INN OF COURT PRESENTATION
June 6, 2017

SCENE ONE

Attorney Saul Goodman is sitting in an office with a client
Screen has an image of a law office in the background

Attorney Goodman:

I know you are really disappointed in the court's ruling, but the outcome is consistent with what you and I discussed would probably happen if we asked the judge to decide the case.

Now, I know that settlement offer her lawyer proposed right before we walked into court is probably looking pretty good about now, but you were really invested in having your day in court and really wanted a chance to say everything you felt needed saying. I think we accomplished that goal with your 15 hours of testimony.

Client:

Well, you're right. I mean, no one has ever listened to me so thoughtfully the way the judge did. I saw her making a lot of notes and shaking her head a lot which tells me she was really paying attention. But, you know, I think we should have tried to get those business documents into evidence. I mean, there it is in black and white that I'm a 50% owner of the business! No judge could dispute these papers – they look totally legit!

Attorney Goodman:

You're right – those papers look really authentic. The challenge here is that you told me you created these documents yourself with the help of a new application you found on the internet. Because you told me that the documents weren't real, I unfortunately had no choice but to tell you I would withdraw as your legal counsel if you insisted on proceeding with that faked evidence. You see, I have an ethical duty to the court not to submit into evidence anything that I know is fraudulent. I also couldn't let you testify about these documents being authentic when I know you would be lying about it I was willing to withdraw before trial so you could represent yourself, but you really insisted that you wanted me by your side so you agreed that you would not lie and not try to enter false evidence.

Client:

Well, I remember talking to you about that and I do really like you and think you are a good lawyer. It wasn't the outcome I was hoping for, but I do feel like a weight as been lifted from my shoulders. Thank you so much for your help.

Attorney Goodman:

Of course! I really enjoyed working with you and I hope you will consider calling me again for your next divorce.

Client:

My next divorce? Oh right, my girlfriend. Hey, do you do prenups?

Attorney Goodman:

I sure do! Give me a call when you're ready and I'll get an iron-clad prenup drawn up for you. Until then, take it easy and be sure to visit my Avvo page and post a review. A good word from a satisfied client never hurts, you know?

Client:

Sure thing!

End of Scene

SCENE TWO

Client is typing on computer
Screen scrolls image of text

Client typing: (and reading out loud slowly while typing)

"Saul Goodman is the worst excuse of a lawyer to set foot in a courtroom. He is nothing less than a cheap, lying, no-good, rotten, four-flushing, low-life, snake-licking, dirt-eating, inbred, overstuffed, ignorant, blood-sucking, dog-kissing, brainless, dickless, hopeless, heartless, fat-ass, bug-eyed, stiff-legged, spotty-lipped, worm-headed sack of monkey shit. He's also a bad lawyer and came to court high as a kite!"

End of Scene

SCENE THREE

Attorney Goodman is at his computer
Screen has same image of law office in the background

Attorney Goodman:

The phone sure has been quiet recently. That's ok. I can use the time to spruce up the old social media.

Wait. What's this? I don't understand? I thought he LOVED me! We had such a good meeting...how could this happen? Oh now, is this why my phone has been so quiet? Oh dear, I wonder if my firm has seen this yet – what if they think its true?

Then, computer goes ding and its "oh my god, its getting worse! The girlfriend just posted a review too!"

"Saul Goodman screwed my boyfriend over big time! He had iron-clad evidence and refused to introduce it for no reason!!! If you want a top notch lawyer and advocate fighting for your rights stay FAR FAR away from this hack. He will screw you over just because he can!

End of Scene

SCENE FOUR

Attorney Goodman is working out at a gym with another attorney
Screen has an image of a gym in background

Attorney Goodman:

Yeah, I know I was his sixth lawyer, but I was sure I could handle him. I've been doing this for more than a few years, you know.

Other Attorney:

Sure, but what are you going to do now?

Attorney Goodman:

What am I going to do? I'll tell you what I'm going to do. I'm going to sue his ass to Tuesday and then add six months for good measure. That's what I'm going to do. When I'm done with him, he won't be able to afford the rent to live under a bridge.

Other Attorney;

Well, that sounds good. The douche bag deserves it. But are you sure you've thought it through?

Attorney Goodman:

What's to think through? The bastard defamed me! Defamed me I say! I intend to make sure his pathetic soul rot in Hell.

End of scene

SCENE FIVE

(Attorney Goodman is consulting with Attorney Ty Slapp about his defamation case)

Attorney Goodman:

Thanks for meeting with me about my defamation case, Mr. Slapp. As they say, an attorney who represents himself has a fool for a client. So, I'm hoping you'll agree to represent me in my defamation case against this online troll.

Attorney Slapp:

Of course – I'm happy to talk with you about the prospective defamation suit. Now, can you remind me exactly what defamatory conduct your former client engaged in?

Attorney Goodman:

Well, I represented him in a divorce case and thought it went pretty well, despite some client management issues. He later decided he wasn't happy with the outcome, and then he posted a really ugly, false review of my work on the internet.

Attorney Slapp:

What kind of things did he say?

Attorney Goodman:

Well, he claimed I was the "worst excuse of a lawyer" who ever stepped into a courtroom! I won't repeat everything he said—you can read it yourself—but he called

me a liar and a "low-life," and said I showed up to court on drugs – all of which is completely false.

I mean, he knows all of those statements are false, and they're also defamatory. So, I have a pretty strong claim, right? How soon can you draft the complaint?

Attorney Slapp:

Well, wait just a minute. Because it involves speech, this is a pretty complicated situation.

Attorney Goodman:

How is it complicated? He defamed me with false statements!

Attorney Slapp:

Well, it's complicated in a couple of ways—both substantive and procedural—and there are some risks to going forward with this claim. First, let's talk about the substance. The First Amendment actually puts some fairly strict limits on the law of defamation, especially when it comes to statements of opinion regarding issues of public concern. So, even if the review is false, you might not be able to take action if it constitutes protected opinion. The constitution essentially prohibits defamation claims based on that type of statement.

Attorney Goodman:

Wait a minute, who says it's a matter of public concern? We're talking about my law practice here—not some grand political debate.

Attorney Slapp:

Well, you should assume this review does relate to a matter of public concern—because it describes matters of interest to the public, and particularly members of the public who are in the market for legal services.

Attorney Goodman:

Ok, but in any case, we're not talking about *opinions* here—this review is full of false factual allegations.

Attorney Slapp:

It's not quite that simple. The standard that distinguishes actionable assertions of fact from nonactionable assertions of opinion is whether a reasonable factfinder could conclude that the statement implies some objective fact about the plaintiff—meaning you.

Attorney Goodman:

Ok, so my claim satisfies that test, right? I mean, this guy claimed I was high in court!

Attorney Slapp:

We actually have to look at the totality of the circumstances—what the courts would call the "general tenor" of the entire review—to see whether the speaker was asserting objective facts or opinion. That's the first step in the three-part analysis that the Oregon Supreme Court recently adopted in a case called *Neumann v. Liles.* In this case, the tenor of the review is pretty mixed—it has some opinion and some statements that might imply facts.

Attorney Goodman:

Ok, so what are the next steps?

Attorney Slapp:

Well, we next look at whether your former client used hyperbole or figurative language, which tends to negate whatever factual implications we might otherwise find. I think you'll agree that the review in this case is chock-full of figurative and hyperbolic language—fair enough?

Attorney Goodman:

Yeah, fair enough, I guess. And what's the final step?

Attorney Slapp:

The final step would be to look at whether the statements are susceptible of being proved true or false. Again, it's a mixed bag here—some of these assertions are just not the type of thing we could prove false. They are basically expressions of a strong personal viewpoint—a viewpoint that may very well be incorrect, but that's not capable of being proved true or false, one way or the other. Again, looking at the totality of the circumstances of this review, it probably falls closer towards the protected "opinion" end of the spectrum.

Attorney Goodman:

Geez. Well, listen, I appreciate your advice, but I'm still willing to take a shot. I mean, the worst that happens is I lose at summary judgment, right? And it's a tort case, so there won't be any fees even if I lose. I'm willing to take the chance just to make sure this scumbag has to defend his actions.

Attorney Slapp:

Not so fast. This is where the procedural part of the analysis becomes really important. Oregon is one of the states that has passed what's called an "anti-SLAPP" law that probably applies to this type of case. In fact, in the *Neumann v. Liles* case I mentioned earlier, the Oregon Supreme Court affirmed the trial court's granting of an anti-SLAPP motion in a case against someone who left a really nasty online review of a wedding venue.

Attorney Goodman:

A what motion?

Attorney Slapp:

Anti-SLAPP, meaning "strategic litigation against public participation." Basically, it creates a new type of dispositive motion that's available to defendants—like your former client—who are sued for conduct—like free speech—that is in some way constitutionally protected.

Attorney Goodman:

Ok, but why should that worry us? I mean, we file our case, we get discovery, and we put the burden on him to try to win judgment as a matter of law, right?

Attorney Slapp:

Wrong, actually. As soon as a defendant files an anti-SLAPP motion, discovery is stayed—you can only get discovery with leave of the court. And, assuming the defendant can make some showing that your claim arises out of protected activity—which this defendant can probably do—the burden will shift to you to present "substantial evidence" that shows you have a probability of winning.

Attorney Goodman:

That seems harsh.

Attorney Slapp:

Well, it is harsh, but the drafters would say that's because it's a procedure designed to protect your constitutional rights.

Attorney Goodman:

Ok, but let's get creative—how about filing a claim other than defamation? Couldn't we sue for intentional interference with economic relations, for example? He's interfering with my business through improper means—his false statements.

Attorney Slapp:

The anti-SLAPP statute doesn't just apply to defamation claims; it applies to all kinds of claims, and probably applies to a claim for intentional interference in this context as well.

And get this—I haven't even mentioned the harshest part: if the defendant wins his anti-SLAPP motion, you have to pay his fees.

Attorney Goodman:

Come on, you and I know Oregon courts don't like awarding fees. Doesn't the court have some discretion?

Attorney Slapp:

No, it's mandatory—the statute says the court "shall" award fees.
So, while I can't tell you not to file a claim, I think your chances of prevailing are really low. The conduct here, however offensive, is almost certainly protected by the First Amendment. And that means that, if you sue him, your former client can file an anti-SLAPP motion at the outset of the case, get it dismissed, and recover his fees.

