



The State Bar *of California*

**OPEN SESSION
AGENDA ITEM
NOVEMBER 2019
REGULATION AND DISCIPLINE COMMITTEE II.A**

DATE: November 14, 2019

TO: Members, Regulation and Discipline Committee

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

SUBJECT: Formal Advisory Ethics Opinion 2019-199: 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 Ethics Advisory Opinion 2019-199 developed by the Committee on Professional Responsibility and Conduct (COPRAC or Committee).

BACKGROUND

COPRAC is charged with developing the State Bar's nonbinding, advisory ethics opinions.¹ Authority to approve the issuance of an ethics opinion is exercised by RAD in accordance with applicable State Bar policy and procedure,² which provides that once the Committee has approved a formal opinion following consideration of public comment, the formal opinion and the issue of whether the formal opinion shall be published shall be placed on the agenda of the next succeeding meeting of RAD for decision.

¹ Each published opinion includes the following statement: "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." Although nonbinding, State Bar formal ethics opinions have been cited by the California courts in analyzing issues of attorney professional responsibility. (See, e.g., *Huskinson & Brown v. Wolf* (2004) 32 Cal.4th 453, 459.)

² See Board Resolutions, July 1979, December 2004, and November 2016.

DISCUSSION

This agenda item requests approval for the publication of Proposed Formal Advisory Ethics Opinion 2019-199. Prior to being finalized for publication, while the opinion was still in development and out for public comment, it was styled as Proposed Formal Opinion Interim No. 12-0003.

Proposed Formal Opinion Interim No. 12-0003 was drafted by COPRAC and at its June 2, 2017 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 February 22, 2019 meeting, COPRAC revised the opinion in response to public comments received, and updated the opinion to conform to the new Rules of Professional Conduct that took effect on November 1, 2018. An additional 60-day public comment period was also approved at that time. At its June 7, 2019 meeting, COPRAC further revised the opinion in response to public comment and approved a final 45-day public comment period.

The full text of the proposed opinion is provided as Attachment A. The question addressed in the proposed opinion is: "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 digest states:

An attorney is not responsible for the content of an attorney's 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" the profile on the directory itself or otherwise using the profile to market the attorney's practice, the attorney becomes responsible for its content. When an attorney uses the profile to market the attorney's practice, the profile becomes a communication about the attorney's services by or on behalf of the attorney, and consequently the attorney must comply with the relevant advertising rules. This means the attorney cannot post or induce another to post content that is false or misleading, 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 or misleading content contained in the profile. An attorney abandons the profile by taking reasonable steps to alert the public that the attorney 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 the attorney's practice.

Public Comment

One public comment was received and is included as Attachment B. The commenter asserts that the opinion goes too far with respect to testimonials. The commenter argues that an attorney's ethical obligation with respect to correcting a false testimonial posted on a third-party website should be fulfilled by the attorney's attempt to remove or correct the false posting, as opposed to publicly posting a disclaimer. In addition, the commenter states the "discussion of abandonment assumes that the attorney has far more control over a third-party site than we actually do."

Given the specific hypothetical facts posed, the Committee made minor revisions in response to the public comment to clarify why a disclaimer is needed.

Concerning the first issue, the hypothetical facts state that the attorney specifically asked a client to post a testimonial concerning the attorney's performance on a third-party website the attorney is using to market his practice. Based on this conduct, the Committee opines that this renders the client's testimonial a communication made on behalf of the attorney. This means it is different from other testimonials posted sua sponte. Because the client's testimonial contains false information regarding the attorney's background and experience, as well as the results the attorney obtained on behalf of the client, the attorney owes a duty to correct the information, including considering "an appropriate disclaimer or qualifying language as to the inaccurate information, or a statement that the editorial policies of the site are such that the attorney cannot vouch for the factual accuracy of the third-party content."

As to the comment regarding a lawyer's duty to abandon a third party website, the opinion states that if an attorney chooses to adopt a profile on a third-party website, or use such a profile to market the attorney's practice, the attorney becomes responsible for its content and must abide by his or her ethical obligations under the California Rules of Professional Conduct. The opinion further states that this obligation exists until the attorney abandons the profile and that abandonment can be evidenced by taking reasonable steps to alert the public the attorney is no longer using or monitoring the site. This analysis does not assume any particular degree of control over a third party website. Instead, it places a burden on a lawyer to take certain reasonable steps subject to whatever control the lawyer might have.

