

Rating Game

*Should you sue your customer over a negative online review?
Here's the story of one remodeler who tried it, with mixed results.*

By Sara Kropf

On Oct. 31, 2012, Dietz Development LLC sued Jane Perez, a former client, for breach of contract and defamation based on negative reviews of the company's remodeling work that Perez had posted online. Company owner Christopher Dietz believed his reputation had been seriously harmed by false statements in the reviews—which included accusations of theft—and that he had lost clients as a result. Dietz worried that the negative reviews would destroy years of effort building Dietz Development.

The remodeler was right to be concerned. According to one 2014 study, 88 percent of consumers read reviews of local businesses online, and that number is rising. The same study also found that 88 percent of consumers trust online reviews as much as they do personal recommendations of businesses. There's little doubt that, while great reviews on Yelp, Angie's List, and other sites can steer consumers to a business, negative ones can also drive them away.

So how should you respond to a false online review? And what should you do if the situation escalates? The Dietz Development case offers some answers for any business facing these difficult questions.

How It All Began

Christopher Dietz started his company in 2005 and, after years of hard work, had built a network of referrals and satisfied customers.

As is the case with many small remodeling companies, Dietz was the sole employee of the business and would subcontract work to others when he couldn't handle it himself.



ILLUSTRATIONS: 308-ILLUSTRATION

The work. Dietz knew Perez from high school, but they had not been friends or been in touch since graduation. In 2011, they reconnected through Facebook when Perez moved back to the area. She needed some minor work done on her townhouse—painting walls, refinishing floors, and miscellaneous small repairs—and he offered to help. They reached an agreement on the scope of the job, and a price, and Dietz Development began work in May 2011 (see timeline, below).

The problem. In late June 2011, however, the relationship soured. According to Dietz, Perez had repeatedly expanded the scope of the project, but refused to pay for work that had been completed. According to Perez, Dietz Development didn't finish the job promised, and the work that it did complete was of poor quality. Perez refused to pay any of the \$9,340 invoice from Dietz Development, and e-mailed Dietz that some of her jewelry was missing. She demanded that he return her key.

The online reviews. Dietz first sued Perez in small claims court, and when the case was dismissed, he stopped by Perez's townhouse to ask her about payment. The visit didn't go as planned. Perez refused to talk to Dietz and instead posted a review of his work on Angie's List. A few days later, she did the same on Yelp. In all, she posted six times over the next nine months (see "Excerpts From the Reviews," at right).

The response. Dietz was troubled by the negative descriptions of his work, and there were parts of the reviews that he thought went too far. For example, Perez accused him of stealing jewelry, of trespassing on her property, and of committing a crime by not having a Virginia license when he did the work at her house.

Dietz responded online to Perez's reviews, explaining that he had sued her after she would not pay his invoice. He also noted that the police had investigated her claims of theft, did not "believe her

EXCERPTS FROM THE REVIEWS

Below are some statements from Perez's reviews of Dietz Development that Dietz claimed were defamatory:

"The matter with the police continues to be pursued, a home security system was installed, and a dog purchased for protection after filing my first ever police report due to this contractor. Apparently, \$K's theft with a sole contractor's access to your home, an email from the contractor of possession of the resident's key as well as not returning that key, and motive are not enough to file charges nor is trespassing past "no trespassing" signs to the townhome complex after the contractor losing his case and showing up at your front door."

"Further, Christopher Dietz committed a Class One Misdemeanor of Unlicensed Work in the State of Virginia, punishable by up to a year in jail and \$500 per day, per the Department of Professional and Occupational Regulation (DPOR)"

"Given Dietz's false online posts that this investigation did/found nothing, DPOR imposed further sanctions against Dietz."

"The day after Dietz was let go from the job on my property, thousands of dollars of jewelry were found stolen and I submitted my first ever police report."

Statements by Dietz that Perez claimed were defamatory:

"I was never allowed by her to remove my materials nor tools/equipment, a value of over \$2,000."

"If theft was made, it was her stealing services and money from me."

"The police investigated her claim of theft but found no grounds for her claim nor did they believe her statements."