Attorney Goodman:

Ok. I guess I really need to think this over. Thanks for your counsel, Mr. Slapp.

Screen shows multiple choice question:

What should Saul Goodman do next?

A. Immediately file a defamation action against his former client?
B. Call OSB Counsel?
C. Call PLF Practice Management Counsel?
D. Move on to his next case?

Outline of Presentation

Judge – Welcome and opening remarks. He will lay out for the audience what they will see during the presentation. (2 minutes)

Launch into the drama – all 5 scenes in a row (takes about 15 minutes)

Lawyer advising Goodman recommends that he contact the Bar and PLF

Judge helps transition to the next segment of the presentation – What can/should Saul Goodman do next? Multiple choice questions on the scene. (2 minutes)

Marc and Sheila (Each have about 10-12 minutes for a brief presentation)

Questions – prepared questions to pose

1. What can Goodman do about the review posted by the client?

2. What can Goodman do about the review posted by the Girlfriend?

3. How does the analysis change if there is dispute with your client over fees? Can you defend yourself online if there is a pending malpractice suite/claim against you?

4. What if there is a Bar complaint of PLF claim?

5. What are the risks to Goodman if he does decide to sue?

6. Is there anything a prudent lawyer can do to prevent these issues from arising? For example, can you put something in your fee agreement? Rules of Professional Conflict?

IN THE SUPREME COURT OF THE
STATE OF OREGON

Carol C. NEUMANN
and Dancing Deer Mountain, LLC,
an Oregon domestic limited liability company,
Respondents on Review,

v.

Christopher LILES,
Petitioner on Review.

(CC 121103711; CA A149982; SC S062575)

On review from the Court of Appeals.*

Argued and submitted May 12, 2015.

Linda K. Williams, Portland, argued the cause and filed the brief for petitioner on review.

No appearance *contra.*

Derek D. Green, Davis Wright Tremaine LLP, Portland, filed the brief for *amici curiae* Reporters Committee for Freedom of the Press, City of Roses Newspaper Company (dba Willamette Week), Gannett Co., Inc., Meredith Corporation (dba KPTV), Oregon Association of Broadcasters, Oregon Newspaper Publishers Association, Oregon Public Broadcasting, Oregonian Publishing Company LLC (dba The Oregonian Media Group), and Western Communications, Inc. (dba The Bulletin of Bend).

Daniel W. Meek, Portland, filed the brief for *amicus curiae* Policy Initiatives Group.

Before Balmer, Chief Justice, and Kistler, Walters, Landau, Brewer, and Baldwin, Justices, and Linder, Senior Judge.**

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* Appeal from Lane County Circuit Court, Charles D. Carlson, Judge. 261 Or App 567, 323 P3d 521 (2014)

** Nakamoto, J., did not participate in the consideration or decision of this case.

BALDWIN, J.

The decision of the Court of Appeals is reversed, and the case is remanded to the Court of Appeals. The decision of the circuit court that dismissed plaintiffs' defamation claim is affirmed.

BALDWIN, J.

This case requires us to decide whether a defamatory statement made in an online business review is entitled to protection under the First Amendment. To make that decision, we follow the test developed by the Ninth Circuit in *Unelko Corp. v. Rooney*, 912 F2d 1049 (9th Cir 1990), *cert den*, 499 US 961 (1991), to determine whether a reasonable factfinder could conclude that an allegedly defamatory statement touching on a matter of public concern implies an assertion of objective fact and is therefore not constitutionally protected. Applying that test, we conclude that the online review at issue in this case is entitled to First Amendment protection. We therefore reverse the decision of the Court of Appeals to the contrary and remand the case to the Court of Appeals to resolve a disputed attorney fee issue.

I. BACKGROUND

Plaintiff Carol Neumann (Neumann) is an owner of plaintiff Dancing Deer Mountain, LLC (Dancing Deer Mountain), a business that arranges and performs wedding events at a property owned by Neumann. Defendant, Christopher Liles (Liles), was a wedding guest who attended a wedding and reception held on Neumann's property in June 2010. Two days after those events, Liles posted a negative review about Neumann and her business on Google Reviews, a publicly accessible website where individuals may post comments about services or products they have received.

The review was entitled, "Disaster!!!!! Find a different wedding venue," and stated:

> "There are many other great places to get married, this is not that place! The worst wedding experience of my life! The location is beautiful the problem is the owners. Carol (female owner) is two faced, crooked, and was rude to multiple guest[s]. I was only happy with one thing. It was a beautiful wedding, when it wasn't raining and Carol and Tim stayed away. The owners did not make the rules clear to the people helping with set up even when they saw something they didn't like they waited until the day of the wedding to bring it up. They also changed the rules as they saw fit. We were told we had to leave at 9pm, but at 8:15 they

> started telling the guests that they had to leave immediately. The 'bridal suite' was a tool shed that was painted pretty, but a shed all the same. In my opinion [s]he will find a why [*sic*] to keep your $500 deposit, and will try to make you pay even more."

A few months later, Neumann and Dancing Deer Mountain filed a defamation claim for damages against Liles.[1] Liles then filed a special motion to strike under ORS 31.150, Oregon's Anti-Strategic Lawsuits Against Public Participation (anti-SLAPP) statute.[2] Specifically, Liles based his motion on provisions of ORS 31.150(2) relating to cases involving statements presented "in a place open to the public or a public forum in connection with an issue of public interest" or "other conduct in furtherance of *** the constitutional right of free speech in connection with a public issue or an issue of public interest." ORS 31.150(2)(c), (d). In response, Neumann and Dancing Deer Mountain submitted evidence to support a *prima facie* case of defamation, as required by ORS 31.150(3).

After a hearing, the trial court allowed Liles's motion to strike and entered a judgment of dismissal of Neumann's defamation claim without prejudice. ORS 31.150(1) (so providing when trial court grants special motion to strike). Neumann appealed, assigning error to the trial court's ruling.

The Court of Appeals reversed the judgment, reasoning that "the evidence submitted by plaintiffs, if credited, would permit a reasonable factfinder to rule in Neumann's favor on the defamation claim, and the evidence submitted by [Liles] does not defeat Neumann's claim as a matter of law." Neumann v. Liles, 261 Or App 567, 575, 323 P3d 521 (2014). The court focused its analysis on whether Liles's statements were capable of a defamatory meaning—that is, whether his statements falsely ascribed to Neumann conduct incompatible with the proper conduct of a wedding venue operator. *Id.*

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[1] Although Neumann and Dancing Deer Mountain asserted additional claims against Liles, only the trial court's dismissal of the defamation claim was challenged by Neumann and Dancing Deer Mountain on appeal. *See* Neumann v. Liles, 261 Or App 567, 580 n 9, 323 P3d 521 (2014) (so explaining).

[2] ORS 31.150 to 31.155 are set out in the appendix of this opinion.

at 576-77. The court concluded that several of Liles's statements, such as his statements that Neumann was "rude to multiple guest[s]," that she is "crooked," and that she "will find a [way] to keep your $500 deposit," could reasonably be interpreted as defamatory. *Id.* The court therefore concluded that the trial court had erred when it struck Neumann's defamation claim. *Id.*[3]

In so concluding, the Court of Appeals rejected Liles's arguments that "his statements were nonactionable opinion" and that "his statements are not defamatory because, in his view, the context of the statements demonstrates that they are figurative, rhetorical, or hyperbolic." *Id.* at 578. In the court's view, Liles's statements were not protected as opinion, because they "reasonably could be understood to state facts or imply the existence of undisclosed defamatory facts." *Id.* The court also disagreed with Liles that his statements were, as a whole, hyperbolic. Rather, the court concluded that Liles had included various factual details in his review and that a reasonable reader therefore would not interpret his statements to be "mere hyperbole." *Id.* at 578-79.

We allowed Liles's petition for review to determine how an actionable statement of fact is distinguished from a constitutionally protected expression of opinion in a defamation claim and whether the context in which a statement is made affects that analysis.

II. ANALYSIS

On review, Liles argues that his online review of Neumann's venue is entitled to protection under the First Amendment.[4] Specifically, he contends that his review, when read in the context of informal online communication, is properly understood as expressing merely his subjective opinion about the venue that he was reviewing. He also

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[3] As we will later explain, based on its disposition, the court did not reach Neumann's further argument that her claim was not subject to the provisions of Oregon's anti-SLAPP statute, ORS 31.150 - 31.155. Nor did the court resolve Liles's cross-assignment of error relating to the amount of attorney fees awarded by the trial court under that statute.

[4] The parties have not raised the issue of whether Liles's statements are protected under Article I, section 8, of the Oregon Constitution. We therefore do not express an opinion on that issue.

contends that the statements in his review are not provable as true or false. Regarding the words that the Court of Appeals concluded to be capable of defamatory meaning, such as "rude" and "crooked," he argues that those words are too vague to imply an assertion of fact.[5]

Although our determination of the legal sufficiency of Neumann's defamation claim hinges on whether Liles's statements are protected under the First Amendment, we begin our analysis by examining the common-law origins of the tort.

A. *Common Law of Defamation*

This court has recognized a common-law action for defamation for injury to reputation for over 150 years. *See Hurd v. Moore*, 2 Or 85 (1863) (false statement by defendant that plaintiff had burned defendant's house). The roots of that tort run even deeper: the English common law had recognized the tort of defamation long before the formation of the American republic. *See Milkovich v. Lorain Journal Co.*, 497 US 1, 11, 110 S Ct 2695, 111 L Ed 2d 1 (1990) ("Since the latter half of the 16th century, the common law has afforded a cause of action for damage to a person's reputation by the publication of false and defamatory statements.") (citing L. Eldredge, *Law of Defamation* 5 (1978)).

