

**THE STATE BAR OF CALIFORNIA
STANDING COMMITTEE ON
PROFESSIONAL RESPONSIBILITY AND CONDUCT
DRAFT FORMAL OPINION INTERIM NO. 10-0001**

ISSUE: Under what circumstances would an attorney's postings on social media websites be subject to professional responsibility rules and standards governing attorney advertising?

DIGEST: Material posted by an attorney on a social media website will be subject to professional responsibility rules and standards governing attorney advertising if that material constitutes a "communication" within the meaning of rule 1-400 (Advertising and Solicitation) of the Rules of Professional Conduct of the State Bar of California; or (2) "advertising by electronic media" within the meaning of Article 9.5 (Legal Advertising) of the State Bar Act. The restrictions imposed by the professional responsibility rules and standards governing attorney advertising are not relaxed merely because such compliance might be more difficult or awkward in a social media setting.

**AUTHORITIES
INTERPRETED:** Rules 1-400 of the Rules of Professional Conduct of the State Bar of California^{1/}
Business and Professions Code section 6106, 6151, and 6152
Business and Professions Code sections 6157 through 6159.2.

STATEMENT OF FACTS

Attorney has a personal profile page on a social media website. Attorney regularly posts comments about both her personal life and professional practice on her personal profile page. Only individuals whom the Attorney has approved to view her personal page may view this content (in Facebook parlance, whom she has "friended").^{2/} Attorney has about 500 approved contacts or "friends," who are a mix of personal and professional acquaintances, including some persons whom Attorney does not even know.

In the past month, Attorney has posted the following remarks on her profile page:

- "Case finally over. Unanimous verdict! Celebrating tonight."
- "Another great victory in court today! My client is delighted. Who wants to be next?"
- "Won a million dollar verdict. Tell your friends and check out my website."
- "Won another personal injury case. Call me for a free consultation."
- "Just published an article on wage and hour breaks. Let me know if you would like a copy."

^{1/} Unless otherwise noted, all rule references are to the Rules of Professional Conduct of the State Bar of California.

^{2/} References to Facebook and "friending" should not be construed as limiting this opinion to that particular social media website. For example, Attorney could post the same language on Twitter, which would be viewed by all of her followers. Guidance to attorneys in this area has not kept pace with all forms of social media usage. Rather than discussing each form of social media, which forms likely will change over time, this opinion sets forth the general analysis that an attorney should undertake when considering use of any particular form of social media.

DISCUSSION

Although attorneys are permitted to advertise, any such advertisements must comply with a number of restrictions in both the Rules of Professional Conduct and the Business and Professions Code. For example, Business and Professions Code section 6157.1 prohibits any “false, misleading or deceptive statement” in an advertisement, while section 6157.2 prohibits including in an advertisement any “guarantee or warranty regarding the outcome of a legal matter.” Bus. & Prof. Code, §§ 6157.1 and 6157.2; see also rule 1-400, Std. 1.^{3/} Rule 1-400 provides even more detailed requirements with which attorney advertising must comply. Specifically, rule 1-400(D) provides rules that must be followed to ensure that a communication is not false or misleading, or made in a coercive manner. Rule 1-400 also provides fifteen enumerated “Standards”^{4/} setting forth such details as the required font size of certain words appearing in an advertisement (Std. 5) and types of communications that would be considered misleading.

In the above hypothetical, Attorney must determine whether her postings constitute advertisements that must comply with these various advertising rules.^{5/} Rule 1-400, however, speaks in terms of “communications” rather than “advertisements.” Thus, it is important to look at how both terms are defined.

Business and Professions Code section 6157(c) defines “advertise” or “advertisement” as:

[A]ny **communication**, disseminated by television or radio, by any print medium, including, but not limited to, newspapers and billboards, or by means of a mailing directed generally to members of the public and not to a specific person, that solicits employment of legal services provided by a member, and is directed to the general public and is paid for by, or on the behalf of, an attorney.

