

**HEADLINE: Proposed Formal Opinion Interim No. 12-0003 (Attorney Directory and Rating Websites)**

**SUBHEAD: The State Bar seeks public comment on Proposed Formal Opinion Interim No. 12-0003 (Attorney Directory and Rating Websites).**

**Deadline: May 10, 2019**

**Background**

The State Bar Standing Committee on Professional Responsibility and Conduct (COPRAC) is charged with the task of issuing advisory opinions on the ethical propriety of hypothetical attorney conduct. In accordance with Tab 5.1, Article 2, Section 6(g) of the State Bar Board Book, the Committee shall publish proposed formal opinions for public comment.

On May 10, 2018, the California Supreme Court issued [an order](#) approving 69 new Rules of Professional Conduct, which will go into effect on November 1, 2018. Information about the new rules is available at the [State Bar website](#). Proposed Formal Opinion Interim No. 12-0003 interprets the new Rules of Professional Conduct.

**Discussion/Proposal**

Proposed Formal Opinion Interim No. 12-0003 considers: what are an attorney's ethical obligations regarding a profile of the attorney posted on a professional directory website maintained by a third party?

The opinion interprets rules 7.1, and 7.2 of the Rules of Professional Conduct of the State Bar of California; and Business and Professions Code sections 6106, and 6157, et seq.

The opinion digest states: An attorney is not responsible for the content of her profile on a professional online directory and rating website created and maintained by a third party. However, if the attorney chooses to exercise "control" over the profile's content by "adopting" her profile on the directory itself or otherwise using the profile to market her practice, she becomes responsible for its content. When an attorney uses her profile to market her practice, her profile becomes a "communication" on behalf of the attorney, and an "advertisement" for her professional services, and consequently she must comply with the relevant advertising rules and the State Bar Act. This means she cannot post or induce another to post content that is false, misleading, or deceptive and must undertake reasonable efforts to correct any such content.

In addition, if third party testimonials are posted on the profile, the attorney should take reasonable steps to ensure that such testimonials are not 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. An appropriate disclaimer or qualifying language often avoids creating unjustified expectations. An attorney who abandons a profile on a third party directory has no further obligation to correct false, misleading, or deceptive content contained in the profile. An attorney abandons the profile by taking reasonable steps to alert the public that she is no longer monitoring the profile such as posting a notice of that fact on the profile as well as ceasing to use it in marketing her practice.

At its June 2, 2017 meeting and in accordance with its Rules of Procedure, the State Bar Standing Committee on Professional Responsibility and Conduct approved Proposed Formal Opinion Interim No. 12-0003 for a 90-day public comment distribution. Subsequently, at its February 22, 2019 meeting, COPRAC revised the opinion in response to public comment, and updated the opinion to conform to the new Rules of Professional Conduct that took effect on November 1, 2018. And, in accordance with its Rules of Procedure, COPRAC approved Proposed Formal Opinion Interim No. 12-0003 for an additional 60-day public comment distribution.

**Any fiscal/personnel impact**

None

**Background material**

Proposed Formal Opinion Interim No. 12-0003

**Source**

State Bar Standing Committee on Professional Responsibility and Conduct

**Deadline**

May 14, 2019

**Direct comments to**

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**THE STATE BAR OF CALIFORNIA  
STANDING COMMITTEE ON  
PROFESSIONAL RESPONSIBILITY AND CONDUCT  
FORMAL OPINION INTERIM NO. 12-0003**

- ISSUES:** What are an attorney’s ethical obligations regarding a profile of the attorney posted on a professional directory website maintained by a third-party?
- DIGEST:** An attorney is not responsible for the content of her profile on a professional online directory and rating website created and maintained by a third-party. However, if the attorney chooses to exercise “control” over the profile’s content by “adopting” her profile on the directory itself or otherwise using the profile to market her practice, she becomes responsible for its content. When an attorney uses her profile to market her practice, her profile becomes a “communication” on behalf of the attorney, and an “advertisement” for her professional services, and consequently she must comply with the relevant advertising rules and the State Bar Act. This means she cannot post or induce another to post content that is false, misleading, or deceptive and must undertake reasonable efforts to correct any such content.
- In addition, if third-party testimonials are posted on the profile, the attorney should take reasonable steps to ensure that such testimonials are not 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. An appropriate disclaimer or qualifying language often avoids creating unjustified expectations. An attorney who abandons a profile on a third-party directory has no further obligation to correct false, misleading, or deceptive content contained in the profile. An attorney abandons the profile by taking reasonable steps to alert the public that she is no longer monitoring the profile such as posting a notice of that fact on the profile as well as ceasing to use it in marketing her practice.
- AUTHORITIES INTERPRETED:** Rules 7.1 and 7.2 of the Rules of Professional Conduct of the State Bar of California.<sup>1/</sup>  
Business and Professions Code section 6106.  
Business and Professions Code sections 6157, et seq.

**STATEMENT OF FACTS**

Attorney visits an online professional directory website. The site has a separate profile page for Attorney, which includes her “Background Information,” with things like the name of her current firm, email address, and other contact information; the undergraduate and law schools from which she graduated; her areas of practice; and a statement that she has no record of discipline. The profile also

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<sup>1/</sup> Unless otherwise indicated, all references to rules in this opinion will be to the Rules of Professional Conduct of the State Bar of California in effect as of November 1, 2018.

includes a numerical rating of Attorney, which the site asserts is a measure of her professional competency, accomplishments, and reputation.

The web host has set up the site in segments, giving Attorney different rights to edit or post depending on the segment. As to the segment containing her Background Information, Attorney may correct any errors once she has “adopted” her profile listing. She can “adopt” her profile by clicking a “button” on the site, which verifies that she is the profiled attorney, and her profile thereafter indicates to anyone who views it that she has formally adopted it.

