



The State Bar of California

Rule 7.1 Communications Concerning a Lawyer's Services (Rule Approved by the Supreme Court, Effective November 1, 2018)

- (a) 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 communication considered as a whole not materially misleading.
- (b) 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 of any type whatsoever about the lawyer or the lawyer's services, including advertising permitted by rule 7.2. A communication includes 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 person.*

[2] A communication that contains an express guarantee or warranty of the result of a particular representation is a false or misleading communication under this rule. (See also Bus. & Prof. Code, § 6157.2, subd. (a).)

[3] 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 it is presented in a manner that creates 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. Any communication that states or implies "no fee without recovery" is also misleading unless the communication also expressly discloses whether or not the client will be liable for costs.

[4] A communication that truthfully reports a lawyer's achievements on behalf of clients or former clients, or a testimonial about or endorsement of the lawyer, 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. An appropriate disclaimer or qualifying language often avoids creating unjustified expectations.

[5] This rule prohibits a lawyer from making a communication that states or implies that the lawyer is able to provide legal services in a language other than English unless the lawyer can actually provide legal services in that language or the communication also states in the language of the communication the employment title of the person* who speaks such language.

[6] Rules 7.1 through 7.5 are not the sole basis for regulating communications concerning a lawyer's services. (See, e.g., Bus. & Prof. Code, §§ 6150–6159.2, 17000 et. seq.) Other state or federal laws may also apply.

**NEW RULE OF PROFESSIONAL CONDUCT 7.1
(Former Rule 1-400)
Advertising and Solicitation**

EXECUTIVE SUMMARY

The Commission for the Revision of the Rules of Professional Conduct (“Commission”) evaluated current rule 1-400 (Advertising and Solicitation) in accordance with the Commission Charter. In addition, the Commission considered the national standard of ABA counterparts to rule 1-400, which comprise a series of rules that are intended to regulate the commercial speech of lawyers: Model Rules 7.1 (Communication Concerning A Lawyer’s Services), 7.2 (Advertising), 7.3 (Solicitation of Clients), 7.4 (Communication of Fields of Practice and Specialization), and 7.5 (Firm Names and Letterheads).

Rule As Issued For 90-day Public Comment

The result of the Commission’s evaluation is a three-fold recommendation for implementing:

- (1) The Model Rules’ framework of having separate rules that regulate different aspects of lawyers’ commercial speech:
 - Proposed rule **7.1** sets out the general prohibition against a lawyer making false and misleading communications concerning the availability of legal services.
 - Proposed rule **7.2** will specifically address advertising, a subset of communication.
 - Proposed rule **7.3** will regulate marketing of legal services through direct contact with a potential client either by real-time communication such as delivered in-person or by telephone, or by directly targeting a person known to be in need of specific legal services.
 - Proposed rule **7.4** will regulate the communication of a lawyer's fields of practice and claims to specialization.
 - Proposed rule **7.5** will regulate the use of firm names and trade names.
- (2) The retention of the Board’s authority to adopt advertising standards provided for in current rule 1-400(E). Amendments to the Board’s standards, including the repeal of a standard, require only Board action; however, many of the Commission’s changes to the advertising rules themselves are integral to what is being recommended for the Board adopted standards. Although the Commission is recommending the repeal of all of the existing standards, many of the concepts addressed in the standards are retained and relocated to either the black letter or the comments of the proposed rules.
- (3) The elimination of the requirement that a lawyer retain for two years a copy of any advertisement or other communication regarding legal services.

Following consideration of public comment, a change was made to proposed rule 7.1 and rule 7.1 was circulated for an additional 45-day public comment period. There were no substantive changes made to proposed rules 7.2, 7.3, 7.4, and 7.5. See the Executive Summary for proposed rules 7.2, 7.3, 7.4, and 7.5.

