Q&A LAWYER LIABILITY AND ETHICS

Here is What You Can Do With Your Negative Review

Joseph Brophy

As the internet enters its third decade of widespread use by the public, the benefits to the legal profession (increased productivity and efficiency, highlighting of firm accomplishments/news, branding) continue to be accompanied by problems that create potential ethical quandaries. It is easier than ever for clients to sing your praises to the general public or to tell everyone you stink at your job. I am referring, of course, to the poor online review. Despite some amusing fact patterns emerging from the disciplinary decisions around the country, the online reputation of a law firm is a cornerstone of any marketing strategy and is no laughing matter. As lawyers take increasing advantage of consumer platforms like Google, Yelp and Avvo, the court and disciplinary opinions over the last five-seven years with regard to lawyer's responses to online reviews have piled up and the results are in.

As a general matter, lawyers have the right to respond to reviews that they perceive to be unfair or inaccurate. However, that right is circumscribed by ER 1.6, which prohibits the disclosure of information relating to the representation or disclosure of confidential information. The prohibition on the disclosure of confidential information contains a "self-defense exception" in ER 1.6(d)(4) (in Arizona anyway, other jurisdictions may have different numbering, but they all have the exception). That exception permits a lawyer to disclose client confidential information to the extent necessary to "establish a claim or defense on behalf of a lawyer in a controversy between the lawyer and the client." It is this exception around which disciplinary action centers when lawyers respond to negative online reviews.

A review of the cases where lawyers had to face discipline for attempting to exercise their ostensible right to defend themselves against a negative online review shows that the self-defense exception rarely works for two reasons: (1) the lawyer evidently (and understandably) finds it impossible to give their side of the story without divulging information subject to confidentiality under Rule 1.6 and (2) a negative online review, by itself, does not meet the requirements of permissible disclosure in self-defense under the rule. In ABA Formal Opinion 496, the reason online reviews do not qualify for the exception is because their informal nature means they do not qualify as a "controversy" between attorney and client under Rule 1.6.

So, congratulations: you have the right to respond to negative online reviews, but not in any manner that is likely to be effective and if you effectively respond you will probably be sanctioned. As the New York State Bar Association helpfully explained, this is a good thing: "Unflattering but less formal comments on the skills of lawyers, whether in hallway chatter, a newspaper account, or a website, are an inevitable incident of the practice of a public profession, and may even contribute to the body of knowledge available about lawyers for prospective clients seeking legal advice." This is a great job, isn't it?

The vast majority of state ethics opinions agree with New York. Colorado Ethics Opinion 136 (2019) specifically finds that if the online criticism rises to the level of a controversy between lawyer and client, the lawyer may ethically disclose limited information, yet urges caution in responding. But there is not much in the way of authority for the proposition that a negative online review can ever qualify as a "controversy," which makes Colorado not much of an exception to the majority rule. The District of Columbia allows responses to negative online reviews, but that is because the DC version of Rule 1.6 allows an attorney to disclose confidential information "to the extent reasonably necessary to respond to specific allegations by the client concerning the lawyer's representation of the client." District of Columbia Rule 1.6(e)(3). DC appears to be alone in its incorporation of this language into Rule 1.6.

Here in Arizona, the comments to ER 1.6(d)(4) mention the exception applying only to "proceedings" between attorney and client. But State Bar of Ariz. Formal Op. 93-02 (1993) (non-binding) did conclude that a criminal defense lawyer may agree to an interview and disclose confidential information to defend against accusations by a former client who was convicted and sentenced to death that the lawyer was incompetent and involved in a conspiracy against the client made to the author of a proposed book, even though there are no pending or imminent legal proceedings. The State Bar concluded that "the assertions made against the attorney by the former client to the effect that he acted incompetently, refused to follow instructions, failed to call certain witnesses, and engaged in a conspiracy with the prosecution to ensure his conviction, were sufficient to establish a "controversy" between the attorney and his former client." The reasoning of the opinion was that if the Rule 1.6(d)(4) language "to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client" were limited only to legal proceedings, then the "in a controversy" language would be rendered superfluous.

