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Ethics Advisory Opinion 09-10

2009 09-10

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UPON THE REQUEST OF A MEMBER OF THE SOUTH CAROLINA BAR, THE ETHICS ADVISORY COMMITTEE HAS RENDERED THIS OPINION ON THE ETHICAL PROPRIETY OF THE INQUIRER'S CONTEMPLATED CONDUCT. THIS COMMITTEE HAS NO DISCIPLINARY AUTHORITY. LAWYER DISCIPLINE IS ADMINISTERED SOLELY BY THE SOUTH CAROLINA SUPREME COURT THROUGH ITS COMMISSION ON LAWYER CONDUCT.

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Applicable Rules: 7.1, 7.2, 8.4(a)

Facts:

Company X offers a free website that provides information about attorneys nationwide. Lawyers need not actively sign up to have their names listed on the website. Instead, Company X uses information obtained through requests to state courts and bar associations under the Freedom of Information Act and creates web site entries for the lawyers whose information is retrieved through these FOIA requests.

Company X collects information about attorneys and generates an internal rating for each listed attorney. Individual attorneys can “claim” their profiles and update their information. Company X has already created listings and ratings for a number of South Carolina attorneys regardless of each lawyer’s knowledge of the listings.

The website also features peer endorsements. Attorneys are able to write comments about one another that are then displayed on the attorney's profile. It is possible to remove these endorsements from public view. Peer endorsements help raise an individual's rating.

The website also features "client ratings." Anyone can submit a client rating about any lawyer, and the lawyer may invite current and former clients to submit ratings. Client ratings do not impact an attorney's internal rating by Company X, but the client comments are prominently posted on the attorney's listing. While Company X monitors and inspects the client ratings and peer reviews, attorneys are unable to control who endorses or rates them.

Questions:

1) May a South Carolina lawyer claim his or her Company X website listing, including peer endorsements, client ratings, and Company X ratings?

2) May a South Carolina lawyer invite peers, clients, or former clients to post comments and/or rate the lawyer ?

Summary

1) Yes, a lawyer may claim the website listing, but all information contained therein (including peer endorsements, client ratings, and Company X ratings) are subject to the rules governing communication and advertising once the lawyer claims the listing.

2) A lawyer may invite peers to rate the lawyer and may invite and allow the posting of peer and client comments, but all such comments are governed by the Rules of Professional Conduct, and the lawyer is responsible for their content.

Opinion

Lawyers are responsible for all communications they place or disseminate, or ask to be placed or disseminated for them, regarding their law practice, and all such communications are governed by Rule 7.1 of the Rules of Professional Conduct. See Cmt. 1 (“This Rule governs all communications about a lawyer’s services.... Whatever means are used to make known a lawyer’s services, statements about them must be truthful.”)(emphasis added). However, a lawyer is not responsible for statements about the lawyer or the lawyer’s practice that are not placed or disseminated by the lawyer. Statements made by Company X on its website about a lawyer are not governed by the Rules of Professional Conduct unless placed or disseminated by the lawyer or by someone on the lawyer’s behalf.

In the Committee’s view, to “claim” one’s website listing is to “place or disseminate” all

communications made at or through that listing after the time the listing is claimed. For example, in Advisory Opinion 99-09, this Committee addressed a client’s website that advertised the lawyer’s services but was created without the lawyer’s knowledge. The Committee advised that, once the lawyer became aware of the advertisement, the lawyer should counsel the client to conform the advertisement to the Rules of Professional Conduct and that, if the client refused, the lawyer’s continued representation of the client may imply the lawyer’s authorization or adoption of the advertisement. Similarly, we advised in Advisory Opinion 00-10 that a lawyer who participates in an internet service for locating attorneys should review, for compliance with Rules 7.1 and 7.2, all information about the lawyer provided through the service. By claiming a website listing, a lawyer takes responsibility for its content and is then ethically required to conform the listing to all applicable rules.

Likewise, a lawyer who adopts or endorses information on any similar web site becomes responsible for conforming all information in the lawyer’s listing to the Rules of Professional Conduct. Martindale-Hubbell, SuperLawyers, LinkedIn, Avvo, and other such websites may place their own informational listing about a lawyer on their websites without the lawyer’s knowledge or consent, and allow lawyers to take over their listings. The language employed by the website for claiming a listing is irrelevant. (Martindale.com, for example, uses an “update this listing” link for lawyers to claim their listings). Regardless of the terminology, by requesting access to and updating any website listing (beyond merely making corrections to directory information), a lawyer assumes responsibility for the content of the listing.