At its September 6, 2019 meeting, following consideration of the public comment received, COPRAC approved the opinion for submission to RAD for formal publication. The State Bar Standing Committee on Professional Responsibility and Conduct requests that RAD approve the publication of Formal Ethics Advisory Opinion No. 2019-199.

FISCAL/PERSONNEL IMPACT

None

RULE AMENDMENTS

None

BOARD OF TRUSTEES POLICY MANUAL AMENDMENTS

None

STRATEGIC PLAN GOALS & OBJECTIVES

Goal: None

RECOMMENDATIONS

It is recommended that the Regulation and Discipline Committee 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 and Conduct, the Board Committee on Regulation and Discipline approves the publication of Formal Ethics Advisory Opinion 2019-199, attached hereto as Attachment A.

ATTACHMENT(S) LIST

- A.** Formal Ethics Advisory Opinion 2019-199
- B.** Full Text of Public Comment

**THE STATE BAR OF CALIFORNIA
STANDING COMMITTEE ON
PROFESSIONAL RESPONSIBILITY AND CONDUCT
FORMAL OPINION NO. 2019-199**

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 an attorney's 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" the profile on the directory itself or otherwise using the profile to market the attorney's practice, the attorney becomes responsible for its content. When an attorney uses the profile to market the attorney's practice, the profile becomes a communication about the attorney's services by or on behalf of the attorney, and consequently the attorney must comply with the relevant advertising rules. This means the attorney cannot post or induce another to post content that is false or misleading, 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 or misleading content contained in the profile. An attorney abandons the profile by taking reasonable steps to alert the public that the attorney 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 the attorney's practice.

AUTHORITIES

INTERPRETED: Rules 7.1 and 7.2 of the Rules of Professional Conduct of the State Bar of California.^{1/}

^{1/} 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.

STATEMENT OF FACTS

Attorney visits an online professional directory website. The site has a separate profile page for Attorney, which includes “Background Information,” with things like the name of Attorney’s current firm, email address, and other contact information; the undergraduate and law schools from which Attorney graduated; Attorney’s areas of practice; and a statement that Attorney has no record of discipline. The profile also includes a numerical rating of Attorney, which the site asserts is a measure of Attorney’s 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 Attorney’s Background Information, Attorney may correct any errors once Attorney has “adopted” Attorney’s profile listing. Attorney can adopt Attorney’s profile by clicking a button on the site, which verifies that Attorney is the profiled attorney, and Attorney’s profile thereafter indicates to anyone who views it that Attorney has formally adopted it.

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

In the hopes of increasing Attorney’s ranking on the site itself, Attorney also convinces Attorney’s 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 Attorney actually and successfully completed a representation, to post a testimonial reviewing Attorney’s performance. Client, acting alone, posts a testimonial that inaccurately Attorney’s background and experience, and incorrectly states the amount obtained in settlement.

Attorney asks Client to post an edited testimonial with the incorrect factual information corrected, but Client refuses. Attorney then asks the website to correct the inaccuracies. The website administrator refuses; Attorney then asks the administrator to delete the testimonial and the administrator again refuses. Finally, Attorney posts the following in the segment of the site where Attorney 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 Attorney's own professional website, and encourages anyone interested in Attorney's qualifications to view Attorney's profile on the third-party site.

After several months, Attorney abandons the profile. Attorney no longer posts information to it, removes the link from Attorney's professional website, no longer urges clients or others to view Attorney's profile on the third-party site, and posts a note in that segment of the website where Attorney is allowed to post that Attorney 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 the attorney's professional legal services is regulated by rules 7.1 and 7.2 of the California Rules of Professional Conduct. See also California State Bar Formal Opn. No. 2001-155.^{2/} The rules prohibit an attorney from making a communication about the attorney or the attorney's services that is false or misleading.^{3/} Rule 7.1, Comment

^{2/} 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.)

^{3/} 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.

[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.”^{4/}

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.” Rule 7.1, Comment [1]. Professional directory websites are available to members of the general public 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 an attorney when the attorney exercises control over it by adopting it as directed by the site itself in order to market the attorney’s practice. The profile would also become “by or on behalf” of the attorney if the attorney used the profile to market the attorney’s 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 the attorney posts on the profile is truthful and not misleading to the public as required by rules 7.1 and 7.2, and to take reasonable steps to ensure that the factual content on the profile page posted by others is similarly truthful and not misleading.

