

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

ISSUES: Under what circumstances is “blogging” by an attorney subject to the requirements and restrictions of the Rules of Professional Conduct and related provisions of the State Bar Act regulating attorney advertising?

DIGEST:

1. Blogging by an attorney is subject to the requirements and restrictions of the Rules of Professional Conduct and the State Bar Act relating to lawyer advertising if the blog expresses the attorney’s availability for professional employment directly through words of invitation or offer to provide legal services, or implicitly through its description of the type and character of legal services offered by the attorney, detailed descriptions of case results, or both.
2. A blog that is a part of an attorney’s or law firm’s professional website will be subject to the rules regulating attorney advertising to the same extent as the website of which it is a part.
3. A stand-alone blog by an attorney that does not relate to the practice of law or otherwise express the attorney’s availability for professional employment will not become subject to the rules regulating attorney advertising simply because the blog contains a link to the attorney or law firm’s professional website.

AUTHORITIES

INTERPRETED: Rule 1-400 of the Rules of Professional Conduct of the State Bar of California.^{1/}

Business and Professions Code sections 6157 – 6158.3.

STATEMENT OF FACTS

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

Attorney B is a member of a law firm focusing on trusts and estates law and litigation that maintains a firm website identifying the types of services the firm provides, the background and experience of the firm’s lawyers, testimonials from firm clients, and other similar information. One page of the website, indistinguishable from the other pages in layout and features, is designated as a “blog,” both on the page and in the related menus linking to it. The “blog” contains a series of articles written by Attorney B and the other lawyers of the firm on topics of potential interest to the firm’s clients, such as changes in tax law, the distinctions between and advantages of wills

^{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.

versus trusts, and similar matters. Each post concludes with the statement, “for more information, contact” the author of the particular post.

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

Attorney D maintains a blog about jazz artists, performances and recordings. The blog is not part of the website Attorney D maintains to promote his business, but that site contains a link to the blog, and the blog contains a link to that site.

DISCUSSION

“Blogging” has become an increasingly frequent activity of attorneys. Although the various definitions of “blog”^{2/} consistently describe it as a website or web page on which a writer, or group of writers, records observations, reflections, opinions, comments, and experiences that are personal in nature, the term has come to encompass essentially any website or page consisting of brief articles or comments on any variety of subjects. Blogs written by attorneys run the gamut from those having nothing to do with the legal profession, to informational articles, to commentary on legal issues and the state of our system of justice, to overt advertisements for the attorney or her law firm.

Most attorney blogs are maintained at least in part to enhance the authoring attorney’s professional reputation and visibility, with an eye to increasing the attorney’s business. However, as has been made clear by both the U.S. Supreme Court (see *Bolger v. Young’s Drug Products Corp.* (1983) 463 U.S. 60, 66-68 [103 S.Ct. 2875]) and the California Supreme Court (see *Kasky v. Nike* (2010) 27 Cal.4th 939, 956-962 [119 Cal.Rptr.2d 296] and *Belli v. State Bar* (1974) 10 Cal.3d 824, 831-833 [112 Cal.Rptr. 527]),^{3/} the fact that a blog is economically motivated does not, in and of itself, mean that it is “commercial speech” subject to regulation by the State Bar as advertising. The applicable rules and statutes provide a much narrower test.^{4/}

^{2/} Dictionary.com defines “blog” as “a website containing a writer’s or group of writers’ own experiences, observations, opinions, etc., and often having images and links to other websites” (<http://dictionary.reference.com/browse/blog?s=t>); Merriam-webster.com defines the term as “a Web site that contains online personal reflections, comments, and often hyperlinks provided by the writer” (<http://www.merriam-webster.com/dictionary/blog>); and the online Oxford English Dictionary defines “blog” as a “personal website or web page on which an individual records opinions, links to other sites, etc. on a regular basis” (http://www.oxforddictionaries.com/us/definition/american_english/blog?searchDictCode=all).

^{3/} The *Belli* court further noted that “when the bar seeks to discipline an attorney for a communication incident to protected speech, in addition to showing that the attorney intended by his communication to generate business for his law practice (*citations*), it must demonstrate that the communication or a part thereof was principally directed toward this end.” The court added, however, “We do not mean to suggest, of course, that Belli and others should be permitted to use such solicitation as a subterfuge for soliciting legal business.”

^{4/} A fundamental issue concerning blogs by attorneys is whether they constitute: (1) core political speech; (2) commercial speech; or (3) a mix of core and commercial speech. The answer to these questions regarding any individual blog includes a Constitutional law analysis which is beyond the scope of this opinion. For purposes of analysis, this opinion assumes that a blog which is subject to the rules as a “communication” or advertisement constitutes commercial speech.

