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## **My Soup Was Cold! Tips for Safely Rebutting Negative Online Reviews**

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Even before the Covid-19 pandemic, available statistics suggested that prospective clients in consumer practice areas increasingly found lawyers through online research. A survey of 6,300 respondents published by Martindale-Avvo in 2019, for example, noted that nearly half used online review sites or the equivalent to research lawyers.<sup>1</sup> The same survey found that of those who had received more traditional recommendations from acquaintances, 46 percent followed by reading online reviews.<sup>2</sup> Forty-two percent of the respondents also stated that they considered online reviews an important tool in ultimately selecting a lawyer.<sup>3</sup> Nothing indicates that these trends have slowed in the wake of the pandemic. For many lawyers in consumer practice areas, therefore, a strong digital presence is a marketing imperative.

As potential clients have increasingly found their lawyers through online research, they have also increasingly reviewed their lawyers in those same forums.<sup>4</sup> Some reviews are glowing. Others are not. Given the weight that potential clients put on reviews, negative comments present a delicate balance for lawyers. On one hand, the natural tendency may be to aggressively rebut unflattering reviews. On the other, the confidentiality rule—RPC 1.6—puts distinct constraints on publicly disclosing “information relating to the

representation of a client.” Although there is a “self-defense” exception in the confidentiality rule, it is understandably narrow given the fundamental nature of our duty of confidentiality. Further, many online critiques of lawyers are more in the nature of restaurant reviews—“my soup was cold”—rather than outright accusations of legal malpractice or unethical conduct that historically framed the outer boundaries of the self-defense exception.

In this column, we’ll first discuss the constraints on rebutting negative online reviews. We’ll then turn to practical alternatives. With both, we’ll take into account significant developments since we last touched on this topic.<sup>5</sup>

Before we do, however, three caveats are in order.

First, we’ll focus on internet-based reviews rather than listservs, blogs, and law firm websites. That said, many of the confidentiality considerations we’ll discuss apply with equal measure to these other forums.<sup>6</sup>

Second, we’ll focus on the confidentiality rule. Any response posted in an online forum must also be truthful—which is the central tenet of all law firm marketing communications under RPC 7.1.<sup>7</sup>

Third, the greatest practical risk of violating the confidentiality rule in this setting is regulatory discipline. It is important to remember, however, that RPC 1.6 reflects the underlying fiduciary duty of confidentiality. The potential risk,

therefore, is not limited to regulatory discipline and might include, depending on the circumstances, civil damage claims for breach of fiduciary duty.<sup>8</sup>

### ***Constraints***

The duty of confidentiality is broad and it continues beyond the end of a client-lawyer relationship.

RPC 1.6(a) frames the duty to current clients: “A lawyer shall not reveal information relating to the representation of a client[.]” Comment 21 to RPC 1.6 underscores the breadth of the duty:

The phrase “information relating to the representation” should be interpreted broadly. The “information” protected by this Rule includes, but is not necessarily limited to, confidences and secrets. “Confidence” refers to information protected by the attorney client privilege under applicable law, and “secret” refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

RPC 1.9(c), in turn, applies these core precepts to former clients:

A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

Although RPC 1.9(c)(1) exempts information that has become “generally known,” ABA Formal Opinion 479 (2017) emphasized that this means more than “publicly available” and is closer to widely known by the general public.

Washington’s rules are based on their ABA Model Rule counterparts and are also consistent with state and federal privilege law.<sup>9</sup> In a similar vein, RPC 1.8(b) prohibits a lawyer from using “information relating to the representation of a client to the disadvantage of a client unless the client gives informed consent, except as permitted or required by these Rules.”

Washington’s confidentiality rule includes a “self-defense” exception, RPC 1.6(b)(5) that is also patterned on the analogous ABA Model Rule:

A lawyer to the extent the lawyer reasonably believes necessary:

...

(5) may reveal information relating to the representation of a client to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer’s representation of the client[.]<sup>10</sup>

The ABA in 2021 examined the “self-defense” exception in the context of negative online reviews in Formal Opinion 496. The ABA opinion focused primarily on whether a negative online review constituted a “controversy”

triggering the exception. Formal Opinion 496 surveyed both the history and application of the exception nationally. The ABA opinion concluded that negative online reviews standing alone do not trigger the exception:

The Committee concludes that, alone, a negative online review, because of its informal nature, is not a “controversy between the lawyer and the client” within the meaning of Rule 1.6(b)(5)[.]<sup>11</sup>

ABA Formal Opinion 496 also touches on the predicate test for all permissive disclosures under ABA Model Rule 1.6(b): “to the extent the lawyer reasonably believes necessary[.]” Formal Opinion 496 concluded that an online response was not “reasonably necessary” in this context:

The Committee further concludes that, even if an online posting rose to the level of a controversy between lawyer and client, a public response is not reasonably necessary or contemplated by Rule 1.6(b) in order for the lawyer to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client.<sup>12</sup>

### ***Alternatives***

Discipline today is more “public” than in years past in the sense that lawyer rating services are quick to include the fact that a lawyer has been sanctioned by a regulatory agency and disciplinary information is readily accessible to consumers doing their own online research.<sup>13</sup> Therefore, “fighting fire with fire” by revealing confidential information may actually produce more “bad news” if it results in public discipline. Given that risk and the narrow

confines of the self-defense exception, practical alternatives short of revealing confidential information are the most prudent.