Bus. & Prof. Code, § 6157(c) (emphasis added). Although section 6157(c) does not refer to computer-based communications like Facebook or Twitter postings, there is little doubt that the restrictions of sections 6157.1 and 6157.2 indeed apply to computer-based communications. See, e.g., Bus. & Prof. Code, §§ 6158 (referring to “advertising by electronic media” in the context of Sections 6157.1 and 6157.2); 6157(d) (defining “electronic medium” as including “computer networks”). What may be less clear is whether a posting on Facebook or Twitter, like that described in the hypothetical, is considered “directed generally to members of the public and not to a specific person,” as required under section 6157(c)’s definition of an advertisement. This opinion does not take a position on this point because, whether or not the hypothetical posting constitutes an “advertisement” as defined in section 6157(c), it nonetheless will be subject to the same requirements as any other advertisement by virtue of rule 1-400 – provided it is a “communication,” as specified in section 6157(c) and rule 1-400(A).^{6/}

Rule 1-400, which is entitled “Advertising and Solicitation,” applies to any “communication,” without concerning itself with whether such communication also constitutes an “advertisement.” Indeed, rule 1-400(A) provides four

^{3/} Unless otherwise noted, all rule references are to the Rules of Professional Conduct of the State Bar of California.

^{4/} The Standards actually go through No. 16, but Standard 11 has been repealed, thereby leaving 15.

^{5/} In California State Bar Formal Opinion No. 2001-155, this Committee concluded that a law firm website is subject to professional responsibility standards governing attorney advertising. The website considered was a commercial website that included, among other promotional content: a description of the law firm and its history and practice; and the education, professional experience, and activities of the firm’s attorneys. Specifically, this Committee found that a commercial law firm website is governed by rule 1-400 because the website’s content concerns a lawyer’s availability for professional employment. This Committee similarly found that such websites are subject to the State Bar Act provisions governing electronic media advertising in Article 9 of the Business and Professions Code.

^{6/} Each of the restrictions and requirements included in Business and Professions Code sections 6157.1 and 6157.2 can be found – in a substantially similar form – in rule 1-400. For example, section 6157 prohibits false or deceptive statements; this same concept is captured, among other places, in rule 1-400(D). Section 6157.2 (a) through (c) prohibits guarantees and misleading testimonials; these concepts are captured in rule 1-400, Standards 1, 2, and 13. Section 6157(d) requires disclosure about whether the client will be responsible for certain costs; this concept is captured in rule 1-400, Standard 14.

nonexclusive examples of “communications” subject to the rule, only one of which is based on the communication being an “advertisement . . . directed to the general public or any substantial portion thereof.” Rule 1-400(A)(3).

Thus, in our hypothetical, Attorney primarily must determine whether any of her postings constitute “communications” under rule 1-400(A). If they do, then those postings that constitute “communications” must comply with several significant requirements imposed elsewhere in rule 1-400 and the accompanying standards.

Communications under Rule 1-400

Rule 1-400(A) defines “communications” for purposes of that rule as: “any message or offer made by or on behalf of a member ***concerning the availability for professional employment*** of a member or a law firm directed to any former, present, or prospective client . . .” (emphasis added). Rule 1-400(A) then goes on to provide non-exclusive examples of types of messages or offers that are covered by the rule, provided that they are “concerning the availability for professional employment.” This includes, without limitation:

- (1) Any use of firm name, trade name, fictitious name, or other professional designation of such member or law firm; or
- (2) Any stationery, letterhead, business card, sign, brochure, or other comparable written material describing such member, law firm, or lawyers; or
- (3) Any advertisement (regardless of medium) of such member or law firm directed to the general public or any substantial portion thereof; or
- (4) Any unsolicited correspondence from a member or law firm directed to any person or entity.

Rule 1-400 does not expressly refer to electronic communications, like those occurring on Facebook, Twitter, or other internet-based social media websites. Nonetheless, just as there is little doubt that a Facebook or Twitter posting that otherwise meets the definition of “advertising” in Business and Professions Code section 6157(c) would be considered an advertisement, there is little doubt that a social media posting that otherwise meets the criteria described in rule 1-400(A) would be a communication for purposes of that rule. Thus, the pertinent question for determining whether a posting constitutes a “communication” under rule 1-400(A) is whether it “concern[s] the availability for professional employment” of Attorney.^{7/}

If a posting is found to be a communication subject to rule 1-400, the result is that the posting must comply with the mandates of Rule 1-400(D) as well as the 15 enumerated Standards set forth in rule 1-400. Rule 1-400(D) generally provides that a communication must not be untrue or misleading (rule 1-400(D)(1), (2) & (3)), must disclose that it is a communication (rule 1-400(D)(4)), and must not be transmitted in a coercive or intrusive manner (rule 1-400(D)(5)).^{8/} As discussed above, the 15 Standards provide various requirements (such as, for

^{7/} This opinion does not address whether the initial “friend” or “connection” request, if motivated primarily by business development purposes, can itself constitute a communication subject to rule 1-400.

