





# Negative Online Reviews: Pause and Think Before You Respond

By David P. Atkins and Marcy Tench Stovall

**It is an inescapable fact of modern life: the internet encourages everyone to have, and share, opinions about everything. And lawyers and law firms, just like restaurants and hotels, increasingly are the subject of online reviews by consumers. Indeed, according to a 2014 survey, more consumers used Yelp to search for a law firm than traditional websites such as Martindale-Hubbell.**

This phenomenon confronts lawyers and law firms with a thorny set of questions: should the firm respond to a former client's negative online reviews, and, if so, what exactly should the firm say—and not say—in its response? And, even if the lawyer's response would not run afoul of the Rules of Professional Conduct, is the posting of an online response prudent as a matter of law firm risk management?

"A lawyer *shall not* reveal information relating to the representation of a client..." (emphasis added) And, as the authors of the *Annotated Rules of Professional Conduct* warn, in contrast to the mechanics of the attorney-client privilege, "Rule 1.6 contains no exception permitting disclosure of information" protected under the Rule even if it has been "previously disclosed or [is] otherwise publically available."<sup>1</sup>

Nor is a lawyer's obligation to stay mum limited to information the client considers to be secret, sensitive, or potentially embarrassing. Instead, a lawyer is duty bound to preserve as confidential *any* information—no matter how innocuous—the lawyer has gleaned that relates to the representation of a client. And this includes matters learned from sources other than the client. As the commen-



## The Ethical Constraints on Publicly Responding to a Client's Negative Online Review

Subject to certain narrow exceptions, Rule 1.6 of the Rules of Professional Conduct imposes a broad prohibition:

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tary to Rule 1.6 provides, the obligation of confidentiality “applies not only to matters communicated in confidence by the client but also to *all* information relating to the representations, whatever its source.” (emphasis added).<sup>2</sup>



### The “Self-Defense” Exception

One of the exceptions to client confidentiality within Rule 1.6 is the so-called “self-defense” exception. Under Rule 1.6(d) of the Connecticut Rules of Professional Conduct, a lawyer is permitted to reveal information otherwise subject to the Rule’s strict non-disclosure obligation if the disclosure is made “to establish a claim or defense...in a *controversy*” with a client or “to respond to allegations in any *proceeding* concerning the lawyer’s representation of the client.” (emphasis added) Of course, even under those circumstances, the Rules’ authors impose a restriction on *how much* the lawyer may properly reveal: the lawyer may disclose client information only “to the extent the lawyer reasonably believes necessary.”

The first question for a lawyer seeking to invoke the self-defense exception is whether a client’s use of an online review site such as Yelp to publicly criticize his or her former (or current) counsel creates a “controversy,” thereby freeing the lawyer, under the self-defense exception, to defend his or her reputation by publicly revealing protected client information. Another question is whether such an online posting amounts to a knowing waiver by the client of the confidentiality protections of Rule 1.6. The consensus of state and local disciplinary bodies is a “no” to both questions.

This is true even in New York, notwithstanding that New York’s version of Rule 1.6 appears to expand the circumstances in which a lawyer may reveal otherwise protected client information: a lawyer

may do so in order “to defend the lawyer or the lawyers’ employees and associates against an *accusation* of wrongful conduct.” (emphasis added).<sup>3</sup> The New York Rule does, however, limit the *scope* of permitted disclosure: as in Connecticut, any permitted disclosure about the client may not go beyond what the lawyer “reasonably believes is necessary” to respond to a public “accusation” of misconduct.

In New York State Bar Association Ethics Opinion 1032 (2014), the Bar Association’s Committee on Professional Ethics concluded that the word “accusation” is “defined as ‘[a] formal charge against a person, to the effect that he is guilty of a punishable offense’...or ‘charge of wrongdoing, delinquency or fault.’” In view of that definition, the committee concluded that a New York lawyer may not disclose otherwise protected client confidential information solely to respond to the criticism by a former client posted on a lawyer-rating website.



### Disciplinary Risks of Going Too Far in Refuting a Client’s Negative Review

A Colorado case from 2016 illustrates the disciplinary risks when a lawyer posts a response that exceeds the bounds of what is “reasonably necessary” to address a negative review. The lawyer in question, a solo criminal defense practitioner, was the subject of an online review posted by a former client on Google+. In his review, the former client asserted that his former counsel is the “worst” attorney in Denver, and that he had paid the attorney \$3,500.00 and in return the attorney “did nothing.” He also reported that the attorney had lost his temper and called the client’s wife names. The former client opined that the attorney should be compelled to terminate his law practice.<sup>4</sup>

The attorney posted a response to Google+. Among other things, he described his former client as “nothing but abusive, demanding, insulting and offensive....” He also publicly disclosed the following about his former client: “He was not even able to substantiate the alleged facts that he presented to me....”

