

DEALING WITH DIGITAL DETRACTORS:

ETHICAL CONCERNS WITH RESPONDING TO ONLINE REVIEWS

By John Browning, JD

In today's digital age, everyone can easily air grievances to the world, and comments posted on lawyer rating sites like avvo.com and lawyerratingz.com or consumer complaint sites like yelp.com and ripoffreport.com can live online forever and pop up in response to Internet searches for your name. So what can a lawyer do when his or her professional reputation is attacked online by a client or former client? As with any criticism, there's a right way and a wrong way to respond - and the wrong way can land you in front of the disciplinary board. Chicago employment attorney Betty Tsamis learned this lesson the hard way in January 2014, when she received a reprimand from the Illinois Attorney Registration and Disciplinary Commission for revealing confidential client information in a public forum.¹ Tsamis had represented Richard Rinehart in an unsuccessful quest for unemployment benefits. After firing Tsamis, Rinehart posted a review of her on avvo.com. In the post, Rinehart expressed his dissatisfaction bluntly, claiming that Tsamis "only

wants your money," that her assurances of being on a client's side are "a huge lie," and that she took this money despite "knowing full well a certain law in Illinois would not let me collect unemployment."² Within days of this posting, Tsamis contacted Rinehart by email, requesting that he remove it; Rinehart refused to do so unless he received a copy of his file and a full refund of the \$1,500 he had paid.

Sometime in the next two months, Avvo removed Rinehart's posting. But Rinehart posted a second negative review of Tsamis on the site. This time, Tsamis reacted by posting a reply the next day. In it, she called Rinehart's allegations "simply false," said he didn't reveal all the facts of his situation during their client meetings, and stated, "I feel badly for him, but his own actions in beating up a female coworker are what caused the consequences he is now so upset about."³ According to the Illinois disciplinary authorities, it was this online revelation of client information by Tsamis that violated the Rules of Professional Conduct, as well as the fact that her posting was "designed to intimidate and

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embarrass Rinehart and to keep him from posting additional information about her on the Avvo website,” which constituted another violation of professional conduct rules as well as conduct that tends to “bring the courts or the legal profession into disrepute.”⁴

An even more recent case serves as a cautionary tale of how not to respond to a negative online review. Colorado attorney James C. Underhill, Jr. was retained by a married couple to help with the husband’s ongoing post-divorce decree issues with his ex-wife. When the clients had problems paying his full fee, Underhill threatened to withdraw unless paid in full in two business days. When the clients terminated the representation, Underhill failed to refund a “filing fee” (nothing had been filed). The clients posted complaints about Underhill on two websites. He responded with postings of his own that, according to Colorado disciplinary authorities, “publicly shamed the couple by disclosing highly sensitive and confidential information gleaned from attorney-client discussions.”⁵ As if that wasn’t bad enough, Underhill then sued the couple for defamation, and even though he was aware that they had retained counsel, he continued to communicate with them ex parte despite being instructed not to by their lawyers. Underhill’s lawsuit was dismissed, but he then brought a second defamation suit in a different court, concocting an unfounded tale of further internet postings by his former clients that Colorado authorities found to be frivolous. Among the myriad disciplinary breaches by Underhill, he was also found to have violated Colorado Rule of Professional Conduct 8.4 (d) (“a lawyer shall not engage in conduct that prejudices the administration of justice”). As a result of his misconduct, Underhill received an 18-month suspension effective October 1, 2015.⁶

Occasionally, a defamation suit might prove successful. In a recent Georgia decision, *Pampattiar v. Hinson et al.*, the appellate court upheld a \$405,000 trial verdict in favor of divorce lawyer Jan V. Hinson, who sued her former client Vivek A. Pampattiar over negative reviews he allegedly posted online.⁷ Hinson represented Pampattiar in a divorce proceeding until a series of disagreements ensued over the representation and billing and she stopped representing him. Approximately six weeks later, Hinson Googled herself and found a sharply negative review that Pampattiar had posted on a professional services review site, kudzu.com. Among other comments, he allegedly described Hinson as “a CROOK lawyer” and an “Extremely Fraudulent Lady” who “inflates her bills by 10 times” and had “duped 12 people i[n] the last couple of years.”⁸ Although the comments were posted under the screen name “STAREA,” an investigation would reveal that STAREA’s IP address matched the IP address used by Pampattiar to send several emails to Hinson.⁹

Hinson sued for fraud, breach of contract over the unpaid legal bills, and libel per se, and she added a count for invasion of privacy and false light after a second pseudonymous review was posted on kudzu.com, accusing Hinson of using her office staff to post “bogus” reviews.¹⁰ The appellate court rejected Pampattiar’s argument that Hinson had shown no actual damages from the defamatory postings, finding that applicable Georgia tort law allows recovery for “wounded feelings,” a form of personal injury to reputation.

However, as another recent decision illustrates, it’s one thing when you know who’s smearing you online, but what about when you don’t? Courts in many jurisdictions are hesitant to unmask anonymous commenters, and websites like Avvo.com, Yelp.com, and others enjoy broad protections under the law. Tampa attorney Deborah Thomson found this out first-hand when she filed a defamation suit against an anonymous reviewer on Avvo.com and asked courts in Seattle (where Avvo is based) to enforce a subpoena for information unmasking her critic. Both the trial court and the appellate court denied her motions.¹¹

Besides the ethical risk of revealing confidential client information when responding to a negative online review, there is another equally disturbing way for an attorney to get in trouble over reviews on websites: by posting false testimonials, both negative and positive. In 2013, an attorney was publicly reprimanded by the Minnesota Supreme Court for “falsely posing as a former client of opposing counsel and posting a negative review on a website.” In Dallas, a pending lawsuit brought by one law firm accused a rival firm of a campaign of false postings while posing as unhappy ex-clients. And in August 2013, Yelp took the extreme step of suing the McMillan Law Group, a San Diego bankruptcy firm, for allegedly “gaming the system” through the “planting of fake reviews intended to sway potential clients with false testimonials.”¹²

With the Internet assuming an ever-increasing marketing importance for lawyers, legal analysts are starting to pay more attention to a lawyer’s options and risks in addressing online reviews.¹³ But surprisingly to date, only a handful of ethics opinions have emerged that deal squarely with the question of whether an attorney may respond to a client’s negative online review.