^{8/} Specifically, rule 1-400(D) provides, in pertinent part:

(D) A communication or a solicitation (as defined herein) shall not:

- (1) Contain any untrue statement; or
- (2) Contain 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; or
- (3) 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; or
- (4) Fail to indicate clearly, expressly, or by context, that it is a communication or solicitation, as the case may be; or
- (5) Be transmitted in any manner which involves intrusion, coercion, duress, compulsion, intimidation, threats, or vexatious or harassing conduct.

...

example, requisite font size, Std. 5) and prohibitions (such as, for example, providing – without appropriate disclaimers – testimonials or guarantees of results, Stds. 1 & 2).

In our scenario, Attorney posts two types of professional information: (1) general legal information, such as recommendations of good articles; and (2) information about her legal practice, such as complaints she has filed and victories in court. With respect to the first type of information (*e.g.*, Example Number 5, below), we conclude that this does not constitute information concerning availability for employment. When Attorney posts information about her practice, however, rule 1-400 may apply.

Specific Examples

Consider the following examples^{9/} of Attorney’s use of personal social media sites for status postings which are visible to all of her “friends,” “connections,” or “followers” (although not to the public at large):

Example Number 1: “Case finally over. Unanimous verdict! Celebrating tonight.”

In the Committee’s opinion, this statement, standing alone, is not a communication under rule 1-400(a) because it is not a message or offer “concerning the availability for professional employment,” whatever Attorney’s subjective motive for sending it.^{10/} 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.

Example Number 2: “Another great victory in court today! My client is delighted. Who wants to be next?”

Similarly, the statement “Another great victory in court today!” standing alone is not a communication under rule 1-400(a) because it is not a message or offer “concerning the availability for professional employment.” However, the addition of the text, “[w]ho wants to be next?” meets the definition of a “communication” because it suggests availability for professional employment. Thus, it is subject to rule 1-400(D) and rule 1-400’s Standards.

Having concluded this status posting is a communication, the post violates the prohibition on client testimonials. An attorney cannot disseminate “communications” that contain testimonials about or endorsements of a member unless the communication also contains an express disclaimer. See Rules Prof. Conduct, rule 1-400(E), Std. 2; see also *Belli v. State Bar* (1974) 10 Cal.3d 824 [112 Cal.Rptr. 527] (holding that suggesting clients are “dazzled by the services they received from the attorney” is prohibited, and consequently an attorney “cannot advertise that he has performed his services so well that his clients consequently praise him”). Attorney has not included a disclaimer, and so her status posting violates the restrictions on testimonials.^{11/}

Similarly, the post violates the prohibition on “guarantees, warranties, or predictions regarding the result of the representation.” See Rules Prof. Conduct, rule 1-400(E), Std. 1. The post expressly relates to a “victory,” and asks rhetorically who wants to be the next victorious client.

The Committee further concludes that “Who wants to be next?” seeks professional employment for pecuniary gain. Accordingly, Attorney’s post violates rule 1-400(E), Std. 5, because it does not bear the word “Advertisement,” “Newsletter,” or words to that effect.^{12/} Attorneys may argue that including this wording for each “communication”

^{9/} To the extent a status posting invites further discussions between the poster and the reader, this opinion does not address whether those further discussions themselves may constitute communications subject to rule 1-400.

^{10/} If, in fact, the statement is not true, then Attorney may be violating other rules not addressed in this opinion – for example, Business and Professions Code section 6106.

^{11/} Both rule 1-400, Standards 1 and 2, and Business and Professions Code section 6158.1 apply only a *presumption* that testimonials such as this one are misleading.

^{12/} Rule 1-400, Standard 5 requires that the word “Advertisement,” Newsletter,” or similar words appear in “12-point print on the first page.” The Committee recognizes that certain social media postings may not allow for the user to choose the font size of postings, and thus technical compliance with Standard 5 may be impossible. It may be that the State Bar needs to review such standards to bring them current in the face of the prevalence of electronic communications. Until any changes are made to this language, however, the Committee cannot express

posting would be overly burdensome, and destroy the conversational and impromptu nature of a social media status posting. The Committee is of the view, however, that an attorney has an obligation to advertise in a manner that complies with applicable ethical rules. If compliance makes the advertisement seem awkward, the solution is to change the form of advertisement so that compliance is possible.^{13/}

Finally, the Committee notes that a true and correct copy of any “communication” must be retained by Attorney for two years. Rule 1-400(F) expressly extends this requirement to communications made by “electronic media.” If Attorney discovers that a social media website does not archive postings automatically, then Attorney will need to employ a manual method of preservation, such as printing or saving a copy of the screen.

Example Number 3: “Won a million dollar verdict. Tell your friends and check out my website.”