A second segment on the site allows the attorney to post any information she wishes about her qualifications, experience, activities, publications, and the like.

A third segment is reserved for content generated by third parties – things like comments, testimonials, and reviews of Attorney’s performance by clients, peers, or other interested third parties. Under the site’s policies, Attorney is not permitted to correct, edit, or delete information in this segment; only the third-party authors of the material posted there may do so.

Attorney adopts her profile and corrects some errors in the Background Information. Later she posts information in the second segment of the site, including a list of legal articles she has written and some accomplishments not directly related to her law practice, including serving on the board of directors of a non-profit charity, and coaching her daughter’s soccer team. She also notes her award as a “Five-Star Lawyer” from another national attorney evaluation website.

In the hopes of increasing her ranking on the site itself, Attorney also convinces her sister, who has never used Attorney’s services and has no real knowledge of the quality of Attorney’s professional abilities, to post a favorable review, extolling Attorney’s handling of a fictitious case.

Attorney also asks Client, for whom she actually and successfully completed a representation, to post a testimonial reviewing her performance. Client posts a testimonial, with no further input from Attorney, stating that Attorney provided excellent service and describing the settlement Attorney helped achieve. However, the testimonial contains incorrect factual information about the representation and settlement, and lacks any disclaimer regarding the likelihood of achieving the same results in similar matters.

Attorney asks Client to post an edited testimonial with the incorrect factual information corrected, and with a disclaimer on the attorney’s behalf, but Client refuses. Attorney then contacts the website and explains her ethical duties to correct the inaccuracies and to post the disclaimer in the testimonial, and asks the administrator to edit Client’s posting. The website administrator, citing the site’s policies, refuses the request and leaves the testimonial as written. Attorney then asks the website administrator to delete the testimonial altogether but, again consistent with the site’s policies, the website administrator refuses. Finally, attorney posts the following in the segment of the site where she is allowed to post material:

TO ANY READERS OF A CLIENT TESTIMONIAL OR OTHER THIRD-PARTY REVIEW OF MY PERFORMANCE AS PART OF THIS PROFILE: PLEASE REALIZE THAT SUCH TESTIMONIAL OR REVIEW DOES NOT CONSTITUTE A GUARANTEE, WARRANTY, OR PREDICTION REGARDING THE OUTCOME OF YOUR LEGAL MATTER, AS THE FACTS AND CIRCUMSTANCES OF EACH CASE DIFFER.

PLEASE ALSO REALIZE THAT THE POLICIES OF THE WEBSITE DO NOT PERMIT ME TO EDIT ANY CLIENT OR OTHER THIRD-PARTY'S REVIEWS OR TESTIMONIALS ON MY PROFILE, AND THUS I CANNOT ATTEST TO THE FACTUAL ACCURACY OF THE STATEMENTS MADE IN ANY SUCH REVIEWS OR TESTIMONIALS.

Attorney thereafter posts a link to the online directory profile on her own professional website, and encourages anyone interested in her qualifications to view her profile on the third-party site.

After several months, Attorney abandons the profile. She no longer posts information to it, removes the link from her professional website, no longer urges clients or others to view her profile on the third-party site, and posts a note in that segment of the website where she is allowed to post that she is no longer monitoring or using the profile.

## DISCUSSION

### **1. When is Attorney's Conduct Related to Online Directory Sites Subject to Attorney Advertising Regulations and Requirements?**

All media an attorney uses to promote her professional legal services as an attorney is regulated by Rules 7.1 and 7.2 of the California Rules of Professional Conduct and Business and Professions Code sections 6157 et seq.; see also California State Bar Formal Opn. No. 2001-155.<sup>2/</sup> The rules and statutes prohibit an attorney from making a communication that is false, misleading, or deceptive.<sup>3/</sup> Rule 7.1, Comment [4] further states: "[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 clients in similar matters without reference to the specific factual and legal circumstances of each client's case."

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<sup>2/</sup> The ethics opinions cited herein may refer to Rules of Professional Conduct in effect prior to November 1, 2018 including, but not limited to, former rule 1-400 (Advertising and Solicitation.)

<sup>3/</sup> Rule 7.1 provides:

(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.

Business and Professions Code section 6157(c) provides:

(c) "Advertise " or "advertisement" means any communication...that solicits employment of legal services provided by a member, and is directed to the general public and is paid for by, or on behalf of, an attorney.

Business and Professions Code section 6157.1 provides:

No advertisement shall contain any false, misleading, or deceptive statement or omit to state any fact necessary to make the statements made, in light of the circumstances under which they were made, not false, misleading or deceptive.

Professional directory websites are available to members of the general public, and thus by definition, are directed to a “person” and, if used to market the attorney’s services, concern the availability for professional employment of the lawyer or firm. A profile becomes “by or on behalf” of the attorney when the attorney exercises control over it by “adopting” it as directed by the site itself in order to market her practice. The profile would also become “by or on behalf” of the attorney if the attorney used the profile to market his or her practice even without “adopting” the profile as directed by the site itself. Hence, adoption of the profile, or any other use of the profile in an attorney’s marketing of her services, obligates the attorney to ensure the information she posts on the profile is truthful and not deceptive, or misleading to the public as required by rules 7.1 and 7.2 and Business and Professions Code sections 6157 et seq., and to take reasonable steps to ensure that the factual content on the profile page posted by others is similarly truthful and not misleading or deceptive.

On the other hand, an attorney who is not aware of her profile on a professional directory website, or who is aware of the profile but takes no action to use or benefit from the profile, is not responsible for any information contained thereon, inaccurate or not, because the information is not made “by or on behalf of” the attorney.