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 with regard to the profile 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 the attorney after consulting the website profile. For example, if the profile inaccurately states that the attorney was a Rhodes scholar and a prospective client were to refer to the attorney having been a Rhodes scholar, the attorney must correct the client’s misconception. Otherwise, the attorney will benefit from the inaccurate statement of fact.

In our hypothetical, when Attorney adopted Attorney’s profile and when Attorney linked the profile page to Attorney’s 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. Consequently, Attorney was thereafter subject to the ethical obligations flowing from those rules regarding Attorney’s profile, including ensuring, to the extent reasonably possible,

^{4/} Business and Professions Code section 6157 *et seq.* contain provisions regulating attorney “advertising” and “advertisements.” These terms, however, are defined as “paid for by, or on behalf of, an attorney.” See Business and Professions Code section 6157(c). Since the facts in this opinion do not involve “paid” advertising these sections are not applicable to these facts.

that only accurate, nonmisleading factual information appears on the profile.^{5/} Such duties last until Attorney abandons 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. A communication is false or misleading if, for example, it contains a material misrepresentation of fact or law. Consequently, the posting of the false review of Attorney's services by Attorney's sister, who had never used those services, at Attorney's request, violates rule 7.1(a). Attorney's conduct in having the false communication posted may also violate rule 8.4, which prohibits an attorney from violating the rules of professional conduct through the acts of another, engaging in dishonesty, fraud, deceit or reckless or intentional misrepresentation; and 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 [100 S.Ct. 2343] [holding that truthful commercial speech is entitled to constitutional protection]). As such, the posting of the legal articles Attorney had written is entirely proper.

Attorney's posting of Attorney's service on the board of directors of a nonprofit charity and Attorney's soccer coaching is also constitutionally protected. (*Ibanez v. Florida Dep't of Business and Prof. Regulation* (1994) 512 U.S. 136 [114 S.Ct. 2084] [holding an attorney's truthful statements that attorney was a CPA and a Certified Financial Planner in attorney's 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 nonlegal 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.^{6/}

^{5/} The Committee does not believe there is any set rule with regard to the frequency with which Attorney must revisit Attorney's profile to ensure the continuing accuracy of the information posted on Attorney's profile page after first adopting it or using it to market Attorney's practice. However, to ensure compliance with Attorney's ethical obligations, some periodic monitoring of the profile should be done.

^{6/} See also California State Bar Formal Opn. No. 1982-67 (finding that listing the qualifications of firm members in letters mailed to nonclients 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.").

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 and Disciplinary Comm'n of Illinois* (1990) 496 U.S. 91 [110 S.Ct. 2281] ("*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,^{7/} 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 attorney.^{8/} Some of these

^{7/} 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 and Disciplinary Comm'n of Illinois* (1990) 496 U.S. 91, 95 [110 S.Ct. 2281]).

^{8/} 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).

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 Attorney's profile Attorney's rating as a "Five-Star Lawyer" from another national attorney evaluation website if it is based upon objective factors relating to Attorney's qualifications and professional reputation, and not merely purchased by Attorney.

A separate question is whether the numerical rating provided by the 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 an attorney for providing or increasing the 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.

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. Rule 7.1 does not hold testimonials or endorsements to be presumptively false or misleading, and the rule does not require the use of a disclaimer. However, Comment [2] of rule 7.1 states that a communication containing an express guarantee or warranty "of the result of a particular representation" is a false or misleading communication under the rule. In addition, 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. Comment [4] notes that an appropriate disclaimer or qualifying language "often avoids creating unjustified expectations."^{9/}

^{9/} 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.

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 and 7.2 implicitly presume the attorney is generally in charge of both the production and distribution of the communication, and has editorial control over it. 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 Client nor the administrator will allow the correction of false or misleading content, or agree to append an appropriate disclaimer, Attorney is left in a potential ethical quandary – being required to take certain measures with regard to a communication about Attorney’s services that is on Attorney’s behalf, but being unable to implement them.^{10/}

Under these facts, the Committee believes that common sense dictates that an attorney’s reasonable, good faith attempt to meet the requirements of rules 7.1 and 7.2 should be sufficient to satisfy the attorney’s 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.

