

AGENDA ITEM

NOVEMBER 2016

DATE: November 4, 2016

TO: Members, Regulation and Discipline Committee

FROM: Andrew Tuft, Staff Attorney, Office of Professional Competence

SUBJECT: Formal Advisory Ethics Opinion Interim No. 12-0006, Request for Approval for Publication

EXECUTIVE SUMMARY

This agenda item seeks Board Committee on Regulation and Discipline (“RAD”) approval for the publication of proposed Formal Opinion Interim No. 12-0006 developed by the Committee on Professional Responsibility and Conduct (“COPRAC” or “Committee”).

BACKGROUND

COPRAC is charged with developing the State Bar’s non-binding, advisory ethics opinions.¹ Authority to approve the issuance of an ethics opinion is exercised by RAD in accordance with applicable State Bar procedure State Bar Board Book Tab 19, Article 2, section 6(j), which provides: “If within thirty days of circulation, no member of the Board Committee objects to publication, the formal opinion shall be published as hereinafter provided. If within thirty (30) days of circulation, any member of the Board Committee does object, the issue of whether the formal opinion shall be published shall be placed on the agenda of the next succeeding meeting of the Board Committee for decision.” However, in compliance with the obligations of Bagley-Keene, effective April 1, 2016, the proposed decision must be considered at a public and properly noticed meeting, and a motion and vote would be required to approve the opinion.

DISCUSSION

Proposed Formal Opinion Interim No. 12-0006 was drafted by COPRAC, and at its December 5, 2014 meeting, in accordance with COPRAC’s Rules of Procedure, the Committee approved the opinion for an initial 90-day public comment distribution. Subsequently, at its January 15, 2016 meeting, COPRAC revised the opinion in response to public comments received and, in further accordance with its Rules of Procedure, approved the opinion for an additional 90-day public comment distribution. At its September 29, 2016 meeting, following consideration of the public

¹ Although non-binding, State Bar formal ethics opinions have been cited by the California courts in analyzing issues of attorney professional responsibility.

comments received, COPRAC approved the opinion for submission to RAD for formal publication.

The full text of the proposed opinion, in the form distributed to RAD for approval, is provided as Attachment A. The question addressed in the proposed opinion is: “Under what circumstances is “blogging” by an attorney a “communication” subject to the requirements and restrictions of the Rules of Professional Conduct and related provisions of the State Bar Act regulating attorney advertising?” The opinion digest states:

1. Blogging by an attorney be a communication subject to the requirements and restrictions of the Rules of Professional Conduct and the State Bar Act relating to lawyer advertising if the blog expresses the attorney’s availability for professional employment directly through words of invitation or offer to provide legal services, or implicitly through its description of the type and character of legal services offered by the attorney, detailed descriptions of case results, or both.
2. A blog that is an integrated part of an attorney’s or law firm’s professional website will be a communication subject to the rules and statutes regulating attorney advertising to the same extent as the website of which it is a part.
3. A stand-alone blog by an attorney, even if discussing legal topics within or outside the authoring attorney’s area of practice, is not a communication subject to the requirements and restrictions of the Rules of Professional Conduct and the State Bar Act relating to lawyer advertising unless the blog directly or implicitly expresses the attorney’s availability for professional employment.
4. A stand-alone blog by an attorney on a non-legal topic is not a communication subject to the rules and statutes regulating attorney advertising, and will not become subject thereto simply because the blog contains a link to the attorney or law firm’s professional website. However, extensive and/or detailed professional identification information announcing the attorney’s availability for professional employment will itself be a communication subject to the rules and statutes.

In compliance with the obligations of Bagley-Keene, the proposed action must be considered at a public and properly noticed meeting, and a motion and vote would be required to approve the opinion.

FISCAL/PERSONNEL IMPACT

None.

RULE AMENDMENTS

None.

BOARD BOOK IMPACT

None.

BOARD COMMITTEE RECOMMENDATIONS

The State Bar Standing Committee on Professional Responsibility and Conduct recommends that the Regulation and Discipline Committee of the Board of Trustees approve the following resolution:

RESOLVED, following the publication for public comment and consideration of the comments received, and upon the recommendation of the Standing Committee on Professional Responsibility, the Board Committee on Regulation and Discipline Oversight approves the publication of proposed Formal Opinion Interim No. 12- 0006, in the form attached.