In December 2012, the Los Angeles County Bar Association issued Formal Opinion No. 525, which dealt with the *Ethical Duties of Lawyers in Connection with Adverse Comments Published by a Former Client*.¹⁴ In the scenario discussed in this opinion, the adverse comments posted by the client did not disclose any confidential information, nor was there any pending litigation or arbitration between the lawyer and the

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former client. (If there had been, so-called “self-defense” exceptions to discussing a client’s confidential information, analogous to those in legal malpractice or grievance context, might apply.) The LA Bar Association committee concluded that an attorney may publicly respond as long as he or she does not disclose any confidential information, does not injure the client with respect to the subject of the prior representation, and is “proportionate and restrained.”¹⁵

In January 2014, the Bar Association of San Francisco weighed in on this subject as well.¹⁶ Like its Los Angeles counterpart, it addressed a scenario with “a free public online forum that rates attorneys,” in which the negative review by the ex-client did not disclose any confidential information.¹⁷ And like its fellow association, the San Francisco Bar reasoned that while an attorney “is not ethically barred from responding generally” to such an online review, the ongoing duty of confidentiality would prohibit the lawyer from disclosing any confidential information. In addition, it concluded, if the matter previously handled for the client was not over, “it may be inappropriate under the circumstances for [the] attorney to provide any substantive response in the online forum, even one that does not disclose confidential information.”¹⁸

Other state ethics opinions have come to similar conclusions. In October 2014, the New York State Bar issued Ethics Opinion 1032, in which it stated that “A lawyer may not disclose client confidential information solely to respond to a former client’s criticism of the lawyer posted on a website that includes client reviews of lawyers.” The Pennsylvania Bar agreed, and like its California counterparts held that the “self-defense” exception to preserving client confidentiality did not apply where online reviews were concerned. In Opinion 2014-200 (2014), the Pennsylvania state bar ethics committee opined that an online disagreement about the quality of a lawyer’s services is not a “controversy” and that no “proceeding” is pending or imminent just because a client impugns his lawyer in an online review. It did, however, propose the following generic response to a negative online review:

A lawyer’s duty to keep client confidences has few exceptions and in an abundance of caution I do not feel at liberty to respond in a point-by-point fashion in this forum. Suffice it to say that I do not believe that the post presents a fair and accurate picture of the events.

So just what is the best approach for dealing with negative online reviews, where posting a rebuttal that’s too specific may result in a trip to the disciplinary board and a defamation suit is chancy at best? Lawyer-coach Debra Bruce of Houston recommends refraining from lashing out. Instead, she says, ask happy clients to post their own positive reviews, and consider “addressing the comment with a gracious apology or regret for their dissatisfaction, appreciation for the feedback, and an invitation to address the matter with the complainant personally.”¹⁹ This advice is echoed by Josh King, general counsel to Avvo, who calls negative commentary “a golden marketing opportunity.”²⁰ King says:

By posting a professional, meaningful response to negative commentary, an attorney sends a powerful message to any readers of that review. Done correctly, such a message communicates responsiveness, attention to feedback, and strength of character. The trick is to not act defensive, petty, or feel the need to directly refute what you perceive is wrong with the review.²¹

This is sound advice. After all, when responding online to a negative posting, you’re not just responding to one former client but to a reading audience of many potential clients.

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1. In the Matter of Tsamis, Commission No. 2013PR00095, available at <http://www.iardc.org/13PR0095CM.html>.

2. Id.

3. Id.

4. Id.

5. People v. James C. Underhill, Jr., Colorado Attorney Disciplinary Proceeding 15PDJ640 (August 12, 2015) 2015 WL 4944102

6. Id.

7. Pampattiar v. Hinson et al., 2014 WL 943230 (Ct. App. Ga., Mar. 12, 2014).

8. Id.

9. Id.

10. Id.

11. Thomson v. Doe, 356 P. 3d 727, 31 Law Man. Prof. Conduct 421 (Wash. Ct. App. 2015).

12. Yelp, Inc. v. McMillan Law Group, Inc., Case No. CGC-13-533654 (Sup. Ct. Cal., Cnty. San Fran., filed Aug. 20, 2013).

13. See, e.g., Debra L. Bruce, How Lawyers Can handle Bad Reviews and Complaints on Social Media, 75 Tex. B.J. 402, 403 (May 2012); Josh King, Your Business: Someone Online Hates You, The Recorder, Aug. 16, 2013; Laurel Rigertas, How Do You Rate Your Lawyer? Lawyers’ Responses to Online Reviews of Their Services, 4 St. Mary’s J. Legal Mal. & Ethics (2014).

14. LA Cnty. Bar Assoc. Professional Responsibility and Ethics Comm., Formal Opinion No. 525 (Feb. 2013)

15. Id.

16. Bar Assoc. San Fran. Ethics Opinion 2014-1 (Jan. 2014), http://www.sfbar.org/ethics/opinion_2014-1.aspx.

17. Id.

18. Id.

19. Bruce, *supra* note 13, at 403.

20. King, *supra* note 13

21. Id.