To establish a claim for defamation, a plaintiff must show that a defendant made a defamatory statement about the plaintiff and published the statement to a third party. *Wallulis v. Dymowski*, 323 Or 337, 342-43, 918 P2d 755 (1996) (so holding). A defamatory statement is one that would subject the plaintiff "to hatred, contempt or ridicule *** [or] tend to diminish the esteem, respect, goodwill or confidence in which [the plaintiff] is held or to excite adverse, derogatory or unpleasant feelings or opinions against [the plaintiff]." *Farnsworth v. Hyde*, 266 Or 236, 238, 512 P2d 1003 (1973) (internal quotation marks omitted). In the professional context, a statement is defamatory if it falsely

[5] Liles also argues that Neumann is a limited purpose public figure and was therefore required under the First Amendment to present evidence of actual malice. Because we conclude, as discussed below, that Neumann's claim is not legally sufficient, we do not address that argument.

"ascribes to another conduct, characteristics or a condition incompatible with the proper conduct of his lawful business, trade, [or] profession." *Brown v. Gatti*, 341 Or 452, 458, 145 P3d 130 (2006) (internal quotation marks omitted).

Some defamatory statements are actionable *per se*—that is, without proof of pecuniary loss or special harm. Libel, that is, defamation by written or printed words, is actionable *per se*. *Hinkle v. Alexander*, 244 Or 271, 277, 417 P2d 586 (1966) (on rehearing). Slander, which is defamation by spoken words, also may be actionable *per se* under certain circumstances. For instance, spoken words that injure a plaintiff in his or her profession or trade may constitute slander *per se*. *See, e.g.*, *Wheeler v. Green*, 286 Or 99, 124, 593 P2d 777 (1979) (where defendant accuses plaintiff of misconduct or dishonesty in performance of plaintiff's profession or employment, matter is "actionable without proof of specific harm"); *see also Barnett v. Phelps*, 97 Or 242, 244-45, 191 P 502 (1920) (discussing classes of spoken words that are actionable *per se*).

At early common law, defamatory statements were generally deemed actionable regardless of whether they were statements of fact or expressions of opinion. "However, due to concerns that unduly burdensome defamation laws could stifle valuable public debate, the privilege of 'fair comment' was incorporated into the common law as an affirmative defense to an action for defamation." *Milkovich*, 497 US at 13. Under the "fair comment" privilege, a statement was protected if "it concerned a matter of public concern, was upon true or privileged facts, represented the actual opinion of the speaker, and was not made solely for the purpose of causing harm." *Id.* at 13-14; *see Bank of Oregon v. Independent News,* 298 Or 434, 437, 693 P2d 35, *cert den*, 474 US 826 (1985) (under qualified privilege of "fair comment and criticism," a defendant is not liable if publication was made in good faith and without malice); *Peck v. Coos Bay Times Pub. Co. et al.*, 122 Or 408, 421, 259 P 307 (1927) (same). The "fair comment" privilege thus served "to strike the appropriate balance between the need for vigorous public discourse and the need to redress injury to citizens wrought by invidious or irresponsible speech." *Milkovich*, 497 US at 14.

B. *First Amendment Limitations*

Since the development of the common-law privilege of "fair comment," the United States Supreme Court has determined that the First Amendment places limits on the application of the state law of defamation. *See Milkovich*, 497 US at 13-17 (summarizing common-law origins and First Amendment limitations on state defamation law). The protection afforded under the First Amendment to statements of opinion on matters of public concern reached what one court called its "high-water mark" in *Gertz v. Robert Welch, Inc.*, 418 US 323, 94 S Ct 2997, 41 L Ed 2d 789 (1974). *Keohane v. Stewart*, 882 P2d 1293, 1298 (Colo 1994), *cert den*, 513 US 1127 (1995) (so characterizing the Supreme Court's opinion in *Gertz*). In *Gertz*, the United States Supreme Court stated in *dictum*:

> "Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact."

418 US at 339-40 (footnote omitted). A majority of state and federal courts interpreted *Gertz* to have announced that expressions of opinion were absolutely privileged under the First Amendment. *See, e.g.*, *Yetman v. English*, 168 Ariz 71, 75, 811 P2d 323, 327 (1991) (acknowledging considerable body of federal law, emanating from *Gertz dictum*, "holding that the expression of opinion is absolutely privileged under the first amendment"); *Keohane*, 882 P2d at 1298 ("The *Gertz* dicta was read by many courts to establish that statements of opinion are not actionable."); *Paint Brush Corp. v. Neu*, 1999 SD 120, ¶ 42, 599 NW2d 384, 395 (1999) ("Most courts, including ours, apparently understood the *Gertz* passage to mean 'opinions' (not just ideas) are absolutely protected by the First Amendment of the United States Constitution."); *see also* Rodney A. Smolla, *Law of Defamation* § 6:11, 6-21 (2d ed 1999) (noting that *Gertz dictum* had appeared to impose "upon both state and federal courts the duty, as a matter of constitutional obligation, to distinguish facts from opinions in order to provide opinions with the requisite absolute First Amendment protection").

The Supreme Court in *Milkovich*, however, dispelled the notion that it had announced a "wholesale defamation exemption for anything that might be labeled 'opinion.'" 497 US at 18. In that case, a newspaper published a column that implied that Milkovich, a high school wrestling coach, had lied under oath in a judicial proceeding after his team was involved in an altercation at a wrestling match and the coach's team was placed on probation. *Id.* at 3-5. Milkovich filed a libel action against the newspaper and a reporter, alleging that the defendants had accused him of committing the crime of perjury, thereby damaging him in his occupation of coach and teacher. *Id.* at 6-7.

The Supreme Court rejected the defendants' argument that all defamatory statements that are categorized as "opinion" as opposed to "fact" enjoy blanket First Amendment protection. *Id.* at 17-18. The Court clarified that the oft-cited passage in *Gertz* had been "merely a reiteration of Justice Holmes' classic 'marketplace of ideas' concept." *Id.* at 18 (citing *Abrams v. United States*, 250 US 616, 630, 40 S Ct 17, 63 L Ed 1173 (1919) (Holmes, J., dissenting) ("[T]he ultimate good desired is better reached by free trade in ideas—*** the best test of truth is the power of the thought to get itself accepted in the competition of the market[.]")). Thus, *Gertz* had not created an additional separate constitutional privilege for anything that might be labeled an "opinion." In the Court's view, such an interpretation of *Gertz* would "ignore the fact that expressions of 'opinion' may often imply an assertion of objective fact." *Id.*

Ultimately, the Court refused to create a separate constitutional privilege for "opinion," concluding instead that existing constitutional doctrine adequately protected the "uninhibited, robust, and wide-open" debate on public issues. *Id.* at 20-21. Under that existing doctrine, full constitutional protection is afforded to statements regarding matters of public concern that are not sufficiently factual to be capable of being proved false and statements that cannot reasonably be interpreted as stating actual facts. *Id.* at 19-20 (citing *Philadelphia Newspapers, Inc. v. Hepps*, 475 US 767, 106 S Ct 1558, 89 L Ed 2d 783 (1986), and *Hustler Magazine, Inc. v. Falwell*, 485 US 46, 108 S Ct 876, 99 L Ed 2d 41

(1988)). The dispositive question in determining whether a defamatory statement is constitutionally protected, according to the Court, is whether a reasonable factfinder could conclude that the statement implies an assertion of objective fact about the plaintiff. *Id.* at 21.

Applying that rule to the facts of *Milkovich*, the Court determined that a reasonable factfinder could conclude that the statements in the newspaper column implied a factual assertion that Milkovich had perjured himself in a judicial proceeding. *Id.* The Court considered various factors. First, the Court noted that the column had not used "the sort of loose, figurative, or hyperbolic language" that would negate the impression that the writer was seriously maintaining that Milkovich had committed the crime of perjury. *Id.* Second, the Court concluded the "general tenor of the article" did not negate that impression. *Id.* Third, in the Court's view, the accusation that Milkovich had committed perjury was "sufficiently factual to be susceptible of being proved true or false." *Id.* Accordingly, the Court held that the column did not enjoy constitutional protection.

The analytical response of both lower federal courts and state courts to *Milkovich* has been varied. *See* David A. Elder, *Defamation: A Lawyer's Guide* § 8:15 (2003) (noting that courts have interpreted *Milkovich* in "widely varying ways," from viewing *Milkovich* as not changing the law but rather merely ensconcing pre-*Milkovich* opinion-fact criteria to viewing *Milkovich* as effectively overruling existing doctrine). Many courts have concluded that, although the Court in *Milkovich* rejected a strict dichotomy between fact and opinion, the Court left the constitutional framework otherwise intact. Those courts generally have continued to apply the factors that they had developed before *Milkovich* for identifying constitutionally protected expressions of opinion. *See, e.g.*, *Yates v. Iowa West Racing Ass'n*, 721 NW2d 762, 771 (Iowa 2006) (concluding that four-factor test developed before *Milkovich* was still good law and applying that test). Other courts, however, have interpreted *Milkovich* as rendering obsolete the various tests that courts had adopted after *Gertz* for distinguishing fact from opinion. *See, e.g.*, *Bentley v. Bunton*, 94 SW3d 561, 580-81 (Tex

2002) (concluding that *Milkovich* analysis supplants tests previously used by lower courts for distinguishing fact from opinion). Still other courts have looked to their state constitutions to determine whether liability may be imposed for statements of opinion. *See, e.g.*, *Vail v. The Plain Dealer Publ'g Co.*, 72 Ohio St 3d 279, 281, 649 NE2d 182, 185 (Ohio 1995), *cert den*, 516 US 1043 (1996) (state constitution provides separate and independent guarantee of protection for opinion, ancillary to freedom of press).

This court has had only one prior occasion to interpret and apply *Milkovich*, in Reesman v. Highfill, 327 Or 597, 965 P2d 1030 (1998). In that case, an air-show pilot brought a defamation claim against members of a citizens' committee that opposed an airport expansion. *Id.* at 599. The defendants had published and distributed a flyer to residents of towns near the airport; that flyer included statements about the plaintiff and attributed certain statements to him. *Id.* at 600-01. This court rejected the plaintiff's argument that those statements had defamatory implications. *Id.* at 604-06. Additionally, the court concluded that two of those statements were constitutionally protected expressions of opinion: "Such statements, which cannot be interpreted reasonably as stating actual facts, are not actionable because they are constitutionally protected." *Id.* at 606 (citing *Milkovich*, 497 US at 20, for proposition that statement of opinion relating to matters of public concern that does not contain a provably false factual connotation will receive full constitutional protection). The court in *Reesman* did not, however, analyze *Milkovich* in any detail.