ATTACHMENT(S) LIST

- A.** Formal Opinion Interim No. 12-0006 (Attorney Blogging)

**THE STATE BAR OF CALIFORNIA
STANDING COMMITTEE ON
PROFESSIONAL RESPONSIBILITY AND CONDUCT
FORMAL OPINION INTERIM NO. 12-0006**

ISSUES: Under what circumstances is “blogging” by an attorney a “communication”^{1/} subject to the requirements and restrictions of the Rules of Professional Conduct and related provisions of the State Bar Act^{2/} regulating attorney advertising?

DIGEST:

1. Blogging by an attorney may be a communication subject to the requirements and restrictions of the Rules of Professional Conduct and the State Bar Act relating to lawyer advertising if the blog expresses the attorney’s availability for professional employment directly through words of invitation or offer to provide legal services, or implicitly through its description of the type and character of legal services offered by the attorney, detailed descriptions of case results, or both.
2. A blog that is an integrated part of an attorney’s or law firm’s professional website will be a communication subject to the rules and statutes regulating attorney advertising to the same extent as the website of which it is a part.
3. A stand-alone blog^{3/} by an attorney, even if discussing legal topics within or outside the authoring attorney’s area of practice, is not a communication subject to the requirements and restrictions of the Rules of Professional Conduct and the State Bar Act relating to lawyer advertising unless the blog directly or implicitly expresses the attorney’s availability for professional employment.
4. A stand-alone blog by an attorney on a non-legal topic is not a communication subject to the rules and statutes regulating attorney advertising, and will not become subject thereto simply because the blog contains a link to the attorney or law firm’s professional website. However, extensive and/or detailed professional identification information announcing the attorney’s availability for professional employment will itself be a communication subject to the rules and statutes.

AUTHORITIES

INTERPRETED: Rule 1-400 of the Rules of Professional Conduct of the State Bar of California.^{4/}
Business and Professions Code sections 6157–6159.2.

STATEMENT OF FACTS

^{1/} California’s Rule of Professional Conduct regulating attorney advertising, rule 1-400, by its terms applies only to “communications” by attorneys, which are defined as “any message or offer made by or on behalf of a member [of the State Bar] concerning the availability for professional employment . . . directed to any former, present, or prospective client.” The counterpart provision of the State Bar Act, Business and Professions Code section 6157, regulates attorney advertisements, which are defined as “communications” soliciting employment under specified conditions. Under either scenario, a message must be a “communication” to be subject to regulation.

^{2/} California Business and Professions Code section 6000, *et seq.*

^{3/} As used in this opinion, a “stand-alone” blog is a blog that exists independently of any website an attorney maintains or uses for professional marketing purposes.

^{4/} Unless otherwise indicated, all references to rules in this opinion will be to the Rules of Professional Conduct of the State Bar of California.

Attorney A is a small firm practitioner in criminal defense law who writes a stand-alone blog entitled “Perry Mason? He’s Got Nothing on Me!” The most recent post, which is typical in content and tone to virtually all of his posts, begins, “I won another case last week. That makes 50 in a row, by my count. Once again, I was able to convince a jury that there was reasonable doubt that my client – who had tested positive for cocaine when pulled over by the local constabulary for erratic driving – was completely unaware of the two-kilo bag of the same substance in her trunk. They were absolutely mesmerized by my closing argument. Here’s to the American justice system!” The blog does not explain what A regards as a “win,” or what percentage of the claimed victories involved court trials. The blog does not expressly invite readers to contact Attorney A, but it does identify Attorney A as “one of California’s premier criminal defense lawyers,” and his name appears as a hyperlink to his law firm’s professional web page.

Attorney B is a member of a law firm focusing on tax law and litigation that maintains a firm website identifying the types of services the firm provides, the background and experience of the firm’s lawyers, testimonials from firm clients, and other similar information. One page of the website, indistinguishable from the other pages in layout and features, is designated as a “blog,” both on the page and in the related menus linking to it. The “blog” contains a series of articles written by Attorney B and the other lawyers of the firm on changes in tax law and other topics of potential interest to the firm’s clients. Each post concludes with the statement, “For more information, contact” the author of the particular post.