In our hypothetical, when Attorney adopted her profile and when she linked the profile page to her own professional website, the profile became a communication by or on behalf of Attorney within the meaning of rules 7.1 and 7.2 of the Rules of Professional Conduct and an “advertisement” under the State Bar Act. Consequently, she was thereafter subject to the ethical obligations flowing from those rules and statutes regarding her profile, including ensuring, to the extent reasonably possible, that only accurate, non-misleading factual information appears on the profile.<sup>4/</sup> Such duties last until Attorney abandons her use of the profile.

## **2. Effect of Posting False Information Solicited by Attorney**

Knowingly posting false or misleading information on a profile, or causing others to do so, violates the provisions of rule 7.1(a), which prohibits a false or misleading communication about the lawyer or the lawyer’s services. The communication is false or misleading if it contains a material misrepresentation of fact or law. Business and Professions Code section 6157.1 also prohibits advertisements containing any “false, misleading or deceptive” statement. Consequently, the posting of the solicited false review of Attorney’s services by her sister, who had never used those services, violates rule 7.1(a) and Business and Professions Code section 6157.1. Further, the solicitation of her sister by Attorney to publish deceptive information to the general public may also violate Business and Professions Code section 6106, prohibiting “act[s] involving moral turpitude, dishonesty or corruption.”

## **3. Effect of Posting Truthful Information and Ratings Information from “Bona Fide” Organizations and the Website Itself**

A state may not constitutionally prohibit, or impose discipline for, an attorney’s communication of truthful information in an advertisement. (*Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*(1980) 447 U.S. 557, 566 [holding that truthful commercial speech is entitled to constitutional protection]). As such, the posting of the legal articles Attorney had written is entirely proper.

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<sup>4/</sup> The Committee does not believe there is any set rule with regard to the frequency with which Attorney must revisit her profile to ensure the continuing accuracy of the information posted on her profile page after first adopting it or using it to market her practice. However, to ensure compliance with her ethical obligations, some periodic monitoring of the profile should be done.

Attorney's posting of her service on the board of directors of a non-profit charity and her soccer coaching is also constitutionally protected. (*Ibanez v. Florida Dep't of Business and Prof. Regulation* (1994) 512 U.S. 136 [holding an attorney's truthful statements that she was a CPA and a Certified Financial Planner in her advertising was constitutionally protected commercial speech without an evaluation of whether such information was of value to prospective clients]). Therefore, the posting of Attorney's non-legal community and business service is proper, and may also be relevant to a legal consumer who wants to retain an attorney who is active in the community or has particular experience outside of the practice of law.<sup>5/</sup>

With regard to Attorney's "Five-Star" rating from a national attorney evaluation organization, the Supreme Court has ruled that an attorney's rating by a bona fide organization with clear evaluation standards is also constitutionally protected commercial speech. (See, *Peel v. Attorney Registration & Disciplinary Comm'n of Illinois* (1990) 496 U.S. 91 ("Peel") [holding an attorney's statement on his stationery that he was a "Certified Civil Trial Specialist" according to the National Board of Trial Advocacy was constitutionally protected because it was not misleading and came from a "bona fide" organization]).

While *Peel* establishes that attorneys may reference accolades or ratings from "bona fide" organizations in their advertisements, it provided only minimal guidance as to what makes an organization "bona fide." That is, while it made a fact-specific argument in *Peel* itself that an award from the National Board of Trial Advocacy was "bona fide" because the group's standards for bestowing such awards were especially rigorous,<sup>6/</sup> the only general direction the Court provided as to what makes an organization "bona fide" was dicta. Specifically, the Court cautioned that, "if the certification had been issued by an organization that had made no inquiry into petitioner's fitness, or by one that issued certificates indiscriminately for a price, the statement, even if true, could be misleading." (*Id.* at 102.)

There is similarly little guidance on this issue by a California court or bar association. However, the ethics committees of several other states have addressed the question of what a "bona fide" organization is for purposes of legal ratings and awards, and the consensus is that if the organization employs a selection methodology based upon objective or other quantifiable factors relating to an attorney's qualifications, such as years of practice, publications, types of experience, reputation within the legal community, and client and other third-party testimonials, the organization may be considered "bona fide" and the rating or appellation awarded by such an organization can be used and cited by the

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<sup>5/</sup> See also California State Bar Formal Opn. No. 1982-67 (finding that listing the qualifications of firm members in letters mailed to non-clients could assist the public in making, "an informed choice of legal counsel, although members of the bar should take care that their communications are not false, misleading or deceptive.").

<sup>6/</sup> The Court stated, "NBTA has developed a set of standards and procedures for periodic certification of lawyers with experience and competence in trial work. Those standards, which have been approved by a board of judges, scholars, and practitioners, are objective and demanding. They require specified experience as lead counsel in both jury and nonjury trials, participation in approved programs of continuing legal education, a demonstration of writing skills, and the successful completion of a day-long examination. Certification expires in five years unless the lawyer again demonstrates his or her continuing qualification. NBTA certification has been described as a 'highly-structured' and 'arduous process that employs a wide range of assessment methods.'" (*Peel v. Attorney Registration & Disciplinary Comm'n of Illinois* (1990) 496 U.S. 91, 95).

attorney.<sup>7/</sup> Some of these sources also emphasized *Peel's* dicta that an award from an organization which charged or accepted a fee for a rating is likely not one from a “bona fide” organization since there is a risk of a legal consumer being misled into believing that such an award was a legitimate reflection of the attorney’s competence and not merely available for purchase by any attorney with sufficient means. (See, e.g., State Bar of Virginia Legal Advertising Opinion A-0114, at 2 [“However, attorneys may not ethically communicate to the public credentials that are not legitimate. For example, if a particular credential or certification is based not upon objective criteria or a legitimate peer review process, but instead is available to any attorney who is willing to pay a fee, then the advertising of such credential or certification is misleading to the public and is therefore prohibited.”].)

