitutes misleading advertising. In *Public Citizen v. Louisiana Attorney Disciplinary Board, supra,* 632 F.3d 212 (5th Cir. 2011), the Fifth Circuit found several of Louisiana’s advertising rules unconstitutional, including the rule that forbade “a reference or testimonial to past successes or results obtained … ." The Public Citizen court also struck down the requirements as to font size, speed of speech on TV ads, and the requirement of both written and spoken disclaimers on television and electronic media.

The Public Citizen court did, however, uphold rules prohibiting “a portrayal of a client by a non-client … or the depiction of any events or scenes … that are not actually authentic without disclaimer,” and prohibiting lawyers from promising results or using a trade name that “states or implies an ability to obtain results … .” These are two areas where courts and other authorities have almost uniformly upheld prohibitions, on the common-sense basis that both false depictions of people and events, and promising results (as opposed to listing victories) are clearly misleading. Even Florida, a relatively strict lawyer-regulation state, had a proposed Rule that would allow lawyers to list past results if objectively verifiable (Proposed Rule 4.7.3, April 2013 draft). So would California.

Note that the Virginia Bar Board found Horace Hunter had also breached client confidentiality by posting, without consent, material learned during the course of the representation that could be embarrassing or detrimental. The Virginia Supreme Court, as we’ve seen, summarily discarded this issue in Hunter’s favor.

The issue of confidentiality was also addressed in District of Columbia Formal Opinion 335 (2006), which held that “a settlement agreement may not compel counsel to keep confidential and not further disclose in promotional materials or on law firm websites public information about the case … .” To do so would prevent counsel from informing potential clients of their experience and expertise.” But the DC bar disagreed with what was to become the Virginia court’s view "If a client withholds permission for her lawyer to disclose public information, we agree that the lawyer must keep the information secret and that D.C. Rule 1.6 applies. A plaintiff settling a sexual harassment claim, for example, may wish to protect her privacy by not allowing her lawyer to publicize further any information about her case."

Our standards do not address or restrict confidentiality.

Last, and least, is APRL's reliance on *Rubenstein v. Florida Bar* (2014) 72 F.Supp.3d 1298 WL 6979574 . In that case, the court ruled that the Bar's enforcement of a ban on putting past results on any advertisement, even if they were objectively verifiable, was not constitutional. Nothing in our Rule would prohibit the advertisement of past results.

Solicitation

Note that solicitation has also been addressed by the Supreme Court in *Ohralik v. Ohio State Bar Association*, 436 U.S. 447 (1978), and *In re Primas*, 436 U.S. 412 (1978). These two cases were decided on the same day, and represent opposite extremes on the issue of direct, case-specific solicitation.

In *Ohralik*, Ohio Attorney Ohralik's solicitation couldn't have been much more overt or overbearing. He learned that two teenage girls had been injured in an automobile accident. He visited the parents of one, whom he knew slightly, and then went to the hospital where he asked the girl, in traction, to sign a one-third contingency fee agreement. Two days later, he went back to the hospital and she signed.

Ohralik visited the second girl at her home the day after she was released from the hospital. He carried a concealed tape recorder. He told her he represented the first girl and asked if she wanted him to represent her as well. At first, she seemed confused, but ultimately said "O.K." After she changed her mind the next day Ohralik, who had captured their conversation on tape, insisted that the girl had entered into a binding agreement, and attempted to obtain about $2,500 in fees from her. Eventually, the first girl fired Ohralik, who sued for breach of contract. Both girls complained to the bar, and the Ohio Supreme Court handed Ohralik an indefinite suspension.

The Supreme Court easily distinguished *Bates*, and concluded that Ohralik's overt, "overreaching," in-person solicitation of clients was not commercial free speech protected under the First Amendment. Justice Powell's opinion emphasized the danger of in-person solicitation and concluded by emphasizing the circumstances of the Ohralik solicitations: the youth of the two girls; their vulnerability, one still in the hospital, the other seen on her first day home; the lack of opportunity for either girl to think objectively about her decision; Ohralik's emphasis on "what sounded like a cost-free and therefore irresistible offer." Id. at p. 1924. Note that our standard 4 would prohibit such conduct.

P*rimus* concerned the actions of attorney Primus, a lawyer who served as a local ACLU officer and cooperating attorney, and as a consultant to the South Carolina Council on Human Relations. On behalf of the Council, Primus met with a group of women who claimed they had been wrongfully sterilized as a condition of receiving Medicaid. The lawyer's meeting was protected because he contacted the women so that the ACLU could represent them and not himself. It was also for free assistance.

In *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466 (1988) attorney Shapero took "targeted" advertising one giant step beyond *Zauderer*, right into the world of solicitation. He asked the state Advertising Commission for permission to send a letter directly to "potential clients who have had a foreclosure suit filed against them." Shapero did not know these people, only that they were facing foreclosure. The mailing, which could hardly qualify as "dignified" is worth reproducing here:

> "It has come to my attention that your home is being foreclosed on. If this is true, you may be about to lose your home. Federal law may allow you to keep your home by ORDERING your creditor to STOP and give you more time to pay them.
>
> You may call my office anytime from 8:30 a.m. to 5:00 p.m. for FREE information on how you can keep your home. Call NOW, don't wait. It may surprise you what I may be able to do for you. Just call and tell me that you got this letter. Remember it is FREE, there is NO charge for calling."

The Advertising Commission did not want to allow the advertisement to go out. Justice

Brennan, speaking for the Court, found Shapiro's conduct closer to that of Zauderer than Ohralik, reasoning that a potential client will feel equally overwhelmed by his legal troubles as he would from a newspaper advertisement - a protected activity. The Shapero Court upheld Shapero's right to send the letter, but the Court was more fundamentally divided in the 4-2-3-Shapero decision than at any time since the 5-4 decision in *Bates*.

Around the same time as the *Ibanez* case*, supra,* the Court in *Edenfield v. Scott Fane*, 507 U.S. 761 (1993) allowed accountants to solicit and cold call potential clients. While APRL touts that case as support for their argument that the standards should be eliminated, the case actually does not support their argument at all. First, accountants are very different from lawyers; the Court compared accountants to lawyers finding that a CPA is not a professional trained in the art of persuasion. A CPA's training emphasizes independence and objectivity, not advocacy. See 1 AICPA Professional Standards, AU section 220. They also said that a CPA's clients are far less susceptible to manipulation than accident victims like in *Ohralik, supra.* Moreover, even if a lawyer's clients are sophisticated in *business*, it does not mean that they are sophisticated in the *law.* In addition, when advertising on a website, a lawyer cannot know everyone who will look at the ad.

Florida Bar v. Went For It, Inc., *supra*, 515 U.S. 618 (1995) was a surprise opinion on solicitation. There, Justice O'Connor, who had shown an increasing discomfort with the extent of lawyer solicitation, wrote for a 5-4 majority that upheld a Florida ban on written communications with accident victims within 30 days of the accident. She justified the Florida regulation by agreeing with the Florida Bar that "it has a substantial interest in protecting the privacy and tranquility of personal injury victims and their loved ones against intrusive, unsolicited contact by lawyers." Id. at p. 624. She relied in part on a lengthy Bar summary and study containing "both statistical and anecdotal [information] supporting the Bar's contentions that the Florida public views direct-mail solicitations in the immediate wake of accidents as an intrusion on privacy that reflects poorly upon the profession." Id at p. 626. O'Connor distinguished the *Shapero* case by noting that the Kentucky regulation was "a broad ban on all direct-mail solicitations, whatever the time frame and whoever the recipient." Id. at p. 629. She also noted that "the State in *Shapero* assembled no evidence attempting to demonstrate any actual harm." Id.

Note that the Court thus chose to protect lawyers' public image over free speech and allowed "opposing parties" (i.e., insurance companies) to step in during the 30-day ban to talk with victims.

In the aftermath of *Shapero*, the Louisville Courier-Journal reported that Kentucky lawyers were "plastering accident victims, accused drunken drivers and other potential customers with mail solicitations." *The Courier Journal Louisville*, Feb. 24th, 1991. Because Kentucky's Open Records Act gave lawyers access to police accident reports, some victims were inundated by the targeted direct mail that the *Shapero* case unleashed.

Meanwhile, lawyers pushed the solicitation envelope after *Shapero* on both coasts by using free medical or scientific screening as a way to solicit clients. In New Jersey, the East Brunswick firm of Garruto, Galex & Cantor offered free chest X-rays to factory workers, in hopes of gaining clients who suffered from mesothelioma, a deadly form of cancer caused by asbestos exposure.

California attorney Gordon Stemple operated medical screening vans he called "examobiles," that traveled all over screening tire factory workers for asbestos exposure. Tire factories were known for having asbestos issues, so in addition, Stemple set up a non-profit he called the National Tire Workers Litigation Project. Stemple's solicitations never resulted in discipline, but he and his firm were eventually sued by Raymark Industries, Inc., an asbestos manufacturer, for civil RICO violations. Stemple in turn sued Raymark. Stemple's suit was dismissed, and he settled Raymark's suit for an undisclosed amount.

In the years since *Went For It*, there have been fewer solicitation matters than those about advertising. I posit three possible reasons: First, *Went For It* and *Ohralik* had set clear solicitation boundaries. Second, lawyers have self-policed solicitation in their own back yards. Thus, in Kentucky, when targeted mail ran rampant, most complaints to the bar came from other attorneys (which supports our rule 1-400 presumptions). Third, solicitation is harder to track by the Bar than an advertisement in say, a newspaper. In the years since the Supreme Court spoke, the history of advertising and solicitation regulation has been more about state regulation than Supreme Court interpretation. State disciplinary agencies fill in the gaps as best they can, subject to eventual constitutional interpretation. But since the high court has not issued a major opinion since *Went For It*, those state regulations have filled the void, thereby protecting the public.

With regard to insurance companies and captive firms (law firms that have normal firm names but really are in-house firms for the insurance company) The Nassau County (New York) Bar Association in Opinion 95-5 (1995) concluded that any rule, one way or the other, was too inflexible; rather, the insured should be apprised of the lawyer's true status and then consent to the representation.

California State Bar Formal Opinion 1987-91 reached a different result: Anything on the letterhead other than "Law Division" would be misleading and therefore unethical.

The "modern age" argument

Case law shows that our standards would pass the *Central Hudson* test. However, another issue discussed by the drafting team as a justification for making major changes to current Rule 1-400 is that, in essence, the Rule needs to "move into the modern age" because it is unworkable. We discussed whether there would be an inability to enforce the Rule in the future. What no one could show is why our current Rule is not sufficient in this "new age".

Let's look at Twitter first. Here, the team considered an initial argument that because Twitter only allowed 140 characters it is impossible to put the attorney's name and contact information on the tweet (as required by our Rule 1-400 standard 12, Exhibit A). But it is clear that Twitter allows the user to click on the name of the poster, allowing the user to navigate to another platform which can be used to provide more information about the poster, including the poster's contact information. The click is not considered part of the 140 characters. Moreover, the Twitter character limit can be used by the poster to include a mini-URL if the poster wants to link more extensive information.

Internet web sites can also be regulated by our current Rule. Mr. Tuft was concerned that web sites cannot be controlled by the attorney, so we should not have the current Rule with its standards to regulate them. That does not support a wholesale change in our Rule, since it would be difficult for me, for example, to modify Mr. Tuft's firm web site. I have seen

absolutely no Bar complaints about web sites being changed by someone other than the owner. It is true that when you put information out in the cloud there is a potential lack of control, but that would be true of any Rule we impose. Besides, most lawyers use cloud services to store information and documents already anyway.

Interestingly enough, Facebook and web postings similar to that of Twitter are the subject of a recent *California State Bar Formal Ethics Opinion 2012-186* (the Opinion could apply to web sites, LinkedIn and every other internet platform as well). The Committee on Professional Responsibility and Conduct (COPRAC) had no problem at all applying Rule 1-400 to a "modern age" internet platform. In addition, COPRAC has written Opinions on the discovery of electronically stored information (*Formal Opinion 2015-193*), on virtual law offices (*Formal Opinion 2012-184*) and e-mail and cloud computing (*Formal Opinion 2010-179*). COPRAC generally applies the Rules, using a "rule of reason" approach, that works.

The team also considered the argument that it is difficult for someone operating a virtual law office to know how to comply with our Rule. I simply do not understand that argument, especially considering that COPRAC did a great job of applying the Rule. The bottom line is that a lawyer who is barred in California must look up the Rules. A lawyer from Texas, for example, can easily find our Rule and see what it prohibits. It is not all that difficult to do; in fact it is quite easy and quick. That lawyer would have to do that anyway no matter where he practices, <u>because the states are not consistent in how they enforce advertising</u>.