Attorney C is a solo practitioner in family law who writes a blog on family law issues. The blog consists primarily of short articles on topics of potential interest to other family law practitioners and divorcing couples, such as special considerations in high-asset divorces, recent legislative developments in child and spousal support laws, and an explanation of custody law when one former spouse moves to another state. Attorney C’s primary purpose in blogging is to demonstrate his knowledge of family law issues, and thereby to enhance his reputation in the field and increase his business. The blog includes a hyperlink to C’s professional web page, but the blog postings do not describe Attorney C’s practice or qualifications, and contain no overt statements of Attorney C’s availability for professional employment. However, several of the blog posts end with the statement that if the reader has “any questions about your divorce or custody case, you can contact me” at Attorney C’s professional office phone number.

Attorney D is a solo practitioner in trusts and estates law who maintains a blog expressing his views on a variety of topics relating to the state of the judiciary and the importance of judicial independence, in particular his concern with the impact of reduced funding for the courts on access to justice and his opposition to judicial recall efforts that Attorney D characterizes as politically motivated. Attorney D claims no expertise in the constitutional or other legal issues related to the concept of judicial independence. Although he describes specifically the negative impact of reduced court funding on the Probate Court in which he regularly practices, and bases his opinions on personal experience, Attorney D includes no express invitation or offer to provide legal services in any of his blog posts or any other content of this website. The site does include a hyperlink to D’s professional web page located at the bottom of each page.

Attorney E is an employment law attorney who maintains a blog about jazz artists, performances, and recordings. The blog is not part of the website Attorney E maintains to promote his practice, but his professional website contains a link to the blog. Similarly, the blog contains a link to Attorney E’s professional website, along with contact information and a brief biographical note explaining that Attorney E is an employment law attorney.

DISCUSSION

“Blogging” has become an increasingly frequent activity of attorneys. Although the various definitions of “blog”^{5/} consistently describe it as a website or web page on which a writer, or group of writers, records observations,

^{5/} Dictionary.com defines “blog” as “a website containing a writer’s or group of writers’ own experiences, observations, opinions, etc., and often having images and links to other websites” (<http://dictionary.reference.com/browse/blog?s=t>); Merriam-webster.com defines the term as “a Web site that contains online personal reflections, comments, and often hyperlinks provided by the writer” (<http://www.merriam->

reflections, opinions, comments, and experiences that are personal in nature, the term now encompasses essentially any website or page consisting of brief articles or comments on any variety of subjects. Blogs written by attorneys run the gamut from those having nothing to do with the legal profession, to informational articles, to commentary on legal issues and the state of our system of justice, to self-promoting descriptions of the attorney's legal practice and courtroom successes, to overt advertisements for the attorney or her law firm.

By its nature, blogging raises First Amendment free speech issues. Prohibited for most of the 20th Century, advertising by attorneys was found to be protected commercial speech by the U.S. Supreme Court in *Bates v. State Bar of Arizona* (1977) 433 U.S. 350 [97 S.Ct. 2691]. *Bates* provides that truthful attorney advertising cannot be absolutely prohibited, but may be subject to reasonable restrictions.

In contrast, informational and educational writing by lawyers for publication, such as newspaper and magazine articles and practice guides, historically have been considered core or political speech, fully protected under the First Amendment^{6/} and subject to restriction or limitation only under extraordinary circumstances, such as when public health and safety is at risk. This is true even though most articles on legal topics by attorneys likely are written, at least in part, to enhance the authoring attorney's professional reputation and visibility and, for attorneys in private practice, to increase business. As has been made clear by both the U.S. Supreme Court (see *Bolger v. Youngs Drug Products Corp.* (1983) 463 U.S. 60, 66–68 [103 S.Ct. 2875]) and the California Supreme Court (see *Kasky v. Nike, Inc.* (2002) 27 Cal.4th 939, 956–962 [119 Cal.Rptr.2d 296]), the fact that a blog is economically motivated does not, in and of itself, mean that it is “commercial speech” subject to regulation by the State Bar as advertising; commercial motivation is only a factor to be considered.

