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The Yelp Decision: A Follow-Up to My Article on Attorneys and On-Line Reviews

Stephen D. Hamilton

Yelp Inc. v. Superior Court, 17 Cal. App. 5th 1 (2017), recently decided by Division Three of the Fourth Appellate District, provides a nice post-script to my previously published article, “When and How to Respond to Online Reviews,” which appeared in Volume 39, Number 1, Issue 1 (2017) of the *Family Law News*. In *Yelp*, an accountant, Gregory M. Montagna, received a scathing review on Yelp.com (hereafter, “Yelp”) from a client, which he felt was defamatory. He filed suit, naming the person whom he believed had published the Yelp review as well as a Doe defendant. He then served a subpoena on Yelp requesting documents that could reveal the identity of the anonymous reviewer.

Mr. Montagna alleged that he had agreed to prepare what he thought would be a W-2 only income tax return for a fee of \$200. After he completed the return, he claimed that it turned out to be more complicated than initially represented, so he charged a total fee of \$400. The disgruntled client allegedly then posted the following review on Yelp:

Too bad there is no zero star option! I made the mistake of using them and had an absolute nightmare. Bill was way more than their quote; return was so sloppy I had another firm redo it and my return more than doubled. If you dare to complain get ready to be screamed at, verbally harassed and threatened with legal action. I chalked it up as a very expensive lesson, hope this spares someone else the same.

Mr. Montagna took umbrage at the review, and filed a defamation action. He then served a deposition subpoena on Yelp that requested copies of any and all documents



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that would identify the Yelp user, “Alex M.,” to either confirm the named party was the poster or learn the true identity of the anonymous reviewer. Yelp objected to the subpoena on the grounds that it violated the poster’s right to free speech, and refused produce the documents. The Orange County Superior Court granted Mr. Montagna’s request for an order compelling production of the requested documents. The trial court also imposed a sanction on Yelp in the amount of \$4,962.59. The Fourth District affirmed the order compelling production of the requested documents, but reversed the monetary sanction.

The panel held that although an Internet service provider may assert the First Amendment rights of an anonymous poster, those rights do not prevent discovery of the identity of the poster when a prima facie showing has been made that the statements are defamatory. Once the party requesting discovery has made a prima facie showing of a libelous statement, no further First Amendment balancing test is required before the court must order the disclosure of the author’s identity. Further, the burden of ensuring “reasonable efforts are made to notify the [commenter] permitting them an opportunity to respond, before disclosure of their identities may be compelled...” falls on the Internet service provider, not the allegedly defamed party.

The decision also discussed and differentiated between defamation and non-actionable statements of pure opinion. Citing *GetFugu, Inc. v. Patton Boggs LLP*, the decision notes that not all “statements of opinion enjoy blanket protection. To the contrary, where an expression of opinion implies a false assertion of fact, the opinion can constitute actionable defamation.” The panel

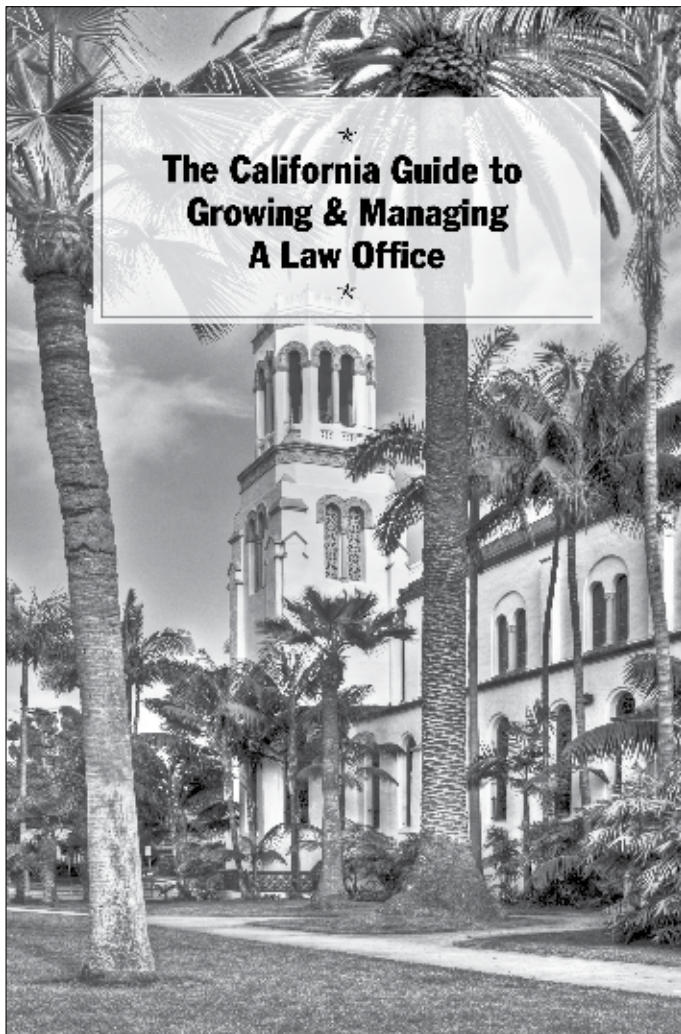
then did a line-by-line analysis of the post to explain why “a reasonable fact finder could conclude the published statement declares or implies a provably false assertion of fact.”¹ It affirmed the trial court’s order requiring Yelp to produce the subpoenaed documents.

However, the court reversed the monetary sanctions against Yelp, finding that “given the dynamic nature of this area of law,” Yelp’s opposition to the motion to compel was substantially justified. Central to that finding was the fact that several decisions relied upon in the opinion were decided after the motion to compel was heard in the trial court.

As the Fourth District observed, this is an evolving area. However, under the *Yelp* decision, attorneys have an avenue of recourse against clients posting false or misleading online reviews.

Endnotes

- 1 *GetFugu v. Patton Boggs LLP*, 220 Cal. App. 4th at 156.



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