Information on business advertising and networking websites are both communications and advertisements; therefore, they are governed by Rules 7.1 and 7.2. While mere participation in these websites is not unethical, all content in a claimed listing must conform to the detailed requirements of Rule 7.2(b)-(i) and must not be false, misleading, deceptive, or unfair. In order to be exempt from the filing requirement of Rule 7.2(b), an advertisement must be limited to directory information only and must not be disseminated through a public medium. Comment 5 to Rule 7.2 specifically excludes from the filing requirement “basic telephone directory listings, law directories such as ‘Martindale Hubbell’ or a desk book

created by a bar association.” The Comment does not address online versions of such directories; however, to require lawyers to file copies of online directory listings would be to require them to file copies of not only Martindale.com listings, but the South Carolina Bar’s online directory listing as well. The Committee does not believe the Court intended the rules to require such filing and therefore does not believe that an online listing containing only directory information must be filed pursuant to Rule 7.2(b). However, if an online listing is updated to include anything beyond directory information (which includes “the name of the lawyer or law firm, a lawyer’s job title, jurisdictions in which the lawyer is admitted to practice, the lawyer’s mailing and electronic addresses, and the lawyer’s telephone and facsimile numbers,” according to Comment 5), then 7.2(b) requires that a copy be filed with the Commission.

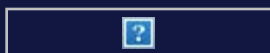
Soliciting peer ratings does not violate the Rules of Professional Conduct. Martindale-Hubbell has employed a lawyer rating system for more than 100 years, and federal courts have held that advertising factual information about such verifiable, independent ratings does not violate state advertising prohibitions against statements likely to mislead or create unjustified expectations about results. See, e.g., *Mason v. Florida Bar*, 208 F.2d 952 (11 th Cir. 2000). More recently, advertisements about newer ratings organizations, such as SuperLawyers, have been given the same regulatory berth by state agencies. See, e.g., *In re Opinion 39 of the Committee on Attorney Advertising*, 961 A.2d 722 (N.J. 2008)(per curiam)(vacating the court’s own committee’s 2006 advisory opinion prohibiting advertising of “SuperLawyers” and “Best Lawyers in America” designations, on the grounds that the prohibition is likely unconstitutional because such designations are factually verifiable). Therefore, provided that the rating is presented in a non-misleading way and is independently verifiable, including one’s rating in an online listing or elsewhere appears permissible.

Client comments may violate Rule 7.1 depending on their content. 7.1(d) prohibits testimonials, and 7.1(d) and (b) ordinarily also prohibit client endorsements. See Cmt. 1. In the Committee’s view, a testimonial is a statement by a client or former client about an experience with the lawyer, whereas an endorsement is a more general recommendation

or statement of approval of the lawyer. A lawyer should not solicit, nor allow publication of, testimonials. A lawyer should also not solicit, nor allow publication of, endorsements unless they are presented in a way that is not misleading nor likely to create unjustified expectations. “The inclusion of an appropriate disclaimer or qualifying language may preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead a prospective client.” Cmt. 3 (emphasis added).

Lawyers soliciting client comments on web-based business listings are also cautioned to adhere to Rule 8.4(a), which prohibits lawyers from violating the Rules of Professional Conduct through the acts of another. Even absent a specific prohibition against testimonials, several states have concluded that client comments contained in lawyer advertising violate the prohibition against misleading communications if the comments include comparative language such as “the best” or statements about results obtained. See, e.g., Virginia State Bar Lawyer Advertising Opinion A-0113 (2000). Rule 7.1(c) prohibits comparative language in all communications, Rule 7.1(b) prohibits statements that are likely to create unjust expectations about results, and Rule 7.2(f) prohibits self-laudatory language in advertisements. Therefore, a lawyer should monitor a “claimed” listing to keep all comments in conformity with the Rules. If any part of the listing cannot be conformed to the Rules (e.g., if an improper comment cannot be removed), the lawyer should remove his or her entire listing and discontinue participation in the service.

This opinion does not take into consideration any constitutional-law issues regarding lawyer advertising.



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