Here, Attorney asked Client to post the testimonial concerning Attorney’s performance on a third-party website Attorney has adopted and is using to market his practice. Under Comment [1] to rule 7.1, the testimonial is a communication made on behalf of Attorney and therefore the prohibition against false or misleading communications applies. The testimonial contains false information regarding Attorney’s background and experience, and the amount obtained in the settlement. If neither Client nor the website administrator agree to any such changes, Attorney must post something on the site in order to satisfy Attorney’s ethical obligation under rule 7.1. Such posting must include an appropriate disclaimer or qualifying language as to the inaccurate information, 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.^{11/} Of course, other ethical concerns such as privilege, confidentiality,

^{10/} In *Hassell v. Bird* (2018) 5 Cal.5th 522 [234 Cal.Rptr.3d 867], the court ordered 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.

^{11/} The need to post a disclaimer or qualifying language in this case is not based on Comment [4] to rule 7.1, which deals with “truthful” testimonials or endorsement that can be “misleading,” but rather the fact that the testimonial actually contains inaccurate information.

and loyalty may limit the specificity of what can be said by attorney;^{12/} however, a general statement that 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, or a general disclaimer or other qualifying language regarding the inaccurate content, should suffice in most situations.

Rule 7.1 states nothing about the proximity of a disclaimer or other qualifying language to a testimonial or other 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 qualifying language 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 the attorney can reasonably do, and that the posting of a disclaimer or other qualifying language as close as reasonably possible to the testimonial on the profile should be sufficient to meet the attorney's 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 or qualifying language 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 an attorney to continue using the profile with any disclaimer or qualifying language as close as reasonably permitted to the testimonial or review is preferable, and consistent with the policies behind rules 7.1 and 7.2.

Finally, as we discuss in greater detail below, another option an 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 Attorney discovered Client's posting. Attorney asked Client to edit the post; when Client refused, Attorney asked the website administrator to make ethically required corrections; and, when the administrator refused, Attorney posted a disclaimer and general disavowal in the section of the website that was available for Attorney 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 Attorney was able to post a general disclaimer and disavowal in the profile,

^{12/} 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).

which ameliorates any misleading effect of Client's inaccurate testimonial. However, when an attorney is prohibited from taking any corrective measures, for example because the website administrator will not allow attorney to post any disclaimer or disavowal, abandonment may be the only reasonable course.

5. Abandonment of Third-party Profile

The obligation to take reasonable steps to correct known inaccurate, misleading, or incomplete information contained on an attorney's profile continues until the attorney abandons the profile. An attorney abandons the profile by taking reasonable steps to alert the public that the attorney 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 attorney's 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 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 attorney's own site. Abandonment may take place at any time, from immediately following adoption of the profile, to years later if the attorney continually uses the profile to market attorney's practice. Once an attorney abandons the profile, the attorney is not thereafter responsible for its content. Here, Attorney's posting a notice that Attorney is no longer using or monitoring it, and Attorney's actions in no longer referring clients to it or referring to it on Attorney's own site, should be sufficient to demonstrate Attorney's abandonment of the profile.^{13/}

CONCLUSION

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

Attorneys may not post false or misleading material on a profile under rule 7.1, nor through their conduct have others do so. Attorneys may, however, post truthful information in their communications, 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

^{13/} Abandoning the third-party profile would clearly not cure an ethical violation resulting from a lawyer's knowingly posting false or misleading information on the profile or causing others to do so, as in this hypothetical.

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, nonmisleading content, so long as client confidentiality and other ethical requirements permit. If such editing is not possible, an attorney should disavow inaccurate information in the third-party postings, either generally or specifically.

When a testimonial on a profile adopted or used by an 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 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 the attorney has abandoned the profile by no longer using the profile in marketing the attorney's practice. An attorney who has decided to abandon a profile should take reasonable steps demonstrating such decision, such as posting that the attorney 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.

Marlaud, Angela

From: Megan Zavieh <megan@zaviehlaw.com>
Sent: Sunday, August 04, 2019 8:05 AM
To: Marlaud, Angela
Subject: Proposed Opinion 12-0003

Ms. Marlaud –

I write the following public comment with respect to proposed opinion 12-0003 re Attorney Ratings Sites.

Overall I think that the gist of the opinion is correct. If we claim a profile, we should be required to ensure that factual information such as our background is correct, and any information we affirmatively post to the profile must not be false and misleading.

However, the opinion goes too far with respect to testimonials, and it places too much significance on an attorney's abandonment of a third party profile.