This case therefore presents the first occasion for this court to announce a framework for analyzing whether a defamatory statement is entitled to First Amendment protection.[6] In the absence of existing law from this court, we look to the approaches of other jurisdictions for guidance. Of those, we find particularly persuasive the approach articulated by the Ninth Circuit.

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[6] Ordinarily, we would look to our state constitution before addressing any federal constitutional issues. As noted, however, the parties to this case have argued this issue solely under the First Amendment and have not invoked Article I, section 8, of the Oregon Constitution.

In *Unelko*, 912 F2d 1049, decided shortly after *Milkovich*, the Ninth Circuit addressed whether certain statements that Andy Rooney had made during two broadcasts of "60 Minutes" were protected as opinion under the First Amendment. The court concluded that, after *Milkovich*, "the threshold question in defamation suits is not whether a statement might be labeled 'opinion,' but rather whether a reasonable factfinder could conclude that the statement impl[ies] an assertion of objective fact." *Id.* at 1053 (internal quotation marks omitted). To resolve that threshold question, the Ninth Circuit drew from the factors that the Supreme Court had considered in *Milkovich* and announced a three-part test: (1) whether the general tenor of the entire work negates the impression that the defendant was asserting an objective fact; (2) whether the defendant used figurative or hyperbolic language that negates that impression; and (3) whether the statement in question is susceptible of being proved true or false. *Id.* at 1053.

Since *Unelko*, the Ninth Circuit has consistently used that three-part inquiry to determine whether a reasonable factfinder could conclude that a statement implies an assertion of objective fact. *E.g.*, *Obsidian Finance Group, LLC v. Cox*, 740 F3d 1284, 1293 (9th Cir 2011), *cert den*, ___ US ___, 134 S Ct 2680 (2014); *Gardner v. Martino*, 563 F3d 981, 986-87 (9th Cir 2009); *Partington v. Bugliosi*, 56 F3d 1147, 1152-53 (9th Cir 1995); *see also Knievel v. ESPN*, 393 F3d 1068, 1074-75 (9th Cir 2005) (articulating court's three-part "totality of the circumstances" test as examining (1) "the statement in its broad context, which includes the general tenor of the entire work, the subject of the statements, the setting, and the format of the work"; (2) "the specific context and content of the statements, analyzing the extent of figurative or hyperbolic language used and the reasonable expectations of the audience in that particular situation"; and (3) "whether the statement itself is sufficiently factual to be susceptible of being proved true or false"); *Underwager v. Channel 9 Australia*, 69 F3d 361, 366 (9th Cir 1995) (same).

Several other courts also have expressly adopted the Ninth Circuit's test. *See, e.g.*, *Adelson v. Harris*, 973 F Supp 2d 467, 488-89 (SDNY 2013) (applying Ninth Circuit's

three-part test, noting that test, "while not binding on this court, is instructive"); *Dodson v. Dicker*, 306 Ark 108, 111, 812 SW2d 97, 98 (1991) (concluding that "the Ninth Circuit's method of analysis is a reasonable extension of the *Milkovich* doctrine" and following that method); *Gold v. Harrison*, 88 Haw 94, 101, 962 P2d 353, 360 (1998), *cert den*, 526 US 1018 (1999) (adopting "three-part test as set forth by the Ninth Circuit to determine whether a statement is false and defamatory" under First Amendment and equivalent provision of state constitution); *Marchant Inv. & Mgmt. Co. v. St. Anthony West Neighborhood Org.*, 694 NW2d 92, 96 (Minn Ct App 2005) (finding federal, post-*Milkovich* considerations instructive and applying them to determine whether defendant's statements constitute defamation; citing Ninth Circuit's decision in *Partington*, 56 F3d at 1153); *Moats v. Republican Party of Nebraska*, 281 Neb 411, 425-26, 796 NW2d 584, 596, *cert den*, ___ US ___, 132 S Ct 251 (2011) (applying three-part test to determine whether statement implied false assertion of fact or protected opinion; citing Ninth Circuit's decision in *Gardner*, 563 F3d at 987).

We agree with those courts that have found the Ninth Circuit's three-part inquiry to be a sound approach for determining whether a statement is entitled to First Amendment protection. The Ninth Circuit's test appropriately considers the totality of the relevant circumstances, including the context in which particular statements were made and the verifiability of those statements. The Ninth Circuit's test is also a reasonable interpretation of *Milkovich*. It explicitly incorporates the factors that the Supreme Court itself considered in deciding *Milkovich*—*i.e.*, the general tenor of a defendant's publication, whether the publication uses figurative or hyperbolic language, and whether the publication is susceptible of being proved true or false. *See Milkovich*, 497 US at 21-22 (applying those factors). Accordingly, we follow the Ninth Circuit's three-part framework for whether a reasonable factfinder could conclude that a given statement implies a factual assertion.

In summary, to determine whether a defamatory statement is protected under the First Amendment, the first question is whether the statement involves a matter of public concern. If it does, then the dispositive question

is whether a reasonable factfinder could conclude that the statement implies an assertion of objective fact. To answer that question, we adopt the following three-part inquiry: (1) whether the general tenor of the entire publication negates the impression that the defendant was asserting an objective fact; (2) whether the defendant used figurative or hyperbolic language that negates that impression; and (3) whether the statement in question is susceptible of being proved true or false. Under that framework, we do not consider the defendant's words in isolation. Rather, we must consider "the work as a whole, the specific context in which the statements were made, and the statements themselves to determine whether a reasonable factfinder could conclude that the statements imply a false assertion of objective fact and therefore fall outside the protection of the First Amendment." *Partington*, 56 F3d at 1153.

C. *Application of First Amendment Limitations*

Before we apply that test to the facts of this case, we repeat, for convenience, Liles's review of Dancing Deer Mountain that he posted on Google.com:

> "Disaster!!!!! Find a different wedding venue
>
> "There are many other great places to get married, this is not that place! The worst wedding experience of my life! The location is beautiful the problem is the owners. Carol (female owner) is two faced, crooked, and was rude to multiple guest[s]. I was only happy with one thing. It was a beautiful wedding, when it wasn't raining and Carol and Tim stayed away. The owners did not make the rules clear to the people helping with set up even when they saw something they didn't like they waited until the day of the wedding to bring it up. They also changed the rules as they saw fit. We were told we had to leave at 9pm, but at 8:15 they started telling the guests that they had to leave immediately. The 'bridal suite' was a tool shed that was painted pretty, but a shed all the same. In my opinion [s]he will find a why [*sic*] to keep your $500 deposit, and will try to make you pay even more."

Initially, we conclude that, if false, several of Liles's statements are capable of a defamatory meaning. Throughout his review, Liles ascribed to Neumann conduct that is incompatible with the proper conduct of a wedding venue

operator and, as the Court of Appeals noted, "inconsistent with a positive wedding experience." *Neumann*, 261 Or App at 577. As a result, a reasonable factfinder could conclude that Liles's statements were defamatory if he or she found that the statements were false. *See Brown*, 341 Or at 458 (statement is defamatory in professional context if it falsely ascribes to the plaintiff conduct that is incompatible with proper conduct of her lawful business). Moreover, because, if false, Liles's defamatory statements were written and published—and therefore libelous—they are actionable *per se*. *See Hinkle*, 244 Or at 277 (libel is actionable *per se*). The question remains, however, whether they are nevertheless protected under the First Amendment.

To resolve that question, we must first determine, by examining the content, form, and context of Liles's statements, whether those statements involve matters of public concern. *Dun & Bradstreet, Inc. v. Greenmoss Builders*, 472 US 749, 761, 105 S Ct 2939, 86 L Ed 2d 593 (1985) (whether statement addresses matter of public concern must be determined by statement's content, form, and context, as revealed by whole record). Neumann has not disputed that Liles's statements involve matters of public concern, and we readily conclude that they do. Liles's review was posted on a publicly accessible website, and the content of his review related to matters of general interest to the public, particularly those members of the public who are in the market for a wedding venue. *See Unelko*, 912 F2d at 1056 (Andy Rooney's statement on "60 Minutes" that a consumer product "didn't work" involved matter of public concern, because it "was of general interest and was made available to the general public").

Next, we must determine whether a reasonable factfinder could interpret Liles's statements as implying assertions of objective fact. Applying the three-part inquiry that we articulated above, we first consider whether the general tenor of the entire work negates the impression that Liles was asserting objective facts about Neumann. From the outset, it is apparent that the review is describing Liles's personal view of Neumann's wedding venue, calling it a "Disaster!!!!!" The general tenor of the piece, beginning with the word "Disaster," is that, in Liles's subjective opinion,

the services were grossly inadequate and that the business was poorly operated. However, read independently, two sentences in the review could create the impression that Liles was asserting an objective fact: "Carol (female owner) is two faced, crooked, and was rude to multiple guest[s]. *** In my opinion [s]he will find a [way] to keep your $500 deposit, and will try to make you pay even more." Standing alone, those statements could create the impression that Liles was asserting the fact that Neumann had wrongfully kept a deposit that she was not entitled to keep. In the context of the entire review, however, those sentences do not leave such an impression. Rather, the review as a whole reveals that Liles was an attendee at the wedding in question and suggests that he did not himself purchase wedding services from Neumann. The general tenor of the review thus reflects Liles's negative personal and subjective impressions and reactions as a guest at the venue and negates the impression that Liles was asserting objective facts.

We next consider whether Liles used figurative or hyperbolic language that negates the impression that he was asserting objective facts. Although the general tenor of the review reveals its hyperbolic nature more clearly than do the individual statements contained therein, several statements can be characterized as hyperbolic. In particular, the title of the review—which starts with the word "Disaster" and is followed by a histrionic series of exclamation marks—is hyperbolic and sets the tone for the review. The review also includes the exaggerative statements that this was "The worst wedding experience of [Liles's] life!" and that Liles was "only happy with one thing" about the wedding. Such hyperbolic expressions further negate any impression that Liles was asserting objective facts.