The same lawyer also faced a separate online review, posted by a different former client, also on Google+. In that review, the former client called the attorney one of the “worst attorneys” and asserted he was “late and unprepared for hearings, and that he walked out of court before a hearing was over and that he never used evidence given to him.” In his response to that review, the lawyer revealed, among other things, that the former client had paid him with a bounced check and had fabricated affidavits using forged signatures. The lawyer wrote that the former client’s “dishonest, fraudulent, and criminal conduct speak for themselves.”

The disciplinary tribunal found that the respondent lawyer had revealed substantial information relating to his representation of the two former clients, and had done so without the permission of either. Thus, the court concluded the lawyer had violated Rule 1.6. The court rejected the attorney’s defense based on the self-defense exception. The court suggested that even if the lawyer’s responses could be deemed a “defense” “in a controversy between” the lawyer and his former clients within the meaning of the self-defense exception, the content of his responses went too far. He “could not have reasonably believed it necessary to disclose the full range of information he posted.... [It] was unnecessary for [the lawyer] to describe the criminal charges his client was facing, and it was even more gratuitous to allege that [the former client] gave him an insufficient funds check and that she fabricated affidavits.” For his violations of Rule 1.6, the Colorado attorney was suspended for six months.



In 2014, an Illinois disciplinary tribunal considered a similar situation and imposed a reprimand on a lawyer for having violated Rule 1.6 in posting a response on Avvo to a former client's review on the site. Among other things, the lawyer described advice she had given the client about settling his unemployment benefits claim: "Despite knowing he would likely lose, he chose to go forward with a hearing to...obtain benefits." She also editorialized that the client's "own actions...are what caused the consequences he is now so upset about."<sup>5</sup>



### Law Firm Risk Management Lesson: Consider the Benefits of Restraint in Responding to a Negative Online Review

Most online review websites, including Yelp and Avvo, are set up to allow the target of a review to post a response that will appear immediately below the posted comments of the dissatisfied client. Significantly, the operators of those websites themselves alert the responder to precisely the risks that led to the unhappy disciplinary outcomes for the Colorado and Illinois lawyers described above.

Avvo actually suggests wording for a law firm's response to a negative review: "We are sorry you had a bad experience with our firm. This matter does not sound familiar and we strive for the utmost client satisfaction in every case. Please contact me directly to discuss your specific concerns." And Yelp provides this astute caution: "Yelp allows businesses to respond publicly and privately to user reviewers. However,...internet messaging is a blunt tool and sometimes good intentions come across badly." Indeed, posting a response readily can backfire, and it likely will increase the number of consumers who actually read the negative review.

In assessing whether to publicly post a response to a client's negative online review, the law firm or lawyer should first determine if one review by a single, disgruntled former client actually will hurt the reputation of the firm or the lawyer. And if the risk-benefit calculation leads the firm to okay a posted response, the lawyer still must ensure its contents do not include any client information beyond what is "reasonably necessary" to respond to the criticism. The firm also should take care not to disclose sensitive information. Even if such details arguably are "necessary"—and even if accurate—the former client is likely to view the disclosure as an effort at embarrassment or character assassination, thereby subjecting the lawyer to possible disciplinary sanction.

other factors and shared by few, if any, others. They will examine your reputation in light of more than one review. Some opinions are self-discrediting and will only influence people you would not want as clients in any event."<sup>6</sup> ■

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One way of threading this needle is to indicate in the public response that while you disagree with a former client's descriptions, your professional obligations prevent you from responding publicly without the client's consent. Another option: without a point-by-point refutation of the assertions in the negative reviews, direct readers to *positive* reviews posted by different clients.

The following, from an assistant general counsel for the Oregon State Bar, provides a useful summary of sensible guidance to lawyers contending with a negative online review: "Not every opinion must be contested. Reasonable consumers recognize that a negative review may be unfounded, motivated by

#### NOTES

1. Ellen J. Bennett and Helen W. Gunnarsson, *Annotated Rules of Professional Conduct* (9th Ed. 2019).
2. See CBA Standing Committee on Professional Ethics, Informal Opinion 98-17 (Rule 1.6 obligation extends to information obtained from client's bookkeeper concerning client's mental health and suspicion of alcoholism, as well as to lawyer's own observations about client).
3. N.Y.R.P.C. 1.6(b)(5).
4. *People v. Isaac*, 2016 WL 6124510 (Colo. Office of Presiding Disciplinary Judge, Sept. 22, 2016).
5. *In re Tsamis*, No. 2013 PR 00095 (Ill. Atty. Registration and Disciplinary Commission, Jan. 15, 2014).
6. Linn D. Davis, *Reputation Management: Responding to Negative Online Reviews*, 77 Oregon State Bar Bulletin 9 (July, 2017).