On the APRL listserv, ABA staff counsel Will Hornsby, a recognized expert on attorney advertising, reminded all that while new tech-based media are important to understand and recognize, it's most important to "move the discussion from the forms of tech-based media to concentrate on the <u>content and context</u> of the message." His observation makes sense: As new forms of advertising come along, the same rules apply: Is it advertising, and thus subject to commercial free speech regulation? Is it false or misleading? And are there other issues, such as adequate disclosures or disclaimers that are legitimate constitutional restraints? None of those questions mean we must or even should dispense with our presumptions.

It is true that the original advertising Rule was written for the non-digital age and not for micro-blogging. It was written for billboard, Yellow Pages, television and radio ads. But it is easy enough to apply the Rule today. COPRAC and the State Bar simply use a "rule of reason" approach. They use of common sense and logical reasoning - just like the courts do for conflicts of interest. It is entirely doable, and has been done for years. The fact that our Rule was first written long ago (and later revised more than once) does not mean it is unconstitutional, vague, or incapable of being applied in the "modern world".

In any event, less "modern" forms of advertising and solicitation still plague the internet and airwaves and cry out for presumptions. For example:

The 800 Number Hotline. Law firms, and consortiums of law firms, have set up 800 number "hotlines" to answer simple questions, and to generate cases in the event the simple question can't be answered on the phone. Some lawyers for a time tried 900 numbers, where the customer who called paid a per-minute fee.

Free Seminars are offered in areas of law that are either lucrative or of particular concern to specific groups, such as seminars on estate planning for the elderly. Those that attend the seminars may be encouraged to engage the services of the lawyers conducting the program.

Private Referral Services. Many bar associations run nonprofit referral services that qualify lawyers by experience and refer potential clients to those lawyers. Some states like California formally regulate such services, and the ABA has similar standards, compliance with which gives the service the right to say it is "ABA approved." Private referral services operate outside this scheme, many emphasizing personal injury referrals, advertising and operating through their on-line presence. Some "referral services" simply turn out to be law firms or groups of firms. Other "referral services" that are not law firms don't qualify lawyers based on knowledge and experience; they simply carve out geographical territory and "sell" that territory to one or more lawyers. As described, however, these entities are inherently misleading because they are not "lawyer referral services" as the term is generally defined.

Endorsements and Testimonials are used in television ads to encourage prospective clients to call "their" lawyer. In one series of frequently shown California TV spots, famous baseball personalities were used to encourage callers in both English and Spanish to hire a particular group of lawyers. Past clients of lawyers are used for testimonials, and in some cases, actors are hired to do the testimonials.

So we are not so "modern" really after all; lots of "old school" advertising still proliferates. And even where we are, that does not mean presumptions should be discarded.

Mr. Tuft contends that "getting into the modern age" means we should be like the vast majority of the states that have adopted the ABA Model Rules on advertising without any presumption language. However, there is a lot of variation among the states in how they craft their Rules **and there is no national standard.** I believe it might make sense to have the same numbering system as the ABA, and in fact our group in an informal vote agreed to that; i.e. communications in rule 7.1, solicitation in 7.3, etc. However, dismembering the standards is a far different thing, and would not achieve any sort of consistency at all, because there is no consistency in the United States on advertising rules.

Lack of enforcement of the Rule/There is no harm from advertising violations

The team has considered the argument that "Rule 1-400 is not enforced." It is true that some late night advertisements do skirt the edge. But if you look closely at them, they do not quite go over the edge. That is because we have standards in our Rule that clearly state what a lawyer must not do! In fact, the advertising Rule has been enforced and the attached case lists (Exhibit E) show that there are published State Bar court opinions on the Rule.

It is important to know that of the many thousands of cases resolved by the Bar only a very, very few result in a published opinion, which is why we don't see a lot of published advertising opinions. Often warning letters are given. How the State Bar discipline process works is that the vast majority of cases are settled either right off the bat, or pre-filing of charges against the lawyer and/or at an Early Neutral Evaluation conference or soon thereafter. Others are settled right after the filing of disciplinary charges. When they are settled this way, they do not result in a published opinion. It is only cases that go through a trial or to the Review Department that have a chance of being published. Since lawyers are a small group compared to litigants in a superior court, and since so few go to trial (many Bar matters are default matters because the lawyer fails to show up) there are few published opinions on many ethics issues except misappropriation of client funds and competence/communication.

It is also important to know that the respondent (the lawyer being disciplined) pays all the Bar's costs plus his own legal fees if he loses, so the incentive to go to trial, much less file an appeal, is not very high. Picture this: the lawyer gets one year actual suspension, and appeals. He loses, so he now pays so much money to his lawyer and the Bar (that he can't earn while suspended) that he ends up essentially out of the practice. Also, our Review Department can impose more discipline on the lawyer on appeal - adding insult to injury. Few risk that - most settle early. Additionally, there may be many more advertising stipulations, settlements or warning letters that are private and all but impossible to access.

One might assert that most transgressors should get a warning letter and that consumers are not naïve, so why have standards that we must enforce? But this argument fails to take into account that most people are not part of the sophisticated 1% like this Commission's clients. Most California users of advertising are not even part of the top 40%. The complainers are usually people lured in to a lawyer's office during a foreclosure or after a devastating accident or divorce. A typical complainant would be a senior who just did not understand the concept of "bait and switch." The types of sophisticated clients that aren't lured in by ads are simply not the majority of people in need of legal services. The unsophisticated are the people we must protect with standards.

This moves us to part two - advertising and the harm it can cause to the public. I attach Exhibits I and J for your review. Exhibit I is the 1993 Lawyer Advertising Task Force Report (see summary of public comments/testimony presented to the Task Force) and Exhibit J is the 1994 legislative counsel analysis of AB 3659. In addition, the *Went For It* opinion cited a Florida study containing both statistical and anecdotal data suggesting that Floridians view direct-mail solicitations in the immediate wake of accidents as an intrusion on privacy that reflects poorly upon the profession.

The "micromanaging" argument

The team considered the argument that California's current law micro-manages advertisements and we should not do that. However, I saw no proof the Bar is micro-managing (in fact, reported case law shows the Bar is not doing that) and no valid reason why requiring things like that the words "dramatization" and "advertisement" be prominently placed and in 12 point bold type on certain advertisements are micro-managing that does not protect the public and that should be stopped.

This argument seems to be grasping at straws. So what if the Bar wants clients to be able to see in large enough letters that a letter from a lawyer is an advertisement? Here is a good example: sometimes it is hard for me, a lawyer, to understand that I may be reading advertising material when I see what appear initially to be articles on *CNN Money* or on the *Wall Street Journal Market Watch* iPhone app. The only way I know it is advertising is because the page prominently says "Advertisement" in a certain size type face on top, the font is sometimes a bit different and it is sometimes colored differently. These are stricter requirements than our Rules, but lawyers handle people's money too.

In fact, only a very few of the standards could be remotely argued to be micro-managing anyway. And none are to the detriment of clients, the very people we are charged with protecting.

Business & Professions Code sections 6157 et seq.

It is important that the Commission recognize that we have advertising standards that already exist in Business and Professions Code sections 6157 et. seq. attached as Exhibit F. Some might disregard them as "the Larry Parker statutes" because they come out of the Leisure World advertising cases where the lawyer engaged in outrageous advertising. I do not understand why the origin of the Business & Professions Code sections matter.

What is important is that the Business and Professions Code sections exist. And they contain provisions that state what a lawyer should and should not include in their advertisements. They are rebuttable presumptions similar to - cue a drum roll - our standards! Some of them track our standards language quite closely; see 6158.1 for example.

It is true that we can and do have Rules that do not track legislation. Witness Rule 3-400 which clearly disallows what the Probate Code allows - the purchase of property at a probate sale. Rule 4-400 I understand is similar. But those Rules forbid that which the public would allow - in short they are stricter than legislation. Rule 1-400 is different because getting rid of standards that create a presumption of illegality make the Rule clearly less strict even with the "false and misleading" standard, and therefore make it harder to enforce. I believe that legislative consent or a ruling by the Supreme Court to delete what the Legislature has enacted would be needed, and is not recommended.

Our California Supreme Court has inherent and primary constitutional authority over admissions, discipline and the regulation of attorneys licensed to practice law in California. We cannot and should not contradict legislation to allow lawyers to get away with more. Some might contend that the false and misleading standard works with Model Rule 8.4 (see attached Exhibit G) to mean that even without the standards lawyers cannot do anything false and deceptive. Okay, but that still does not logically compel a conclusion that the standards must be eradicated, especially when they track in some places the Business and Professions Code. "False and misleading" is not a bright line. However, clear standards are - what we have already.

In short, the question is not can we and should we draft a Rule different from legislation. The question is do we want to eliminate standards where there is clear legislation, thereby invoking the wrath of legislators and the public who will surely come back, even if at a later time, to point the finger at the Bar and this Commission for not protecting them?

It is true that RRC1 did not address much about the legislation in effect at the time - perhaps a reflection of why the Supreme Court sent their Rules back for this Commission to review. (See RRC1's draft, attached as Exhibit H). They did what I call a "mash-up" wherein they numbered the Rules like the Model Rules but included concepts from both the Model Rules and the California Rules. Unlike the rest of the United States they kept in a definition of solicitation and concepts from the standards - most of them were retained except standard 6 and some were made into comments. (As noted before there is variation among the states as to how much of the ABA Model Rules they adopt and how much of their own language is used).

RRC1 decided to focus on getting an advertising Rule drafted while at the same time flagging issues so that when they were done the State Bar could address how to resolve them. For every batch of Rules issued they invited public comment and feedback but got very little. Today, however, we cannot take that approach. The signal from the Supreme Court is for us to be on a timeline and to craft Rules that are in line with the law. Taking out the standards will

be viewed as lowering the bar on what a lawyer can do to advertise while at the same time raising the burden of persuasion to the Supreme Court and the Board of Trustees that we have a good reason for contradicting active legislation. This will be a concern to everyone, even if there is not controlling precedent on when we can create a Rule in contradiction to a set of statutes.

Case law on the issue of whether we can craft a Rule that is less strict than a statute is skimpy indeed. *In re Attorney Discipline* (1998) 19 Cal.4th 582 holds that the California Supreme Court has inherent and primary authority over admissions, discipline and regulation of attorneys licensed to practice law in California. While the Legislature may enact statutes relating to the practice of law, the Court is the final policy maker and may require more through its inherent powers over the practice of law. "Legislative regulations regarding the qualifications of attorneys are, at best, but minimum standards unless the courts themselves are satisfied that such qualifications as are prescribed by legislative enactment are sufficient….In other words, the courts in the exercise of their inherent power may demand more than the legislature has required…[W]hen the matter at issue involves minimum standards for engaging in the practice of law, it is this court and not the Legislature which is the final policy maker." *In re Attorney Discipline*, *supra*, 19 Cal.4th at p. 602.

However, it is rare when the Supreme Court has used its inherent power to regulate the practice of law. See *Santa Clara County Counsel Attys. Assn. v. Woodside* (1994) 7 Cal. 4th 525, 543. In *Merco Constr. Ins. Engineers, Inc. v. Municipal Court* (1978) 21 Cal. 3d 724 [147 Cal. Rptr. 631], [581 P.2d 636], former Code of Civil Procedure section 90, giving non-attorney representatives of corporations the right to appear in municipal court, was found by the California Supreme Court to unconstitutionally infringe on the judiciary's exclusive right to grant admission to the practice of law.

In *In re Lavine* (1935) 2 Cal.2d 324, 329 [41 P.2d 161], the California Supreme Court held unconstitutional a statute that automatically reinstated to the bar attorneys who were convicted felons, once they received a full gubernatorial pardon. The statute was found to encroach upon "the inherent power of [the Supreme Court] to determine who may be admitted to the practice of the law and is tantamount to the vacating of a judicial order by legislative mandate." (Ibid.)

Statutes are not going to be able to impinge on the Court's right to regulate attorneys. However, the Legislature, under the police power, can have "'a reasonable degree of regulation and control over the profession and practice of law . . .' in this state." *Hustedt v. Worker's Comp. Appeals Bd.*, (1981) 30 Cal.3d 329 at p. 337. "The Legislature may put reasonable restrictions upon constitutional functions of the courts provided they do not defeat or materially impair the exercise of those functions.'" (*Id*. at p. 338, citing *Brydonjack v. State Bar* (1929) 208 Cal. 439, 444 [281 P. 1018.]

Note that in the *County Counsel* case cited above, the Court discussed the legislative regulation of solicitation as an example of the above and said it was with the Supreme Court's approval. The Court also said that in the field of attorney-client conduct, as in these other areas, this court has the inherent power to provide a higher standard of attorney-client conduct than the minimum standards prescribed by the Legislature. See *Emslie v. State Bar* (1974) 11 Cal.3d 210, 225; *In re Lavine*, *supra*, 2 Cal.2d at p. 328. We also recognize that any statute which would permit an attorney to act in such a way as to seriously violate the integrity of the

attorney-client relationship, so as to "materially impair" the functioning of the courts (*Hustedt v. Workers' Comp. Appeals Bd.*, *supra*, 30 Cal.3d at p. 339), would be constitutionally suspect. But a ruling that a statute affecting attorney-client relations is unconstitutional on separation of powers grounds will not be lightly made. **Those raising such a claim must at least show that a direct and fundamental conflict exists between the operation of the statute in question as it applies to attorneys, and attorneys' settled ethical obligations, as embodied in this state's Rules of Professional Conduct or some well-established common law rule.** There is no conflict right now, but there certainly would be if the standards were taken out.