Testimonials

The opinion's handling of testimonials is my biggest issue with the proposal. As noted in the opinion itself, Rule 7.1 does not require a disclaimer regarding testimonials. Even Comment 4 to Rule 7.1 does not require it, but merely states that a disclaimer may avoid unjustified expectations. Yet, the opinion places an undue burden on attorneys. The burden is based upon a misconception that the online review consuming public is unable to discern the import of an online review. This opinion is likely to have a chilling effect on attorneys who would otherwise claim and maintain online profiles, which is a benefit to the consuming public, and will not further the goal of public protection.

The opinion states that Rules 7.1 and 7.2 presume the attorney is in control of the content of an advertisement, but that is nonsense in the context of content produced on a third party website. The general public is aware that online reviews are not controlled by the businesses about which they are posted. This is why online reviews carry so much weight in consumer purchasing decisions. This lack of control by the businesses contributes significantly to the success of sites like Yelp, Avvo, and Google's reviews. It is reasonable to place some burden on the consuming public relying upon online reviews to discern that they are not controlled by the lawyer. Compare the independence of these online reviews to Amazon reviews in which Amazon requires paid testimonials to be clearly identified; consumers who utilize online reviews on third party sites are accustomed to discerning the difference between an independent review and a paid testimonial.

This lack of control over reviews will at times allow for a review containing false information; this is true of all review platforms. The attorney with the review containing false information absolutely should take steps to try to correct it, such as contacting the client to seek correction and asking the platform to remove a false review (though this is truly unlikely, as platforms typically safeguard the independence of the reviews from business interference). While it is clearly preferable not to have false reviews in the public eye, a review on a third party site is very different than a testimonial affirmatively posted by the lawyer on her own website. The attorney's ethical obligation as to the review on a third party platform should be fulfilled by her attempts to remove the false posting. She should not be required to publicly post a disclaimer.

The opinion erroneously assumes that third party sites will always have the option for the attorney to place some content on the profile containing the testimonials, thereby allowing compliance with the opinion's mandate to post a disclaimer. Not every third party site allowing reviews is going to give the attorney this ability. Moreover, the proposed disclaimer language creates another issue for lawyers posting it. The fact that it is posted on a single attorney's profile when not necessarily posted on other attorneys' profiles will give the impression to the public that there is something inaccurate in the lawyer's reviews, but it will not be clear what is inaccurate. As noted in the opinion, the lawyer still has

duties of confidentiality and privilege, so the lawyer cannot specify what is wrong with which specific review. So, there is created a distinct marketing disadvantage for the lawyer complying with the opinion. The impact of all favorable reviews for the lawyer will be undermined by the disclaimer. This does not protect the public in any way from the dissemination of false or misleading information; in fact, it creates a false impression upon the public that the lawyer's reviews cannot be trusted. This is not necessary and significantly disadvantages the complying lawyer disproportionately to the harm the disclaimer is intended to prevent.

Instead of requiring the affirmative disclaimer, the lawyer's ethical obligations should be fulfilled by attempting to have the false testimonial corrected or removed.

Abandonment

The discussion of abandonment of a profile also assumes that the attorney has far more control over a third party site than we actually do. For attorneys not actively fostering an online presence, the entire first page of Google results for the attorney's name may be third party sites. It is not always clear whether an attorney has claimed listings, and certainly is not going to be clear whether they were abandoned. The fact that a lawyer does not refer people to a site makes no difference in how easily that third party site is accessed when the attorney is searched online. The proposed opinion places undue significance on an attorney's abandonment of an online profile.

I am an ethics and State Bar defense attorney focused exclusively on California law, and issues surrounding how attorneys comply with the ethics rules are the foundation of my practice. Thank you for the opportunity to submit these comments.

Megan Zavieh

Attorney-at-Law

California State Bar Number 206446

Admitted to Practice in CA, NY, NJ, GA

Voice (510) 936-1534

Cell (404) 465-6110

Fax (404) 796-7827

Mailing address: 12460 Crabapple Road, Suite 202-272

Alpharetta, GA 30004-6646

<https://www.zaviehlaw.com>

Blog <http://californiastatebardefense.com>

Self-help practice guide <https://statebarplaybook.com>

Twitter @ZaviehLaw

To schedule an appointment with me, [click here](#)

Read about me on [My Shingle](#) (Part 2 [here](#))