

# BUSINESS LAW NEWSLETTER

Volume 15, Issue 2

March 2015

## In This Issue

Small Businesses:  
Responding to and  
Resolving Scathing  
(or False) Online  
Reviews.....Page 1

DWI in Your  
Driveway.....Page 3



2300 Wilson Blvd., 7th Floor  
Arlington, VA 22201  
703.525.4000  
www.beankinney.com

### Business & Finance

- Business Organizations & Transactions
- Commercial Lending
- Credit Enforcement & Collection
- Employment
- Government Contracting
- Intellectual Property
- Mergers & Acquisitions
- Taxation

### Litigation & Dispute Resolution

- Alternative Dispute Resolution
- Appellate Practice
- Commercial & Civil Litigation

### Personal Services

- Domestic Relations
- Estate Planning & Administration
- Negligence/Personal Injury

### Real Estate

- Commercial Leasing
- Construction
- Real Estate
- Zoning & Land Use

## Small Businesses: Responding to and Resolving Scathing (or False)

### Online Reviews

By **Rachelle Hill**



The Internet is a great resource for businesses to market to clientele in both an efficient and cost-effective manner. Unfortunately, the ease with which a person can use the Internet also results in the possibility of disastrous consequences to a business's reputation when people take to the Internet to post reviews.

With the rising popularity of review sites such as Yelp and Angie's List, clients can post favorable and unfavorable reviews anonymously, making it impossible at times for a business to evaluate the accuracy of the review or to try to resolve the problem directly with the client. Even more troubling, the Internet provides an avenue for abuse of anonymous speech, so a business may be faced with fake reviews. So what options do you have as a business owner to try to resolve these reviews?

### Setting up Alerts

First and foremost, a business must actively monitor its online presence and reviews. The easiest solution is to set up a Google Alert to receive a notification when the business is referenced online. Some review sites like Yelp and Google Plus also allow a business to claim its listing and set up an account at no cost to be able to respond to and flag reviews.

### Addressing Negative Reviews

As soon as you become aware of a negative review you need to decide whether to take any action. If you are able to identify the reviewer and confirm it is a past client, go ahead and reach out directly to him/her, apologize and offer to do whatever you can to resolve the issue. This could be a refund of any monies received or an offer to redo work or anything the client indicates would make them satisfied. Clients will often voluntarily delete the negative review or add an update indicating the efforts you took to resolve the issue. However, you should not condition any resolution on him/her removing or updating the review.

Another option is to respond to the reviews, both favorable and negative ones. These responses should be extremely short and polite. For negative reviews, simply apologize for any issue and invite the consumer to contact you to resolve it. When in doubt, consult a business attorney or other consultant before engaging the client.

## **Addressing False Reviews/Contacting the Website Owner**

In the event your business receives a review that is negative and you determine to be false, we recommend taking steps to engage the site to take it down. If you have set up an account with Yelp and claimed your business listing, you can “flag” reviews that violate Yelp’s Content Guidelines, which generally require that reviews be truthful, based on personal experience and relevant to the business’s services. Upon flagging a review, Yelp will determine whether it believes the review is a violation of its guidelines and if so, remove the review.

In the event Yelp does not respond to the flagged review or if you haven’t claimed your business listing, the next step is to contact Yelp directly and demand the review be taken down. We have had success in directly contacting website owners to get false reviews taken down. The key is to cite the Guidelines the review violates and provide as many facts as possible to support your position. For instance, if you own a cleaning service in Virginia but the reviewer’s location is Iowa, it is very likely that the reviewer might not be an actual client.

## **Taking the Issue to Court**

When all else fails, the final consideration is whether it is worth the expense to pursue a lawsuit to (1) determine the identity of the reviewer (if anonymous), (2) obtain injunctive relief from the Court to remove the negative review and (3) obtain damages that your business incurred. A lawsuit should be the last resort and should only be considered where the review constitutes defamation. Defamation is the legal term for damages to one’s reputation resulting from a false statement of fact. The key to a successful defamation suit is that the comment must be regarding a fact (e.g. the contractor broke my window) not an opinion (e.g. the contractor was unprofessional) and it must be false.

### ANTI-SLAPP Laws

Before filing a lawsuit, a business should determine whether the state has an Anti-SLAPP law and then evaluate its potential exposure. While Virginia does not currently have such a law, 28 states, including Maryland (MD. Code Ann. Cts. & Jud. Proc. § 5-807) and the District of Columbia (D.C. Code 16-5502) have enacted Anti-SLAPP laws. SLAPP stands for “Strategic Lawsuit Against Public Participation.” The premise behind these laws is that actions filed by businesses against reviewers are meant to chill free speech. Supporters believe that the business does not intend to pursue the lawsuit and instead is using it to intimidate the reviewer and force him/her to take down the review. Generally the Anti-SLAPP laws enable a defendant to move to dismiss the suit, and if successful, the court may award attorneys’ fees and costs to the defendant.

### Anonymous Reviews and Unmasking Laws

When faced with an anonymous review that constitutes defamation, most states have an “unmasking” law that enables a litigant to file suit against a John Doe and upon meeting a certain number of requirements set by statute, obtain the identity of the reviewer, typically by subpoenaing the website owner. In Virginia, Va. Code § 8.01-407 establishes procedures and requirements for obtaining a subpoena in a civil action to identify an “anonymous communicator” who has posted material on the internet that “is or may be tortious or illegal.” Upon meeting the factors set forth in the statute, a plaintiff can subpoena the website owner or other source to obtain the identity of the anonymous reviewer and name him/her as a defendant.