Finally, we consider whether Liles's review is susceptible of being proved true or false. As discussed, Liles's statements generally reflect a strong personal viewpoint as a guest at the wedding venue, which renders them not susceptible of being proved true or false. Again, the sentences quoted above referring to Neumann as "crooked" and stating that, "[i]n my opinion [s]he will find a [way] to keep your $500 deposit, and will try to make you pay even more" could,

standing alone, create the impression that Liles was asserting facts about Neumann. However, viewed in the context of the remainder of the review, those statements are not provably false. The general reference to Neumann as "crooked" is not a verifiable accusation that Neumann committed a specific crime. Moreover, in light of the hyperbolic tenor of the review, the use of the word "crooked" does not suggest that Liles was seriously maintaining that Neumann had, in fact, committed a crime. Similarly, Liles's statement that "[i]n my opinion [Neumann] will find a [way] to keep your $500 deposit, and will try to make you pay even more" is not susceptible of being proved true or false. That statement is explicitly prefaced with the words, "In my opinion"—thereby alerting the reader to the fact that what follows is a subjective viewpoint. Of course, those words alone will not insulate an otherwise factual assertion from liability. *See Milkovich*, 497 US at 19 (simply couching statements in terms of opinion does not dispel their defamatory implications). However, given that Liles—as a mere guest at the wedding—presumably did not pay the deposit for the wedding involved in this case, his speculation that Neumann would try to keep a couple's deposit is not susceptible of being proved true or false.

Based on the foregoing factors, we conclude that a reasonable factfinder could not conclude that Liles's review implies an assertion of objective fact. Rather, his review is an expression of opinion on matters of public concern that is protected under the First Amendment. We therefore further conclude that the trial court did not err in dismissing Neumann's claim, and we reverse the Court of Appeals determination to the contrary.

D. *Remaining Attorney Fee Dispute*

As noted, the trial court granted Liles's special motion to strike under the provisions of Oregon's anti-SLAPP statute, ORS 31.150 to 31.155, and entered a judgment of dismissal of Neumann's action without prejudice under ORS 31.150(1). SLAPP, as earlier noted, is an acronym that stands for "strategic lawsuit against public participation." *See generally* George W. Pring, *SLAPPs: Strategic Lawsuits Against Public Participation*, 7 Pace Envtl L Rev 3 (1990).

Oregon's anti-SLAPP statute creates an expedited procedure for dismissal of certain nonmeritorious civil cases without prejudice at the pleading stage. *See* Staten v. Steel, 222 Or App 17, 29, 191 P3d 778 (2008), *rev den*, 345 Or 618 (2009) (purpose of ORS 31.150 is "to provide for the dismissal of claims against persons participating in public issues *** before the defendant is subject to substantial expenses in defending against them"); Horton v. Western Protector Ins. Co., 217 Or App 443, 452, 176 P3d 419 (2008) ("[I]t is apparent that the legislature envisioned a process that would provide an expedited resolution to the litigation that is the subject of ORS 31.150 to 31.155.") (citing legislative history).

On appeal, the Court of Appeals summarized the issues presented as follows:

> "On appeal, plaintiffs assert that the trial court erred in two respects: by concluding that their action was subject to the anti-SLAPP procedures, and by concluding that Neumann had not established a *prima facie* case of defamation. On cross-appeal, defendant contends that the trial court erred by awarding him less than the full amount of attorney fees that he requested."

Neumann, 261 Or App at 572. The court reached only the question of whether Neumann had established a *prima facie* case of defamation, concluding that she had and reversing the trial court on that ground. *Id.* at 575. The court did not resolve the question of whether Neumann's action was of a type subject to the provisions of the anti-SLAPP statute. *Id.* at 573-74. The trial court made an award of attorney fees to Liles under ORS 131.152(3), after Liles prevailed on his special motion to strike. Further, based on its disposition, the court did not reach Liles's cross-appeal challenging the amount of the attorney fee award in his favor and instead vacated that award. *Id.* at 580-81. Ordinarily, having affirmed the trial court's dismissal of Neumann's action, we would not need to determine whether her claim was subject to the anti-SLAPP statute. Because the trial court awarded attorney fees under the anti-SLAPP statute, however, we remand the remaining issues under that statute to the Court of Appeals for decision.

III. CONCLUSION

For the reasons we have explained, we conclude that the trial court did not err in dismissing Neumann's defamation claim, because Liles's statements are entitled to First Amendment protection. We therefore reverse the decision of the Court of Appeals on that issue. We remand to the Court of Appeals to resolve Neumann's argument that her claim is not subject to the provisions of Oregon's anti-SLAPP statute, and to resolve Liles's cross-appeal relating to the amount of attorney fees awarded by the trial court.

The decision of the Court of Appeals is reversed, and the case is remanded to the Court of Appeals. The decision of the circuit court that dismissed plaintiffs' defamation claim is affirmed.

APPENDIX

ORS 31.150 provides:

"(1) A defendant may make a special motion to strike against a claim in a civil action described in subsection (2) of this section. The court shall grant the motion unless the plaintiff establishes in the manner provided by subsection (3) of this section that there is a probability that the plaintiff will prevail on the claim. The special motion to strike shall be treated as a motion to dismiss under ORCP 21 A but shall not be subject to ORCP 21 F. Upon granting the special motion to strike, the court shall enter a judgment of dismissal without prejudice. If the court denies a special motion to strike, the court shall enter a limited judgment denying the motion.

"(2) A special motion to strike may be made under this section against any claim in a civil action that arises out of:

"(a) Any oral statement made, or written statement or other document submitted, in a legislative, executive or judicial proceeding or other proceeding authorized by law;

"(b) Any oral statement made, or written statement or other document submitted, in connection with an issue under consideration or review by a legislative, executive or judicial body or other proceeding authorized by law;

"(c) Any oral statement made, or written statement or other document presented, in a place open to the public or a public forum in connection with an issue of public interest; or

"(d) Any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.

"(3) A defendant making a special motion to strike under the provisions of this section has the initial burden of making a prima facie showing that the claim against which the motion is made arises out of a statement, document or conduct described in subsection (2) of this section. If the

defendant meets this burden, the burden shifts to the plaintiff in the action to establish that there is a probability that the plaintiff will prevail on the claim by presenting substantial evidence to support a prima facie case. If the plaintiff meets this burden, the court shall deny the motion.

"(4) In making a determination under subsection (1) of this section, the court shall consider pleadings and supporting and opposing affidavits stating the facts upon which the liability or defense is based.

"(5) If the court determines that the plaintiff has established a probability that the plaintiff will prevail on the claim:

"(a) The fact that the determination has been made and the substance of the determination may not be admitted in evidence at any later stage of the case; and

"(b) The determination does not affect the burden of proof or standard of proof that is applied in the proceeding."

ORS 31.152 provides:

"(1) A special motion to strike under ORS 31.150 must be filed within 60 days after the service of the complaint or, in the court's discretion, at any later time. A hearing shall be held on the motion not more than 30 days after the filing of the motion unless the docket conditions of the court require a later hearing.

"(2) All discovery in the proceeding shall be stayed upon the filing of a special motion to strike under ORS 31.150. The stay of discovery shall remain in effect until entry of the judgment. The court, on motion and for good cause shown, may order that specified discovery be conducted notwithstanding the stay imposed by this subsection.

"(3) A defendant who prevails on a special motion to strike made under ORS 31.150 shall be awarded reasonable attorney fees and costs. If the court finds that a special motion to strike is frivolous or is solely intended to cause unnecessary delay, the court shall award costs and reasonable attorney fees to a plaintiff who prevails on a special motion to strike.

"(4) The purpose of the procedure established by this section and ORS 31.150 and 31.155 is to provide a defendant with the right to not proceed to trial in cases in which the plaintiff does not meet the burden specified in ORS 31.150 (3). This section and ORS 31.150 and 31.155 are to be liberally construed in favor of the exercise of the rights of expression described in ORS 31.150 (2)."

ORS 31.155 provides:

"(1) ORS 31.150 and 31.152 do not apply to an action brought by the Attorney General, a district attorney, a county counsel or a city attorney acting in an official capacity.

"(2) ORS 31.150 and 31.152 create a procedure for seeking dismissal of claims described in ORS 31.150 (2) and do not affect the substantive law governing those claims."

June 2017 Inn of Court: Articles about Responding to Negative Online Reviews

5 Tips for Small Law Firms to Deal with Negative Online Reviews

Your law firm just received a scathing negative online review. Adrenaline courses through your veins as you contemplate this brazen affront to your integrity.

We've heard all the horror stories of small businesses trying to deal with the consequences of negative online reviews, malicious blog comments and inaccurate reports, which can damage a company's reputation (http://blogs.findlaw.com/strategist/2014/04/reputation- in-the-age-of-jerkcom-revenge-porn-and-yelp.html) and hinder sales for years.

How do you react? Don't panic. Take a deep breath and address the issue.

InternetReputationManagement.com founder and chief SEO strategist Kent Campbell offers the following 5 tips on how to deal with a negative online review:

1. DON'T respond online: It is possible that any additional comments on the review site will just strengthen the link in the eyes of search engines. By defending yourself online, you may be drawing more attention to the negative. While you may be tempted to immediately explain or defend yourself, resist the urge to do so, so you don't unintentionally fan the flames.

2. DON'T file suit or fire off a demand letter: Or at least think about it first. As an attorney, you may file a complaint or send a letter which could find its way online, get indexed on Google, and then pop up as a link in Google's search results -- it can worsen the problem if handled incorrectly.

3. DON'T share the bad news: Business owners usually want to talk about the bad review with their teams, or worse, online, asking "Can you believe this guy?" . . . but Kent advises not to. "It's the opposite of containing the problem. You share the bad news, which is the same as spreading the negative sentiment." Make your best call, but you don't want it to end up on an employee's Facebook page.

4. DO call the reviewer (or reporter) on the phone (if you can get a hold of his number) and speak calmly (http://practice.findlaw.com/practice-guide/how-to-handle-difficult- clients.html). Don't send an email. If you do, the email may be reposted online. Discuss the reviewer's concerns and allow them to feel heard. Many times, people who are upset about a perceived situation simply want to have their grievances heard and addressed.