Another case on the issue is *O'Brian v. Jones*, (2000) 23 Cal.4th 40, where the court allowed legislation which provided that judges of the State Bar Court could be appointed by the Governor, the Senate Committee on Rules and the Speaker of the Assembly and not just the Supreme Court. They allowed it because it did not impair or undermine their inherent authority in that area, as the Applicant Evaluation and Nomination Committee had to find them qualified.

California Attorney General Opinion No. 90-201 analyzed the conflict between now California Rule of Court 9.44 (Registered Foreign Legal Consultant) which does not require passing the state bar exam as a condition to providing legal consultation/advice on the law of a foreign country, and Bus. & Prof. Code section 6060 which requires a person to be admitted to practice law in California to have "passed the general bar examination given by the examining committee." The A.G. Opinion concludes: "In our view, the application of the statutory conditions would directly conflict with and effectively preclude the exercise by the court of its inherent jurisdiction in the matter, thereby materially impairing the judicial domain respecting the admission to practice law."

All of these cases supported a more strict application of law if it differed from the Supreme Court's expressed intent. Not a single case allowed a difference where Legislation or law would loosen attorney standards. It appears that the Supreme Court can set a minimum standard and the Legislature can augment that. But not overrule it. It is the Supreme Court that keeps us in check. In my view, it is good that they do.

Our Next Step

It is my firm belief that any major overhaul of the advertising Rule should not be done in our quick time limit and should be done in a separate Commission appointed after this Commission or concurrent with it that will be named the Commission to Revise the Advertising Rule. Under the current time frame for completing the Commission's comprehensive work on all of the rules, we cannot realistically take the time to develop a major lawyer advertising proposal that might be the forerunner of the country on advertising. There is inadequate time to do that. We also need guidance from an internet specialist who can plainly explain forms of web advertising we may not understand or have thought of.

This is my belief no matter who's view you adopt. I do not believe we should amputate our current Rule in violation of current legislation and of case law that does not in any way whatsoever support an argument that our Rule is unconstitutional, and then have the Supreme Court not adopt it. Or maybe worse, invoke the Legislature's wrath, who will then form their own law person's Commission to write a Rule.

If we are going to keep the standards, minus the standards OCTC does not care about having, then I support us crafting Rules similar to the ABA but with the majority of the standards intact.

*Note that some passages in the text are from Zitrin, Langford & Cole, Legal Ethics in the Practice of Law, (Fourth Edition 2014, Lexis/Nexis).

Rule 1-400 [7.1 – 7.5] List of Exhibits

The following exhibits are available upon request. Please contact Angela Marlaud at: angela.marlaud@calbar.ca.gov. You are encouraged to review them in advance of this meeting.

Exhibit A:	Current Rule 1-400
Exhibit B:	Association of Professional Responsibility Lawyers (APRL) Advertising Report 6-22-15
Exhibit C:	Constitutionality of Advertising, Chemerinsky Testimony, January 1993
Exhibit D:	Lawyer Advertising Report, 1978
Exhibit E:	Supreme Court Attorney Discipline Cases Involving CPRC 1-400 Violations
Exhibit F:	Business & Professions Code section 6157 et seq., Article 9.5
Exhibit G:	ABA Model Rule 8.4
Exhibit H	Proposed Rules 7.1-7.5
Exhibit I:	Lawyer Advertising Task Force Report, April 1993
Exhibit J:	Assembly Bill 3659 Legislative Counsel Analysis

COOPER WHITE & COOPER

MEMORANDUM

TO: RRC-2

FROM: Mark L. Tuft

DATE: December 29, 2015

RE: Rule 1-400 [Model Rules 7.1-7.5]

This memo argues in favor of "option 3" -- structuring the advertising rules based on Model Rules 7.1-7.5 with minor variations to conform to California law. The Commission's charge requires that we take a fresh look at the regulation of lawyer advertising in response to the dramatic changes in the way information regarding lawyers and legal services is disseminated to the public. Rule 1-400 and the advertising standards relate back to outdated methods of communication that have become increasingly unworkable in the age of e-commerce and Internet-based client development tools and no longer reflect a "clear and enforceable articulation of disciplinary standards." The Internet has been the most significant change in the world of advertising and is an accepted medium for attracting clients and disseminating information about lawyers and legal services. The more recent explosion of social media, professional networking services and mobile technology has further resulted in ineffective enforcement of the existing advertising regulations.

Innovative dissemination of information that educates the public about the existence of legal rights and remedies, the availability of legal services and the selection of lawyers should not be discouraged by blanket presumptions and overly restrictive regulations that make compliance challenging if not impractical. The vast increase in diverse forms of electronic media communication regarding lawyers and legal services include not only websites and attorney blogs, but micro blogs such as Twitter and Instagram, YouTube, infomercials, webinars, postings on social media such as Facebook and LinkedIn, on-line review sites, text messaging, the use of smartphones, "apps", links, video technology and tag lines.[1]

Lawyers and law firms are also engaged in highly sophisticated forms of marketing and advertising that generally are not monitored by the State Bar. These include "advertorials," cooperative lawyer ads, retargeting, search engine optimization, on-line referral and lead-sharing sites, and "pay-per-click" or "pay-per-deal" arrangements. For example, Google's Ad Words is a highly efficient marketing device where lawyers may choose key words in creating text advertisements. When an internet user types these key words into Google's search engine, the lawyer's advertisement appears in a list of "sponsored links" on the results page.[2] Lawyers are also increasingly involved, either voluntarily or involuntarily, in on-line lawyer rating services, such as Avvo.com, Yelp, "SuperLawyers," and "Best Lawyers." Premium services provide website, blogging and on-line marketing to law firms. There is also a number of social networking websites for lawyers, including Avvo, JDOasis, LegalOnRamp, WireLawyer, and FoxWorthy.

There is a growing disconnect between the way lawyers are told they must communicate with prospective clients and the way the public communicates with everyone else and seeks information about legal services.[3] The current rule and the advertising standards are not able to keep pace with emerging communication technologies and sophisticated methods of marketing. Instead, they have had a chilling effect on disseminating useful information to consumers who want more, not less, information in a legal services market that strongly favors e-commerce.

The increasing reliance on mobile technology and the Internet has resulted in borderless forms of advertising and marketing. The public is not served by maintaining overly-technical advertising standards that have no counter-part in other jurisdictions and that are becoming increasingly irrelevant.[4] The current set of advertising standards are not uniformly enforced, and in many cases, impose impractical obligations.[5] Rather than protect the public from advertising that is inherently false and deceptive, the current standards often confound lawyers in deciphering how to apply them to Internet-based advertising and client development tools. The lack of predictability on how bar counsel will view a given advertisement is an additional disincentive in utilizing innovative advertising media to inform consumers about lawyers and legal services.

The Operative Disciplinary Standard Should Prohibit False and Misleading Lawyer Advertising

Our charge is to "facilitate compliance with and enforcement of the Rules by eliminating ambiguities and uncertainties." The realities of on-line and other forms of electronic media advertising call for a more simplified set of rules that are flexible to accommodate changes in technology and consumer preferences for accessing information. Model Rule 7.1 provides a clear, workable statement of the legitimate goal of regulating lawyer advertising through discipline that applies to all forms of communication:

> "A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading."

A further definition of "communication" is not necessary, nor are examples that will invariably change over time. While the Supreme Court has allowed certain time, place and manner restrictions, most pertain to solicitation and targeted mailings, which are regulated under Model Rule 7.3. The single "false or misleading" standard is consistent with the disciplinary standard under Model Rule 8.4(c) which prohibits lawyers from engaging "in conduct involving dishonesty, fraud, deceit or misrepresentation." Lawyers should not be subject to discipline for advertisements that are potentially or "presumably" misleading. Nor should lawyers be subject to discipline for violation of technical requirements regarding font size, placement of a disclaimer, or advertising record retention. The bar should use non-disciplinary measures for responding to complaints about lawyer advertising where the communication does not violate Rule 7.1's false or misleading standard.

Solicitation and Targeted Communications Should be Separately Regulated

The regulation of lawyer advertising and the regulation of solicitation and targeted communications have separate public protection objectives and require separate rules. Rule 7.1 prohibits all false and misleading communications regarding a lawyer's services. Direct encounters with prospective clients by lawyers who are trained advocates can be constitutionally banned without regard to the accuracy of the communication. While an argument can be made that the ban should not include real-time electronic contact, empirical data supports retaining the prohibition when the lawyer's significant motive is pecuniary gain.

Truthful and accurate targeted written or electronic communications can be prohibited if they are transmitted in a manner than involves coercion, duress, harassment, or are overly intrusive. The public protection objective in this situation is the *means* of transmitting information and not the content of the communication.

Rule 1-400 and the advertising standards conflate these prohibitions in a single rule which creates ambiguities and causes confusion. Separating solicitation and targeted communications from the advertising rule clarifies the constitutional justifications for regulating each under *Central Hudson*. Model Rule 7.3 properly treats direct contact with prospective clients as a separate rule. We should adopt the Model Rule framework and treat targeted and overly intrusive communications separately from general media advertising.

The Model Rules Eliminate the Need for Many if Not All of the Advertising Standards

In addition to prohibiting false and misleading communications concerning the availability of legal services (Rule 7.1) and separately regulating direct contact and targeted communications with prospective clients (Rule 7.3), the remaining rules in the 7 series address many of the issues raised by the advertising standards and the current rules. For example, restrictions on referral arrangements and paying others for recommending a lawyer are covered in Rule 7.2. The Commission should start with RRC-1's version of Rule 7.2 which carries forward the protections in current Rule 1-320(B) and (C). The Rule goes further in addressing "strategic alliances" and other reciprocal referral arrangements with another lawyer or non-lawyer. Rule 7.2(b)(4) was added in 2002 in response to the multi-disciplinary practice debate to assure professional independence and notice to the client. Rule 7.2(c) requires that communications made pursuant to the rule include the name and address of at least one lawyer or law firm responsible for its content.[6] Rule 7.4 addresses what lawyers may say about their fields of practice and specialization. Rule 7.5 prohibits the false and misleading use of firm and trade names and professional designations.[7] These Model Rule provisions should be carefully considered before recommending retention of any of the advertising standards.

Empirical Evidence Supports Adoption of the Model Rule Approach to Lawyer Advertising Regulation

Exhibit E to Ms. Langford's report is a chart prepared by State Bar staff of Supreme Court disciplinary cases and State Bar Court Review Department decisions involving Rule 1-400 violations over the past 30 years. Of the 13 cases reported, 5 involved solicitations in violation of rule 1-400(C), 2 involved violations of former rule 2-101 and 4 involved targeted mailings. The 2 cases decided by the Supreme Court, one in 1985 and the other in 1995, involved

attorney mailers. All of the reported cases involve false and deceptive practices that would violate Model Rule 7.1. Indeed, all of the cases involve conduct that would constitute a violation of Model Rule 8.4(c).

For example, *Matter of Respondent V*, involved targeted mailings to out-of-state residents using a facsimile of the great seal of California on the attorney's letterhead, which was clearly false and misleading. *Matter of Venie*, involved targeted solicitation letters to county jail inmates which included on the front of the envelopes "legal mail," "attorney mail," or "attorney client mail" rather than the word "advertisement." The court found that respondent intentionally omitted the term "advertisement" or "solicitation" from the envelopes because he knew the sheriff's department would not deliver the envelopes unless they were attorney-client communications. Venie's conduct clearly constituted false and deceptive targeted advertising. *Matter of Morse* also involved direct targeted mailings that were false and deceptive by inclosing misleading homestead information sheets and using direct mail envelopes that suggested that respondent's firm was affiliated with the recipient's mortgage lenders. *Matter of Miller Reinstatement* involved a lawyer seeking reinstatement who worked for his son's firm as a paralegal under the firm name of "Miller & Miller" -- conduct that would be proscribed under Model Rule 7.5.[8]

Only two of the reported cases make reference to the advertising standards. Standard 6 is mentioned in a concurring opinion in *Respondent V* and is not the basis of the holding in that case. In *Matter of Copren,* the hearing judge found in a default proceeding that respondent had violated Rule 1-400(E)(1) by sending a prospective client a letter promising that the client's foreclosure process could be stopped and the client's Chapter 13 bankruptcy plan would allow the client to keep her home. However, respondent did not participate in the proceeding. The issue on appeal was whether the discipline recommendation should include a requirement that respondent comply with former rule 955. There are no cases litigating the validity of a presumption in a disciplinary proceeding. Since the State Bar has the burden of proving a violation of Rule 1-400 by clear and convincing evidence, no explanation has been given how the State Bar satisfies its burden by shifting the burden of producing evidence to the respondent as to the nonexistence of the presumed fact.