Most “traditional” blogs expressing the blogger's knowledge and opinions on various topics and issues, legal and non-legal, will be regarded as core or political speech. However, if a blog post advertises the attorney's availability for employment, according to the standards established by the Rules of Professional Conduct and statutes adopted in light of the court cases applicable to attorney advertising, the blog may be held subject to those rules and statutes.^{7/}

This opinion is not intended to chill or limit the protected speech of any lawyer, but rather to provide guidance to attorneys engaged in blogging activity as to the types of blogs or blog posts that may fall within the ambit of those regulations and statutes.^{8/}

Advertising for California attorneys is governed primarily by rule 1-400, which prohibits “communications” which are false or deceptive in content or presentation, or which tend to confuse, deceive, or mislead the public.

webster.com/dictionary/blog); and the online Oxford English Dictionary defines “blog” as a “personal website or web page on which an individual records opinions, links to other sites, etc. on a regular basis” (http://www.oxforddictionaries.com/us/definition/american_english/blog?searchDictCode=all). Blogging by lawyers is sometimes referred to as “blawging.”

^{6/} This distinction has been recognized since at least 1928, when the Canons of Professional Ethics adopted by the American Bar Association – and followed in all states for most of the century – held that “[a] lawyer may with propriety write article for publications in which he gives information upon the law” (Canon 40), while at the same time providing that “[i]ndirect advertisements for professional employment . . . and all other like self-laudation, offend the traditions and lower the tone of our profession and are reprehensible.” (Canon 27). (See also Utah State Bar Ethics Advisory Opinion No. 98-15, N.J. Att’y Advertising Comm. Op. 23, 149 N.J.L.J. 1298 (1997); Tex. Ethics Op. 425, 1985 (Tex. Sup. Ct. Prof. Ethics Comm.); Ill. Ethics Adv. Op. 763, 1982 (Ill. St. Bar Ass’n).)

^{7/} See also *Belli v. State Bar* (1974) 10 Cal.3d 824, 831–833 [112 Cal.Rptr. 527], in which the California Supreme Court held that solicitations for educational activities (a lecture series) constituted fully protected speech, but further noted, “We do not mean to suggest, of course, that Belli and others should be permitted to use such solicitation as a subterfuge for soliciting legal business.”

^{8/} This opinion addresses only the question of whether different types of blogging constitute attorney advertising under the Rules of Professional Conduct and related provisions of the State Bar Act. It does not address other professional ethical requirements imposed on attorneys, which may come into play in their online postings. (See, for example, *In re Joyce Nanine McCool*, 2015-B-0284, Attorney Disciplinary Proceeding, Supreme Court of Louisiana [lawyer disbarred due to overzealous social media activism against judges].)

(Rule 1-400(D)(1), (2), and (3).) Rule 1-400(D)(4) also prohibits “communications” which do not “indicate clearly, expressly, or by context, that it is a communication or solicitation, as the case may be.” Rule 1-400 also includes a list of standards adopted by the State Bar’s Board of Trustees (rule 1-400(E))^{9/} that describe types of communications that are presumed to be deceptive or misleading, and are therefore presumptively prohibited under the rule. These communications include such things as guarantees, warranties, or predictions regarding the result of the representation (Standard (1)) and testimonials about or endorsements of a member without an express disclaimer such as “this testimonial or endorsement does not constitute a guarantee, warranty, or prediction regarding the outcome of your legal matter” (Standard (2)).^{10/}

Rule 1-400, by its terms applies only to “communications” by attorneys.^{11/} Rule 1-400(A) defines a “communication” as “any message or offer made by or on behalf of a member [of the State Bar] concerning the availability for professional employment . . . directed to any former, present, or prospective client.” To qualify as a communication, the message or offer must: (1) be made by or on behalf of a California attorney; (2) concern the attorney’s availability for professional employment; and (3) be directed to a former, present, or prospective client.