5. DO try to get the reviewer to retract the comment. If you are able to get a hold of her by phone, offer to fix the problem and see if she's willing to retract the comment once you do. If you're successful, you'll be saving yourself the cost of an internet reputation expert to push the review further down in Google's search results.

By following Mr. Campbell's "do's and don'ts," hopefully you can keep an unpleasant experience from turning into an even bigger headache.

There may, of course, be instances where a reviewer will not respond to calm dialogue or a polite request to resolve the issue. In such situations, pursuing legal options may be unavoidable.

It is important to remember, however, that whatever approach you take in responding to a negative online review, your ethical obligations (http://blogs.findlaw.com/strategist/2013/07/yelp-negative-reviews-require- professionalism-ethics.html) are still paramount. Regardless of how upset your are by the situation, you still have professional responsibilities to maintain.

How to Properly Handle Negative Reviews of your Law Firm Online

Posted on: ***April 26th, 2017*** *by* ***Walker Advertising****. Category: Reviews*

The online reputation of any business in important now more than ever, but especially for law firms because the commitment involved is a big decision. Unlike other products and services, a client is not able to request a return or demand their money back simply because they didn't like the outcome. Any serious prospect will be conducting research about your firm before they decide whether or not to make contact. In order to help them make the decision, your marketing efforts must include encouraging online reviews. Visitors will typically look at your social media profile on sites like Facebook, Yelp, and Google, to read what others have to say about their experiences with your firm.

According to a BrightLocal Consumer Review survey from 2014, 88% of consumers said they trusted online reviews as much as personal recommendations. Eighty-five percent of people read up to 10 online reviews when researching a product or service, and 72% said they were more likely to make a purchase if the product or service had favorable online reviews. Public feedback provides a level of credibility and helps instill trust in a prospect even before they make contact. Therefore, it is important to put resources into the marketing and client service efforts to gain reviews.

Many firms have traditionally been hesitant to focus on reviews due to the possibility of negative feedback. It is best to mentally accept that fact that you *will* get some less than stellar reviews – it's only a matter of time. Satisfied customers don't always find it necessary to review a service because they have gotten exactly what they expected. On the flip side, unhappy clients will go out of their way to write negative feedback. This is natural and once you come to terms with the business reality of not pleasing every client 100%, you can handle the situation in a professional manner and still appeal to your target clients.

How to Handle Negative Reviews of Your Law Firm

It's happened. You've received a negative review, and you're finding it very hard not to panic. Before you do anything rash, here are various ways to combat the feedback in order to minimize the reputational damage of your firm.

- **While it may be tempting to respond to the comment by pointing out everything the client did wrong and revealing specific details about the case – don't!** Not only does it make you seem petty and unprofessional, but also from a marketing perspective, it is possible that additional comments will only strengthen the placement of the comment to the top of search engine results. Don't draw more attention to the matter than necessary.

- **Call the reviewer and address their feedback directly.** Sometimes all it takes is the other person understanding why your team worked in a specific way, focused on one angle versus another, or didn't get the desired results. Allow the client to share how the outcome personally impacted their life and do your best to understand where they are coming from. Offer a fix if there is anything your firm can do to remedy the situation or rework the outcome. Once you have spoken to the person, you may want to add a comment to the review expressing your appreciation that they were open to discussing the matter and you are glad the problem could be resolved in a satisfactory manner.

- **If your call with the reviewer went well, ask them to retract the comment.** It may feel self-serving but it is worth asking because it may save you the cost of having to hire a reputation consultant to push the review further down on search engines.

- If you cannot reach the person on the phone or you are not able to identify the poster, **reply to the comment in a sympathetic and professional tone.** Express your disappointment in their feedback and provide a few suggestions on how to remedy the situation. Show future prospects that you are willing to look beyond the insults for the sake of a client's best interest.

- It's understandable to feel angry about a bad review, **but do not create a big deal around the office.** While you may want to consult with the relevant attorneys to get an accurate idea of what went wrong, making it widespread company business will put a damper on your corporate environment. And you certainly don't want employees, interns, or other clients mentioning it on their social media pages.

- **Request for the negative review to be removed from the page.** Not every outlet will agree, but if you can provide proof that the review constituted harassment, bullying, conflict of interest, or trademark/copyright violations, you have a fair chance of getting it down.

- One of the best things a law firm can do to negate the effects of bad reviews is to **make sure they only make up a small percentage of the total.** Prospects are realistic and know that no law firm will have a perfect record. As long as you have an overwhelming number of glowing reviews, the negative ones will be less relevant. To achieve this, you must set expectations with your clients from early on that you would appreciate a review at the end of your work with them.

- If the individual who leaves the negative review is a former employee, competitor, or someone you once knew personally, **take screenshots of the**

post in case you decide to use it for legal action in the future. If the harassment escalates, you will also have proof of each review.

- **If you are being trolled or bombarded with fake reviews from the same person or group, consider taking legal action such as a temporary restraining order or order of protection.**This usually (but not always) leads to the removal of the malicious posts on third-party websites.

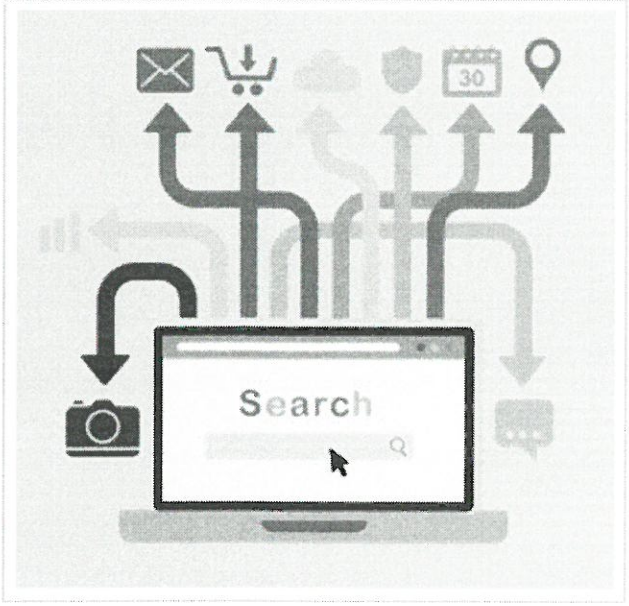
- **You can try to reduce the number of negative reviews by asking clients you know are happy to rate your services.** Whether you've just won their case or gone beyond their expectations for a settlement, seize the opportunity! Although this will not completely stop unsatisfied customers from posting, it contributes to a higher percentage of good reviews versus bad reviews.

VORYS
INTERNET DEFAMATION
Removal Attorneys
A Blog Focused on Strategies for Deleting Damaging Online Content

How to Remove False and Defamatory Google Reviews

By Whitney C. Gibson and Jordan S. Cohen on April 30, 2015

When running a search of a business on Google, chances are that an aggregate star rating (on a 5.0 scale) and a listing of Google Reviews will appear high up in the search results. While Google Reviews may not yet have the widespread appeal of Yelp, they are gaining in popularity and will continue to be prominently displayed in Google.com search results for obvious reasons.



Google Reviews are generally helpful for the countless consumers using Google to browse businesses. But, predictably, the subjects of false and defamatory reviews can be negatively impacted, in particular those companies with fewer total reviews to outweigh the harm of a single false (and lowly-rated) review.

If a business knows the identity of the author of a review, the business can either pursue the author of the review legally, naming that person as a defendant in a lawsuit, or seek to resolve the issue with that person outside the courts. Oftentimes this will involve first issuing a subpoena to Google (discussed below). However, there are instances where a business can identify the author of a review without a subpoena and attempt to resolve the situation offline.

Subpoenaing Google

To publish a Google Review (which, technically is a Google+ Local business listing), one must first register a Google account. The author of a false and defamatory Google Review will likely have created a unique Google account solely to publish the review, or — at minimum — would not have provided his or her real name upon registering the Google account used to publish the review.

Thus, should a business that is the victim of a false and defamatory review plan to subpoena Google for records pertaining to the account holder associated with the post (in particular, requesting information relating to the URL of the Google+ page affiliated with the account the person used), it must anticipate that some of the information might be unreliable.

To register with Google, a registrant must specify a name (both first and last), birth date and gender. But none of this verified. A mobile phone and a secondary email address are both optional.

A subpoenaing party should still ask for all of this potential information, and most certainly the internet protocol (IP) address used to create the account and IP log records. IP addresses can be traced to the issuing internet service providers, or ISPs, which can produce subscriber information in response to a separate subpoena.

In short, even if a person provided a fake name and no legitimate phone number or secondary email address, IP addresses are usually sufficient to help the identify the author of a review.

Defamation Removal from Google

In other situations – including when it has been more difficult to identify the author of a defamatory Google review – it might be necessary to go directly to Google for potential relief. As seen through Google's Legal Removal Requests page, there are two main options:

1. A business can directly reply to a review through a "Google My Business" account.
2. A business can seek to obtain a judgment from a court declaring the statements in a review to be false, and then present the court order to Google with the goal of having the relevant URL(s) de-indexed from Google.

Obviously the former is more efficient and less costly than the latter. But simply replying to a review might lead to a virtual dead end.

Beyond these two methods, Google's business support pages about reviews do offer a couple potential alternatives, albeit far from guarantees of removal.

First, Google states it will "remove reviews that represent personal attacks on others." Thus, in the event of a false review that targets an individual or individuals from a business, this is a possible avenue (although this still will likely require presenting a court order to Google).

Second, a business representative can flag a review as inappropriate and hope that Google will determine there to be a policy violation and, accordingly, remove the review. Factoring in the countless requests Google receives daily, a business probably should not assume that simply flagging a review will lead to defamation removal.

All in all, while there is no "easy button," there are legitimate options for removing false and defamatory Google reviews and resolving issues with disgruntled parties.

For more information, contact Whitney Gibson at 855.542.9192 or wcgibson@vorys.com. Read more about the practice at http://www.defamationremovalattorneys.com and follow @WhitneyCGibson on Twitter.