"I took her to court, only after asking her for months to pay me the balance or what she felt was a fair dollar amount for the work I did."

TIMELINE



statements,” and hadn’t charged him with any crime. Finally, he said, “if theft was made, it was her stealing services and money from me.”

The lawsuit and verdict. Dietz also asked Yelp to remove the reviews, and when it refused, he filed a lawsuit against Perez for breach of contract and defamation. Perez countersued for breach of contract, trespass, theft, and defamation. Fifteen months later, Dietz and Perez sat in a Fairfax County, Va., courtroom listening to the verdict. The jury concluded that Perez had defamed Dietz and had breached the contract. It also concluded that Dietz had defamed Perez and had also breached the contract. The jury awarded zero in damages to either party. The case was over.

Is a Defamation Lawsuit the Answer?

Should you sue for defamation in an online review? The short answer is no, mainly because it’s difficult to prove that the reviews caused your business tangible financial harm (see “Proving Defamation,” opposite). Even putting aside the difficulty of winning a case, there are many reasons why suing a customer should be your last resort.

It’s expensive. Assuming that the case goes all the way through trial, you can expect to spend more than \$100,000 on legal fees for an experienced defamation lawyer. That said, most litigation ends with a voluntary settlement. This is much less expensive than full-blown litigation. However, when you start a case, it’s impossible to know if it will end quickly with a settlement or years later with a trial.

It’s time consuming. Most clients underestimate the time it takes to be a plaintiff in a lawsuit. There will be many hours spent talking to your lawyer, answering questions, reviewing court papers, searching for documents, preparing for and having your deposition taken, attending other depositions, getting ready for your trial

testimony, and attending the trial. Apart from the expense of hiring a lawyer, you may lose income because of the time you spend working on the case instead of on your business. Plus, there is the toll on family life to be considered.

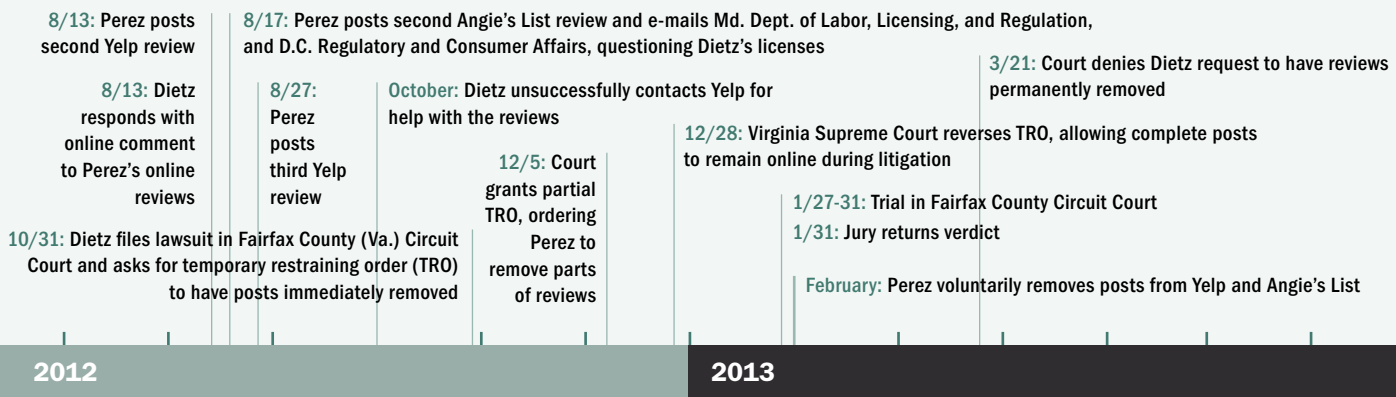
It’s stressful. The lawyer on the other side may investigate your background and ask intrusive and embarrassing questions. Everything about the case is public and available for anyone to see and read. Plus, a lawsuit can take a year in a fast-moving court, but in a slower jurisdiction, a case may last three years or more.

It’s risky. In some cases the defendant may be “judgment-proof,” meaning that he or she does not have enough money to pay even if you win the case. A competent lawyer will help you evaluate whether it is worthwhile to sue someone who may be judgment-proof.