This history is consistent with the trend across the country. A recent survey of bar regulators conducted with the assistance of the National Organization of Bar Counsel concerning the enforcement of the advertising rules by state disciplinary authorities confirms that complaints about lawyer advertising are rare.[9] The survey found that people who complain about lawyer advertising are predominantly other lawyers and not consumers.[10] According to the survey results, a majority of complaints about lawyer advertising are handled informally, even when there is a provable advertising rule violation.[11] Few states engage in active monitoring of lawyer advertisements.[12] Many cases in which discipline has been imposed involve conduct that would constitute a violation of ABA Model Rule 8.4(c), independent of the rules specific to advertising practices.[13] Other surveys regarding the attitude of bar regulators and consumers toward lawyer advertising enforcement report similar findings.[14]

There is an absence of case law or empirical evidence that the advertising standards are effective in regulating lawyer advertising or that the standards are capable of compliance with the growing diversity in on-line and mobile technologies. A great deal has changed in the 26

years since Rule 1-400 was last amended and 20 years since the standards were last examined. The presumptions were developed at a time when the law regulating lawyer advertising under *Bates* was still developing. Many of the standards have their origin in former rule 2-101, adopted in 1979, following the decision in *Bates.* The law has since crystalized with the development of the commercial speech standards under *Central Hudson.*

What has been shown is that the presumptions are not necessary to regulate inherently false and deceptive advertising. As presently framed, the presumptions force lawyers to have to prove a negative. They create a lack of predictability with respect to how a particular bar regulator will view a given advertisement. The standards also create a risk of inconsistent enforcement and an unchecked opportunity to regulate "taste" and "professionalism" in the name of "misleading" advertisements. In the absence of deception or illegal activities, regulations concerning the content of advertisements are constitutionally permitted only if they are narrowly drawn to advance a substantial governmental interest. *Cent. Hudson Gas & Elec. v. Pub. Serv. Comm'n,* 447 U.S. 557 (1980); *Alexander v. Cahill*, 598 F.3d. 79 (2d Cir. 2010) (state's ban on "advertising techniques" that are no more than potentially misleading are unconstitutionally broad).

The standards are not "guidelines" as suggested by the Chief Trial Counsel. The "standards *shall only be used* as presumptions affecting the burden of proof in disciplinary proceedings involving alleged violations of these rules" Rule 1-400(E). They are intended to serve no other purpose.

The FTC does not discipline advertisers through the use of presumptions. Cease and desist orders are civil remedies not licensure rules. Instead, the FTC has on occasion reminded various state regulators that overly broad advertising restrictions not only reduce competition and violate federal antitrust laws, but also restrict truthful information about legal services.[15] The presumptions in §6158.1 are intended to apply in civil enforcement and private actions, not state bar disciplinary proceedings. See AB 3659 (Horcher) Legislative Counsel Analysis at page 6.

Business and Professions Code Art. 9.5 is not a stumbling block

The Horcher bill was enacted in 1994 to regulate "advertisements" directed to the general public and which are paid for "by, or on behalf of, an attorney". The Act does not apply to targeted communications and, according to State Bar Formal Opinion 2012-186, would not apply to certain forms of social media. More importantly, the statute does not limit or preclude changes to the rules of professional conduct. §6159.2(a) ("Nothing in this article shall be deemed to limit or preclude enforcement of any other provision of law, or of any court rule or of the State Bar Rules of Professional Conduct").

Since 1994, there has only been brief mention of §6157- 6159.2 in reported state and federal cases. Of the 5 cases found, 3 Ninth Circuit decisions cite §6157 for definitional purposes with no holding; one Ninth Circuit case included a footnote that briefly discussed §6157.1; another case from the second district court of appeal discussed §6157.2 in a footnote but relied on Rule 1-400 for its decision.

Numerous state and federal statutes impose additional and, in some cases, more demanding requirements for lawyer advertising that Rule 1-400. See, e.g., Labor Code §139.45, §3215; Penal Code §646, §646,6; 15 USC §7701 et. seq. ("CAN-SPAM Act").[16] None of these statutes pose a barrier to updating the lawyer advertising rules or preclude the Commission from considering Model Rules 7.1 – 7.5. RRC-1's proposed versions of the lawyer advertising rules were sent to Senate and Assembly legislative committees during the public comment period and no response was received.

No one on the drafting team is advocating that the State Bar compromise its regulatory authority over lawyer advertising. This memo argues, instead, that effective lawyer advertising regulation requires updated rules that are capable of compliance and consistent enforcement as technologies evolve while ensuring that consumers have access to accurate information about legal services without being deceived or subject to undue coercion or harassment.

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[1] See ABA Commission on Ethics 20/20's "Issues Paper Concerning Lawyer's Use of Internet-Based Client Development Tools" (September 2010). According to the report, LinkedIn currently has approximately 300,000,000 users, with a geographical reach of 200 countries and territories and continues to grow.

[2] Connor Mullin, *Regulating Legal Advertising on the Internet, Blogs, Google & SuperLawyers*, 20 Geo. J. Legal Ethics 835, 838 (2007).

[3] For example, according to a Pew Research Center 2014 Social Media Update, for the 81% of American adults who use the Internet, 52% of online adults now use two or more social media sites; 71% are on Facebook, 70% engage in daily use, 23% use Twitter and 26% use Instagram.

[4] The fact that there is wide variation among jurisdictions in their approach to regulating lawyer advertising does not excuse us from achieving greater uniformity in regulating lawyer advertising. While states have made variations to the Model Rules, most jurisdictions employ the same framework and the differences (albeit regrettable) are more easily identified.

[5] A lawyer's message to the public via Snapchat disappears in 10 seconds and cannot be retrieved. A lawyer who live-tweets on Twitter or Redditt or posts a status update on YouTube about a live event in order to promote herself is unlikely to include the words "Advertisement," "Newsletter" or words of similar import in *12 point print.*

[6] The rule should be modified to require an e-mail address or other means of the identifying the lawyer or law firm without requiring an "office address."

[7] Model Rule 7.6 [political contributions to obtain government engagements or judicial appointments] has been adopted by very few states and is not recommended.

[8] No advertising standards were needed in the recent Review Department decision in *Matter of Sangary,* Case No. 13-O-13838 DFM (2014), in which respondent's website falsely portrayed respondent in photos with various celebrities and public figures that had been photo-shopped.

[9] In response to the question how often complaints about lawyer advertising are received, 56% responded, "rarely," 17% responded, "almost never," and 8% responded, "frequently."

[10] In response to the question, "Who are the predominant complainants in lawyer advertising charges?" 78% responded that it was other lawyers; 3% responded that it was consumers.

[11] The survey responses reported that in some cases, advertising complaints involving a provable advertising rule violation are handled with warning letters, diversion, dismissal of formal charges, changes in advertising language, and other dispositions.

[12] Only 17% of the jurisdictions responding reported that they actively monitor lawyer advertisements.

[13] In response to the question: "How often do formal advertising complaints alleging false or misleading communications result in disciplinary sanctions, including diversion and probation," 50% responded, "rarely," 36% responded "almost never," and 6% responded, "frequently."

[14] *See, e.g.*, Donald R. Lundberg, S*ome Thoughts About Regulating Lawyer Advertising*, 34 ABA Nat'l Conference on Prof'l Responsibility (2008); Fred C. Zacharias, *What Lawyers Do When Nobody's Watching: Legal Advertising as a Case Study of the Impact of Underenforced Professional Rules,* 87 IOWA L. REV. 971 (2002).

[15] ABA Center for Professional Responsibility, *FTC Letters Regarding Lawyer Advertising*, http://www.americanbar.org.

[16] For a list of other statutes and rules impacting lawyer advertising in California, see *Cal.Prac. Guide: Prof. Resp.* ¶2.4 (Rutter Group 2015).

Rule 1-400 Advertising and Solicitation
(Current California Rule)

Rule 1-400 Advertising and Solicitation

(A) For purposes of this rule, "communication" means any message or offer made by or on behalf of a member concerning the availability for professional employment of a member or a law firm directed to any former, present, or prospective client, including but not limited to the following:

(1) Any use of firm name, trade name, fictitious name, or other professional designation of such member or law firm; or

(2) Any stationery, letterhead, business card, sign, brochure, or other comparable written material describing such member, law firm, or lawyers; or

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

(4) Any unsolicited correspondence from a member or law firm directed to any person or entity.

(B) For purposes of this rule, a "solicitation" means any communication:

(1) Concerning the availability for professional employment of a member or a law firm in which a significant motive is pecuniary gain; and

(2) Which is:

(a) delivered in person or by telephone, or

(b) directed by any means to a person known to the sender to be represented by counsel in a matter which is a subject of the communication.

(C) A solicitation shall not be made by or on behalf of a member or law firm to a prospective client with whom the member or law firm has no family or prior professional relationship, unless the solicitation is protected from abridgment by the Constitution of the United States or by the Constitution of the State of California. A solicitation to a former or present client in the discharge of a member's or law firm's professional duties is not prohibited.

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

(1) Contain any untrue statement; or

(2) Contain any matter, or present or arrange any matter in a manner or format which is false, deceptive, or which tends to confuse, deceive, or mislead the public; or

(3) Omit to state any fact necessary to make the statements made, in the light of circumstances under which they are made, not misleading to the public; or

(4) Fail to indicate clearly, expressly, or by context, that it is a communication or solicitation, as the case may be; or

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

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

(E) The Board of Governors of the State Bar shall formulate and adopt standards as to communications which will be presumed to violate this rule 1-400. The standards shall only be used as presumptions affecting the burden of proof in disciplinary proceedings involving alleged violations of these rules. "Presumption affecting the burden of proof" means that presumption defined in Evidence Code sections 605 and 606. Such standards formulated and adopted by the Board, as from time to time amended, shall be effective and binding on all members.

(F) A member shall retain for two years a true and correct copy or recording of any communication made by written or electronic media. Upon written request, the member shall make any such copy or recording available to the State Bar, and, if requested, shall provide to the State Bar evidence to support any factual or objective claim contained in the communication.

Standards:

Pursuant to rule 1-400(E) the Board of Governors of the State Bar has adopted the following standards, effective May 27, 1989, unless noted otherwise, as forms of "communication" defined in rule 1-400(A) which are presumed to be in violation of rule 1-400:

(1) A "communication" which contains guarantees, warranties, or predictions regarding the result of the representation.

(2) A "communication" which contains testimonials about or endorsements of a member unless such communication also contains an express disclaimer such as "this testimonial or endorsement does not constitute a guarantee, warranty, or prediction regarding the outcome of your legal matter."

(3) A "communication" which is delivered to a potential client whom the member knows or should reasonably know is in such a physical, emotional, or mental state that he or she would not be expected to exercise reasonable judgment as to the retention of counsel.

(4) A "communication" which is transmitted at the scene of an accident or at or en route to a hospital, emergency care center, or other health care facility.

(5) A "communication," except professional announcements, seeking professional employment for pecuniary gain, which is transmitted by mail or equivalent means which does not bear the word "Advertisement," "Newsletter" or words of similar import in 12 point print on the first page. If such communication, including firm brochures, newsletters, recent legal development advisories, and similar materials, is transmitted in an envelope, the envelope shall bear the word "Advertisement," "Newsletter" or words of similar import on the outside thereof.

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

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

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

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

(10) A "communication" which implies that the member or law firm is participating in a lawyer referral service which has been certified by the State Bar of California or as having satisfied the Minimum Standards for Lawyer Referral Services in California, when that is not the case.

(11) (Repealed. See rule 1-400(D)(6) for the operative language on this subject.)

(12) A "communication," except professional announcements, in the form of an advertisement primarily directed to seeking professional employment primarily for pecuniary gain transmitted to the general public or any substantial portion thereof by mail or equivalent means or by means of television, radio, newspaper, magazine or other form of commercial mass media which does not state the name of the member responsible for the communication. When the communication is made on behalf of a law firm, the communication shall state the name of at least one member responsible for it.

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

(14) A "communication" which states or implies "no fee without recovery" unless such communication also expressly discloses whether or not the client will be liable for costs.

(15) A "communication" which states or implies that a member is able to provide legal services in a language other than English unless the member can actually provide legal services in such language or the communication also states in the language of the communication (a) the

employment title of the person who speaks such language and (b) that the person is not a member of the State Bar of California, if that is the case.

(16) An unsolicited "communication" transmitted to the general public or any substantial portion thereof primarily directed to seeking professional employment primarily for pecuniary gain which sets forth a specific fee or range of fees for a particular service where, in fact, the member charges a greater fee than advertised in such communication within a period of 90 days following dissemination of such communication, unless such communication expressly specifies a shorter period of time regarding the advertised fee. Where the communication is published in the classified or "yellow pages" section of telephone, business or legal directories or in other media not published more frequently than once a year, the member shall conform to the advertised fee for a period of one year from initial publication, unless such communication expressly specifies a shorter period of time regarding the advertised fee.