It is thus appropriate for Attorney to post on her profile her rating as a “Five-Star Lawyer” from another national attorney evaluation website if it is based upon objective factors relating to her qualifications and professional reputation, and not merely purchased by Attorney.

A separate question is whether the numerical rating provided by third-party’s website itself is an award from a “bona fide” organization and thus within the constitutional protections of *Peel*. So long as the site does not require or accept payment by the attorney for providing or increasing an attorney’s rating, and the criteria for calculating the rating on the site are in line with what other “bona fide” groups use in deciding to bestow an award to an attorney such as years in practice, awards, legal publications, reputation, etc., it is likely an attorney website’s internal rating does not implicate any ethical concerns and an attorney’s use of it as part of her profile would be constitutionally protected.<sup>8/</sup>

#### **4. Testimonials and Reviews by Third Parties**

Online professional directory websites often provide opportunities for clients, peers, and other interested third parties to post testimonials, endorsements, and reviews of individual attorneys on the attorney’s profile. Comment [4] of rule 7.1 states that 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. Rule 7.1 does not hold testimonials or endorsements to be presumptively deceptive or misleading, and does not affirmatively

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<sup>7/</sup> See e.g., Alaska Bar Association Ethics Opinion 2009-2; State Bar of Arizona Opinion No. 05-03 (July 2005) (providing that a listing in *The Best Lawyers in America* was a “bona fide” award); Delaware State Bar Association Committee of Professional Ethics, Opinion 2008-2 at 7-8 (stating that an attorney’s listing in *Super Lawyers* and *Best Lawyers* were “bona fide” awards); State Bar of Iowa Ethics Opinion 07-04; North Carolina State Bar 2007 Formal Ethics Opinion No. 14; South Carolina Bar Association Advisory Opinion 09-10; State Bar of Virginia Legal Advertising Opinion A-0114. See also, *In re Opinion 39 of the Comm. on Atty. Advertising* (2008) 197 N.J. 66, 79 [961 A.2d 722] (vacating ethics opinion which found ratings misleading as the result of court case *Dwyer v. Cappell* (3rd Cir. 2014), 762 F.3d 275 on ground that truthful disclosure of such information was protected by the First Amendment).

<sup>8/</sup> In addition to checking on the site’s criteria for providing a numerical rating, the Committee suggests that an attorney investigate and understand all the policies of the site with respect to the ability to post disclaimers or correct misleading content before adopting it or otherwise using it to market her practice.



require a disclaimer. Comment [4] to rule 7.1 notes, however, that an appropriate disclaimer or qualifying language “often avoids creating unjustified expectations.”<sup>9/</sup>

The factually inaccurate testimonial posted by Client presents a number of potential ethical problems for Attorney. These problems stem from the fact that rules 7.1, 7.2, and the related advertising provisions in the State Bar Act presume the attorney is generally in charge of both the production and distribution of the advertisement, and has editorial control over it. Hence if a client is willing to have his or her testimonial published for the attorney’s benefit in an advertisement, the accuracy of the client’s statements, and the ability to add a disclaimer or qualifying language, is presumed to be within the attorney’s control.

However, when the content comes directly from clients and other third parties, and these testimonials and reviews are posted on an independently-run site, final editorial content of what is said has passed to the clients and third parties who author the statements, and to the website administrator who controls their edits. If neither the client nor the administrator will allow the correction of false or misleading content, or agree to append an appropriate disclaimer to the client’s testimonial, an attorney is left in a potential ethical quandary – being required to take certain measures in an advertisement that is on her behalf, but being unable to implement them.<sup>10/</sup>

The Committee believes that common sense dictates that the attorney’s reasonable, good faith attempt to meet the requirements of rules 7.1, 7.2, and the related State Bar Act provisions should be sufficient to satisfy her ethical obligations. Some steps an attorney should consider taking are:

1. *Requesting that the client, or other third-party author of the content, either revise the posting to make it accurate and complete so as to be in compliance with the attorney’s ethical obligations, or delete the posting altogether.*
2. *Requesting that the website administrator correct or remove any inaccurate information, add an appropriate disclaimer, or delete the posting altogether.*

If neither Client nor the website administrator agrees to any such changes, the attorney should attempt to post something herself on the site in order to satisfy her ethical obligations. Such posting should likely include the language of an appropriate disclaimer or qualifying language as stated in Comment [4] of rule 7.1, or a statement that the editorial policies of the site are such that the attorney cannot vouch for the factual accuracy of third-party content, either generally or as regards a particular post. Of course, other ethical concerns such as privilege, confidentiality, and loyalty may limit the specificity of what can

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<sup>9/</sup> Business and Professions Code sections 6157.2 through 6158.3 still prohibit certain advertising practices, require disclaimers under specified circumstances, and create some evidentiary presumptions arising from advertising, none of which apply to the facts presented. Accordingly, the committee does not address them in this opinion.

<sup>10/</sup> In *Hassell v. Bird* (2018) 5 Cal.5th 522 [234 Cal.Rptr.3d 867], the court ordered that the poster of defamatory review on Yelp to remove the offending posting from the website. However, the court would not compel Yelp to do so, finding that the latter was protected as a provider of an interactive computer service under the Communications Decency Act of 1996, 47 U.S.C. section 230.

be said by the attorney;<sup>11/</sup> however, a general statement that the attorney cannot correct any inaccuracy in a third-party's post on the profile due to the editorial restrictions imposed by the site's administrator, and a general disclaimer, should suffice in most situations.