It isn’t easy to get reviews permanently removed. In a defamation case, some clients simply want the posts permanently removed instead of being awarded monetary damages (especially if the defendant is judgment-proof). This may sound simple, but it is not. The First Amendment protects almost all speech, and courts are hesitant to stop someone from posting about a business or forcing them to remove online reviews. Plus, you must first prove that the review is defamatory before the court will even consider ordering its removal.

In the Dietz Development case, for example, although the jury concluded that Perez’s reviews were defamatory, the court later refused to order that those reviews be permanently removed. The judge concluded that because Perez had already voluntarily removed the online posts, the issue raised in the motion for an injunction was “moot” and did not need to be decided. (The judge did note, however, that Dietz should return to ask for an injunction “if the posts reappear.” In essence, he made clear that if Perez were to

TIMELINE CONTINUED ...



PROVING DEFAMATION

Defamation is also known as slander (when spoken) or libel (when written). The law varies from state to state, but in general, five elements must be proven to win a defamation case:

1. There was a “published” statement, meaning that the speaker made the statements to at least one person other than the plaintiff.
2. The statement must be false. A true statement is never defamatory.
3. The statement must be a statement of fact, not opinion.
4. The “speaker” must have either acted with malice or been negligent in making the statement, depending on the type of case.
5. The plaintiff must prove some amount of damages.

Statement	Defamatory?	Why or Why Not?
Larry's Locksmith is a bunch of liars and cheats.	No	Mere insults are not defamatory
Pete's Painting overcharged me for the work they did.	Yes, if false	Statement of fact
Floyd's Flooring's work was awful and unprofessional.	No	Statement of opinion
The hardware store located at 45 Main Street in Springfield sold me a broken hammer and refused to refund my money.	Yes, if false	If the subject of the statement is identifiable, the name does not have to be used
It is my opinion that Eric's Electricians uses unlicensed electricians to do all of its work.	Yes, if false	Simply labeling a statement as “opinion” does not make it an opinion. This is a statement of fact.
No one should ever hire or work with Paul's Plumbing because they did a terrible job fixing my clogged sink.	No	Statement of opinion.

post the same comments again, he would be willing to order her to remove them.)

It attracts backlash from customers and media. As we learned in the Dietz Development lawsuit, defamation cases can get a lot of attention from the media. Some readers will applaud your fortitude to fight against a defamatory review, but many more will criticize you for suing a customer. A lawsuit over a review may scare away potential clients; news stories about Dietz Development’s lawsuit are still part of any Internet search of the company.

It's difficult to prove damages. In the Dietz Development trial, it was very difficult to prove damages. This makes sense, considering that the best way to establish any losses is to show that a potential customer saw the negative review and decided not to hire you. But how would you ever find these potential customers, and even if you could, how would you convince them to come to court and testify?

What Are the Alternatives?

If your company is facing negative reviews, here are a few options in order of least to most aggressive.

Completely ignore the review. This advice is easier given than taken. When it’s your business being defamed, it can be hard to sit back and simply accept it.

Respond online, but work out a solution offline. The best approach here is a short response acknowledging that the customer is unhappy and inviting him or her to contact you offline to find a solution. A short, polite response will show consumers that you pay attention to reviews of your work and want your clients to be happy. It is not a good idea, however, to admit that your company did anything wrong because this could later be used against you.

Additionally, you should never react to a review in anger. Unfortunately, Dietz made a very specific response to Perez’s review online, saying that she had taken services from him without paying. This opened the door for the defamation judgment that was eventually rendered against him.

Ask the customer to voluntarily remove the review. This will rarely work, but it is low-risk. You can call the customer directly or send a polite e-mail. It may be persuasive to explain how the review is hurting your business. You can offer a refund and/or a replacement item, and you can also apologize for the fact that the customer is not happy. This letter should not threaten a lawsuit.

You can also consider negotiating a settlement payment for removal of the review. This agreement must be subject to a confidentiality agreement, so that the customer can’t tell others that you paid for the review to be removed.