Currently pending before the Virginia Supreme Court is an action that might change the requirements of the Virginia unmasking statute or affirm it is constitutional. The appeal pertains to a Virginia business owner that sued John Doe for anonymous reviews that it determined were false. After meeting the requirements in Virginia’s unmasking statute, the company subpoenaed Yelp for the identity of the posters. The Alexandria Circuit Court found Yelp in contempt for not complying with the subpoena and Yelp appealed, arguing that the statute as applied violates the first amendment right to free speech. The Court of Appeals affirmed the lower court’s ruling and the Supreme Court is expected to rule on this appeal imminently.

## Immunity - Yelp/Angie's List

A lot of people ask whether they can sue the website owner, which they feel is the source of many of these problems. The answer to that question is "No." While you can subpoena a website owner to obtain the identity of a reviewer, you cannot pursue a cause of action against the owner. A federal law called the Communications Decency Act (CDA) affords the provider of interactive computer services, or what we commonly refer to as the website owner, immunity for third party postings.

### **Conclusion**

In summary, there are several options businesses can take to address negative and potentially fake reviews online, with going to court as a last resort. We encourage all business owners to monitor its online presence and to utilize legal counsel when faced with responding to negative and/or false online reviews.

*Rachelle Hill is an associate attorney focusing her practice on business services, employment law and commercial litigation. She can be reached at 703.525.4000 or rhill@beankinney.com.*

---

## **DWI in Your Driveway**

By James Irving



Drivers in the Commonwealth be forewarned: a conviction for driving while intoxicated does not require that the defendant be driving the vehicle or that it be on a public road.

In October of 2014, the Supreme Court of Virginia affirmed the conviction of Charlottesville resident Justin Sarafin for Driving While Intoxicated ("DWI"). It was largely uncontested that Mr. Sarafin was intoxicated when K. E. McBrearty knocked on his car window at 3:30 in the morning. It was also uncontested that he was parked in his driveway at the time and the car's ignition was not engaged.

Mr. Sarafin spent part of the evening at a local pub, shopped for some groceries and went home where "he consumed additional alcohol." Unable to sleep and the house radio being broken, he went out to his car parked in the driveway around 2:30 in the morning to listen to the radio. He fell asleep with the key in the ignition turned to auxiliary.

Responding to a noise complaint an hour later, Officer McBrearty encountered Mr. Sarafin and asked him to exit the car. Sarafin smelled of alcohol and when he failed several field tests and the breath test, McBrearty arrested him for DWI.

The trial presented one of those rare cases with very little in dispute. The defense focused on the statutory definition of "operation" of a vehicle and whether Sarafin could be convicted of DWI since he was on a private driveway rather than a public road. The court provided such an exhaustive analysis of the language of the statute and case law as to leave the impression that they were conscious of the apparent inequity of the result – or even that they would have been happy had the analysis led to a different conclusion.

But the Court was clear that DWI does not require that the car be on a public highway: "the plain language of Code § 18.2-266 demonstrates there is no 'on a highway' requirement for the operation of motor vehicles. The General Assembly clearly ... chose not to do so where the operator of a motor vehicle is intoxicated." You are not immune if you confine yourself to your private property.

Turning to the larger issue, the Court held that DWI does not require that the operator be driving or even have the intention of driving. He does not even have to be in the driver's seat. The facts of the case put Sarafin

(Continued to next page)

behind the wheel, but as a matter of law, that was coincidental. In Virginia, it is “unlawful for any person to drive or operate any motor vehicle... while such person has a blood alcohol concentration of .08 or more...”

While “operate” is not defined in the DWI statute, it is defined elsewhere as a “person who drives or is in actual physical control of a motor vehicle.” In *Williams v. City of Petersburg* (another DWI case), the Supreme Court of Virginia held that “operating” a motor vehicle includes “not only the process of moving the vehicle from one place to another, but also includes starting the engine or *manipulating the mechanical or electrical equipment of the vehicle without actually putting the car in motion. It means engaging the machinery of the vehicle which alone, or in sequence, will activate the motor power of the car*” (italics added).

Given the broad language adopted by the legislature and the Court, *Sarafin v. Commonwealth* begs a series of intriguing questions. If manipulating the mechanical or electrical equipment of a vehicle while intoxicated is enough to earn a conviction for DWI, is it illegal to repair your car’s starter in your driveway while intoxicated, since you’d likely test the result by starting the engine? Is it unlawful to wax your car with the radio on while intoxicated, with the key turned to auxiliary in the ignition? Are you drunk driving if you exit your house and unlock your car with an electronic key, even if your only intention is to remove something from the trunk? Given an aggressive officer and prosecutor, the answer to all three questions is probably “yes.”

Perhaps the DWI statute is an unartfully drafted law in this respect, but it is the law. The examples above may seem far-fetched, but laws have been stretched further to achieve greater injustice.

*James Irving is a shareholder focusing his practice in business law. He can be reached at [jirving@beankinney.com](mailto:jirving@beankinney.com).*