Rule 7.1 states nothing about the proximity of the disclaimer to the testimonial or the proximity of any disavowal or posting of correct information to the third-party post that such statements are designed to correct. However, with electronic webpages administered by others, it is entirely possible that the disclaimer or disavowal in the segment of the website where the attorney can post information might be several "screens" away from the testimonial or review itself, and thus, an interested reader would never see it or even know to look for it. In this situation, the Committee believes that the attorney can only be ethically required to do what she can reasonably do, and that the posting of a disclaimer or disavowal as close as reasonably possible to the testimonial on the profile should be sufficient to meet her ethical obligations. The alternative would be to prohibit the attorney from using or adopting the third-party profile at all once the attorney discovered that any inaccuracies in third-party postings could not be corrected and any required disclaimer could not be placed in a prominent enough location to be easily or reliably noticed. This could lead to attorneys choosing not to take advantage of such websites in the first place so as to avoid an ethical gamble. As we believe attorney profiles in professional online directory and rating websites maintained by third parties provide information that some legal consumers value in selecting counsel, we believe allowing the attorney to continue using the profile with any disclaimer or disavowal as close as reasonably permitted to the testimonial or review is preferable, and consistent with the policies behind rules 7.1, 7.2, and the related provisions of the State Bar Act.

Finally, as we discuss in greater detail below, another option the attorney should at least consider when faced with inaccurate factual information that cannot be corrected on a ratings website posted by others is to abandon the profile altogether.

In our hypothetical, Attorney acted ethically once she discovered Client's posting. She asked Client to edit the post; when Client refused, she asked the website administrator to make ethically required corrections and insertions; and, when the administrator refused, she posted a disclaimer and general disavowal in the section of the website that was available for her to do so, which was as proximate as reasonably possible to the testimonial itself. We do not believe that Attorney was required to abandon the profile under these facts because she was able to post a general disclaimer and disavowal in the profile, which ameliorates any misleading effect of the client's inaccurate testimonial. However, when the attorney is prohibited from taking any corrective measures, for example because the website administrator will not allow her to post any disclaimer or disavowal, abandonment may be the only reasonable course.

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<sup>11/</sup> See, e.g., Los Angeles County Bar Association Professional Responsibility and Ethics Committee, Formal Opinion No. 525 (2012) (opining an attorney may respond to website comments from former client consistent with client confidentiality and in a response that "is proportionate and restrained."); Bar Association of San Francisco, Opinion No. 2014-1 (opining an attorney may respond to negative online reviews provided no confidential information is revealed, and there is no adverse effect on the matter the attorney previously handled for the client). See also, *In the Matter of Betty Tsamis*, Illinois Attorney Registration and Disciplinary Commission No. 6288664 (attorney charged with violation of client confidentiality obligation when responding to client criticism on AVVO).

## **5. Abandonment of Third-party Profile**

The obligation to take reasonable steps to correct known inaccurate, misleading, or incomplete information contained on the attorney's profile continues until the attorney abandons it. An attorney abandons the profile by taking reasonable steps to alert the public that she is no longer monitoring the profile such as posting a notice of that fact on the profile as well as ceasing to use it in marketing her practice.

Whether an attorney has abandoned a profile posted on an online professional directory site is a case-by-case, fact-based inquiry. Although the Committee cannot define all the ways in which an attorney may demonstrate her abandonment of the profile, some tangible evidence of abandonment includes no longer referring clients to the profile and no longer making reference to the profile on her own site. Abandonment may take place at any time, from immediately following adoption of the profile, to years later if the attorney continually uses her profile to market her practice. Once an attorney abandons the profile, she is not thereafter responsible for its content. Here, Attorney's posting a notice that she is no longer using or monitoring it, and her actions in no longer referring clients to it or referring to it on her own site, should be sufficient to demonstrate her abandonment of it.<sup>12/</sup>

## **CONCLUSION**

An attorney is not responsible for a profile on an online professional directory website which she has not adopted or otherwise used in order to market her practice. Adopting a profile, or otherwise using it to market her practice, makes the profile a communication on the attorney's behalf, and an advertisement for her professional services, and obligates an attorney to take reasonable steps to ensure the information on the profile is accurate and not misleading.

Attorneys may not post false, misleading or deceptive material on a profile under rule 7.1 and Business and Professions Code section 6157.1, nor request others to do so. Attorneys may, however, post truthful information in their advertisements, regardless of whether it is directly related to the practice of law. Attorneys may also report their ratings or accolades from a bona fide attorney evaluation website (including from the website hosting the profile) which uses verifiable criteria based upon the attorney's experience, accomplishments, professional reputation, and the like. Attorneys should avoid using ratings issued for a price.

An attorney must take reasonable steps to correct any inaccuracies posted by a third-party in a profile adopted or used by the attorney. These steps can include asking the party who posted the information, or the web site administrator, to edit the posting so that it only reports accurate, non-misleading content, so long as client confidentiality and other ethical requirements permit. If such editing is not possible, attorney should disavow inaccurate information in the third-party postings, either generally or specifically.

When a testimonial on a profile adopted or used by the attorney appears without a disclaimer, and the absence of a disclaimer could lead a reasonable person to form an unjustified expectation of the same results in similar matters, the attorney should take reasonable steps to correct the situation. Again these

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<sup>12/</sup> Abandoning the third-party profile would clearly not cure an ethical violation resulting from a lawyer's knowingly posting false, misleading, or deceptive information on the profile or causing others to do so, as in this hypothetical.

steps include a request to the person who posted the testimonial or the website administrator to provide a proximally close disclaimer. If such requests are denied, a general disclaimer regarding all testimonials on the profile or abandoning the profile altogether are other actions which should be considered to fulfill an attorney's ethical obligations.

An attorney is not responsible for profile content on an online professional directory posted after she has abandoned the profile by no longer using the profile in marketing her practice. An attorney who has decided to abandon a profile should take reasonable steps demonstrating such decision, such as posting that she is no longer monitoring or using the profile, and not directing clients to it.