RRC1 PROPOSED RULES
CHAPTER 7
INFORMATION ABOUT LEGAL SERVICES

Rule 7.1 Communications Concerning the Availability of Legal Services

(a) For purposes of Rules 7.1 through 7.5, "communication" means any message or offer made by or on behalf of a lawyer concerning the availability for professional employment of a lawyer or a lawyer's law firm directed to any 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 lawyer or law firm; or

(2) Any stationery, letterhead, business card, sign, brochure, domain name, Internet web page or web site, e-mail, other material sent or posted by electronic transmission, or other writing describing such lawyer or law firm; or

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

(4) Any unsolicited correspondence, electronic transmission, or other writing from a lawyer or law firm directed to any person or entity.

(b) A lawyer shall not make a false or misleading communication as defined herein.

(c) A communication is false or misleading if it:

(1) Contains any untrue statement; or

(2) Contains a material misrepresentation of fact or law; or

(3) Contains any matter, or presents or arranges any matter in a manner or format that is false, deceptive, or that confuses, deceives, or misleads the public; or

(4) Omits to state any fact necessary to make the statements made, in the light of circumstances under which they are made, not materially misleading.

(d) The Board of Trustees of the State Bar may formulate and adopt standards as to communications that will be presumed to violate Rule 7.1, 7.2, 7.3, 7.4 or 7.5. The standards shall only be used as presumptions affecting the burden of proof in disciplinary proceedings involving alleged violations of these Rules. "Presumption affecting the burden of proof" means that presumption defined in Evidence Code sections 605 and 606. Such standards formulated and adopted by the Board, as from time to time amended, shall be effective and binding on all lawyers.

Comment

[1] This Rule governs all communications about the availability of legal services from lawyers and law firms, including advertising permitted by Rule 7.2. Whatever means are used to make

known a lawyer's services, statements about them must be truthful. The requirement of truthfulness in a communication under this Rule includes representations about the law.

[2] This Rule prohibits truthful statements that are misleading. A truthful statement is misleading if it omits a fact necessary to make the lawyer's communication considered as a whole not materially misleading. A truthful statement is also misleading if there is a substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable factual foundation.

[3] An advertisement that truthfully reports a lawyer's achievements on behalf of clients or former clients may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case. Similarly, an unsubstantiated comparison of the lawyer's services or fees with the services or fees of other lawyers may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison can be substantiated. The inclusion of an appropriate disclaimer or qualifying language may avoid creating unjustified expectations or otherwise misleading a prospective client.

[3A] The list of communications under paragraphs (a)(1) through (a)(4) of this Rule is not exclusive. For example, a lawyer's misleading use of metatags to divert a prospective client to the web site of the lawyer or the lawyer's law firm would also be prohibited under this Rule.

[4] See also Rule 8.4(e) for the prohibition against stating or implying an ability to influence improperly a government agency or official or to achieve results by means that violate these Rules or other law.

Standards

Pursuant to paragraph (d), the Board of Trustees has adopted the following standards related to paragraph (b) of this Rule:

(1) A "communication" that contains guarantees, warranties, or predictions regarding the result of the representation.

(2) A "communication" that contains testimonials about or endorsements of a lawyer unless such communication also contains an express disclaimer such as "this testimonial or endorsement does not constitute a guarantee, warranty, or prediction regarding the outcome of your legal matter."

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

(4) A "communication" that states or implies "no fee without recovery" unless such communication also expressly discloses whether or not the client will be liable for costs.

(5) A "communication" that states or implies that a lawyer is able to provide legal services in a language other than English unless the lawyer 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.

(6) An unsolicited “communication” transmitted to the general public or any substantial portion thereof primarily directed to seeking professional employment primarily for pecuniary gain that sets forth a specific fee or range of fees for a particular service where, in fact, the lawyer 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 lawyer 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 7.2 Advertising

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

(b) A lawyer shall not give anything of value to a person 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 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 nonlawyer 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

(i) the reciprocal referral agreement is not exclusive, and

(ii) the client is informed of the existence and nature of the agreement; and

(5) offer or give a gift or gratuity to any 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 office address of at least one lawyer or law firm responsible for its content.

Comment

[1] To assist the public in obtaining legal services, lawyers should be allowed to make known their services not only through reputation but also through advertising. The public's need to know about legal services is particularly acute in the case of persons of moderate means who have not made extensive use of legal services. Lawyers must be aware, however, that advertising by them entails the risk of practices that are misleading or overreaching.

[2] This Rule permits public dissemination of information concerning a lawyer's name or firm name, address and telephone number; 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.

[3] This Rule permits advertising by electronic media, including but not limited to television, radio and the Internet. But see Rule 7.3(a) concerning real-time electronic communications with prospective clients.

[4] 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

[5] Lawyers are not permitted to pay others for channeling professional work. Paragraph (b)(1), however, allows a lawyer to pay for advertising and communications permitted by this Rule, including the costs of print directory listings, online directory listings, newspaper ads, television and radio airtime, domain-name registrations, sponsorship fees, banner ads, and group advertising. A lawyer may also 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 the conduct of nonlawyers who prepare marketing materials for them.

[6] Paragraph (b)(2) permits a lawyer to pay the usual charges of a group or pre-paid legal service plan exempt from registration under Business and Professions Code section 6155(c). Paragraph (b)(2) permits a lawyer to pay the usual charges of a qualified 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. See Business and Professions Code, section 6155, and rules and regulations pursuant thereto. See also Rule 5.4(a)(4).

[7] A lawyer who accepts assignments or referrals from a legal service plan or referrals from a lawyer referral service must act reasonably to assure that the activities of the plan or service are compatible with the lawyer's professional obligations. See Rules 5.3 and 5.4. Legal service plans and lawyer referral services may communicate with prospective clients, but such communication must be in conformity with these Rules. Thus, advertising must not be false or misleading, as would be the case if the communications of a group advertising program or a group legal services plan would mislead prospective clients to think that it was a lawyer referral service sponsored by a state agency or bar association. Nor could the lawyer allow in-person, telephonic, or real-time contacts that would violate Rule 7.3.

[8] Paragraph (b)(4) permits a lawyer to make referrals to another, 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 Rule 5.4(c). A lawyer does not violate paragraph (b)(4) of this Rule by agreeing to refer clients or customers to another, so long as the reciprocal referral agreement is not exclusive and the client is informed of the referral agreement. Conflicts of interest created by arrangements made pursuant to paragraph (b)(4) are governed by Rule 1.7. Reciprocal referral agreements should not be of indefinite duration and should be reviewed periodically to determine whether they comply with these Rules. This Rule does not restrict referrals or divisions of revenues or net income among lawyers within a law firm comprised of multiple entities. A division of fees between or among lawyers not in the same law firm is governed by Rule 1.5.1.

Required information in advertisements

[9] Paragraph (c) also applies to a group of lawyers that engages in cooperative advertising. Any such communication made pursuant to this Rule shall include the name and office address of at least one member of the group responsible for its content. See also Business and Professions Code section 6155(h). See also Business and Professions Code section 6159.1, concerning the requirement to retain any advertisement for one year.

Rule 7.3 Direct Contact with Prospective Clients

(a) A lawyer shall not by in person, live telephone or real-time electronic contact solicit professional employment from a prospective client when a significant motive for doing so is the lawyer's pecuniary gain, unless the communication is protected from abridgment by the Constitution of the United States or by the Constitution of the State of California, or 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 from a prospective client 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 prospective client 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, compulsion, intimidation, threats, or vexatious or harassing conduct.

(c) Every written, recorded or electronic communication from a lawyer soliciting professional employment from a prospective client known to be in need of legal services in a particular matter shall include the words “Advertising Material” 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 telephone 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] There is a potential for abuse inherent in direct in person, live telephone or real-time electronic contact by a lawyer with a prospective client known to need legal services. These forms of contact between a lawyer and a prospective client subject the layperson to the private importuning of the trained advocate in a direct interpersonal encounter. The prospective client, 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.

[2] This potential for abuse inherent in direct in person, live telephone or real-time electronic solicitation of prospective clients justifies its prohibition, particularly since lawyer advertising and written and recorded communication permitted under Rule 7.2 offer alternative means of conveying necessary information to those who may be in need of legal services. Advertising and written and recorded communications which may be mailed or autodialed make it possible for a prospective client to be informed about the need for legal services, and about the qualifications of available lawyers and law firms, without subjecting the prospective client to direct in person, telephone or real-time electronic persuasion that may overwhelm the client's judgment.

[3] The use of general advertising and written, recorded or electronic communications to transmit information from a lawyer to prospective clients, 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.

[4] There is far less likelihood that a lawyer would engage in abusive practices against an individual who is a former client, or with whom the lawyer has a close personal or family relationship, or in situations in which the lawyer is motivated by considerations other than the lawyer’s pecuniary gain. Nor is there serious potential for abuse when the person contacted is a lawyer. Consequently, the general prohibition in paragraph (a) and the requirements of paragraph (c) are not applicable in those situations. Also, paragraph (a) is not intended to 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.

[5] Even permitted forms of solicitation can be abused. Thus, any solicitation which (i) contains information which is false or misleading within the meaning of Rule 7.1, (ii) is transmitted in any manner which involves intrusion, coercion, duress, compulsion, intimidation, threats, or vexatious or harassing conduct within the meaning of paragraph (b)(2), or (iii) involves contact with a prospective client who has made known to the lawyer a desire not to be solicited by the lawyer within the meaning of paragraph (b)(1).

[6] 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.

[7] The requirement in paragraph (c) that certain communications be marked "Advertising Material" or with words of similar import does not apply to communications sent in response to requests of potential clients or their representatives. Paragraph (c) also does not apply to general announcements by lawyers, including but not limited to changes in personnel or office location, nor does it apply where it is apparent from the context that the communication is an advertisement.

[8] 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 also Rules 5.4 and 8.4(a).

Rule 7.4 Communication of Fields of Practice and Specialization

(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 is limited to or concentrated in a particular field of law, subject to the requirements of Rule 7.1.

(b) A lawyer registered to practice patent law before the United States Patent and Trademark Office may use the designation "Patent Attorney" or a substantially similar designation.

(c) A lawyer engaged in Admiralty practice may use the designation "Admiralty," "Proctor in Admiralty" or a substantially similar designation.

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

(1) the lawyer is 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.

Rule 7.5 Firm Names and Letterheads

(a) A lawyer shall not use a firm name, letterhead or other professional designation that violates Rule 7.1. A trade name may be used by a lawyer in private practice if it does not imply a connection with a government agency or with a public or charitable legal services organization and is not otherwise in violation of 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.

(d) Lawyers may state or imply that they practice in a partnership or other organization only when that is the fact.

Comment

[1] A firm may be designated by the names of all or some of its lawyers, by the names of deceased or retired lawyers where there has been a continuing succession in the firm's identity, by a distinctive website address, or by a trade name such as the "ABC Legal Clinic." Use of such names in law practice is acceptable so long as it is not misleading in violation of Rule 7.1. If a private firm uses a trade name that includes a geographical name such as "Springfield Legal Clinic," the firm may have to expressly disclaim that it is a public legal aid agency to avoid a misleading implication. 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. Lawyers associated with a lawyer who is disbarred or who resigns with charges pending must comply with Business and Professions Code section 6132.

[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. A lawyer may state or imply that the lawyer or lawyer's law firm is "of counsel" to another lawyer or a law firm only if 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.

ABA MODEL RULES
CHAPTER 7
INFORMATION ABOUT LEGAL SERVICES

Rule 7.1 Communications Concerning a Lawyer's Services

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

Comment

[1] This Rule governs all communications about a lawyer's services, including advertising permitted by Rule 7.2. Whatever means are used to make known a lawyer's services, statements about them must be truthful.

[2] Truthful statements that are misleading are also prohibited by this Rule. A truthful statement is misleading if it omits a fact necessary to make the lawyer's communication considered as a whole not materially misleading. A truthful statement is also misleading if there is a substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable factual foundation.

[3] An advertisement that truthfully reports a lawyer's achievements on behalf of clients or former clients may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case. Similarly, an unsubstantiated comparison of the lawyer's services or fees with the services or fees of other lawyers may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison can be substantiated. The inclusion of an appropriate disclaimer or qualifying language may preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead the public.

[4] See also Rule 8.4(e) for the prohibition against stating or implying an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law.

Rule 7.2 Advertising

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

(b) A lawyer shall not give anything of value to a person 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 charges of a legal service plan or a not-for-profit or qualified lawyer referral service. A qualified lawyer referral service is a lawyer referral service that has been approved by an appropriate regulatory authority;

(3) pay for a law practice in accordance with Rule 1.17; and

(4) refer clients to another lawyer or a 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

(i) the reciprocal referral agreement is not exclusive, and

(ii) the client is informed of the existence and nature of the agreement.