All blogs maintained by an attorney, in the attorney’s professional capacity, meet the first and third parts of this test.^{12/} Blog posts written or specifically authorized by an attorney are messages made by or on behalf of a member of the State Bar. Posts on the Internet are directed to the general public, which necessarily includes all possible former, present, or prospective clients. (Cal. State Bar Formal Opn. Nos. 2001-155 and 2012-186.)

Thus, whether a blog post may be found to be a “communication” subject to regulation under rule 1-400 will depend on whether it meets the second part of the test: Is the post “concerning the availability for professional employment” of the member or her firm?

In California State Bar Formal Opinion No. 2012-186, this Committee analyzed whether five short hypothetical posts on a social media website would be considered “communications” under rule 1-400. The Committee concluded that posts which contained words of offer or invitation relating to representation (“Who wants to be next?”; “Check out my web site!”; or “Call for a free consultation”) met the criteria, while those which were informational in nature, offering free copies of an article the attorney had written, did not. We believe the same analysis applies with respect to blogs. Thus, a blog post which contains an offer to the reader to engage the attorney, or is a step towards securing potential employment, such as offering a free consultation, would be a “communication” within the meaning of rule 1-400 and subject to the rule’s requirements and conditions, while a post which provides or offers only information or informational materials would not.

^{9/} See rule 1-400(E): “The Board of Trustees 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.”

^{10/} The State Bar Act also includes Article 9.5 (encompassing §§ 6157–6159.2) governing legal advertising. Like rule 1-400, these sections prohibit any advertising that is false or misleading (§ 6157.1) or that contains any guarantee of outcome or promise of quick payment (§ 6157.2). Section 6158 provides that the “message as a whole may not be false, misleading, or deceptive, and the message as a whole must be factually substantiated.” Sections 6158.1 and 6158.2 set forth types of communications that are presumed either to be false, misleading, or deceptive (§ 6158.1) or to be in compliance with the provisions of this statutory article (§ 6158.2).

^{11/} Although rule 1-400 also regulates “solicitations” by attorneys, those provisions are not applicable to blog posts, even those which concern the availability of the writer for professional employment. A “solicitation” under the rule is defined as a “communication . . . (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.” Whether or not a blog post is a communication under rule 1-400, it cannot be a solicitation because it is not “delivered in person or by telephone,” nor is it “directed to a specific person known to be represented by counsel.” (See Cal. State Bar Formal Opn. Nos. 1995-143 and 2004-166.)

^{12/} As we discuss below in connection with Attorney E, an attorney’s blog addressing non-legal issues is unlikely to be deemed a “communication” for purposes of rule 1-400.

Formal Opinion No. 2012-186 did not address the type of posts made in many blogs, which describe in detail the services offered by the authoring attorney or law firm, and contain detailed author contact information, but which do not include express words of offer or invitation to engage the attorney's services. The Committee believes such posts can constitute "communications" subject to rule 1-400. This Committee has previously opined that, even without specific words of invitation or offer, a website that "includes a description of Attorney A's law firm and its history and practice; the education, professional experience, and activities of the firm's attorneys;" and other features relating to the practice of law implicitly indicates the firm's availability for professional employment and, thus, is a "communication." (Cal. State Bar Formal Opn. No. 2001-155.) The detailed listing of services, qualifications, background, and other attributes of the attorney or law firm, and their distribution to the public, carries with it the clear implication of availability for employment.

The Committee believes the same analysis applies to blog posts that detail an attorney or law firm's courtroom victories or other professional successes. Such posts necessarily involve a description of the type and character of the legal services the attorney/law firm provides, as discussed above. The Committee continues to believe that this characterization does not apply to general expressions of excitement or exultation over a single result,^{13/} but advises that multiple such posts may be held to be communications because they implicitly concern the attorney's availability for professional employment, particularly if they include more detailed information about the attorney's practice or are related to posts that include such information.