Advertising for California attorneys is primarily governed by rule 1-400, which prohibits “communications” which are false or deceptive in content or presentation, or which tend to confuse, deceive, or mislead the public. (Rule 1-400(D)(1), (2), and (3).) The rule includes a list of standards adopted by the State Bar’s Board of Trustees (rule 1-400(E)) that describe types of communications – such as guarantees, warranties, or predictions regarding the result of the representation, or testimonials about or endorsements of a member without an express disclaimer – that are presumed to be in violation of the rule. Rule 1-400(F) also states that the attorney is to retain a copy or recording of any communications by written or electronic media for two years, and to make these copies or recordings available to the State Bar upon request.

The State Bar Act (§§ 6000 et seq. of the California Business and Professions Code) also includes a chapter (encompassing §§ 6157 – 6159.2) governing attorney advertising. Like rule 1-400, these sections prohibit any advertising that is false or misleading (§ 6157.1) or that contains any guaranty of outcome or promise of quick payment (§ 6157.2). Section 6158 provides that the “message as a whole may not be false, misleading, or deceptive, and the message as a whole must be factually substantiated.” Sections 6158.1 and 6158.2 set forth types of communications that are presumed to violate (§ 6158.1) or be in compliance with (§ 6158.2) the provisions of this statutory article.

The analysis of whether a blog or blog post is subject to regulation under the rules and statutes begins with the question of whether a given blog constitutes a “communication” under rule 1-400(A)^{5/} or an “advertisement” under Business and Professions Code section 6157. If it is a communication or advertisement, the blog is subject to the restrictions and requirements of the rule or statute.

Rule 1-400(A) defines a “communication” as “any message or offer made by or on behalf of a member [of the State Bar] concerning the availability for professional employment . . . directed to any former, present, or prospective client.” This establishes a three-part test, all three parts of which must be satisfied in order for the message or offer to qualify as a communication: (1) be made by or on behalf of a California attorney; (2) concern the attorney’s availability for professional employment; and (3) be directed to a former, present, or prospective client.

All blogs maintained by an attorney, in the capacity of an attorney, meet the first and third parts of this test.^{6/} Blog posts by an attorney are messages made by a member of the State Bar. Posts available to the general public, which includes all possible former, present or prospective clients, by definition, are “directed” to them. (Cal. State Bar Formal Opn. Nos. 2001-155 and 2012-186.)

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

This Committee considered a similar issue in some detail in California State Bar Formal Opinion No. 2012-186, which analyzed whether five short hypothetical posts on a social media website would be considered “communications” under rule 1-400. The Committee expressed that posts which contained words of offer or invitation relating to representation (“Who wants to be next?”; “Check out my web site!”; or “Call for a free

^{5/} Although rule 1-400 also regulates “solicitations” by attorneys, those provisions are not applicable to blog posts, even those which concern the availability of the writer for professional employment. A “solicitation” under the rule is defined as a “communication . . . (a) delivered in person or by telephone, or (b) directed by any means to a person known to the sender to be represented by counsel in a matter which is a subject of the communication.” Whether or not a blog post is a communication under rule 1-400, it cannot be a solicitation because it is not “delivered in person or by telephone,” nor is it “directed to a specific person known to be represented by counsel” (see Cal. State Bar Formal Opn. Nos. 1995-143 and 2004-166).

^{6/} As we discuss below in connection with Attorney D, attorneys blogging on non-legal issues – *i.e.*, not in their capacity as lawyers – are less likely to be found to be communicating for purposes of rule 1-400.

consultation”) met the standard, while those which were informational in nature, offering free copies of an article the attorney had written, did not. We believe the same conditions apply with respect to blogs, and a blog post which contains an offer to the reader to engage the attorney, or is a step towards securing potential employment such as offering a free consultation, is a “communication” within the meaning of rule 1-400 and subject to the rule’s requirements and conditions, while those which provide or offer only information or informational materials are not.

California State Bar Formal Opinion No. 2012-186 did not address the type of posts made in many blogs, which describe in detail the services offered by the authoring attorney or law firm, and contain an address and/or phone number at which the author may be contacted, but which do not include specific words of offer or invitation to engage the attorney’s services. The Committee believes such posts constitute “communications” subject to rule 1-400. Even without specific words of invitation or offer, a law firm’s professional website “that includes a description of Attorney A’s law firm and its history and practice; the education, professional experience, and activities of the firm’s attorneys,” and other features relating to the practice of law indicates the firm’s availability for professional employment and is a communication. (Cal. State Bar Formal Opn. No. 2001-155.)^{7/} The listing of services, qualifications, background, and other attributes of the attorney or law firm, and their distribution to the public, carries with it the clear implication of availability for employment.