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 licensee of the State Bar.



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Re: Interim Opinion 12-0003

Dear Angela:

The Professional Responsibility and Ethics Committee of the Los Angeles County Bar Association appreciates the opportunity to submit the following comments on proposed Interim Opinion No. 12-0003. While our Committee agrees with many of the points made in the draft opinion, we have some concerns and suggestions, as set forth below. For ease of reference, these comments are provided in the order in which the points arise in the draft opinion rather than in order of importance:

- 1) The draft places a number of terms in quotes, suggesting they are defined terms having a particular and limited meaning, but only two of them ("communication" and "advertisement") are defined. We believe that readers might think the others ("adopting," "Background Information," and "button") have a special meaning when in fact they only are used descriptively. To avoid unnecessarily creating confusion among readers, we recommend removing the quotation marks and generalizing the explanations (and see below regarding "advertisement").
- 2) We believe the draft opinion can be shortened by focusing on the points being made, thereby increasing its accessibility to those most in need of its teaching. Such concentration might also avoid drafting errors and remove unneeded information that could mislead readers. The public comment deadline prevents us from going into as much detail as we would like, but we offer two examples.

- a. The sixth complete paragraph on page 2 (beginning with "Attorney also asks ...") contains the following sentences: "Client posts a testimonial, with no further input from Attorney, stating that Attorney provided excellent service and describing the settlement Attorney helped achieve. However, the testimonial contains incorrect factual information about the representation and settlement, and lacks any disclaimer regarding the likelihood of achieving the same results in similar matters." These sentences do not recognize the important difference between errors that overstate and those that understate the lawyer's credentials. They might be restated more briefly as follows: "Client, acting alone, posts a testimonial that overstates Attorney's background and experience, and lacks any disclaimer regarding the likelihood of achieving the same results in similar matters."
  - b. The seventh complete paragraph on page 2 (beginning with "Attorney asks Client to post ...") contains the following: "Attorney then contacts the website and explains her ethical duties to correct the inaccuracies and to post the disclaimer in the testimonial, and asks the administrator to edit Client's posting. The website administrator, citing the site's policies, refuses the request and leaves the testimonial as written. Attorney then asks the website administrator to delete the testimonial altogether but, again consistent with the site's policies, the website administrator refuses." This statement could be stated more succinctly, for example: "Attorney then asks the website to correct the inaccuracies and to post a disclaimer. The website administrator refuses; Attorney then asks the administrator to delete the testimonial and the administrator again refuses."
- 3) The draft at page 4, first paragraph, begins: "Professional directory websites are available to members of the general public, and thus by definition, are directed to a 'person'" but there is no explanation of the origin of this standard. That standard is not in the text of rule 7.1 or 7.2, and the section 6157(c) definition of "advertisement" speaks of communications "directed to the general public." We believe that the opinion should explicitly refer to rule 7.1, Comment [1], which provides in relevant part that "[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.\**" (Emphasis added.)
- 4) There are several references to sections 6157, *et seq.*, but we do not believe those provisions apply because the section 6157(c) definition of "advertisement" is one that is "paid for by, or on behalf of, an attorney." For section 6157 to apply, it would be necessary to discuss who pays for the website, which presumably are the website's third party advertisers only, and then to conclude that their payments to the website for advertising their own products and services, are payments "on

behalf of [the] attorney.” We do not believe this interpretation is supported by the statute and conclude that the opinion either should state directly that section 6157 does not apply or (to shorten and simplify the opinion) simply remove all references to sections 6157, *et seq.* As noted in our third point, the simpler solution would be to base the analysis on rule 7.1 and its Comment [1].

- 5) We also believe that there is a risk of reader confusion due to its use of what we believe is the inapplicable section 6157. Here are two examples:
  - a. the draft several times uses “by or on behalf of”, a phrase that is found in section 6157 and former rule 1-400, but not in the text of rule 7.1; and
  - b. the draft uses “communication” and “advertising” interchangeably while only “communication” is used in rule 7.1.
- 6) The second complete paragraph on page 4 (beginning with “On the other hand, Attorney ...”) concludes that, so long as the lawyer does not affirmatively adopt or republish a published profile that the lawyer knows to be incorrect, the lawyer will not be responsible for those inaccuracies. We agree with that conclusion but have concerns with the second paragraph’s syntax that appears to equate the situations of the lawyer with no knowledge and the passive lawyer with actual knowledge. We believe that the second paragraph should emphasize the substance of the preceding paragraph that precedes it. We suggest that a revision of the second paragraph along the following lines will drive home the point that a lawyer’s inaction despite knowledge is appropriate only if the lawyer refrains from taking advantage in any way of inaccurate facts in the profile:

On the other hand, an attorney who is not aware of a profile on a professional directory website is not responsible for any information contained thereon, inaccurate or not, because the information is not made “by or on behalf of” the attorney. Similarly, an attorney who is aware of the profile but takes no action is also not responsible for its content. However, that attorney must not take any action to use or benefit from the profile, for example, by linking from the attorney’s website to the profile. Moreover, the attorney must correct any misconceptions of a prospective client who approaches attorney after consulting the website profile. For example, if the profile inaccurately states that Attorney was a Rhodes scholar and prospective client were to refer to Attorney having been a Rhodes scholar, Attorney must correct the client’s misconception. Otherwise, Attorney will “benefit” from the inaccurate statement of fact.