While a recitation or listing of all of an attorney's cases and outcomes, without commentary, may be informational, "[a] message as to the ultimate result of a specific case or cases presented out of context without adequately providing information as to the facts or law giving rise to the result" is presumed to be false, misleading, or deceptive. (Bus. & Prof. Code section 6158.1(a); see also, Standard (1) of rule 1-400 regarding "guarantees, warranties, or predictions regarding the result of the representation.") Even a numerical quantification of "wins" or similar terms can be misleading, absent a description of what the attorney blogger considers a "win"; a courtroom victory is a far different thing than pleading to a lesser charge, though both arguably can be described under some circumstances as "wins."

Although there are no California ethics opinions or cases directly on point, the Supreme Court of Virginia held in *Hunter v. Virginia State Bar ex rel. Third District Committee* (2013) 285 Va. 485 [744 S.E.2d 611] (cert. denied (2013) __ U.S. __ [133 S.Ct. 2871]), that an attorney's blog which focused almost exclusively on the attorney's successes in the field of criminal defense law constituted advertising within the meaning of Virginia's attorney advertising rule. The Supreme Court of Virginia found that attorney Horace Hunter's focus on his skills as an attorney and his firm's seemingly unbroken record of successes "could lead the public to mistakenly believe that they are guaranteed to obtain the same positive results if they were to hire Hunter," and therefore was subject to regulation. This is consistent with Comment [3] to ABA Model Rule of Professional Conduct, Rule 7.1,^{14/} which states:

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.

^{13/} See California State Bar Formal Opinion No. 2012-186, where the Committee found that a posting of "Case finally over. Unanimous verdict! Celebrating tonight," standing alone, was not a "communication." The Committee added, "Attorney status postings that simply announce recent victories without an accompanying offer about the availability for professional employment generally will not qualify as a communication."

^{14/} The ABA Model Rules are not binding in California but may be used for guidance by lawyers where there is no direct California authority and the ABA Model Rules do not conflict with California policy. (*City & County of San Francisco v. Cobra Solutions, Inc.* (2006) 38 Cal.4th 839, 852.) Thus, in the absence of related California authority, we may look to the Model Rules, and the ABA Formal Opinions interpreting them, as well as the ethics opinions of other jurisdictions or bar associations for guidance. (Rule 1-100(A) [ethics opinions and rules and standards promulgated by other jurisdictions and bar associations may also be considered]; *State Compensation Ins. Fund v. WPS, Inc.* (1999) 70 Cal.App.4th 644, 656 [82 Cal.Rptr.2d 799].)

While California's rules and statutes differ from Virginia's and the Model Rules, they share many similarities in this area. Rule 1-400(D)(2) and (D)(3) prohibit communications which "[c]ontain 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," as well as communications which "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." As noted above, both Standard (1) of rule 1-400 and Business and Professions Code section 6158.1(a) provide that communications which contain guarantees, warranties, or predictions are presumed to be false, misleading, or deceptive.

Both the Virginia Supreme Court in *Hunter* and the Model Rules provide that 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. The same is true in California. Both rule 1-400 and the State Bar Act provide that an appropriate disclaimer may, but will not necessarily, overcome the presumption that descriptions of case results are misleading. Standard (2) of rule 1-400(E) provides that only a testimonial or endorsement bearing a disclaimer such as "this testimonial or endorsement does not constitute a guarantee, warranty, or prediction regarding the outcome of your legal matter" can overcome the presumption that those testimonials and endorsements are false, misleading, or deceptive pursuant to the rule. Section 6158.3 provides that any electronic media advertisement which conveys a message portraying a result in a particular case or cases must either "adequately disclose the factual and legal circumstances that justify the result portrayed in the message" or "state that the result portrayed in the advertisement was dependent on the facts of that case, and that the results will differ if based on different facts." The section warns, however, that "use of the disclosure alone may not rebut any presumption created in Section 6158.1."

In light of these considerations, we review the individual fact scenarios described above.

Attorney A – "Perry Mason? He's Got Nothing on Me!"

Attorney A's blog is an extreme example of a blog post that does not include specific words of invitation to retain the authoring attorney's services, but which, in the Committee's view, is a "communication" subject to rule 1-400. The blog posts describe the attorney's services as a criminal defense lawyer, and make specific representations concerning the quality of those services ("they were absolutely mesmerized by my closing argument"). The posts also implicitly express Attorney A's availability for professional employment and invite readers to employ Attorney A's services. The comments in the blog posts about the justice system are far more self-promotional than analytical, serving primarily to reinforce the message that the author is capable of taking advantage of the system.

