

MONDAY, NOVEMBER 25, 2019

PERSPECTIVE

Ethics: Dos and don'ts for lawyers managing online profiles

By Shawn Shaffie

Attorney profiles on professional online directories and rating websites maintained by third parties such as Avvo provide marketing perks to attorneys and valuable information to legal consumers when selecting legal counsel. Emphasis on the use of such online profiles within the practice of the law has increased in recent years, as have the electronic footprints of the attorneys who use them. The professional and ethical obligations which arise from attorneys use of online profiles is the subject of the recently published Formal Opinion Number 2019-199 of the State Bar of California Standing Committee on Professional Responsibility and Conduct. It is imperative that attorneys to understand how their profiles are classified by the State Bar and what ethical guidelines are implicated.

Know the Rules and Know the Platform

The opinion emphasizes that “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.” As such, all law firms should adopt and update firm-wide social media policies, as well as educate attorneys and staff regarding such policies. No matter how infrequent your use of online professional directories, ignorance of an online platform’s functions or the Rules of Professional Conduct, won’t cut it.

Adopting a Profile and/or Using the Profile for Marketing Triggers Ethical Obligations

Rules 7.1 and 7.2 prohibit attorneys from making communications about the attorney or the attorney’s services that are false or misleading. Rule 7.1 goes on to state that “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.”

Pursuant to Rule 7.1, Comment [1], 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. In this way, a professional directory profile is determined to be “by or on behalf” of an attorney in one of two ways: (1) if the attorney exercises control over the profile by adopting it, or (2) if the profile is utilized by the attorney in marketing services. Use of an online profile in either of these two ways obligates the attorney, pursuant to the Rules of Professional Conduct, to ensure the information posted on the profile is truthful and not misleading, as for instance, the attorney must not mischaracterize prior accomplishments or achievements, falsely state they are licensed or have handled matters in certain jurisdiction, or falsely state the date they graduated from law school. “Such duties last until an attorney abandons use of the profile.”

Attorneys who do not Adopt or Market an Online Profile have no Ethical Obligations Towards that Particular Profile

With the rapid increase of new online professional directories, comes an increase of attorney profiles to potentially be managed. Indeed, many online professional directories auto-populate attorney profiles without notifying the particular attorney, and without the subject profile’s attorney’s knowledge and/or consent. If such is the case and an attorney is not aware of a profile on a professional directory website, then that attorney is not responsible for the information contained therein, regardless of whether or not it is accurate, because the information is not made pursuant to Rule 7.1 “by or on behalf” of the attorney. Similarly, and for the less tech-savvy or attorneys whose business models allow them to altogether avoid having an online professional directory presence, the opinion goes on to state that “an attorney who is aware of the profile but takes no action with regard to the profile is also

not responsible for its content.” Again, however, that attorney must not adopt the at-issue profile, and must not take any action to benefit from it, by, for instance placing a link to the online profile on the attorney’s law firm’s own web page or placing a “badge” indicating that he or she has received a positive rating from the online directory on their email signature lines. In addition, if the profile inaccurately states that the attorney received one of the highest personal injury awards within the state last year, and a prospective client who viewed the flawed profile was to refer to the attorney having achieved such a high award, then the attorney must correct that client’s misconception, or otherwise, the attorney would “benefit” from the inaccurate statement of fact in violation of Rules 7.1 and 7.2.

Managing False or Misleading Reviews by Clients or Third Parties

While it goes without saying that an attorney individually, or by causing others to do so, cannot knowingly post false or misleading information (Rules 7.1, 8.4, and Business and Professions Code Section 6106), the ethical obligations which arise when false or misleading information is posted by someone other than the attorney are significantly more complex. In the event an attorney is faced with such a dilemma, the opinion suggests certain measures which can be taken to reduce the associated risks. They are as follows:

(1) Requesting the client or third party author of the content either revise the posting so that it is in compliance with the attorney’s duties, or delete the posting altogether.

(2) Requesting that the website administrator correct or remove the inaccurate information, add an appropriate disclaimer, or delete the posting altogether.

(3) If neither one or two can be accomplished, then pursuant to Rule 7.1, the attorney must post something on the directory’s website which includes an appropriate disclaimer or qualify-

ing language regarding the inaccurate information, or a statement that the editorial policies of the site do not allow the attorney to vouch for the factual accuracy of third party content, either generally or in regards to the particular post. Such a post should remain general in nature, so as to not violate other ethical concerns such as those in relation to client confidentiality, privilege, or loyalty.

(4) A final, and last resort option that an attorney would have, if for instance, repeated problems arise with a certain professional directory, is for the attorney to abandon the profile altogether. While abandonment is determined on a case-by case factual basis, it generally can be accomplished by taking reasonable steps to alert the public that the attorney is no longer monitoring the profile, such as posting a notice of the fact on the profile, as well as ceasing to use the profile or directory in marketing for the attorney’s practice.

Conclusion

While each attorney’s online presence is different, there are common risks and rules of professional conduct which practitioners must be aware of in order to steer clear of ethical violations. ■

Shawn Shaffie is an attorney at Parker Mills LLP. His practice involves all aspects of litigation, business, and deal making. He also focuses on professional liability concerning attorneys, accountants and other business professionals.