June 6, 2017

PRACTICAL TIPS ADDRESSING NEGATIVE REVIEWS ON SOCIAL MEDIA WITHOUT RESPONDING DIRECTLY TO THE POST

YELP – CONSIDER WHETHER THERE IS A VIOLATION OF YELP'S CONTENT GUIDELINES. IF THERE IS, YELP IS LIKELY TO REMOVE THE REVIEW

A. CONTENT GUIDELINES

Yelp allows users to contribute different kinds of content, including reviews, photos, videos, events, votes, tips, direct messages, and more. Yelp has put together these general guidelines to help guide contributor posts. If you see a negative review about your or your law firm which violates these guidelines, Yelp may remove the post completely once you point out to them the content violation. Below is how Yelp describes their own content guidelines:

Inappropriate content: Colorful language and imagery is fine, but there's no need for threats, harassment, lewdness, hate speech, and other displays of bigotry.

Conflicts of interest: Your contributions should be unbiased and objective. For example, you shouldn't write reviews of your own business or employer, your friends' or relatives' business, your peers or competitors in your industry, or businesses in your networking group. Business owners should not ask customers to write reviews.

Promotional content: Unless you're using your Business Owners Account to add content to your business's profile page, we generally frown upon promotional content. Let's keep the site useful for consumers and not overrun with commercial noise from every user.

Relevance: Please make sure your contributions are relevant and appropriate to the forum. For example, reviews aren't the place for rants about a business's employment

practices, political ideologies, extraordinary circumstances, or other matters that don't address the core of the consumer experience.

Privacy: Don't publicize other people's private information. Please don't post close-up photos or videos of other patrons without their permission, and please don't post other people's full names unless you're referring to service providers who are commonly identified by or commonly share their own full names.

Intellectual property: Don't swipe content from other sites or users. You're a smart cookie, so write your own reviews and take your own photos and videos, please!

Demanding payment: Beyond simply asking for a refund to remedy a bad experience, you should not use removing or posting your review as a way to extract payment from a business, regardless of whether you've been a customer.
other reasons yelp might remove a review

B. 3 main reasons why YELP might remove a review

1. **The reviewer has an apparent conflict of interest**
   They appear to be a competitor or former employee

   They appear to be affiliated with the business

   They're receiving payment or other incentives for the review

   They're promoting the business or a competitor

2. **The review doesn't focus on the reviewer's own consumer experience**
   It's about someone else's consumer experience

   It's a response to a current event in the news

   It's primarily disputing another Yelper's review

   It's about a different business

   It appears to be plagiarized from another source

3. **The review includes inappropriate material**
   It contains hate speech, lewd commentary, or threatening language
   It contains private information about employees or patrons

****Tip: There are different Yelp sites – both web page based and mobile. See Yelp's support page for how to tackle both.
https://www.yelp-support.com/article/How-do-I-report-a-review?l=en_US

****Tip: You may need to claim your business profile first. People can still post about your business even if you haven't claimed it yet.

AVVO – CONSIDER IF THERE IS A VIOLATION OF AVVO'S COMMUNITY GUIDELINES. IF SO, THEY MAY REMOVE THE REVIEW

Community guidelines

AVVO asks that all participants adhere to the following guidelines:

Inappropriate content: While Avvo maintains a relatively open forum, this is a professional site devoted to professional services. So please, while a certain amount of passion, colorful language and even hyperbole is permissible, do not engage in name-calling, threats, harassment, lewdness, or displays of bigotry.

Reviews: All reviews are moderated by Avvo prior to being posted. Reviews are most useful to others when they include specific details of your experience.

We are looking for your personal experience with the lawyer or law office you hired or had a consultation with. Reviews relating what you've heard from someone else are not helpful. Again, the most valuable information for other consumers is the specifics of what delighted or frustrated you about your experience.

Be factually accurate. While you are free to express your opinion, it is important to not exaggerate or misrepresent your experience. Avvo doesn't verify or investigate reviews, and we don't take sides when it comes to factual disputes – so we expect you to stand behind your review.

Reviews that include accusations of criminal activity or unethical behavior must include some specific factual details. And the more serious the accusation, the more specific you need to be about what was done wrong.

We will not post reviews that appear to have been left for attorneys with whom you did not consult. Although it may be tempting to leave a review for the attorney who was on the "other side" of a matter from you, remember: all attorneys have a duty of zealous advocacy to their clients, and you would want that if they were representing you. Please only review YOUR attorney.

Some situations involve a person paying an attorney's fee without being in a typical attorney-client relationship. Reviews are permitted in such cases where the payor and the client have aligned interests - for example, a parent paying for the representation of a minor child. However, reviews are not permitted where payor and client interests are not aligned, or the attorney is performing the role of a neutral. This most commonly comes up in mediation, arbitration and guardianship matters.

GOOGLE – REMEMBER THAT THERE ARE SEVERAL DIFFERENT PLACES WITHIN GOOGLE WHERE SOMEONE CAN LEAVE A NEGATIVE REVIEW

1. FLAG AND FIX INAPPROPRIATE REVIEWS

Reviews that violate the Google review policies can be removed from Google My Business listings. See the instructions below to either flag an inappropriate review that you find on your listing or fix a review you wrote that's been flagged or removed.

A. Flag a review

If you find a review that you believe violates Google review policies, you can flag it for removal. The review will be assessed and possibly removed from your listing.

Before you begin:

- **Check the policy**. Only flag reviews that violate Google policies. Don't flag reviews that you don't like but are still factually accurate. Google doesn't get involved when merchants and customers disagree about facts, since there's no reliable way to discern who's right about a particular customer experience. Read the policy before flagging a review.
- **Be patient**. It can take several days for a review to be assessed, so don't contact support right after you flag it.

To flag a review for removal:

1. Navigate to Google Maps.
2. Search for your business using its name or address.
3. Select your business from the search results.
4. In the panel on the left, scroll to the "Review summary" section.
5. Under the average rating, click **[number of] reviews**.
6. Scroll to the review you'd like to flag and click the flag icon .
7. Complete the form in the window that appears and click **Submit**.

A. Fix a review that was flagged by someone else

If a review you wrote has been flagged and removed, you can fix it yourself. Edit your review to follow Google review policies—for example, you might remove a phone number or URL from the review. Your review will be automatically republished.

Google uses automated spam detection measures to remove reviews that are probably spam. Although legitimate reviews are sometimes inappropriately

removed, these spam prevention measures help improve people's experiences on Google by ensuring that the reviews they see are authentic, relevant, and useful.

THERE ARE PRIVATE COMPANIES THAT CAN HELP

We are lawyers – not IT professionals. Ask for help if you or your firm needs assistance managing your online social media presences.

www.themodernfirm.com

www.reputationmanagement.com

FORMAL OPINION NO 2011-185

Withdrawal from Litigation: Client Confidences

Facts:

During litigation, Lawyer and Client have a dispute concerning the representation. Lawyer and Client cannot resolve the dispute and Lawyer files a motion to withdraw in which Lawyer wishes to state one of the following:

1. My client will not listen to my advice;
2. My client will not cooperate with me;
3. My client has not paid my bills in a timely fashion; or
4. My client has been untimely and uncooperative in making discovery responses during the course of this matter.

Question:

May Lawyer choose unilaterally to provide the court any of the client information noted above in the motion to withdraw?

Conclusion:

No, qualified.

Discussion:

Oregon RPC 1.0(f) provides:

> "Information relating to the representation of a client" denotes both 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 would be likely to be detrimental to the client.

Oregon RPC 1.6(a) provides:

> A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the

> disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

Oregon RPC 1.6(b) provides, in part:

> A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
>
> . . . .
>
> (4) 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;
>
> (5) to comply with other law, court order, or as permitted by these Rules.

Lawyer's obligation not to reveal information relating to the representation of a client continues even when moving to withdraw from representing Client. *See* Oregon RPC 1.6(a). To the extent the withdrawal is based on "information relating to the representation of a client," the Lawyer may not reveal the basis for the withdrawal to the court unless disclosure is permitted by one of the narrow exceptions in Oregon RPC 1.6(b).[1]

Depending upon the specific factual circumstances involved, the four statements noted above seem likely to constitute information relating to the representation of a client because the information "would be embarrassing or would be likely to be detrimental to the client." *See also The Ethical Oregon Lawyer* § 4.2-1 (OSB Legal Pubs 2015) (providing that an event "such as nonpayment of fees, may have confidential aspects

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[1] This opinion does not address the situation that would occur when a client terminates a lawyer's services. Pursuant to Oregon RPC 1.16(a)(3), a lawyer is required to withdraw from the representation of a client if "the lawyer is discharged." Under those circumstances, it would be appropriate to inform the court that the lawyer's motion is being brought pursuant to Oregon RPC 1.16(a)(3).

to it, and therefore may constitute information protected by Oregon RPC 1.6").[2]

For example, a client's inability or refusal to pay may prejudice the client's ability to resolve the dispute with an opposing party. Likewise, a party's unwillingness to cooperate with discovery may lead the plaintiff to file additional pleadings or seek sanctions. Consequently, Lawyer cannot unilaterally and voluntarily decide to make this information public unless an exception to Oregon RPC 1.6 can be found.

Neither a disagreement between Lawyer and Client about how the client's matter should be handled nor the client's failure to pay fees when due constitute a "controversy between the lawyer and the client" within the meaning of Oregon RPC 1.6(b)(4). While there may be others, the two most obvious examples of such a controversy are fee disputes and legal-malpractice claims. A client's dissatisfaction with the lawyer's performance may ultimately ripen into a controversy, but at the point of withdrawal, such a controversy is inchoate at best. In a fee dispute or malpractice claim, fairness dictates that the lawyer be on equal footing with the client regarding the facts. Such is not the case under the facts presented here.

Suppose, however, that the court inquires regarding the basis for the withdrawal or orders disclosure of such information.[3] Comment 3 to ABA Model RPC 1.16 offers guidance and provides, in part:

> The court may request an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would con-

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[2] This opinion assumes that the dispute between Lawyer and Client does not concern whether Lawyer should take action in violation of the Oregon Rules of Professional Conduct. For an analysis of such a situation, see OSB Formal Ethics Op No 2005-34, which notes that if a client will not rectify perjury, "the lawyer's only option is to withdraw, or seek leave to withdraw, from the matter without disclosing the client's wrongdoing." *See also In re A.*, 276 Or 225, 554 P2d 479 (1976).