Under the facts presented, Attorney A's blog posts describing his courtroom successes would presumptively violate the following standards adopted by the State Bar's Board of Trustees pursuant to rule 1-400(E): Standard (1) [a communication which contains guarantees, warranties, or predictions regarding the result of the representation] and, in the case of any posts describing the satisfaction of his clients, Standard (2) [a communication which contains testimonials about or endorsements of a member unless such communication also contains an express disclaimer]. They also presumptively would be deemed false, misleading, or deceptive under Business and Professions Code section 6158.1 as a "message as to the ultimate result of a specific case or cases presented out of context without adequately providing information as to the facts or law giving rise to the result."^{15/} This is particularly true in the instant case because the posts do not explain what Attorney A means when he says he has "won" 50 cases in a row, which could include a broad range of results.

The Committee further believes that the express disclosure required under rule 1-400(D)(4) and section 6158.3 that the post may constitute attorney advertising should be conspicuously displayed on the blog post itself.

^{15/} Attorney A's blog also risks violating his duty of confidentiality owed to the client described in the blog, if that client is identifiable even without inclusion of his name. See Comment [4] to Model Rule 1.6, which states that the prohibition against revealing client confidential information "also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person." (See also *In re Peshek*, M.R. 23794 (Ill. 2010).) As referenced in footnote 7 above, this opinion does not address these and other potential ethics issues raised by the various hypothetical blogs discussed herein.

Attorney B - Blog as Part of a Professional Website

Professional websites maintained by attorneys and law firms have been found to concern their availability for professional employment and, thus, are attorney advertising subject to regulation. In California State Bar Formal Opinion No. 2001-155, this Committee concluded that an attorney's professional website is a communication within the meaning of rule 1-400(A), as well as advertising subject to regulation under Business and Professions Code section 6157. The Committee further expressed the belief that "this conclusion is not altered by the inclusion in the web site of information and material of general public interest."^{16/}

The Committee concludes that "information and material of general public interest" includes a blog or blog post that is on the firm website. As part of a larger communication (the professional website) which concerns the firm's availability for professional employment, the blog will be subject to the same requirements and restrictions as the website.

Consistent with Formal Opinion 2001-155's finding that law firm websites are *per se* communications pursuant to rule 1-400, the committee believes that the website – and any included blog – meets the requirement of rule 1-400(D)(4) that it clearly indicate it is a communication by context, and therefore no additional disclosure of that fact is required.

Attorney C – Stand-Alone Blog in Attorney Practice Area

Attorney C's blog consists of short articles directly related to C's area of practice on such topics as "How to Make a Visitation Exchange Go Smoothly," "Collaborative Divorce in California," "How to Survive Divorce with Style and Some Cash Left," and "California QDROs (Qualified Domestic Relations Orders)." None of the blog posts focuses on current or former cases of Attorney C's, nor describes his own family law practice. All of the posts identify Attorney C as the author, with Attorney C's name hyperlinking to his professional web page. Some of the posts conclude with the statement that if the reader has "any questions about your divorce or custody case, you can contact me" at Attorney C's professional office phone number.

The Committee opines that, except as noted in the following paragraph, Attorney C's stand-alone family law blog is not a "communication" subject to rule 1-400. Even though Attorney C's primary purpose in blogging is to demonstrate his knowledge of family law issues to his colleagues and prospective clients in order to enhance his reputation in the field and increase his business, the blog posts are informational expressions of Attorney C's knowledge and opinions. They are not offers or messages concerning Attorney C's availability for professional employment; they do not invite readers to employ Attorney C's services; and they do not specifically describe the services that Attorney C offers. For these reasons, the Committee believes they are not "communications" subject to the rule.

The Committee believes, however, that the concluding statement in several of the blog posts in which Attorney C asks his readers to call him if they have questions about their personal divorce or custody cases does constitute words of invitation evidencing Attorney C's availability for professional employment. Unless the concluding statements are removed, the posts to which they are attached may be found to be "communications" subject to the provisions of rule 1-400, including that rule's requirement in (D)(4) that the post "indicate clearly, expressly, or by context, that it is a communication."