The Committee believes the same analysis applies to posts that detail an attorney or law firm’s courtroom victories or other professional successes. First, such posts necessarily involve a description of the type and character of the legal services the attorney/law firm provides, as discussed above. Second, descriptions of case results are considered presumptively misleading under section 6158.1 of the Business and Professions Code^{8/} and standard 1 of rule 1-400 regarding “guarantees, warranties, or predictions regarding the result of the representation.” The Committee continues to believe that this characterization does not apply to general expressions of excitement or exultation over a single result,^{9/} but advises that multiple such posts may be held to be “communications,” particularly if they include more detailed information about the attorney’s practice or are related to posts that do.

^{7/} Similarly, American Bar Association Committee on Ethics and Prof. Responsibility, Formal Opinion No. 10-457 states, “Lawyer websites may provide biographical information about lawyers, including educational background, experience, area of practice, and contact information (telephone, facsimile, and e-mail address). A website also may add information about the law firm, such as its history, experience, and areas of practice, including general descriptions about prior engagements Any of this information constitutes a “communication about the lawyer or the lawyer’s services,” and is therefore subject to the requirements of Model Rule 7.1,” the equivalent of rule 1-400. Nowhere in the opinion does it suggest specific words of offer or invitation are required. Although rules and ethics opinions from other jurisdictions are not binding in California, they may be used for guidance by lawyers where there is no direct California authority and do not conflict with California policy. (Rule 1-100(A) (ethics opinions and rules and standards promulgated by other jurisdictions and bar associations may also be considered); *State Comp. Ins. Fund v. WPS, Inc.* (1999) 70 Cal.App.4th 644, 656 [82 Cal.Rptr.2d 799]; *City & County of San Francisco v. Cobra Solutions, Inc.* (2006) 38 Cal.4th 839, 852 [43 Cal.Rptr.3d 771].)

^{8/} Section 6158.1 provides, “A message as to the ultimate result of a specific case or cases presented out of context without adequately providing information as to the facts or law giving rise to the result” is presumed to be false, misleading, or deceptive. Section 6158.3 further provides, “If an advertisement in the electronic media conveys a message portraying a result in a particular case or cases, the advertisement must state, in either an oral or printed communication, either of the following disclosures: The advertisement must adequately disclose the factual and legal circumstances that justify the result portrayed in the message, including the basis for liability and the nature of injury or damage sustained, or the advertisement must state that the result portrayed in the advertisement was dependent on the facts of that case, and that the results will differ if based on different facts.” The section further provides, however, that use of the disclaimer may not be sufficient to rebut the presumption.

^{9/} See California State Bar Formal Opinion No. 2012-186, where the Committee found that a posting of “Case finally over. Unanimous verdict! Celebrating tonight,” standing alone, was not a communication. The Committee added that “Attorney status postings that simply announce recent victories without an accompanying offer about the availability for professional employment generally will not qualify as a communication.”

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

An advertisement that truthfully reports a lawyer's achievements on behalf of clients or former clients may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case.

While California's rules and statutes differ from Virginia's and the Model Rules, there are many similarities in this area. Rule 1-400(D)(2) prohibits communications which "[c]ontain any matter, or present or arrange any matter in a manner or format which is false, deceptive, or which tends to confuse, deceive, or mislead the public," as well as communications which "omit to state any fact necessary to make the statements made, in the light of circumstances under which they are made, not misleading to the public." As noted above, both standard 1 of rule 1-400 and Business and Professions Code section 6158.1(a) provide that communications which contain guarantees, warranties, or predictions are presumed to be false, misleading, or deceptive.

Another factor that may play a role in determining whether a particular blog will be found to constitute attorney advertising is whether or not the blog invites comments on its individual posts (i.e., the blog is "interactive"). In *Hunter*, the majority of the Virginia Supreme Court noted that the "non-interactive blog does not allow for discourse about the cases, as non-commercial commentary often would by allowing readers to post comments." This was a significant factor in the court's determination that the ostensible blog constituted advertising (*Hunter v. Virginia State Bar ex rel. Third District Committee, supra*, at p. 498). The court pointed out that "blog readers are most frequently permitted to leave comments and create threads of discussion," while, "in furtherance of his commercial pursuit, Hunter invites the reader to 'contact us' the same way one seeking legal representation would contact the firm through the website."