- 7) Although perhaps implicit in the current draft, we recommend that the opinion state directly that lawyers do not have an obligation to search for on-line or other statements to seek out possible exaggerations about their background or experience.
- 8) The second sentence in section 2 of the Discussion states: "The communication is false or misleading if it contains a material misrepresentation of fact or law." We believe there are two problems with this sentence. First, there is no predicate fact of a communications that would support the use of "the," so the correct word is "a." Second, we are concerned that the sentence makes an absolute statement that could be taken out of context to mean that a communication cannot be false or misleading unless "it contains a material misrepresentation of fact or law." See, e.g., rule 7.1, Comment [3]. There are many drafting solutions, such as to say: "... if, for example, it contains a material misstatement ...."
- 9) The last sentence of section 2 of the Discussion states that Attorney's solicitation of Attorney's sister to "publish deceptive information to the general public" might violate section 6106. This sentence raises two substantive points.
  - a. We do not believe that the sentence should refer to solicitation, which is an attempt, but only should speak of the accomplished act. For example, the sentence could be restated along these lines: "Attorney, acting through Attorney's sister, posted ...." The second Rules Revision Commission was urged to make attempted rule violations the subject of professional discipline. The Commission rejected that approach and instead recommended that that rules should be examined individually to determine whether an attempt is a violation. The California Supreme Court agreed with that approach. With respect to rule 7.1, our Committee strongly believes that the solicitation of the sister, which merely constitutes an attempt, should not be treated as a violation and that the sentence should be rewritten to exclude that reading.
  - b. We believe that section 6106 is not the proper reference here, and that the opinion instead should cite rule 8.4(a) and (c). Section 6106 is a general catch-all provision that is not needed when there is a specific rule to cite, and the two aforementioned paragraphs of rule 8.4 are applicable here.
- 10) We recommend the removal of footnote 8 on page 6. This is a best practices suggestion rather than an explanation of what is ethically required. We believe that best practices recommendations should be avoided throughout the opinion.



- 11) The last sentence in the first complete paragraph on page 7 (beginning with “The factually inaccurate testimonial ...”) states that it is presumed that the lawyer has the ability to add a disclaimer to a client’s testimonial. We do not know the basis for that presumption and do not agree with that statement of what always is true. A lawyer has the ability to add a disclaimer if the lawyer makes or recirculates the communication – the lawyer then is the source of the communication. However, this draft opinion involves a different situation, as is stated in the second full paragraph on page 7. The starting point for these two paragraphs is that the lawyer has control if the lawyer is the source of the communication but might not have that control “when the content comes directly from clients or other third parties ....”
- 12) Footnote 10: In the clause “...ordered that the poster of defamatory review on Yelp to remove the offending posting,” the word “that” should be removed.
- 13) In the first line of the last paragraph on page 7 (beginning with “If neither Client nor the website ...”), we believe that “should attempt” needs to be changed to “must,” and in the next line “should likely” also needs to be changed to “must.” The use of the aspirational “should” signals that the proposed conduct is merely best practices when the context reflects that it is a duty.
- 14) Similarly, in the second complete paragraph on page 8 (beginning with “Finally, as we discuss ...”), we believe the phrase “should at least consider” is misleading. The correct statement is that rule 7.1 prohibits a lawyer from adopting or taking advantage of a false or misleading communication. Attorney bears the responsibility for assuring that no known communication made by Attorney or on Attorney’s behalf violates the rule 7.1 standard.
- 15) We also believe the final paragraph on page 8 (beginning with “In our hypothetical ...”) goes too far in its conclusion. It is only possible to reach a conclusion as to whether a lawyer is obligated to abandon the profile based on all the facts and circumstances, and only some of them are known in an advisory opinion.
- 16) Finally, we believe that the opinion should be rendered gender neutral. Given the recent revisions to the Code of Judicial Ethics and the recent implementation of the California Rules of Professional Conduct, both of which explicitly recognize the fluidity of gender, we believe that rather than assigning a specific gender to Attorney, the opinion should simply refer to “Attorney” instead of using the pronouns “she” and “her.”

Thank you for the opportunity to comment on the Proposed Formal Opinion.

Sincerely,

A handwritten signature in blue ink, appearing to read "Neil J. Wertlieb". The signature is fluid and cursive, with the first name "Neil" and last name "Wertlieb" clearly distinguishable.

Neil J Wertlieb  
Chairman  
Professional Responsibility and Ethics Committee,  
Los Angeles County Bar Association



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May 13, 2019

Angela Marlaud, Esq.

Office of Professional Competence, Planning and Development

State Bar of California

180 Howard Street

San Francisco, California 94105-1639

Re: Proposed Formal Opinion Interim No. 12-0003

Dear Ms. Marlaud:

The Orange County Bar Association (OCBA) respectfully submits the following comments concerning Proposed Formal Opinion Interim No. 12-0003.

Founded over 100 Years ago, the OCBA has over 9,000 members, making it one of the largest voluntary bar associations in California. The OCBA Board of Directors, made up of practitioners from large and small firms, with varied civil and criminal practices, of differing ethnic backgrounds and political leanings, has approved these comments prepared by the Professionalism and Ethics Committee.

We believe that the opinion provides valuable guidance for attorneys facing the ethical dilemmas described in the opinion.

We also have comments and suggestions that we believe could clarify and improve the opinion and provide even more clarity for practitioners confronted with these dilemmas, which we address below:

The opinion is longer than many COPRAC opinions. We suggest that the opinion could be shortened if the fake testimonial were omitted. It seems like an unlikely scenario and one so obviously improper it may not need to be raised. There may be other ways to shorten the opinion. We suggest that be considered.

As to section 1, the opinion uses the language “by or on behalf of” at the top of page 4, which derives from former rule 1-400(A). That does not appear in the new rule 7.1, which references communication “about” the lawyer or the lawyer’s services. Although Comment [1] makes clear that the former “by or on behalf of” definition of “communication” is still included within the rule, rule 7.1 itself is broader. We suggest at the top of page 4 and elsewhere that the opinion focus on whether the communication is “about” the lawyer or the lawyer’s services, not whether it is “by or on behalf of” the lawyer.