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

Comment

[1] To assist the public in learning about and obtaining legal services, lawyers should be allowed to make known their services not only through reputation but also through organized information campaigns in the form of advertising. Advertising involves an active quest for clients, contrary to the tradition that a lawyer should not seek clientele. However, the public's need to know about legal services can be fulfilled in part through advertising. This need is particularly acute in the case of persons of moderate means who have not made extensive use of legal services. The interest in expanding public information about legal services ought to prevail over considerations of tradition. Nevertheless, advertising by lawyers entails the risk of practices that are misleading or overreaching.

[2] This Rule permits public dissemination of information concerning a lawyer's name or firm name, address, email address, website, and telephone number; 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.

[3] Questions of effectiveness and taste in advertising are matters of speculation and subjective judgment. Some jurisdictions have had extensive prohibitions against television and other forms of advertising, against advertising going beyond specified facts about a lawyer, or against "undignified" advertising. Television, the Internet, and other forms of electronic communication are now among the most powerful media for getting information to the public, particularly persons of low and moderate income; prohibiting television, Internet, and other forms of electronic advertising, therefore, would impede the flow of information about legal services to many sectors of the public. Limiting the information that may be advertised has a similar effect and assumes that the bar can accurately forecast the kind of information that the public would regard as relevant. But see Rule 7.3(a) for the prohibition against a solicitation through a real-time electronic exchange initiated by the lawyer.

[4] Neither this Rule nor Rule 7.3 prohibits communications authorized by law, such as notice to members of a class in class action litigation.

Paying Others to Recommend a Lawyer

[5] Except as permitted under paragraphs (b)(1)-(b)(4), lawyers are not permitted to pay others for recommending the lawyer's services or for channeling professional work in a manner that violates Rule 7.3. A communication contains a recommendation if it endorses or vouches for a lawyer's credentials, abilities, competence, character, or other professional qualities. Paragraph (b)(1), however, allows a lawyer to pay for advertising and communications permitted by this Rule, including the costs of print directory listings, on-line directory listings, newspaper ads, television and radio airtime, domain-name registrations, sponsorship fees, Internet-based advertisements, and group advertising. A lawyer may 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. Moreover, a lawyer may pay others for generating client leads, such as Internet-based client leads, as long as the lead generator does not recommend the lawyer, any payment to the lead generator is consistent with Rules 1.5(e) (division of fees) and 5.4 (professional independence of the lawyer), and the lead generator's communications are consistent with Rule 7.1 (communications concerning a lawyer's services). To comply with Rule 7.1, a lawyer must not pay a lead generator that states, implies, or creates a reasonable impression that it is recommending the lawyer, is making the referral without payment from the lawyer, or has analyzed a person's legal problems when determining which lawyer should receive the referral. See also Rule 5.3 (duties of lawyers and law firms with respect to the conduct of nonlawyers); Rule 8.4(a) (duty to avoid violating the Rules through the acts of another).

[6] A lawyer may pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service. A legal service plan is a prepaid or group legal service plan or a similar delivery system that assists people who seek to secure legal representation. A lawyer referral service, on the other hand, is any organization that holds itself out to the public as a lawyer referral service. Such referral services are understood by the public to be consumer-oriented organizations that provide unbiased referrals to lawyers with appropriate experience in the subject matter of the representation and afford other client protections, such as complaint procedures or malpractice insurance requirements. Consequently, this Rule only permits a lawyer to pay the usual charges of a not-for-profit or qualified lawyer referral service. A qualified lawyer referral service is one that is approved by an appropriate regulatory authority as affording adequate protections for the public. See, e.g., the American Bar Association's Model Supreme Court Rules Governing Lawyer Referral Services and Model Lawyer Referral and Information Service Quality Assurance Act (requiring that organizations that are identified as lawyer referral services (i) permit the participation of all lawyers who are licensed and eligible to practice in the jurisdiction and who meet reasonable objective eligibility requirements as may be established by the referral service for the protection of the public; (ii) require each participating lawyer to carry reasonably adequate malpractice insurance; (iii) act reasonably to assess client satisfaction and address client complaints; and (iv) do not make referrals to lawyers who own, operate or are employed by the referral service.)

[7] A lawyer who accepts assignments or referrals from a legal service plan or referrals from a lawyer referral service must act reasonably to assure that the activities of the plan or service are compatible with the lawyer's professional obligations. See Rule 5.3. Legal service plans and lawyer referral services may communicate with the public, but such communication must be in conformity with these Rules. Thus, advertising must not be false or misleading, as would be the case if the communications of a group advertising program or a group legal services plan would mislead the public to think that it was a lawyer referral service sponsored by a state agency or

bar association. Nor could the lawyer allow in-person, telephonic, or real-time contacts that would violate Rule 7.3.

[8] A lawyer also may agree to refer clients to another lawyer or a 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). Except as provided in Rule 1.5(e), a lawyer who receives referrals from a lawyer or non lawyer professional must not pay anything solely for the referral, but the lawyer does not violate paragraph (b) of this Rule by agreeing to refer clients to the other lawyer or nonlawyer professional, so long as the reciprocal referral agreement is not exclusive and the client is informed of the referral agreement. Conflicts of interest created by such arrangements are governed by Rule 1.7. Reciprocal referral agreements should not be of indefinite duration and should be reviewed periodically to determine whether they comply with these Rules. This Rule does not restrict referrals or divisions of revenues or net income among lawyers within firms comprised of multiple entities.

Rule 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 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 from a prospective client 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 has made known to the lawyer a desire not to be solicited by the lawyer; or

(2) the solicitation involves coercion, duress or harassment.

(c) Every written, recorded or electronic communication from a lawyer soliciting professional employment from anyone known to be in need of legal services in a particular matter shall include the words "Advertising Material" 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).

(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 telephone 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 solicitation is a targeted communication initiated by 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. 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 overreaching.

[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.

[5] 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 close personal or family relationship, or in 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, paragraph (a) is not intended to prohibit a lawyer from participating in constitutionally protected activities of 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 their members or beneficiaries.

[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).

[7] This Rule is not intended to prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a 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. 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.

[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).

Rule 7.4 Communication of Fields Of Practice And Specialization

(a) A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law.

(b) A lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation "Patent Attorney" or a substantially similar designation.

(c) A lawyer engaged in Admiralty practice may use the designation "Admiralty," "Proctor in Admiralty" or a substantially similar designation.

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

(1) the lawyer has been certified as a specialist by an organization that has been approved by an appropriate state authority or that has been accredited by the American Bar Association; and

(2) the name of the certifying organization is clearly identified in the communication.

Comment

[1] Paragraph (a) of this Rule permits a lawyer to indicate areas of practice in communications about the lawyer's services. If a lawyer practices only in certain fields, or will not accept matters except in a specified field or fields, the lawyer is permitted to so indicate. A lawyer is generally permitted to state that the lawyer is a "specialist," practices a "specialty," or "specializes in" particular fields, but such communications are subject to the "false and misleading" standard applied in Rule 7.1 to communications concerning a lawyer's services.

[2] Paragraph (b) recognizes the long-established policy of the Patent and Trademark Office for the designation of lawyers practicing before the Office. Paragraph (c) recognizes that designation of Admiralty practice has a long historical tradition associated with maritime commerce and the federal courts.

[3] Paragraph (d) permits a lawyer to state that the lawyer is certified as a specialist in a field of law if such certification is granted by an organization approved by an appropriate state authority or accredited by the American Bar Association or another organization, such as a state bar association, that has been approved by the state authority to accredit organizations that certify lawyers as specialists. Certification signifies that an objective entity has recognized an advanced degree of knowledge and experience in the specialty area greater than is suggested by general licensure to practice law. Certifying organizations may be expected to apply standards of experience, knowledge and proficiency to insure that a lawyer's recognition as a specialist is meaningful and reliable. In order to insure that consumers can obtain access to useful information about an organization granting certification, the name of the certifying organization must be included in any communication regarding the certification.

Rule 7.5 Firm Names and Letterheads

(a) A lawyer shall not use a firm name, letterhead or other professional designation that violates Rule 7.1. A trade name may be used by a lawyer in private practice if it does not imply a connection with a government agency or with a public or charitable legal services organization and is not otherwise in violation of 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.

(d) Lawyers may state or imply that they practice in a partnership or other organization only when that is the fact.

Comment

[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.

Rule 7.6 Political Contributions To Obtain Government Legal Engagements Or Appointments By Judges

A lawyer or law firm shall not accept a government legal engagement or an appointment by a judge if the lawyer or law firm makes a political contribution or solicits political contributions for the purpose of obtaining or being considered for that type of legal engagement or appointment.

Comment

[1] Lawyers have a right to participate fully in the political process, which includes making and soliciting political contributions to candidates for judicial and other public office. Nevertheless, when lawyers make or solicit political contributions in order to obtain an engagement for legal work awarded by a government agency, or to obtain appointment by a judge, the public may legitimately question whether the lawyers engaged to perform the work are selected on the basis of competence and merit. In such a circumstance, the integrity of the profession is undermined.

[2] The term "political contribution" denotes any gift, subscription, loan, advance or deposit of anything of value made directly or indirectly to a candidate, incumbent, political party or campaign committee to influence or provide financial support for election to or retention in judicial or other government office. Political contributions in initiative and referendum elections are not included. For purposes of this Rule, the term "political contribution" does not include uncompensated services.

[3] Subject to the exceptions below, (i) the term "government legal engagement" denotes any engagement to provide legal services that a public official has the direct or indirect power to award; and (ii) the term "appointment by a judge" denotes an appointment to a position such as

referee, commissioner, special master, receiver, guardian or other similar position that is made by a judge. Those terms do not, however, include (a) substantially uncompensated services; (b) engagements or appointments made on the basis of experience, expertise, professional qualifications and cost following a request for proposal or other process that is free from influence based upon political contributions; and (c) engagements or appointments made on a rotational basis from a list compiled without regard to political contributions.

[4] The term “lawyer or law firm” includes a political action committee or other entity owned or controlled by a lawyer or law firm.

[5] Political contributions are for the purpose of obtaining or being considered for a government legal engagement or appointment by a judge if, but for the desire to be considered for the legal engagement or appointment, the lawyer or law firm would not have made or solicited the contributions. The purpose may be determined by an examination of the circumstances in which the contributions occur. For example, one or more contributions that in the aggregate are substantial in relation to other contributions by lawyers or law firms, made for the benefit of an official in a position to influence award of a government legal engagement, and followed by an award of the legal engagement to the contributing or soliciting lawyer or the lawyer’s firm would support an inference that the purpose of the contributions was to obtain the engagement, absent other factors that weigh against existence of the proscribed purpose. Those factors may include among others that the contribution or solicitation was made to further a political, social, or economic interest or because of an existing personal, family, or professional relationship with a candidate.

[6] If a lawyer makes or solicits a political contribution under circumstances that constitute bribery or another crime, Rule 8.4(b) is implicated.

CURRENT CALIFORNIA RULE 1-400
"Advertising and Solicitation"

I. Text of Current Rule:

(A) For purposes of this rule, "communication" means any message or offer made by or on behalf of a member concerning the availability for professional employment of a member or a law firm directed to any former, present, or prospective client, including but not limited to the following:

(1) Any use of firm name, trade name, fictitious name, or other professional designation of such member or law firm; or

(2) Any stationery, letterhead, business card, sign, brochure, or other comparable written material describing such member, law firm, or lawyers; or

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

(4) Any unsolicited correspondence from a member or law firm directed to any person or entity.

(B) For purposes of this rule, a "solicitation" means any communication:

(1) Concerning the availability for professional employment of a member or a law firm in which a significant motive is pecuniary gain; and

(2) Which is:

(a) delivered in person or by telephone, or

(b) directed by any means to a person known to the sender to be represented by counsel in a matter which is a subject of the communication.

(C) A solicitation shall not be made by or on behalf of a member or law firm to a prospective client with whom the member or law firm has no family or prior professional relationship, unless the solicitation is protected from abridgment by the Constitution of the United States or by the Constitution of the State of California. A solicitation to a former or present client in the discharge of a member's or law firm's professional duties is not prohibited.

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

(1) Contain any untrue statement; or

(2) Contain any matter, or present or arrange any matter in a manner or format which is false, deceptive, or which tends to confuse, deceive, or mislead the public; or

(3) Omit to state any fact necessary to make the statements made, in the light of circumstances under which they are made, not misleading to the public; or

(4) Fail to indicate clearly, expressly, or by context, that it is a communication or solicitation, as the case may be; or

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

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

(E) The Board of Governors of the State Bar shall formulate and adopt standards as to communications which will be presumed to violate this rule 1-400. The standards shall only be used as presumptions affecting the burden of proof in disciplinary proceedings involving alleged violations of these rules. "Presumption affecting the burden of proof" means that presumption defined in Evidence Code sections 605 and 606. Such standards formulated and adopted by the Board, as from time to time amended, shall be effective and binding on all members.