In light of these considerations, we review the individual fact scenarios:

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

Attorney A's blog is an extreme example of a blog post that does not include specific words of invitation to retain the authoring attorney's services, but which, in the Committee's view, is a communication subject to rule 1-400. The post describes the attorney's services as a criminal defense lawyer, and makes specific representations concerning the quality of those services ("they were mesmerized by my closing argument"). The comments in the blog post about the justice system are far more self-promotional than analytical, serving only to reinforce the message that the author is capable of taking advantage of the system. This is reinforced by the lack of interactivity of the site, excluding comment and dialogue that could possibly shift the focus away from Attorney A's self-promotion.

In the Committee's view, under the facts presented, Attorney A's blog posts describing his courtroom successes presumptively would violate rule 1-400(D), prohibiting statements which present "any matter in a manner or format which is false, deceptive, or which tends to confuse, deceive, or mislead the public under," in conjunction with standards 1 (a "communication" which contains guarantees, warranties, or predictions regarding the result of the representation) and 2 (a "communication" which contains testimonials about or endorsements of a member unless such communication also contains an express disclaimer). They also presumptively would violate Business and Professions Code section 6158's prohibition against advertising that is false, misleading, or deceptive as a "message as to the ultimate result of a specific case or cases presented out of context without adequately providing information as to the facts or law giving rise to the result" under section 6158.1.

Attorney B - Blog Included on a Professional Website

Professional websites maintained by attorneys and law firms concern their availability for professional employment, and are attorney advertising subject to regulation. In California State Bar Formal Opinion No. 2001-155, this Committee concluded that an attorney's professional website is a "communication" within the meaning of rule 1-400(A), as well as advertising subject to regulation under Business and Professions Code section 6157. The Committee further expressed the belief that "this conclusion is not altered by the inclusion in the web site of information and material of general public interest."^{10/}

The Committee concludes that Attorney B's blog on the firm website constitutes information and material of general public interest on the law firm's parent website, and is subject to rule 1-400 to the same extent as the parent site, as well as the corresponding provisions of the Business and Professions Code.

Attorney C – Stand-Alone Blog

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

The Committee opines that, were it not for the concluding admonition to readers to contact him, Attorney C's stand-alone family law blog would not be a "communication" subject to rule 1-400. Even though Attorney C's primary purpose in blogging is to demonstrate his knowledge of family law issues to his colleagues and prospective clients to enhance his reputation in the field and increase his business, the blog posts are informational in nature. They are neither offers nor messages concerning Attorney C's availability for professional employment; they do not invite readers to employ Attorney C's services, nor do they specifically describe the services that Attorney C offers. To this extent, they are not "communications" subject to the rule.

The concluding admonition in several of the blog posts in which Attorney C advises his readers to call him, if they have questions about their divorce or custody cases, are words of invitation evidencing Attorney C's availability for professional employment, and make Attorney C's blog – including those posts that do not include the admonition – subject to the provisions of rule 1-400.^{11/}

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

The fact that Attorney D's blog by-line is a hyperlink to Attorney D's professional website does not change the character of the associated blog unless the subject matter of the blog and the attorney's or firm's practice area are closely related. In those instances, a link to the professional or firm website would function as words of invitation

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

^{11/} Although an argument can be made that rule 1-400 should apply only to those blog posts in which the words of invitation appear, the Committee believes the message of availability carries over from post to post. Because of the nature of a blog as a continuous series, once the reader is specifically made aware that the blog's author is an attorney offering his services for employment, that awareness transfers to all posts read subsequently.

similar to “if you have questions, contact me.” On the other hand, a link from the by-line to the attorney author’s professional page will not serve to transform a blog on non-legal topics, such as jazz, or topics unrelated to the attorney’s practice area, into advertising subject to rule 1-400, but instead functions as identification of the author. The Committee believes an attorney may freely write a blog consisting of movie reviews, recipes, wilderness survival tips, or any of countless non-legal subjects without being subject to rule 1-400, provided the attorney author does not actively use the blog to solicit business as an attorney.

CONCLUSION

Attorney blogs are subject to the requirements and restrictions of rule 1-400 and the related provisions of the Business and Professions Code if the blog expresses the attorney’s availability for professional employment directly through words of invitation or offer to provide legal services, or implicitly through a description of the attorney’s legal practices and successes in such a manner that the attorney’s availability for professional employment is evident. A blog that is a part of an attorney’s or law firm’s professional website is subject to the rules regulating attorney advertising to the same extent as the website of which it is a part. A non-legal blog by an attorney is not necessarily subject to the rules or statutes regulating attorney advertising because it includes a hyperlink to the attorney’s professional web page.

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

[Publisher’s Note: Internet resources cited in this opinion were last accessed by staff on December 18, 2014. Copy of these resources are on file with the State Bar’s Office of Professional Competence.]