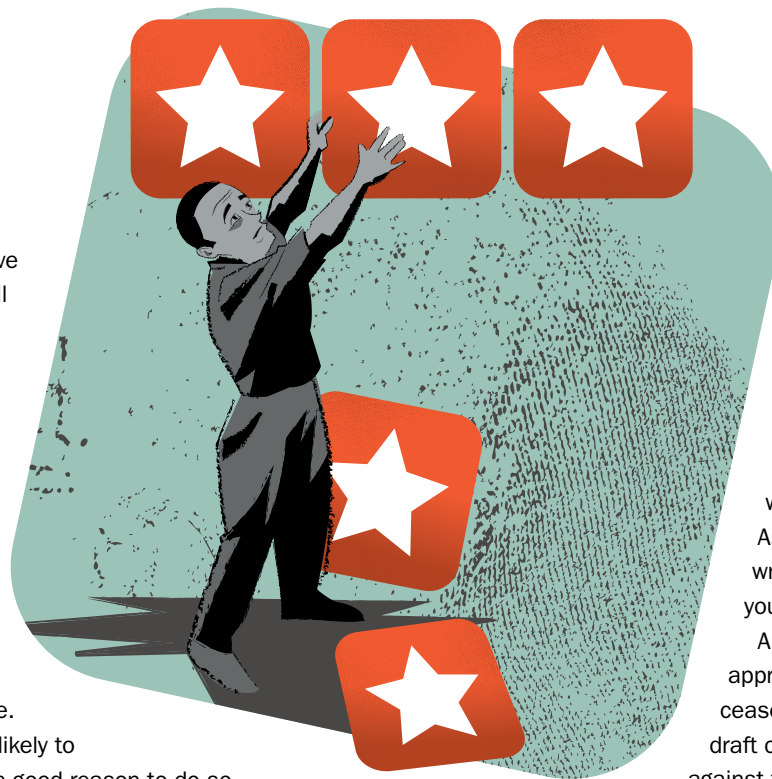
Ask the website to voluntarily remove the review. The more established national websites have specific rules about when they will remove reviews. You should carefully read those terms of service. For example, Yelp's website says that businesses may "flag" a posting for the company's internal review if the post violates content guidelines, which include forbidding defamatory statements. Yet, because Yelp says it will not "arbitrate disputes," the company will not step in to help you if the review is false.

Smaller websites may be more likely to remove a post if you can provide a good reason to do so—sending pictures of the completed work, for example, or explaining that the customer never hired you at all. It's worth making the request in a polite e-mail.

There's some content that nearly every website will remove, including threatening or obscene language, posts that infringe on copyrighted or trademarked material, and reviews that contain confidential information. For example, if a customer posts your home address, you should have success getting the review removed.

Send a cease-and-desist letter demanding removal of the review and threatening a lawsuit. This is the most aggressive step short of filing, and you risk a backlash if the client decides to take your letter public. It's better to have a lawyer draft this document, since it will contain legal language and could be used against you in court. However, if you choose to write the letter yourself, here are some points to include:

- Acknowledge that the client is not happy
- Quote the statements in the review that are false or misleading
- Briefly describe why the statements are false
- Request removal of the posts by a certain date
- Explain that if the posts are not removed by that date, you intend to file a lawsuit against the person. It's helpful to note the court in which you will file and the claims that will be made.
- Offer to discuss the situation in advance of the date



There have been situations where a cease-and-desist letter has "gone viral" because the disgruntled customer decided to widely publicize the letter. These letters must be written in a polite, neutral tone and not say anything that you would not want other customers to read. As a general rule, it's best not to write one of these letters unless you are prepared to sue.

An even more aggressive approach is to include with the cease-and-desist letter a copy of a draft complaint that you intend to file against the customer. This gives the

strong impression that you are serious about the lawsuit and it may encourage the person to remove the reviews rather than face the consequences.

Immediate Steps to Protect Your Online Reputation

Given the prevalence and influence of online reviews, businesses can't ignore their online reputations. A simple Internet search will turn up the reviews of your business in seconds. Most potential customers will read those reviews and form an impression of your company.