Opinion 93-02 is non-binding and its applicability to a negative Google+ review (for example) is questionable given the very different facts upon which the opinion is based (a client giving a negative review is in a different position than a convicted client sitting on death row after a completed trial). But the opinion's reasoning is logical and is not addressed by the opinions limiting the lawyer's ability to respond to negative online reviews.

Some possible alternatives to blasting your client's flaws on the internet in response to a negative review include: (1) requesting that the host of the website or search engine remove the offensive post or (2) reaching out to the client to address their concerns and asking them to remove the review.

Now, if you have read this far you deserve to be rewarded. So, we will conclude with my favorite lawyer response to a negative Yelp review, which the author does not endorse, and which is quoted here solely for entertainment purposes: "Well, [client] is a convicted felon for fleeing the state with children. A wonderful parent. Additionally, she has been convicted of shoplifting from a supermarket. Hide your wallets well during a massage. Oops, almost forgot about the DWI conviction. Well, maybe a couple of beers during the massage would be nice." ■

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The Consequences on Debtors

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relied on existing law (A.R.S. § 33-964(A)) when holding that pursuant to Arizona law no lien attached to a debtor's homestead, therefore there was no reason for a bankruptcy judge to sign an order avoiding the unsecured judgment.

The new law changes that well-settled result. Now all valid judgments (no matter their age) will attach to someone's home and, in refinancing to the homestead exemption. If someone ever filed for bankruptcy protection, with a recorded judgment, but did not obtain a court order avoiding existing judicial liens, there is a possibility that the old discharged judgment creditors will attempt to use this new law to shoehorn their way into foreclosing on the debtor's home, even a home they did not own when they filed bankruptcy. Some bankruptcy language was included as an amendment, but only time will tell if that language holds up to litigation. The end result is that it is possible thousands of bankruptcy cases will need to be reopened, at a substantial cost to the homeowner, in order to obtain a court order avoiding a judgment lien. What a nightmare for the homeowner, the title companies and bankruptcy attorneys!

This change in the law will most certainly lead to a significant increase in bankruptcy filings in order to eliminate the judgment liens on homestead property.

The Toma amendments to the bill allow the judgment creditor to invade the equity "homestead exemption" in the case of a refinance.

When a borrower is struggling financially, prior to this new law the borrower could refinance the mortgage, take out existing equity, and use that money to pay essential living expenses, repair a leaky roof, remediate mold, address other necessary home repairs, or pay emergency medical bills. The Toma Floor amendment effectively eliminates the homestead exemption by creating an exception to its application in the event of a refinance. As a result, when a homeowner refinances a judgment creditor will take the refinancing monies before the borrower/homeowner receives any funds. Unless the title company explains the new law (arguably not their job), this will happen without warning to the homeowner. Leaving the homeowner with a higher mortgage balance and no additional funds.

Some judgments are decades old and long forgotten by the debtors. If the judgment was timely renewed it stays collectable until the judgment debtor dies (even then it may still invade the judgment debtor's estate). Debt buyers, including the primary instigator of the new law, pay pennies on the dollar to buy debts. The new law does not take into consideration how much the debt buyer paid for the debt. Instead, the focus is on the original judgment, plus interest and costs, which may result in the 10-to-1,000-fold multiplier of the original debt actual amount paid to purchase the judgment.

The bill and its amendments negatively affect other creditors.

By allowing a judgment to retroactively attach to a homestead, the new law wreaks havoc on the law of priorities for secured and unsecured creditors. There is some language in the bill that helps preserve priority for secured debts prior to the effective date of the law, but that does not apply to all new secured debts after January 1, 2022. This is going to dramatically affect the junior lending market and cause chaos on the title industry.

Results:

The provision to increase the homestead exemption to $250,000 is long overdue and a welcome change. However, converting judgments into automatic liens that attach to a person's homestead, significantly weakens the homestead protections granted all Arizonans.

Retroactively granting lien rights to judgment creditors will be the foundation for a significant amount of litigation in both Arizona courts and federal courts, including the Arizona bankruptcy court. Giving judgment creditors greater rights to a homeowner's equity upon refinance completely defeats the purpose of the homestead exemption.

Courts have repeatedly found that the legislative purpose of the homestead exemption statutes is to allow the family to prevent judgment creditors from taking the family home. Judgment creditors are paid only if a sale takes place and then only after the homeowner receives their homestead exemption. ■

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