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What Can You Say? Responding to Negative On-Line Reviews

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In today's social media and web-centric environment, we've all seen on-line reviews posted by disgruntled customers of everything from restaurants to flashlights. They usually don't allege outright negligence in the vein of "my soup had a rock in it." Rather, the more typical criticism is along the lines of "my soup was cold and service was slow." So, too, with on-line reviews of lawyers by former clients. The criticism is rarely "my lawyer committed malpractice." Instead, negative on-line reviews are more often "my lawyer was lousy and didn't return my calls."

With clients in at least "retail" practice areas like family law and plaintiffs' personal injury increasingly turning to the web to find lawyers, negative on-line reviews often need to be rebutted. At the same time, there are distinct constraints that limit what lawyers can say. In this column, we'll first survey the constraints and then examine some practical alternatives.

The Constraints

The principal constraint affecting what lawyers can say in rebutting negative on-line reviews is the confidentiality rule—RPC 1.6. The sweep of the rule is broad and encompasses the attorney-client privilege, work product and other confidential information gained during the course of a representation.

Under RPC 1.9(c) and OSB Formal Opinion 2005-23, our duty of confidentiality continues beyond the termination of the attorney-client relationship involved.

Although there is a “self-defense” exception to the confidentiality rule in RPC 1.6(b)(4), it is generally limited by its terms to formal proceedings or the equivalent such as legal malpractice claims or bar complaints. Oregon is not unique in this regard, with our exception patterned generally on the corresponding ABA Model Rule. Lawyers have been disciplined around the country under counterparts to Oregon RPC 1.6 for revealing confidential information when rebutting negative on-line reviews by former clients with equally public comments also made on-line by the lawyers (*see, e.g., People v. Isaac*, 2016 WL 6124510 (Colo OPDJ Sept 22, 2016), *In re Skinner*, 758 SE2d 788 (Ga 2014), and *In re Tsamis*, 2013 PR 00095 (IARDC Jan 15, 2014)). In the analogous context of a listserv post, an Oregon lawyer was disciplined in *In re Quillinan*, 20 DB Rptr 288 (2006), for revealing confidential information about a former client.

Additional constraints effectively bar addressing post-representation criticism in the fee agreement. RPC 1.6(a) prohibits waiver of lawyer confidentiality “unless the client gives informed consent[.]” This would almost never be in the client’s interest and, therefore, would create an issue from the

outset about whether any consent obtained was sufficiently “informed.” Further, the Consumer Review Fairness Act of 2016, 15 USC 45b, *et seq.*, generally renders unenforceable provisions in “form contracts” limiting the ability of customers to provide reviews of the products or services involved. With law firms increasingly using standardized terms that likely fall within the definition of “form contracts,” this new federal law effectively precludes the use of “non-disparagement” clauses in many lawyer fee agreements.

Lawyers who are disciplined today also face the very real prospect that the fact of their discipline will be quickly picked-up and posted by influential lawyer rating services like AVVO. This can have an even more negative long-term marketing consequence than isolated criticism by a former client. Therefore, lawyers who “fight fire with fire” are likely to get burned.

The Practical Alternatives

Consumer review web sites typically have terms of use that may be prudent to consult to determine whether there is a basis to ask the service involved to remove a negative post.

If a negative post cannot be removed, lawyers need to assess whether it makes sense to respond. Despite the constraints lawyers face, RPC 1.6 does

not prohibit responses altogether. In doing so, however, lawyers should be guided by three practical considerations.

First, be professional. A polite and tempered response can in and of itself undermine the credibility of the former client critic. A response that—without revealing otherwise confidential information—puts the lawyer’s firm in context can potentially turn a negative into a positive by stressing the firm’s background, depth and commitment to client service.

Second, be proportionate. An “over the top” response to a mild rebuke will likely only reinforce the impression that the lawyer is thin-skinned and may indeed have done whatever it is that the former client has alleged.

Third, be honest. Lawyers need to be scrupulously accurate in their responses to avoid an equally serious charge under the “dishonesty rule”—RPC 8.4(a)(3). For the same reason, lawyers should resist the temptation to “balance the scales” by submitting a false positive review under a pseudonym. Although in a different context, a lawyer was disciplined in *In re Carpenter*, 337 Or 226, 95 P3d 203 (2004), for submitting a false posting under a pseudonym to a web site for former high school classmates.

Summing Up

Lawyers and law firms often focus significant time and funds in creating and maintaining a strong presence in web and social media marketing. When a disgruntled former client leaves a negative on-line review, there can often be an all-too-human inclination to hit back. Lawyers, however, need to carefully calibrate any response to both stay within the constraints of the RPCs and to effectively address the criticism they are attempting to rebut.

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