You should also be aware that not creating an online profile for your business is no guarantee against negative reviews. The reason: On many websites, anyone can create a profile for a business and then write a review. For example, Dietz Development didn't have a profile on Yelp or Angie's List before Perez posted her reviews; Perez created the profile.

Here are three steps you can take to protect your online reputation before any negative reviews appear.

1. Create online profiles and keep them up to date. You should be the person to describe your business, ensure that contact information is correct, and give the first impression of your company. Some websites (Houzz comes to mind) give you an excellent platform to showcase your work by posting pictures and descriptions of projects. The key is to build a substantial and positive online presence so that a single negative review will cause little harm.

2. Constantly monitor your online reputation. If you're unaware of what is being written about your company, you have zero chance

to protect your reputation. You must regularly check your profile and read all of the reviews. (See “Reputation Tracking Tool,” at right.)

3. Ask customers for good reviews. It’s unethical to pay for reviews, to write your own, or to post negative reviews on a competitor’s profile. Some websites prohibit the solicitation of reviews, but there is nothing wrong with asking your customers to review your work if they are happy with it, and little risk that a website will discover that you asked a customer to write a review.

Yelp has come under considerable criticism for its algorithm that decides which reviews are prominently displayed and which are hidden on a separate page. I talked with one company that had several one-star reviews on its Yelp profile page but had numerous five-star reviews hidden on a second page. The upshot is that even if your customers write positive reviews of your business, there is no guarantee that those reviews can easily be found by potential customers.

If You Still Want to Sue

There are times when a lawsuit is a necessary evil. The negative review may be so destructive to your business that you are willing to accept the costs of litigation. Unfortunately, while the websites themselves have the “deep pockets” needed to pay a judgment, section 230 of the Communications Decency Act of 1996 completely protects them from defamation lawsuits. It essentially says that the review sites are not the “publishers” of reviews, instead they are a platform where reviews appear. And because publication is the very first element that defines a defamation claim, the websites are immune from those types of suits. Only the customer who posted the review can be sued for defamation. Although many have argued that this provision should be changed, for now it is a complete bar to suing the websites on which reviews appear.

When it comes to suing an individual, there are several factors to consider. Is this a one-time negative review, or is this customer beginning a campaign against your company? Will the negative review appear at the top of search engine results or on the third page of results? Can you prove that your business was harmed as a direct result of the review?

Even though the Dietz Development lawsuit didn’t result in a monetary award, it did achieve one of its primary goals: The defendant removed the reviews after the verdict and has not reposted them. In that sense, the case was a success. Although a lawsuit should be your last resort in the face of negative reviews, it may also turn out to be a necessary step to protect your business. **PR**



REPUTATION TRACKING TOOL

Online reviews are a fact of remodeling life these days. All remodelers hope for great rankings, but good or bad, the important thing is knowing when someone has posted a review of your business. Many remodelers don’t realize that most review sites use publicly available data to create profiles of small businesses without the business owner’s knowledge. A bad rating that goes unnoticed on one of those profiles can do extensive damage.

One solution is Review Trackers software. The application searches more than 50 online review sites—including Google+, Yelp, Houzz, and HomeAdvisor—and associates the profiles it finds with a subscriber’s company address. It then compiles all of the review links into a single dashboard that shows the actual ratings received. The service is customizable, so users can request immediate e-mail alerts for negative reviews only, for example, but receive summary reports for positive reviews at less frequent intervals.

That’s the responsive side of the coin; on the preventive side, the software includes a set of tools and customizable templates to help subscribers generate ratings from customers who have had a good experience. If a client has a negative experience, the program helps to generate feedback on what could have been better, giving subscribers an opportunity to correct the situation before the customer posts a negative review. The company is currently piloting an app that will enable a remodeler to get a signed rating from a customer on the spot, via iPad.

A single-location subscription to Review Trackers (reviewtrackers.com) costs \$29 per month and includes multiple log-ins. —*Sal Alfano*

Sara Kropf represented Dietz Development and Mr. Dietz in this lawsuit. In addition to defamation cases, Kropf’s practice focuses on defending individuals and companies that have been sued in a civil case or who face a criminal investigation. For more information about Kropf, visit her website, kropf-law.com.

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