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**My Soup Was Cold!
New OSB Opinion on Rebutting Negative Online Reviews**

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For many lawyers, online reviews by clients have become as central to marketing as they have long been for other businesses such as restaurants. Again as with other businesses, positive comments by “satisfied customers” can be extremely effective marketing. By contrast, negative comments present both a marketing challenge and for lawyers come with a distinct set of constraints under the confidentiality rule that limit rebuttal. The past two years have seen important guidance for lawyers on this sensitive subject. The Oregon Supreme Court in 2021 addressed some—but not all—of the issues involved. Last year, the Oregon State Bar followed with an advisory ethics opinion that discusses many of the remaining questions left in the wake of the Supreme Court decision. In this column, we’ll look at both.

The Supreme Court Decision

In re Conry, 368 Or 349, 491 P3d 42 (2021), involved a lawyer who handled a deportation case for a client who had been convicted of two misdemeanors. After a deportation order was entered at the hearing level, the client hired a new law firm that was able to get the case dismissed. The former client then posted negative reviews of the first lawyer on Yelp, Google and Avvo. The reviews neither mentioned the convictions nor used the client’s last name.

The lawyer responded with both. A bar complaint followed and the case eventually went to the Oregon Supreme Court.

Although the confidentiality rule includes an exception permitting a lawyer to reveal otherwise confidential information in self-defense—RPC 1.6(b)(4)—the Supreme Court did not address the exception squarely. Instead, the Supreme Court found that even if the exception applied, the lawyer had exceeded the scope of any permitted disclosure when he used the client’s full name in his online rebuttals because the Oregon exception is prefaced with the qualifier “to the extent the lawyer reasonably believes necessary[.]”

The OSB Opinion

OSB Formal Opinion 2022-201 (2022), in turn, directly addresses the “self-defense” exception in the context of rebutting negative online reviews. In doing so, the Oregon opinion closely dovetails with a recent ABA opinion—Formal Opinion 496 (2021)—that analyzes this issue from a national perspective under the ABA Model Rule version of the “self-defense” exception. The opinions are available, respectively, on the OSB and ABA websites.

Both opinions focus on the key predicate for the “self-defense” exception to be triggered: “a controversy between the lawyer and the client[.]” The ABA opinion surveys the history of the Model Rule exception, and the Oregon opinion

does the same for RPC 1.6(b)(4). Both find that a “controversy” historically meant a formal proceeding like a malpractice claim or a bar complaint. Both also acknowledge that some areas outside formal proceedings—such as responding to a demand letter asserting negligent or unethical conduct—may also invoke the exception. Both conclude, however, that simply an unflattering online review does not.

The ABA and OSB opinions underscore a central challenge with negative online reviews. A few may be: “my lawyer committed malpractice.” Many, however, are the lawyer version of the familiar restaurant critique: “my soup was cold.” While irritating, the latter will not trigger the self-defense exception. Further, the scope of what constitutes “confidential” information is quite broad under the confidentiality rule, RPC 1.6, and its associated definition of “information relating to the representation of a client” in RPC 1.0(f). The risk in responding with a broadside of confidential information is potential bar discipline which in today’s electronic environment is often quickly reposted by web-based lawyer rating services that potential clients may consult. In short, responding with confidential information outside the self-defense exception risks generating even more “bad news.”

The ABA and OSB opinions collectively also offer useful practical advice in light of the significant constraints posed by the confidentiality rule.

One approach is not to respond. If the criticism is an outlier in an otherwise stellar digital presence, the review may simply be ignored like similar outliers on a wide spectrum of consumer sites.

Another is to review the terms of use for the site concerned. Some criticism may be from “sore” former opposing parties rather than former clients. In those instances, the terms of use may preclude reviews by people who did not actually use the services involved. At the same time, threatening to sue the platform where a negative review was posted is unlikely to have traction. In *Browne v. AVVVO, Inc.*, 525 F Supp2d 1249 (WD Wash 2007), for example, the federal court in Seattle pointed to the First Amendment in dismissing claims by a lawyer who disagreed with his evaluation by a rating site. Similarly, the Consumer Review Fairness Act, 15 USC § 45b, voids provisions in “form” contracts that restrict consumers’ rights to offer opinions on services.

OSB Formal Opinion 2022-201 counsels (at 8) a measured response if a lawyer concludes one is required:

Consistent with Oregon RPC 1.6, the attorney may also make generic, truthful statements about the lawyer’s practice. . . . The attorney

may [also] acknowledge publicly that the attorney does not respond to posts due to ethical obligations.

While perhaps not as cathartic as “fighting fire with fire,” a professional response can often present a better counterpoint that advances the lawyer’s overall electronic marketing.

ABOUT THE AUTHOR

Mark J. Fucile of Fucile & Reising LLP handles professional responsibility and risk management 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 has served on the Oregon State Bar Legal Ethics Committee and is a member of 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.