1. Recommendation of the ABA Model Rule Advertising & Solicitation Framework.

The partitioning of current rule 1-400 into several rules corresponding to Model Rule counterparts is recommended because advertising of legal services and the solicitation of potential clients is an area of lawyer regulation where greater national uniformity would be helpful to the public, practicing lawyers, and the courts. The current widespread use of the Internet by lawyers and law firms to market their services and the trend in most jurisdictions, including California, toward permitting some form of multijurisdictional practice, warrants such national uniformity. In addition, a degree of uniformity should follow from the fact that all jurisdictions are bound by the constitutional commercial speech doctrine when seeking to regulate lawyer advertising and solicitation.

2. Recommendation to repeal or relocate the current Standards into the black letter or comments of the relevant proposed rule but to retain current rule 1-400(E), which authorizes the Board to promulgate Standards.

The standards are not necessary to regulate inherently false and deceptive advertising. The Commission reviewed each of the standards and determined that most fell into that category. Further, as presently framed, the presumptions force lawyers to prove a negative. They thus create a lack of predictability with respect to how a particular bar regulator might view a given advertisement. The standards also create a risk of inconsistent enforcement and an unchecked opportunity to improperly 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. *Central 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).

Nevertheless, although the Commission's review led it to conclude that none of the current standards should be retained as standards, it determined that proposed rule 7.1 should carry forward current rule 1-400(E), the standard enabling provision, in the event future developments in communications or law practice might warrant the promulgation of standard to regulate lawyer conduct.

A description of proposed rule 7.1 follows.

As noted, proposed rule 7.1 sets out the general prohibition against a lawyer making false and misleading communications concerning a lawyer's availability for legal services.

Paragraph (a) carries forward the basic concept in current rule 1-400(D) by prohibiting false or misleading communications and providing an explanation of when a communication is false or misleading. (Compare rule 1-400(D)(1) – (4).)

Paragraph (b) carries forward the enabling provision in current rule 1-400(E) authorizing the Board to formulate and adopt advertising standards. (See discussion at recommendation 2, above.) The current rule provides that the Board "shall" adopt standards but given the comprehensive revisions recommended for the advertising rules, the Commission is recommending that the enabling provision be revised to be a permissive as opposed to mandatory provision (e.g., that the Board "may" formulate and adopt standards).

There are six comments. Comment [1] explains the breadth of the concept of lawyer "communication" about a lawyer's services and is consistent with the similar concept in current rule 1-400(A). Comment [2] carries forward the concept found in current rule 1-400(E), Standard

No. 1, which explains that guarantees and warranties are false or misleading under the rule. Comment [3] provides specific examples of how certain communications are misleading although true, thus providing insight into how the rule should be applied. Comment [4] provides similar guidance by focusing lawyers on the concept of reasonable, as opposed to unjustified, client expectations in evaluating whether a communication violates the rule. Comment [5] carries forward the concept in current Standard No. 15 regarding communications that promote a lawyer's or firm's facility with a foreign language. A lawyer's communication of a foreign language ability is helpful information to a consumer in choosing a lawyer, but it can also mislead a potential client who has expectations that a lawyer, as opposed to a non-lawyer, possesses the foreign language ability. Comment [6] provides cross-references to other law, including Bus. & Prof. §§ 6157 to 6159.2 and 17000 et seq., that regulate lawyer commercial speech. As can be seen, all of the comments provide interpretative guidance or clarify how the rule should be applied.

Post-Public Comment Revisions

After consideration of comments received in response to the initial 90-day public comment period, the Commission deleted the phrase, "an untrue statement," from paragraph (a). The Commission has "an untrue statement" is redundant because the concept comes within the term "material misrepresentation of fact or law."

With this change, the Board authorized an additional 45-day public comment period on the revised proposed rule.

Final Commission Action on the Proposed Rule Following 45-Day Public Comment Period

After consideration of comments received in response to the additional 45-day public comment period, the Commission made no changes to the proposed rule and voted to recommend that the Board adopt the proposed rule.

The Board adopted proposed rule 7.1 at its March 9, 2017 meeting.

Supreme Court Action (May 10, 2018)

The Supreme Court approved the rule as submitted by the State Bar to be effective November 1, 2018. But see, Comment [6], where the citation style was revised to conform to the California Style Manual.