If several blog posts, or parts thereof, are grouped together, and some of those blog posts are potentially subject to rule 1-400, it would be prudent for the attorney to include a conspicuous disclosure pursuant to rule 1-400(D) proximate to the blog posts explaining that some of the posts listed may constitute attorney advertising.

^{16/} This is consistent with the conclusion reached in American Bar Association Committee on Ethics and Prof. Responsibility, Formal Opinion No. 10-457. The ABA opinion concludes that the requirements of rules 7.1, 8.4(c), and 4.1(a) also apply to information of a general nature contained on the website, including information provided to assist the public in understanding the law and in identifying when and how to obtain legal services. Although the opinion does not specifically refer to a website-based blog, its application of the requirement to articles, information provided in a narrative form, and FAQ's (frequently asked questions) makes the application to blogs clear.

Attorney D – Stand-Alone Blog on Legal Topics Outside of Attorney Practice Area

Attorney D's stand-alone blog includes posts concerning what he sees as the negative impact of reduced court funding on societal access to justice, including his own practice area of trusts and probate law, as well as the impact of politically-motivated recall petitions on judicial independence. Although Attorney D is a practicing lawyer and the blog includes a hyperlink to his professional web page, the Committee concludes that the facts presented indicate that the blog does not concern Attorney D's availability for professional employment. Therefore, the blog would not be construed as a "communication" subject to rule 1-400 or an "advertisement" under Business and Professions Code section 6157(c).

Attorney E– Non-Legal Blog Linked to Professional Web Page

The fact that Attorney E's blog by-line is a hyperlink to Attorney E's professional website, contains contact information, and identifies Attorney E as an attorney will not change the character of the associated blog or render it attorney advertising. Neither a link from the by-line to the attorney author's professional page nor the inclusion of contact information will itself serve to transform a blog on any topic, legal or non-legal, into advertising subject to rule 1-400 or Business and Professions Code sections 6157, *et seq.* An attorney may freely write a blog on any of countless legal and non-legal subjects, and may identify himself or herself as an attorney thereon, without concern of being subject to rule 1-400, unless the blog or blog post specifically invites the reader to retain the attorney's services or otherwise indicates the attorney's availability for professional employment pursuant to rule 1-400(A) or Business and Professions Code section 6157.

CONCLUSION

A blog by an attorney will not be considered a "communication" subject to rule 1-400 or an "advertisement" subject to Business and Professions Code sections 6157, *et seq.*, unless the blog expresses the attorney's availability for professional employment directly through words of invitation or offer to provide legal services, or implicitly, for example, through a detailed description of the attorney's legal practice and successes in such a manner that the attorney's availability for professional employment is evident.

A blog included on an attorney's or law firm's professional website is part of a "communication" subject to the rules regulating attorney advertising to the same extent as the website of which it is a part.

A stand-alone blog by an attorney on law-related issues or developments within his or her practice area is not a "communication" subject to the rules regulating attorney advertising unless it invites the reader to contact the attorney regarding the reader's personal legal case, or otherwise expresses the attorney's availability for professional employment.

A stand-alone blog on law-related issues maintained by an attorney that is not part of the attorney's professional website is not a "communication" subject to attorney advertising regulations unless the blog indicates the attorney's availability for professional employment.

A non-legal blog by an attorney is not a "communication" subject to the rules or statutes regulating attorney advertising, even if it includes a hyperlink to the attorney's professional web page or contains biographical or contact information. However, the biographical or contact information itself may be subject to the rules and statutes.

This opinion is issued by the Standing Committee on Professional Responsibility and Conduct of the State Bar of California. It is advisory only. It is not binding on the courts, the State Bar of California, its Board of Trustees, any persons or tribunals charged with regulatory responsibilities, or any member of the State Bar.

[Publisher's Note: Internet resources cited in this opinion were last accessed by staff on February 4, 2016. Copy of these resources are on file with the State Bar's Office of Professional Competence.]