Before surveying those, however, we'll first touch on a few that usually don't work. Suing the client is typically barred by the First Amendment.<sup>14</sup> Suing the platform usually leads to the same result.<sup>15</sup> Threatening to reveal confidential information unless the client removes a negative post has resulted in discipline in analogous contexts.<sup>16</sup> Including a prohibition against posting reviews in a template fee agreement is unenforceable under the federal Consumer Review Fairness Act of 2016.<sup>17</sup>

If the negative review was posted by a non-client, then there may be an avenue to have the review removed if the site terms of use limit reviews to consumers of the services involved. At the same time, lawyers need to be completely accurate when dealing with a site in this regard. An Oregon lawyer, for example, was disciplined for claiming that a negative post was written by a non-client when, in fact, the reviewer had been a client.<sup>18</sup>

A polite, professional response that does not reveal confidential information can be an effective counterpoint. ABA Formal Opinion 496 includes sample responses in this regard.<sup>19</sup> Ironically, while a full-throated broadside may feel more satisfying, it can validate—rather than rebut—a less than flattering

review. By contrast, a professional response emphasizing, for example, the lawyer's experience may lessen the impact of the negative review on a practical level.

Finally, in what is often the hardest choice for many lawyers, not responding may be the most prudent course. Think, for example, of the last time you surveyed product reviews on a major e-commerce site. Undoubtedly, even a stellar product included a few reviews along the lines of "I didn't like the color" or "I never give five stars." If those outliers were eclipsed by other positive reviews, you probably bought the product anyway. So, too, with lawyers. If the criticism is an exception in an otherwise strong digital presence, silence may be best.<sup>20</sup>

## **ABOUT THE AUTHOR**

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<sup>1</sup> Martindale-Avvo, *Hiring an Attorney 2019* (2019) at 9 (available at [www.Martindale-Avvo.com](http://www.Martindale-Avvo.com)).

<sup>2</sup> *Id.* at 10.

<sup>3</sup> *Id.* at 3.

<sup>4</sup> *Id.* at 9-10.

<sup>5</sup> Mark J. Fucile, *The Delicate Art of Responding to Negative On-Line Reviews*, 72, No. 3 NWLawyer 10 (Apr./May 2018).

<sup>6</sup> See generally *In re Quillinan*, 20 DB Rptr. 288 (Or. 2006) (lawyer disciplined for revealing confidential information on listserv); ABA Formal Op. 480 (2018) (confidentiality considerations in lawyer blogs); ABA Formal Op. 10-457 (2010) (lawyer websites).

<sup>7</sup> RPC 7.1 states, in pertinent part: "A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services."

<sup>8</sup> See generally *Eriks v. Denver*, 118 Wn.2d 451, 824 P.2d 1207 (1992) (discussing the interplay between the professional rules and corresponding fiduciary duties).

<sup>9</sup> See Robert H. Aronson, Maureen A. Howard and Jennifer M. Aronson, *The Law of Evidence in Washington* §§ 9.05[3]-9.05[4] (rev. 5th ed. 2023) (discussing scope and duration of privilege); see also *Martin v. Shaen*, 22 Wn.2d 505, 156 P.2d 681 (1945) (privilege extends beyond death of client); *Swidler & Berlin v. United States*, 524 U.S. 399, 118 S.Ct. 2081, 141 L.Ed.2d 379 (1998) (same).

<sup>10</sup> As noted, RPC 1.9 governs duties to former clients. RPC 1.9(c) applies the "self-defense" exception in the former client context by referencing the exceptions that "these Rules" (*i.e.*, the RPCs) permit. See also RPC 1.6, cmt. 20 (noting that the duty of confidentiality continues after the termination of a representation and cross-referencing RPC 1.6 with RPC 1.9(c).)

<sup>11</sup> ABA Formal Op. 496 (2021) at 3. Regionally, Oregon reached a generally similar conclusion in Oregon State Bar Formal Opinion 2022-201 at 7 (2022) ("[O]ne should assume that any online disclosure is not a case or controversy and that the self-defense exception will be applied sparingly, if at all.").

<sup>12</sup> ABA Formal Op. 496, *supra*, at 3; see, *e.g.*, *In re Conry*, 491 P.3d 42 (Or. 2021) (assuming without deciding that a negative online review bordering on an accusation of malpractice might trigger the exception, the Oregon Supreme Court nevertheless disciplined an attorney for exceeding what was "reasonably necessary" in responding to the review).

<sup>13</sup> See generally Mark J. Fucile, *Public Discipline Is More "Public" Than Ever: The Impact of Web-Based Lawyer Rating Services on Discipline*, 24, No. 1 ABA Professional Lawyer 42 (2016).



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<sup>14</sup> See, e.g., *Thomson v. Doe*, 189 Wn. App. 45, 356 P.3d 727 (2015) (discussing First Amendment as it relates to consumer reviews of lawyers).

<sup>15</sup> See, e.g., *Browne v. Avvo, Inc.*, 525 F. Supp.2d 1249 (W.D. Wash. 2007) (dismissing lawyer's suit against rating site on First Amendment grounds). See also 42 U.S.C. §230 (providing immunity to online platforms from civil liability based on third-party content).

<sup>16</sup> See, e.g., *In re Boelter*, 139 Wn.2d 81, 985 P.2d 328 (1999) (tax lawyer disciplined for threatening to reveal confidential information to the IRS unless client paid bill).

<sup>17</sup> 15 U.S.C. §45b.

<sup>18</sup> *In re Heinzelman*, 33 DB Rptr. 6, 14 (Or. 2019).

<sup>19</sup> ABA Formal Op. 496, *supra*, at 6 (“Please contact me by telephone so that we can discuss your concerns.” and “Professional obligations do not allow me to respond as I would wish.”).

<sup>20</sup> A variant of this approach is to simply note that the confidentiality rules governing lawyers do not permit a full response.