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What Can You Say?
Rebutting Negative On-Line Reviews

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This past year saw two significant developments in the evolving law governing the extent to which a lawyer can rebut a negative on-line review. The first was an Oregon Supreme Court decision parsing some—but not all—of the issues involved. The second was an ABA ethics opinion discussing the topic comprehensively—including a critical piece not directly addressed in the Oregon opinion. In this column, we'll look at both and then conclude with some practical "take-aways" to guide law firm risk management in this difficult area.

The Oregon Decision

In re Conry, 368 Or 349, 491 P.3d 42 (2021), involved a lawyer who handled a deportation proceeding that followed a client's misdemeanor convictions. The client was ordered deported. At that point, the client hired new counsel who argued on appeal that the convictions were not crimes of "moral turpitude" that would support deportation. The federal government dismissed the deportation proceeding.

The by-then former client later posted critical reviews of the first lawyer on Yelp, Google and Avvo. The former client only used his first name in the reviews and did not mention his convictions. The lawyer responded on all three platforms. Collectively, the lawyer revealed the client's full name and described

the client's criminal convictions. When the client learned of the posts, he filed a bar complaint against the lawyer.

A trial panel concluded that the lawyer had breached the confidentiality rule—RPC 1.6—in revealing the client's full name and criminal convictions. An appeal to the Oregon Supreme Court followed. The Supreme Court agreed that the lawyer had violated RPC 1.6, but on the facts before it drew a distinction between the client's name and the convictions.

The Supreme Court first observed that Oregon's lawyer confidentiality rule is broad and encompasses both the attorney-client privilege and, under RPC 1.0(f), "other information gained in a current or former professional relationship . . . the disclosure of which would be embarrassing or would be likely detrimental to the client." Although privilege was not involved, the Supreme Court found that the client's full name and criminal conviction history were confidential under the other prong of the rule.

The Supreme Court noted that the Oregon rule, like its ABA Model Rule counterpart, includes a so-called "self-defense" exception—Oregon RPC 1.6(b)(4). As we'll discuss in the following section, the legal question under the exception is whether it applies to informal criticism posted on-line or whether it is generally reserved to more formal venues like malpractice suits and bar

complaints. The Supreme Court found, however, that it did not need to resolve this legal issue because, even if the exception applied, the lawyer had exceeded it. In this regard, the Supreme Court reasoned that the exception is limited to information that the lawyer "reasonably believes necessary" to defend the specific charges. Although it described the criminal convictions as a close question, the Supreme Court found that—assuming (without deciding) that the exception applied—the convictions were relevant to rebutting the posts. On the use of the client's full name, however, the Supreme Court took a different approach:

> [R]espondent revealed not only client's criminal convictions, but his full name. That changes the matter substantially. By posting client's name together with the details of client's criminal history, respondent revealed client's identity and his convictions, not just to those persons who sought out these particular reviews, but also to other members of the public as well. . . . Now anyone who searched for the client's name in an internet search engine, for any reason whatsoever, could uncover the details of client's criminal convictions. 368 Or at 370.

The ABA Opinion

ABA Formal Opinion 496 (2021) focuses on the question that the Oregon Supreme Court left unanswered: does the "self-defense" exception include on-line criticism within the term "controversy" on which the exception is predicated. Following an extended survey of the history of the exception and its interpretation

around the country, the opinion concludes that the exception is generally limited to formal settings such as malpractice claims, bar complaints and criminal investigations.

The ABA opinion also highlights another practical constraint. Although some negative reviews include allegations of malpractice, many others are the lawyer equivalent of "my soup was cold" or "service was slow." Lawyers would be hard pressed to convincingly argue that those restaurant-style critiques amounted to a sufficient "controversy" between the lawyer and the client to justify the lawyer revealing the client's confidential information in a response.

Take-Aways

Given the constraints imposed by RPC 1.6 and the bedrock duty it reflects, lawyers should be extremely circumspect in crafting a response. On-line rating services are quick to report public discipline—which creates a significant potential to compound a negative review. At the same time, threatened lawsuits directed to either the platform or the reviewer are unlikely to gain much practical traction on constitutional grounds. Similarly, the Consumer Review Fairness Act (15 USC 45b) generally limits the ability to include "non-disparagement" clauses in template fee agreements.

The ABA opinion suggests considering whether a response is even necessary—particular if the lawyer has a strong digital presence that includes otherwise positive reviews. If the lawyer responds, however, a general focus on the lawyer's practice and client service is far safer than revealing confidential information to "fight fire with fire."

ABOUT THE AUTHOR

Mark J. Fucile of Fucile & Reising LLP handles professional responsibility, risk management and attorney-client privilege issues for lawyers, law firms and corporate and governmental legal departments throughout the Northwest. Mark has chaired both the WSBA Committee on Professional Ethics and its predecessor, the WSBA Rules of Professional Conduct Committee. Mark is a member of the Oregon State Bar Legal Ethics Committee and the Idaho State Bar Section on Professionalism & Ethics. Mark writes the Ethics Focus column for the Multnomah (Portland) Bar's *Multnomah Lawyer*, the Ethics & the Law column for the WSBA *Bar News* and is a regular contributor on legal ethics to the WSBA *NWSidebar* blog. Mark is the editor-in-chief and a contributing author for the WSBA *Legal Ethics Deskbook* and a principal editor and contributing author for the OSB *Ethical Oregon Lawyer* and the WSBA *Law of Lawyering in Washington*. Before co-founding Fucile & Reising LLP in 2005, Mark was a partner and in-house ethics counsel for a large Northwest regional firm. He also teaches legal ethics as an adjunct for the University of Oregon School of Law at its Portland campus. Mark is admitted in Oregon, Washington, Idaho, Alaska and the District of Columbia. He is a graduate of the UCLA School of Law. Mark's telephone and email are 503.224.4895 and Mark@frllp.com.