[3] See, for example, Oregon RPC 1.16(c), which provides that a lawyer wishing to withdraw must "comply with applicable law requiring notice to or permission of a tribunal when terminating a representation." *See also* UTCR 3.140 (discussing resignation of attorneys); LR 83-11 (discussing withdrawal from a case).

> stitute such an explanation. The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient.[4]

If the court orders disclosure, Lawyer may reveal information relating to the representation of Client under Oregon RPC 1.6(b)(5) but may only do so to the extent "reasonably necessary" to comply with the court order. Lawyer should therefore take steps to limit unnecessary disclosure of confidential information by, for example, offering to submit such information under seal (or outside the presence of the opposing party) so as to avoid prejudice or injury to the client.

Approved by Board of Governors, August 2011.

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[4] Similarly, *The Ethical Oregon Lawyer* provides that

> [i]n most instances, it should be sufficient to state on the record or in public pleadings that the situation is one in which withdrawal is appropriate and to offer to submit additional information under seal or in chambers (and outside the presence of the opposing party) if the court orders the lawyer to do so."

The Ethical Oregon Lawyer § 4.2-1.

COMMENT: For additional information on this general topic and other related subjects, see *The Ethical Oregon Lawyer* chapter 4 (withdrawal), § 6.2-2 (information relating to the representation of a client), § 6.2-3 (difference between duty of confidentiality and lawyer-client privilege); and *Restatement (Third) of the Law Governing Lawyers* §§ 32, 59–60 (2000) (supplemented periodically).

§ 6.2 BASIC COMPONENTS OF DUTY OF CONFIDENTIALITY

§ 6.2-2 What Is "Information Relating to the Representation"?

With the 2005 adoption of the American Bar Association's Model Rules of Professional Conduct (RPCs), Oregon did away with its long-held use of the dichotomy between "confidences" and "secrets." Oregon RPC 1.6 does not directly use either of these terms, but instead purports to adopt the terminology of the model rules. In point of fact, however, Oregon RPC 1.0(f) defines the phrase *information relating to the representation of a client* to match, word for word, the prior definitions of the terms *confidences* and *secrets*. Thus, there is no actual change to what is covered. On the other hand, it is also arguable that there would be no material change even if there had been no Oregon RPC 1.0(f).

The rule applies not only to matters that are communicated in confidence but also to almost any information gained during the lawyer-client relationship. *Cf.* Model RPC 1.6, comment [3]. For example, information can be and generally is considered related to the representation even if the lawyer obtains it from a source other than the client. As explained further in subsequent sections of this chapter, the distinction is that information obtained from a nonclient source will generally be subject to a duty of confidentiality (which means that the lawyer cannot voluntarily disclose it), while information exchanged between a lawyer and his or her client in confidence and for the purpose of providing legal advice is subject to the potentially greater protection of the attorney-client privilege. *See* § 6.2-3.

QUERY: Is information confidential even when it is available somewhere in the public record? Oregon authority comes down on both sides of this issue. *Compare In re Perkins*, 2 DB Rptr 1 (1988) (a former client's prior criminal convictions were matters of public record and therefore not secrets), *with In re A.*, 276 Or 225, 554 P2d 479 (1976) (the lawyer should not have revealed a client's perjured testimony that the client's mother was still alive; the bar lawyer had argued that the mother's death could not be secret and that the lawyer was therefore obligated to disclose it because probate proceedings for the mother had been instituted). In *Hunter v. Virginia State Bar ex rel. Third Dist. Comm.*, 285 Va 485, 503–04, 744 SE2d 611, *cert den*, 133 S Ct 2871 (2013), the Virginia Supreme Court held that publicly available information about a client should not be held protected by Virginia RPC 1.6. It remains to be seen, however, whether or to what extent that position will be followed. For example, *Restatement (Third) of the Law Governing Lawyers* § 59 comment d (2000) (supplemented periodically), draws a distinction between

information that is generally known among interested individuals or can be found fairly easily (which is not to be considered confidential) and information that is not generally known and would be difficult to find (which will be considered confidential).

Another category of information that is not confidential even if learned while working for a client is information concerning the law, legal institutions, and similar matters. *Restatement* § 59 comment e. If this were not so, lawyers could never develop and use any meaningful expertise because all such information would belong to the lawyer's first client in any subject-matter area.

CAVEAT: Mandatory reporting obligations pertaining to child abuse or elder abuse may at times "trump" the duty to protect confidential client information. *See* ORS 124.060; ORS 419B.010(1).

CAVEAT: Mediation privilege may "trump" a waiver of the attorney-client privilege. *Alfieri v. Solomon*, 263 Or App 492, 498–99, 329 P3d 26, *rev allowed*, 356 Or 516 (2014) (a client cannot sue the lawyer for malpractice during mediation where proof of the claim would depend on documents or information that cannot be admitted into evidence in light of the mediation privilege).

QUERY: Suppose that, while working as corporate in-house counsel, a lawyer learns information that is generally known to employees at the corporation and is not related to any legal questions asked of, or advice given by, the lawyer. As noted in Geoffrey C. Hazard, Jr., W. William Hodes & Peter R. Jarvis, 1 *The Law of Lawyering* § 10.17 (4th ed 2015) (supplemented periodically), confidentiality should not apply.

QUERY: Are invoices sent by a lawyer to a client subject to a confidentiality privilege or the attorney-client privilege? They certainly would appear to be confidential in the sense that the lawyer should not voluntarily disclose them to third parties. On the other hand, the California Court of Appeal recently went further and held that under California law, all invoices are subject to the attorney-client privilege. *Cnty. of Los Angeles Bd. Of Supervisors v. Superior Court of Los Angeles Cnty.*, 235 Cal App 4th 1154, 185 Cal Rptr 3d 842 (2015), *rev granted and opinion superseded by Cnty. of Los Angeles Bd. Of Sup'rs v. S.C. (ACLU of S. California)*, 189 Cal Rptr 3d 206, 351 P3d 329 (Cal 2015). In *Comprehensive Care Corp. v. Livingston & Co.*, Civ No 94-384-FR, 1996 WL 19427 (D Or Jan 12, 1996), however, Judge Frye reached a different conclusion, and her opinion is consistent with what is now OSB Formal Ethics Op No 2005-157 (rev 2014) (submission of bills to insurer's third-party audit service). In other words, it would appear that the answer in Oregon is that law-firm invoices are not automatically privileged in their entirety and that it may be appropriate to redact portions of them before production.

PRACTICE TIP: In litigation in which it is anticipated that law-firm invoices may have to be produced in the future, it may be preferable to avoid the kind of detailed discussions in the individual entries that would need redaction.

QUERY: Suppose that a lawyer wants to withdraw from a matter because of a client's failure to cooperate, failure to pay the lawyer as agreed, or other similar failures. May the lawyer voluntarily disclose the specific reasons in the lawyer's motion to withdraw? As noted in OSB Formal Ethics Op No 2011-185, the answer is generally no. In most such situations, this information will constitute information protected by Oregon RPC 1.6(a), whether or not the information is subject to the attorney-client privilege. If the court orders disclosure as a condition for withdrawal, the lawyer should make the minimum disclosure that the lawyer "reasonably believes necessary" and should seek to file any such information under seal. Oregon RPC 1.6(a), (b)(5); OSB Formal Ethics Op No 2011-185.

§ 6.3 LIMITS ON THE DUTY

§ 6.3-6 Client or Witness Perjury

Oregon Rule of Professional Conduct (RPC) 1.6 must be read in conjunction with Oregon RPC 3.3. Under Oregon RPC 3.3(b), a lawyer who learns from client confidences that the client is committing perjury in a trial that the lawyer is handling must call on the client to correct the perjury. If the client refuses to do so, the lawyer's only ethical course is to seek leave to withdraw; the lawyer may not ethically disclose the perjury and must in effect say to the court only that, under the applicable Oregon RPCs, the lawyer cannot continue with the case. *In re A.*, 276 Or 225, 554 P2d 479 (1976); OSB Formal Ethics Op No 2005-34.

> CAVEAT: The American Bar Association's Formal Ethics Op No 87-353 reaches a contrary conclusion and requires the lawyer to make disclosure, but it is based on language in Model RPC 3.3(c), which states that the duty to disclose the fraud to the tribunal applies "even if compliance requires disclosure of information otherwise protected by Rule 1.6," whereas Oregon RPC 3.3(c) prohibits "disclosure of information otherwise protected by Rule 1.6." Oregon lawyers who appear *pro hac vice* in litigation in other states should be careful to determine the rule that applies elsewhere if they encounter this problem.

A lawyer whose motion to withdraw is denied may ethically continue to try the case. *In re Lathen*, 294 Or 157, 166–67, 654 P2d 1110 (1982); OSB Formal Ethics Op No 2005-34. Under no circumstances, however, may the lawyer participate in creating or presenting false evidence or argue to the court that a decision should be based on false evidence. *See* Oregon RPC 8.4(a)(3)–(4); Oregon RPC 3.3(a); *Nix v. Whiteside*, 475 US 157, 173, 106 S Ct 988, 89 L Ed 2d 123 (1986) (there is no Sixth Amendment right to assistance of counsel to introduce perjured testimony).

> QUERY: What if the perjury is not the client's perjury but perjury by a witness for the client? Arguably, the language of Oregon RPC 3.3(a) requires disclosure in such a case rather than withdrawal. This point is not entirely beyond debate, however. ORS 9.460(3) requires the lawyer to "[m]aintain the confidences and secrets of the attorney's clients consistent with the rules of professional conduct established pursuant to ORS 9.490." A statutory requirement of nondisclosure would prevail over a contrary Oregon RPC. *State v. Keenan*, 307 Or 515, 521, 771 P2d 244 (1989). This conclusion arguably is buttressed as well by the strong antidisclosure position taken in *A.*, 276 Or at 237–40.

At a minimum, a lawyer in a witness-perjury situation, or in a client-perjury situation in which the perjury comes to light through a client secret, must at least seek leave to withdraw. The lawyer cannot simply continue a case in which a client or witness has, to the lawyer's knowledge, committed perjury. *Cf.* OSB Formal Ethics Op No 2005-119.