That's Not True! Considering Whether to Respond to a Negative Social Media Post

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You have enjoyed full-star ratings on all of the legal ranking websites for two years. Then suddenly you receive word that your former client, Litigious, who had failed to provide you with damaging information that eventually came out in deposition to his detriment has taken to bashing you on any online platform that will allow him access. Litigious has said that you are incompetent, and missed a deadline that caused his case to be dismissed. But you didn't and you believe that Litigious's comments are not only bad for business but also defamatory.

What should you do? Are you ethically prohibited from responding to the post with confidential information?

This question was answered, at least in part, by the Oregon Supreme Court's recent decision in ***In re Conry***, 368 Or. 349, 491 P.3d 42 (2021). As Oregon attorneys, we have often queried about how much we can say online—particularly in response to former clients making negative comments about our services or the outcome of a particular case. The Oregon Supreme Court provided some surprisingly positive guidance as to what and how much can be disclosed by lawyers to defend ourselves and our reputations.

The ethical framework

The import of the court's decision in *Conry* derives at least in part from the fact that the legal profession is often slow to react to changes in technology, and the rules that govern attorneys are always playing catch-up. (A good example of this is that the ABA first mandated that law schools must teach ethics to get the association's approval in response to Watergate. (See "1965-1974: Watergate and the rise of legal ethics" https://www.abajournal.com/magazine/article/1965).While Oregon lawyers may attempt to embrace new marketing opportunities afforded by the internet and social media, time and time again lawyers have been limited in their online activities by outdated advertising and confidentiality rules that have not anticipated the instant impact (positive and negative) or the widespread access that these technologies afford.

Lawyers who engage in online activities must consider at least two of the Oregon Rules of Professional Conduct. First, RPC 7.1 prohibits false or misleading information about a lawyer or the lawyer's services, even in advertising. The policy behind the rule that requires accurate information that is not misleading is fairly obvious.

Second, RPC 1.6(a) prohibits a lawyer from disclosing information relating to the representation of a client, which in Oregon is defined to include information protected by the attorney-client privilege under applicable law, and other information gained in a current or former professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or likely to be detrimental to the client. See RPC 1.0(f). The legal profession has a long tradition of protecting confidential information, which enables clients to provide full and truthful information, and which in turn facilitates competent legal advice.

And even though the concept of privacy changed dramatically in the age of Facebook, Instagram, and YouTube, regulators have continued to give RPC 1.6 extreme deference, cautioning lawyers from "speaking out" against negative reviews and online gripes (actual or invented). See, e.g., Los Angeles County Bar Association 525 (2012); NYSBA Opinion 1032 (2014); ABA Formal Opinion 496 (2021). Similarly, in "The Ethics of Online Blogging, Posting and Chatting By Lawyers," (OSB Bar Bulletin, July 2018), the Oregon State Bar's General Counsel cautioned lawyers to remember that in blogs, social media, and other forms of internet advertising, publicly available information does not necessarily equate to publishable information under the restrictions of RPC 1.6(a).

The advice has long been to say nothing when confronted with negative social media; or, at most, to use a generic post such as the following: "The post is inaccurate. I represented this client zealously and effectively. My ethical duty to protect this client's confidences prevents me from responding in more detail. Please see my website for accurate information about my practice."

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Put another way, the lawyer has traditionally been told to take the "high road," and follow the age-old advice that "if you can't say something nice about someone—say nothing." Although this is still good advice, it may be more conservative than it need be, given the Supreme Court's recent holding.

In re Conry

In *Conry,* a client posted a negative review of an immigration lawyer on multiple websites. The lawyer viewed those reviews as defamatory. In particular, the client indicated that he "was not deportable with the charges that he had." The lawyer responded to that assertion by contending that the client's criminal charges had allowed the client to be deported, under the law as it existed when the client had hired respondent. *Conry*, 368 Or. at 369. The lawyer also provided the client's name in a response to one of the three posts.

Recognizing the importance of the case, the court began by discussing online reviews and client confidentiality in general. On one hand, the court observed:

> "[I]t appears that negative online reviews may have a dramatic impact on an attorney's income. … One law review article from 2015 contained substantial discussion of the effects of online reviews on businesses generally, and—to the extent the data was available at the time—on attorneys specifically. … A 2014 study, for example, had concluded that '[e]ighty-three percent of respondents indicated that their review of online feedback was their first step to finding an attorney.' … In the context of online reviews of restaurants, a 2011 study concluded that a drop of one star in ratings could affect revenue between five and nine percent. …" *Conry*, 368 Or. at 360 (citations omitted).

On the other hand, the court noted that "[t]he attorney's ability to harm the client is amplified when an attorney can functionally publicize a client's secrets to the entire online world at the click of a button." *Id*. at 361.

The court reviewed the lawyer's disclosures and found that they were "information relating to the representation of a client" and therefore protected by RPC 1.6(a). *Id.* at 365.

The court then explored whether RPC 1.6(b)(4)—the so-called self-defense exception—would apply, and thus permit the lawyer to provide the responses he did. That provision provides, in relevant part, that a "lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client …".

The court first sidestepped whether the client's reviews created a controversy between lawyer and client for purposes of RPC 1.6. Although the court concluded that it need not resolve the question, it still assumed a controversy existed and turned to the question of whether the lawyer reasonably believed it necessary to reveal the information he did.

The court broke down the revealed information into two categories: the client's criminal convictions and the client's identity. Significantly, it found that the lawyer could disclose the first category of information under the circumstances. The court said the lawyer could have reasonably believed that disclosure of the client's criminal convictions was necessary to rebut the client's contention that the lawyer was unaware of the applicable immigration law. It was therefore reasonable to share the convictions to demonstrate that the lawyer had provided the correct guidance under existing law. Thus, even though the information was confidential and protected by RPC 1.6(a), the information was revealed "at least arguably to explain to the audience the grounds the government had asserted for deportation—conviction of a crime involving moral turpitude—and whether client's crimes constituted such a crime." *Id*. at 370.

The client's identity, however, was determined not to be an objectively reasonable disclosure, particularly where it was disclosed in conjunction with the information about the client's convictions. When this information was disclosed together, it enabled "anyone who searched for client's name in an internet search engine, for any reason whatsoever, [to] uncover the details of client's criminal convictions." *Id*. at 370.

Accordingly, the court clarified that a lawyer may no longer have to simply turn the other cheek. When she or he reasonably believes it necessary to establish a claim or defense in a controversy with a client, a lawyer may respond to negative online reviews by disputing the allegations.

Conclusion

It is fair to say that just because a lawyer can respond, it does not mean he or she must or should do so. A lawyer should first take a deep breath after receiving a negative social media review and determine if there is anything to learn from the post (e.g., could the lawyer have treated the client better?). But if a post could be considered defamatory, a lawyer may now consider whether posting additional details would be appropriate in light of the *Conry* decision. ◆