In the Committee’s opinion, this language also qualifies as a “communication” because the words “tell your friends,” in this context, convey a message or offer “concerning the availability for professional employment.” It appears that Attorney is asking the reader to tell others about her so that they may consider hiring her. This language therefore is subject to the restrictions in rule 1-400(E) (e.g., it must contain the word “Advertisement” or a similar word) and the preservation requirement in rule 1-400(F).^{14/}

Example Number 4: “Won another personal injury case. Call me for a free consultation.”

Again, the Committee concludes that this posting is a “communication” under rule 1-400(A), due primarily to the second sentence.

A communication has to include an offer about availability for professional employment so the “free” consultation language at first might indicate the posting is not a communication. Yet the rule does not limit “communications” to messages seeking financial compensation for services. To the contrary, a communication includes any “message or offer made by or on behalf of a member concerning the availability for professional employment of a member or a law firm.” See Rules Prof. Conduct, rule 1-400(A).¹⁵ Given that the rule does not require that all communications

an opinion to the effect that the use of font size of less than 12-point is acceptable. That said, the Committee notes that it appears the purpose of the 12-point font requirement is to ensure that the word “Advertisement” or similar word is not obscured by the surrounding content.

^{13/} For example, Facebook offers businesses the opportunity of creating a “Fan Page,” on which statements of “Advertisement” or “Newsletter” might be considered less awkward, provided that the “Fan Page” complies with Business and Professions Code sections 6157 and 6158.

^{14/} The posting in this example is distinct from running and capping as described in the California Business and Professions Code. A “runner” or “capper” is defined in California Business and Professions Code section 6151 as “any person, firm, association or corporation acting for consideration” as an agent for a lawyer or law firm, in soliciting business. In contrast to prohibited running and capping activities identified in Business and Professions Code section 6152, Attorney’s posting does not establish or seek to establish an agency relationship for profit with anyone who views her postings, nor does it imply that Attorney is seeking to do so. Nonetheless, because it is a communication subject to rule 1-400, Attorney must comply with rule 1-400(D) and the Standards set forth in rule 1-400.

^{15/} In contrast, solicitations – an express subset of communications subject to further restrictions – are defined to be communications “[c]oncerning the availability for professional employment of a member or law firm in which a significant motive is pecuniary gain,” and which “is delivered in person or by telephone, or 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.” Rule 1-400(B). Because Attorney is not reaching out in person or on the telephone, her postings cannot be solicitations, regardless of whether she seeks pecuniary gain. See Cal. State Bar Formal Opn. 2001-155 (describing the “delivered in person or by telephone” requirement for a solicitation as very specific and thus intended as an easy-to-understand “bright line” test); see also Cal. State Bar Formal Opn. 2004-166 (lawyer’s communication with a prospective fee-paying client in an internet chat room for victims of mass disaster not a prohibited solicitation, but an improper communication, because it is delivered to a prospective client whom the attorney knows may not have the requisite emotional or mental state to make a reasonable judgment about retaining counsel).

are for pecuniary gain, we conclude that an offer to perform a professional service for free can constitute a communication. An offer of a free consultation is a step toward securing potential employment, and the offer of a free consultation indicates that the lawyer is available to be hired. On balance, this example in the Committee's opinion constitutes a "communication."

Example Number 5: "Just published an article on wage and hour breaks. Let me know if you would like a copy."

In this instance, we believe the statement does not concern "availability for professional employment." The attorney is merely relaying information regarding an article that she has published, and is offering to provide copies. See *Belli v. State Bar, supra*, 10 Cal.3d 824, 838 [112 Cal.Rptr. 527] (holding that "[e]xposition of an attorney's accomplishments in an effort to interest persons" in an event involving an attorney did not violate restrictions on attorney advertising); see also Los Angeles County Bar Assn. Formal Opn. 494 ("Communications or solicitations solely relating to the availability of seminars or educational programs, or the mailing of bulletins or briefs where there is no solicitation of business, are also constitutionally protected under the State Constitution and First Amendment as noncommercial speech."). Accordingly, this posting does not fall under rule 1-400, and need not comply with any of the Standards of rule 1-400(E).

CONCLUSION

Attorney may post information about her practice on Facebook, Twitter, or other social media websites, but those postings may be subject to compliance with rule 1-400 if their content can be considered to be "concerning the availability for professional employment." Such communications also may be subject to the relevant sections of California Business and Professions Code sections 6157 *et seq.*

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 upon the courts, the State Bar of California, its Board of Governors, any persons, or tribunals charged with regulatory responsibilities, or any member of the State Bar.