(F) A member shall retain for two years a true and correct copy or recording of any communication made by written or electronic media. Upon written request, the member shall make any such copy or recording available to the State Bar, and, if requested, shall provide to the State Bar evidence to support any factual or objective claim contained in the communication.

Standards:

Pursuant to rule 1-400(E) the Board of Governors of the State Bar has adopted the following standards, effective May 27, 1989, unless noted otherwise, as forms of "communication" defined in rule 1-400(A) which are presumed to be in violation of rule 1-400:

(1) A "communication" which contains guarantees, warranties, or predictions regarding the result of the representation.

(2) A "communication" which contains testimonials about or endorsements of a member unless such communication also contains an express disclaimer such as "this testimonial or endorsement does not constitute a guarantee, warranty, or prediction regarding the outcome of your legal matter."

(3) A "communication" which is delivered to a potential client whom the member knows or should reasonably know is in such a physical, emotional, or mental state that he or she would not be expected to exercise reasonable judgment as to the retention of counsel.

(4) A "communication" which is transmitted at the scene of an accident or at or en route to a hospital, emergency care center, or other health care facility.

(5) A "communication," except professional announcements, seeking professional employment for pecuniary gain, which is transmitted by mail or equivalent means which does not bear the word "Advertisement," "Newsletter" or words of similar import in 12 point print on the first page. If such communication, including firm brochures, newsletters, recent legal

development advisories, and similar materials, is transmitted in an envelope, the envelope shall bear the word “Advertisement,” “Newsletter” or words of similar import on the outside thereof.

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

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

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

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

(10) A “communication” which implies that the member or law firm is participating in a lawyer referral service which has been certified by the State Bar of California or as having satisfied the Minimum Standards for Lawyer Referral Services in California, when that is not the case.

(11) (Repealed. See rule 1-400(D)(6) for the operative language on this subject.)

(12) A “communication,” except professional announcements, in the form of an advertisement primarily directed to seeking professional employment primarily for pecuniary gain transmitted to the general public or any substantial portion thereof by mail or equivalent means or by means of television, radio, newspaper, magazine or other form of commercial mass media which does not state the name of the member responsible for the communication. When the communication is made on behalf of a law firm, the communication shall state the name of at least one member responsible for it.

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

(14) A “communication” which states or implies “no fee without recovery” unless such communication also expressly discloses whether or not the client will be liable for costs.

(15) A “communication” which states or implies that a member is able to provide legal services in a language other than English unless the member can actually provide legal services in such language or the communication also states in the language of the communication (a) the employment title of the person who speaks such language and (b) that the person is not a member of the State Bar of California, if that is the case.

(16) An unsolicited “communication” transmitted to the general public or any substantial portion thereof primarily directed to seeking professional employment primarily for pecuniary gain which sets forth a specific fee or range of fees for a particular service where, in fact, the

member charges a greater fee than advertised in such communication within a period of 90 days following dissemination of such communication, unless such communication expressly specifies a shorter period of time regarding the advertised fee. Where the communication is published in the classified or "yellow pages" section of telephone, business or legal directories or in other media not published more frequently than once a year, the member shall conform to the advertised fee for a period of one year from initial publication, unless such communication expressly specifies a shorter period of time regarding the advertised fee.

II. Background/Purpose:

A. 1979 Rule[1]

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

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

> **Rule 2-101 Professional Employment**
>
> This rule is adopted to foster and encourage the free flow of truthful and responsible information to assist the public in recognizing legal problems and in making informed choices of legal counsel.
>
> Accordingly, a member of the State Bar may seek professional employment from a former, present or potential client by any means consistent with these rules.
>
> (A) A "communication" is a message concerning the availability for professional employment of a member or a member's firm. A "communication" made by or on behalf of a member shall not:
>
> (1) Contain any untrue statement; or

[1] See "Final Report and Recommendation of the Special Committee on Lawyer Advertising and Solicitation," November 1978.

(2) Contain any matter, or present or arrange any matter in a manner or format which is false, deceptive, or which tends to confuse, deceive or mislead the public; or

(3) Omit to state any fact necessary to make the statements made, in the light of the circumstances under which they are made, not misleading to the public; or

(4) Fail to indicate clearly, expressly or by context, that it is a "communication"; or

(5) State that a member is a certified specialist unless the member holds a current certificate as a specialist issued by the California Board of Legal Specialization pursuant to a plan for specialization approved by the Supreme Court; or

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

(B) No solicitation or "communication" seeking professional employment from a potential client for pecuniary gain shall be delivered by a member or a member's agent in person or by telephone to the potential client, nor shall a solicitation or "communication" specifically directed to a particular potential client regarding that potential client's particular case or matter and seeking professional employment for pecuniary gain be delivered by any other means, unless the solicitation or "communication" is protected from abridgment by the Constitution of the United States or by the Constitution of the State of California. A potential client includes a former or present client.

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

(C) A member or member's firm shall not solicit or accept professional employment offered or obtained through the acts of an agent, runner or capper, which acts would be in violation of law, or which, if performed by a member of the State Bar, would be in violation of subdivisions (A) or (B) of this rule 2-101.

(D) The Board of Governors of the State Bar shall formulate and adopt standards as to what "communications" will be presumed to violate subdivisions (A) or (B) of this rule 2-101. The standards shall have effect exclusively in disciplinary proceedings involving alleged violations of these rules as presumptions affecting the burden of proof. "Presumption affecting the burden of proof" means that presumption

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

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

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

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

(1) Contains guarantees, warranties or predictions regarding the result of legal action; or

(2) Contains testimonials about or endorsements of a member; or

(3) Is delivered in person or by telephone to a potential client who is in such a physical, emotional or mental state that he or she would not be expected to exercise reasonable judgment as to the retention of counsel; or

(4) Is transmitted at the scene of an accident or at or en route to a hospital, emergency care center or other health care facility.

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

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

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

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

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

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

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

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

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

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

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

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

B. 1989 Rule[2]

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

> (A) For purposes of this rule, “communication” means any message or offer made by or on behalf of a member concerning the availability for professional employment of a member or a law firm directed to any former, present, or prospective client, including but not limited to the following:
>
> (1) Any use of firm name, trade name, fictitious name, or other professional designation of such member or law firm; or
>
> (2) Any stationery, letterhead, business card, sign, brochure, or other comparable written material describing such member, law firm, or lawyers; or
>
> (3) Any advertisement (regardless of medium) of such member or law firm directed to the general public or any substantial portion thereof; or
>
> (4) Any unsolicited correspondence from a member or law firm directed to any person or entity.

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

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

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

> (B) For purposes of this rule, a “solicitation” means any communication:
>
> (1) Concerning the availability for professional employment of a member or a law firm in which a significant motive is pecuniary gain; and
>
> (2) Which is;
>
> (a) delivered in person or by telephone, or
>
> (b) directed by any means to a person known to the sender to be represented by counsel in a matter which is a subject of the communication.

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

> (C) A solicitation shall not be made by or on behalf of a member or law firm to a prospective client with whom the member or law firm has no family or prior professional relationship, unless the solicitation is protected from abridgment by the Constitution of the United States or by the Constitution of the State of California. A solicitation to a former or present client in the discharge of a member’s or law firm’s professional duties is not prohibited.

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

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

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

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

> (D) A communication or a solicitation (as defined herein) shall not:
>
> (1) Contain any untrue statement; or
>
> (2) Contain any matter, or present or arrange any matter in a manner or format which is false, deceptive, or which tends to confuse, deceive, or mislead the public; or
>
> (3) Omit to state any fact necessary to make the statements made, in the light of circumstances under which they are made, not misleading to the public; or
>
> (4) Fail to indicate clearly, expressly, or by context, that it is a communication or solicitation, as the case may be; or
>
> (5) Be transmitted in any manner which involves intrusion, coercion, duress, compulsion, intimidation, threats, or vexatious or harassing conduct; or
>
> (6) State that a member is a “certified specialist” unless the member holds a current certificate as a specialist issued by the California Board of Legal Specialization, or any other entity accredited by the State Bar to designate specialists pursuant to standards adopted by the Board of Governors, and states the complete name of the entity which granted certification.

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

> (E) The Board of Governors of the State Bar shall formulate and adopt standards as to communications which will be presumed to violate this rule 1-400. The standards shall only be used as presumptions affecting the burden of proof in disciplinary proceedings involving alleged violations of these rules. “Presumption affecting the burden of proof” means that presumption defined in Evidence Code sections 605 and

606. Such standards formulated and adopted by the Board, as from time to time amended, shall be effective and binding on all members.

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

(F) A member shall retain for two years a true and correct copy or recording of any communication made by written or electronic media. Upon written request, the member shall make any such copy or recording available to the State Bar, and, if requested, shall provide to the State Bar evidence to support any factual or objective claim contained in the communication.

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

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

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

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

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

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

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

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

C. 1992 Rule[3]

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

D. 1993 Repeal of (D)(6)[4]

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

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

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

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

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

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

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

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

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

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

1. Amendment of Standard (5)

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

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

The Task Force concluded that the proposed amended standard's additional minimal disclosure requirement would protect the public from being misled by requiring the placement of the word "Advertisement" or "Newsletter" in 12 point print on the first page

of an attorney communication. The amended standard helped clarify to the recipient of such a communication that the communication is, in fact, a solicitation for legal employment. The proposed new standard reads as follows:

> (5) A "communication," except professional announcements, seeking professional employment for pecuniary gain, which is transmitted by mail or equivalent means which does not bear the word "Advertisement," "Newsletter" or words of similar import in 12 point print on the first page. If such communication, including firm brochures, newsletters, recent legal development advisories, and similar materials, is transmitted in an envelope, the envelope shall bear the word "Advertisement," "Newsletter" or words of similar import on the outside thereof.

2. Adoption of New Standard (12)

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

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

> (12) A "communication," except professional announcements, in the form of an advertisement primarily directed to seeking professional employment primarily for pecuniary gain transmitted to the general public or any substantial portion thereof by mail or equivalent means or by means of television, radio, newspaper, magazine or other form of commercial mass media which does not state the name of the member responsible for the communication. When the communication is made on behalf of a law firm, the communication shall state the name of at least one member responsible for it.

3. Adoption of New Standard (13)

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

Based on its study, the Task Force concluded that advertisements containing dramatizations can be misleading to consumers of legal services. The proposed standard's minimal disclosure requirement would protect the public from wrongly

believing that the characters or situations portrayed in an attorney's communication are real where, in fact, such characters are being played by actors or the situation portrayed is either fictitious, a reenactment or otherwise staged. The proposed new standard reads as follows:

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

4. Adoption of New Standard (14)

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

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

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

> (14) A “communication” which states or implies “no fee without recovery” unless such communication also expressly discloses whether or not the client will be liable for costs.

5. Adoption of New Standard (15)

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

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

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

> (15) A "communication" which states or implies that a member is able to provide legal services in a language other than English unless the member can actually provide legal services in such language or the communication also states in the language of the communication (a) the employment title of the person who speaks such language and (b) that the person is not a member of the State Bar of California, if that is the case.

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

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

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

> (D) A communication or a solicitation (as defined herein) shall not:
>
> (6) State that a member is a "certified specialist" unless the member holds a current certificate as a specialist issued by the Board of Legal Specialization, or any other entity accredited by the State Bar to designate specialists pursuant to standards adopted by the

Board of Governors, and states the complete name of the entity which granted certification.

III. Input from the State Bar Office of the Chief Trial Counsel (OCTC):

A. In a 2001 Letter to the Prior Commission, OCTC Provided the Following Comment on Rule 1-400:

OCTC recommends that this rule be updated to specifically include e-mail, internet or other electronic transmissions.

Add the following language:

(A) . . .

(2) Any stationary, letterhead, business card, sign, brochure, *e-mail, internet web page or other written document sent by electronic transmission,* or other comparable written material describing such member, law firm, or lawyers.

(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, by telephone, *or through contemporaneous electronic transmission,* 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.

. . .

OCTC COMMENTS:

OCTC recommends that the rule include reference to e-mail and internet pages so that members are fully aware that these rules apply in those situations too. The Standards might also be changed to include a reference to these means of transmission.

B. In a _____, 2015 memorandum to the Commission, OCTC provided the following comment regarding rule 1-400:

(Note: OCTC is expected to provide new comments on this rule. These comments will be distributed to the drafting team when they are received from OCTC.)

IV. Potential Deficiencies in the Current Rule:

A. See above input from OCTC.

The current rule uses a definitional approach that defines a "communication" (broadly to include advertising and letterheads, signs, etc. . .) and a "solicitation" and imposes pertinent prohibitions and requirements for each of these categories of attorney commercial speech. Some other jurisdictions use separate rules to address: (1) advertising, (2) solicitation and (3) letterheads, notices and signs. (Compare the separate New York rules for advertising, solicitation, and other communications: [https://www.nycourts.gov/rules/jointappellate/NY-Rules-Prof-Conduct-1200.pdf].) (See also, ABA MR 7.1 through 7.5.)