Similarly, this same paragraph refers to “the availability for professional employment,” which also is a remnant of former rule 1-400(A). Although that concept may still exist in rule 7.1’s reference to “the lawyer’s services,” we believe it would be better to focus on the words of rule 7.1 rather than the words of former rule 1-400(A).

Concerning the application of Section 6157(c), we note that statute requires payment for the advertisement. If there is no payment for the advertisement, Section 6157 would not be applicable. In the facts, there is no payment for the advertising. However, the proposed opinion states at page 4, in the third paragraph, that the profile became an advertisement under the State Bar Act. We think that the absence of payment is a typical scenario. Therefore we would not propose that payment be added to the facts. The proposed opinion should be revised to provide that unless payment is made for the advertisement, Section 6157 is not applicable.

Along the same lines, the beginning of Section 1 states, “All media an attorney uses to promote her professional legal services as an attorney is regulated by Rules 7.1 and 7.2 of the California Rules of Professional Conduct and Business and Professions Code sections 6157 et seq.,” but that statement seems overbroad because sections 6157 et seq. only apply to an “advertisement” that falls within the definition set forth in section 6157(c), and not to all communications by an attorney to promote her practice. Similarly, in Section 2, there is a conclusion that the matter violates Section 6157.1. However, again, the definition of “advertisement” in 6157, which applies to “this article,” requires payment, so would technically not apply.

As to Section 4, footnote 9 indicates that none of the presumptions apply to the testimonial. But if, as the opinion currently states, the State Bar Act does apply to this professional directory website (which we question, as set forth above), then it seems that Business and Professions Code section 6158.1 would be applicable to the testimonial because it is a message about the “ultimate result of a specific case... presented out of context without adequate information as to the facts and law giving rise to the result.” There is therefore a rebuttable presumption that the message is false, misleading or deceptive within the meaning of section 6158, which governs “advertising by electronic media.” But as stated above, we do not believe that the professional directory website is “advertising” within the meaning of section 6158 so that the presumption would not apply. If, however, the Committee disagrees with our conclusion that the State Bar Act does not apply based on the facts as stated, then, to be consistent, the opinion should conclude that the rebuttable presumption set forth in section 6158.1(a) also applies. Also, a warning about the potential for promulgation of new standards under rule 7.1 might be helpful here.

On page 7, in the first full paragraph, the last sentence states, “[I]f a client is willing to have his or her testimonial published for the attorney’s benefit in an advertisement, ... the ability to add a disclaimer or qualifying language is presumed to be within the attorney’s control.” We suggest that this be deleted, as it simply is not accurate on many platforms, including Yelp, where clients can say anything and the attorney has no control whatsoever. The following paragraph of the proposed opinion is more accurate.

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As to Section 5, we believe a change is in order because in many if not most profiles, it is not practical to post a notice of abandonment on a profile. Although the opinion provides guidance on other ways to abandon a profile, it leads with "posting a notice."

Thank you for considering our comments.

Sincerely,

The Orange County Bar Association

A handwritten signature in black ink, appearing to read "Deirdre Kelly". The signature is fluid and cursive, with the first name "Deirdre" written in a larger, more prominent script than the last name "Kelly".

Deirdre M. Kelly  
2019 President



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May 23, 2019

Angela Marlaud

Office of Professional Competence, Planning and Development

State Bar of California

180 Howard Street

San Francisco, CA 94105-1639

Re: Formal Opinion Interim No. 12-0003

Dear Ms. Marlaud:

The San Diego County Bar Association, through its Legal Ethics Committee, has considered the above referenced interim COPRAC opinion. We appreciate the opportunity to share our observations regarding the opinion with COPRAC.

We have two overall comments. First, the opinion at 10 pages is very long, and we would like to suggest that it be shortened in some way. For example, perhaps having two testimonials is unnecessary. In addition, the opinion should more carefully delineate between advertising and communications throughout.

Section 1 indicates that "all media an attorney uses to promote her professional legal services is regulated by Rules 7.1 and 7.2 of the California Rules of Professional Conduct and Business and Professions Code Section 6157, et seq." However, section 6157 applies only if there is payment for the advertisement, which is not the case in the hypothetical facts. So, section 6157 would not apply here and the opinion should be revised accordingly. Specifically, at page 4, in the last paragraph of Section 1, the profile is not an advertisement as defined by the State Bar Act.

At the top of page 2, in the first paragraph, the language "by or on behalf of" should be changed to "about" to conform to the new language in Rule 7.1.

A similar revision is also required in section 2 of the opinion indicating there is a violation of section 6157. That would not be the case given the definition of advertisement requires a payment. This section should be revised to indicate that the posting would not violate section 6157.1.

We recommend that section 4 of the opinion, regarding Business and Professions Code section 6158.1, be clarified to indicate that, because there is no payment for the advertisement, that section is not applicable.

There are also two practical issues we would like to bring to COPRAC's attention. On page 7, in the first full paragraph, the opinion indicated that "the ability to add a disclaimer or qualifying language is presumed." We think this language should be deleted, as it is not accurate as a practical matter. Many platforms give the client an opportunity to comment without the attorney having the ability to post a disclaimer or qualifying language.



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As to section 5 of the opinion, we think that the indication that the user can post a notice of abandonment of a profile should be deleted. Again, that is because it is not an option as a practical matter on many platforms.

As always, we thank COPRAC for its work in providing ethics guidance to California lawyers. If COPRAC has any questions, our Legal Ethics Committee would be pleased to address them.

Respectfully submitted,

Lilys McCoy  
SDCBA President

cc: Leah S. Strickland, Esq., co-chair, LEC  
Edward J. McIntyre, Esq., co-chair, LEC