B. Although the definition of a "communication" in the current rule is broadly stated, the current rule does not explicitly refer to new technology terms such as: "a domain name," "Internet web page or web site," "e-mail, other material sent or posted by electronic transmission," or "real-time electronic communication." Explicit references might help clarify the rule's applicability to modern technology concepts.

C. Rule 1-400(F) states a requirement to retain copies of lawyer advertisements for two years but this is different from a similar statutory requirement. (See Bus. & Prof. Code § 6159.1 that states a one year retention requirement.)

D. Rule 1-400 does not address a lawyer's conduct in compensating non-lawyers or other lawyers for client referrals. This is found in current Rules 1-320(B) and 2-200(B). Some other jurisdictions align this conduct with their advertising rules. (Compare the New York Rule 7.2 regarding compensation for referrals: [https://www.nycourts.gov/rules/jointappellate/NY-Rules-Prof-Conduct-1200.pdf].)

V. California Context:

A. Laws that apply generally to advertising and fair business practices also govern lawyer advertising (see Business and Professions Code sections 17529 – 17529.9, 17538.41, 17538.43, 17538.45).

B. Article 9.5 of the State Bar Act (entitled: "Legal Advertising") sets forth extensive statutory regulation of lawyer advertising, including provisions that expressly apply to electronic media advertisements. Also included in the statutory scheme is a special enforcement mechanism that affords the alleged violator a nine-day opportunity to withdraw an advertisement.

C. Rules 9.47(b)(3) and 9.48(b)(3) of the California Rules of Court include provisions that impose website requirements on out-of-state lawyers practicing in California under multi-jurisdictional practice of law (MJP) standards.

D. Compensation for client referrals are found in current rules 1-320(B) and 2-200(B). In addition, the State Bar Act prohibits "running and capping" in Business and Professions Code sections 6150 through 6154.

E. State Bar Act provisions regulating a lawyer referral service in California are not to be construed as prohibiting attorneys from "jointly advertising their services." (Bus. & Prof. Code § 6155(h).)

F. The Labor Code includes special provisions governing advertisements for workers' compensation claims (see Labor Code sections 139.45, and 5432 through 5434). In particular, Labor Code section 139.45 adapts the language of rule 1-400(D) to describe advertisements that are "false or misleading."

G. Business and Professions Code section 6132 requires the removal from all law firm advertisements, letterhead, signs and other materials of the name of an attorney who is disbarred, or who resigned with charges pending within 60 days of the disbarment or resignation.

VI. Approach In Other Jurisdictions (National Backdrop):

A. The ABA Comparison Chart, entitled "Variations of the ABA Model Rules of Professional Conduct, Rule 7.1: Communications Concerning a Lawyer's Services," revised April 10, 2015, is available at:

http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_7_1.pdf

- Nineteen states have adopted Model Rule 7.1 verbatim.[5] Thirty-two jurisdictions have adopted a version of the rule that is substantially different to Model Rule 7.1."[6]

B. The ABA Comparison Chart, entitled "Variations of the ABA Model Rules of Professional Conduct, Rule 7.2: Advertising," revised April 10, 2015, is available at:

http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_7_2.pdf

[5] The nineteen states are: Arizona, Connecticut, Delaware, Illinois, Indiana, Iowa, Maine, Maryland, Massachusetts, Minnesota, Nebraska, Oklahoma, Oregon, Pennsylvania, Tennessee, Vermont, Washington, West Virginia, and Wyoming.

[6] The thirty-two jurisdictions are: Alabama, Alaska, Arkansas, California, Colorado, District of Columbia, Florida, Georgia, Hawaii, Idaho, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Rhode Island, South Carolina, South Dakota, Texas, Utah, Virginia, and Wisconsin.

- Six states have adopted Model Rule 7.2 verbatim.[7] Fifteen states have adopted a slightly modified version of Model Rule 7.2.[8] Twenty-six states have adopted a version of the rule that is substantially different to Model Rule 7.2."[9] Four jurisdictions do not have a version of the Model Rule 7.2.[10]

C. The ABA Comparison Chart, entitled "Variations of the ABA Model Rules of Professional Conduct, Rule 7.3: Direct Contact with Prospective Clients," revised April 10, 2015, is available at:

http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_7_3.pdf

- Six states have adopted Model Rule 7.3 verbatim.[11] Fifteen states have adopted a slightly modified version of Model Rule 7.3.[12] Four jurisdictions have adopted a version of the rule that is substantially different to Model Rule 7.3."[13] Two jurisdictions do not have a version of the Model Rule 7.3.[14]

D. 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

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[7] The six states are: Alaska, Iowa, Maine, Nebraska, West Virginia, and Wyoming.

[8] The fifteen states are: Colorado, Delaware, Hawaii, Idaho, Illinois, Kansas, Massachusetts, Minnesota, New Hampshire, New Mexico, Oklahoma, Oregon, Vermont, Washington, and Wisconsin.

[9] The twenty-six states are: Alabama, Arizona, Arkansas, California, Connecticut, Florida, Georgia, Indiana, Louisiana, Maryland, Michigan, Mississippi, Missouri, Montana, Nevada, New Jersey, New York, North Carolina, North Dakota, Ohio, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, and Utah.

[10] The four jurisdictions are: District of Columbia, Kentucky, Texas, and Virginia.

[11] The six states are: Delaware, Idaho, Iowa, Kansas, New Mexico, and Wyoming.

[12] The fifteen states are: Alabama, Alaska, Illinois, Maryland, Minnesota, Mississippi, Montana, Nebraska, North Dakota, Oklahoma, South Dakota, Utah, Vermont, West Virginia, and Wisconsin.

[13] The twenty-eight states 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, Virginia, and Washington.

[14] The two jurisdictions are: District of Columbia, and Texas.

- Eight states have adopted Model Rule 7.4 verbatim.[15] Twenty-three states have adopted a slightly modified version of Model Rule 7.4.[16] Seventeen states have adopted a version of the rule that is substantially different to Model Rule 7.4."[17] Three jurisdictions do not have a version of the Model Rule 7.4.[18]

E. 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

- Twenty-four jurisdictions have adopted Model Rule 7.5 verbatim.[19] Eighteen states have adopted a slightly modified version of Model Rule 7.5.[20] Nine states have adopted a version of the rule that is substantially different to Model Rule 7.5."[21]

VII. Public Comment Received by the First Commission:

The clean text of proposed new rules 7.1, 7.2, 7.3, 7.4, and 7.5 drafted by the first Commission and adopted by the Board to replace rule 1-400 are enclosed with this assignment, together with the synopsis of public comments received on those proposed rules and the full text of those comments. Although the proposed rules differ from current rule 1-400, the drafting team might consider to what extent, if any, the public

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

[16] 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.

[17] The seventeen states are: Alabama, Alaska, California, Florida, Georgia, Illinois, Louisiana, Maryland, Massachusetts, Mississippi, Missouri, Nevada, New Hampshire, North Carolina, South Carolina, Tennessee, and Virginia.

[18] The three jurisdictions are: District of Columbia, Oregon, and Texas.

[19] 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.

[20] The eighteen states are: Alaska, Georgia, Hawaii, Iowa, Kansas, Kentucky, Louisiana, Montana, Nebraska, Nevada, New Hampshire, New York, North Carolina, North Dakota, Pennsylvania, Rhode Island, South Dakota, and Virginia.

[21] The nine states are: Alabama, California, Florida, Indiana, Mississippi, New Jersey, Ohio, Oregon, and Texas.

comments received on the proposed rules provide helpful information in analyzing the current rule.

To facilitate the review and to appreciate the relevance of these public comments, redline comparisons of the proposed rules showing changes to rule 1-400 are also enclosed with the public comments received. However, given the Board's charge to engage in a comprehensive review of the current rules and to retain the historical nature of the California Rules as "a clear and enforceable articulation of disciplinary standards," a drafting team that considers amendments developed by the first Commission should not presume that the approach taken by the first Commission was appropriate to achieve those objectives.

VIII. Potential Issues Identified by Professional Competence Staff Following Review of the Proposed Rule Developed by the First Commission and Adopted by the Board:

Bearing in mind the Commission's Charter to engage in a comprehensive review of the current rules and to retain the historical nature of the California Rules as "a clear and enforceable articulation of disciplinary standards," Professional Competence staff identified the following rule amendment issues (in no particular order) that the drafting team might consider. The drafting team need not address any of the issues. For example, if after critically evaluating an issue addressed by a revision made by the first Commission, the drafting team determines that the revision does not address an actual (as opposed to theoretical) public protection deficiency in the current rule, then the drafting team should hesitate to recommend a change to the current rule despite the prior decision by the first Commission and the Board to address the issue. (Note: For the sake of completeness and ease of reference, some of the issues listed below may have already been mentioned in connection with other information provided above, such as in connection with the approaches taken in other jurisdictions or prior public comment. Multiple mentions of an issue do not necessarily warrant the drafting team taking action on an issue.)

1. Whether the rule should retain the existing California definitional approach (e.g., defining a "communication" and a "solicitation" and imposing pertinent prohibitions and requirements for each of these categories of attorney commercial speech) or use a different multiple rule approach. (Compare the New York lawyer advertising rules:

   [https://www.nycourts.gov/rules/jointappellate/NY-Rules-Prof-Conduct-1200.pdf].) (See also, ABA MR 7.1 through 7.5.)

2. Regardless of whether the existing approach is changed, should the rule be updated to clarify the rule's applicability to modern technology concepts by specifically addressing, as examples, the following: "a domain name," "Internet web page or web site," "e-mail, other material sent or posted by electronic transmission," or "real-time electronic communication."

3. Whether the rule should be revised to delete (or modify) the existing requirement to retain copies of lawyer advertisements for two years. (Compare Bus. & Prof. Code § 6159.1 that states a one year retention requirement.)

4. Whether the existing provisions governing/prohibiting compensation paid to lawyers and non-lawyers for client referrals should be included in the advertising rule. (See rules 1-320(B) and 2 200(B).)

5. Whether there should be any changes to the lawyer advertising standards that have been adopted by the Board.

IX. Research Resources:

- Business and Professions Code § 6132
- Business and Professions Code § 6157 – 6158.4
- Business and Professions Code § 17529 – 17529.9, 17538.41, 17538.43, 17538.45
- Labor Code §§ 139.45 and 5431 – 5434.
- CAL 2012-186 (Social Media)
- CAL 2004-167 (Use of Firm Name Mistaken for Government Entity/Title)
- CAL 2004-166 (Solicitation via Internet chat room)
- CAL 2001-155 (Website Advertising)
- CAL 1995-142 (Direct Mail Marketing of Legal Services)
- In re Morse (1995) 11 Cal.4th 184, 207 [44 Cal.Rptr.2d 620] (advertisement misleading)
- *Leoni v. State Bar* (1985) 39 Cal.3d 609, 621
- *In the Matter of Guzman* (Review Dept. 2014) 5 Cal. State Bar Ct. Rptr. 308 [2014 Calif. Op. LEXIS 15, *15-16].
- *In the Matter of Goddard* (Review Dept. 2011) 2011 Calif. Op. LEXIS 13, *19-20.
- *In the Matter of Venie* (Review Dept. 2010) 2010 Calif. Op. LEXIS 10, *9-11.
- *In the Matter of Copren* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 861 [2005 Calif. Op. LEXIS 8, *2, *5-6].
- *In the Matter of Phillips* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 315 [2001 Calif. Op. LEXIS 9, *60-62].
- *In the Matter of Kroff* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 838 [1998 Calif. Op. LEXIS 4, *6-12].
- *In the Matter of Respondent V* (Review Dept.1995) 3 Cal. State Bar Ct. Rptr. 442 [1995 Calif. Op. LEXIS 4, *32-33].
- *In the Matter of Respondent S* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 255 [1995 Calif. Op. LEXIS 20, *3-4].
- *In the Matter of Fonte* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 752, [1994 Calif. Op. LEXIS 43, *31].
- *In the Matter of Scapa and Brown* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 635 [1993 Calif. Op. LEXIS 57, *44-46].
- *In the Matter of Miller Reinstatement* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 423 [1993 Calif. Op. LEXIS 73, *30].

- *Belli v. State Bar of California* (1974) 10 Cal. 3d 824, 838.
- *Ohralik v. Ohio State Bar Ass'n* (1978) 436 U.S. 447, 467 [98 S. Ct. 1912].
- *Peel v. Atty. Registration & Disciplinary Comm'n* (1990) 496 U.S. 91, 98-99 [110 S. Ct. 2281].
- *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio* (1985) 471 U.S. 626, 652-653 [105 S.Ct. 2265]