Reprinted with permission. Attorney Professionalism Forum/ What Should a Lawyer Do When Targeted On Social Media: Sue, Respond In Kind, Or Simply Keep Quiet?/ New York State Bar Association Journal, May/June 2021, Vol 93, No. 3.

The Attorney Professionalism Committee invites our readers to send in comments or alternate views to the responses printed below, as well as additional hypothetical fact patterns or scenarios to be considered for future columns. **Send your comments or questions to: NYSBA, One Elk Street, Albany, NY 12207, Attn: Attorney Professionalism Forum, or by email to journal@nysba.org.**

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TO THE FORUM:

I am an attorney of 12 years, admitted to practice in New York State and about five years ago, I became a sole practitioner. In order to reach potential clients, I created a website to promote my services and to showcase my biography, pro bono work, testimonials and more. Recently, however, it came to my attention that a former client had posted an extremely negative review of me and my staff on the *Yelp* website:

"*Attorney Stones and her staff are rude and beyond incompetent. They overcharged for 'legal' work that I could have done myself – and honestly should have – because I am no better off than I was before their 'help,' if anyone would even dare to call it that! It really makes me wonder if she actually went to law school. She needs to be canceled immediately. Highly do not recommend!!*"

- Inda Limbo

I have suspicions about who the client may be. I narrowed it down to two individuals; one client owes me a great deal of money, while the other client possesses a criminal record. Yet both discharged me as their attorney without explanation.

Needless to say, no matter who posted the negative review, I am worried that my previously unblemished reputation is going to be subject to disparagement forever. Continuing to work has been difficult during the age of COVID-19. With the pandemic shutting everyone in, I rely now, more than ever, on my website, as well as my internet presence, to obtain business and grow my reputation. I am concerned about these statements – they pop up whenever my name is run through a search engine.

I would like to resolve this without getting myself involved with the Grievance Committee. Am I ethically

permitted to respond in defense of my reputation? What can I say and how do I counter this negative review?

Very truly yours,
Styx N. Stones

DEAR ATTORNEY STONES,

Given your name, we are certain that you will appreciate the old adage: "Sticks and stones may break my bones, but words will never hurt me." If it were not for the damaging impact that a negative internet or social media posting may do to your reputation, our advice might be to simply ignore it. However, as we say below, there are ways to respond in a professional manner, but saying less actually counts for more, especially when caught in the crossfire of what can be characterized as internet warfare.

However unpleasant, you should consider yourself fortunate that this is the only dissatisfied client that you have encountered during your 12 years of practice. The "occasional" dissatisfied or high maintenance client is a sad fact of life. Over the years, we have tried in this Forum to offer practical and proactive guidance as to dealing with the problem client, maintaining/restoring the client-attorney relationship and terminating the representation should that become necessary. *See* Vincent J. Syracuse, Maryann C. Stallone, & Alyssa C. Goldrich, Attorney Professionalism Forum, N.Y. St. B.J., April 2020, Vol. 92, No. 3 (https://www.thsh.com/uploads/Dealing-With-The-Difficult-Client-And-Breakdowns-In-The-Attorney-Client-Relationship.pdf.) and Attorney Professionalism Forum, N.Y. St. B.J. September/October 2020. Vol. 92, No. 7 (https://www.thsh.com/uploads/Atty-Prof-Forum-SeptOct2020-The-Problematic-Client-and-When-is-it-time-to-Withdraw.pdf).

Unfortunately, it appears to be too late for you to repair the relationship with your former client, so we will do our best to provide you and our readers with information as to how to best deal with the situation at hand: Inda Limbo's negative internet posting.

As an attorney with an unblemished record, it is surely disconcerting to see your reputation maligned by a former client's online rant, especially since in these times negative social media posting may remain on the internet forever. When a search of your name reveals a negative internet posting, you can either ignore it or do something to lessen its impact. Hopefully, we can offer you advice as to how to protect your interests ethically and professionally.

Websites and other social media platforms can be invaluable resources allowing us to have a public "online presence" by posting positive information promoting our areas of practice, legal services, and accomplishments, which have the potential to reach clients. We note that when using these platforms, we lawyers need to be mindful of our ethical obligations. Thus, we must be fully aware of the consequences that may arise from using the internet for purposes such as discussing a case on a blog or website. When posting and maintaining an online presence, you must not only provide truthful and accurate information, but there are many other requirements that you should not ignore. Specifically, you should review the New York Rules of Professional Conduct at 22 N.Y.C.R.R. § 1200 (RPC), and in particular, the applicable attorney advertising Rules: Rules 1.0 (a)(c) and (i); Rule 7.1; 7.3; 7.4 and 7.5. Best practices for attorney advertising are a subject for another Forum so for now we will refer you to these Rules, as well as the many NYSBA Ethics Opinions issued over the past 10 years, which can be found at: https://nysba.org/category/ethics-opinions.

OPTIONS FOR RESPONDING TO A BAD REVIEW

Turning to your question, what should a lawyer do when clients, opposing parties and others engage in internet warfare by making negative comments in social media, websites, blogs lawyer-rating services or other online venues with the intent to malign a reputation?

Some lawyers tackled the problem by suing for defamation. We do not opine as to whether this is a good idea or what New York law and/or precedent provides as to the parameters of a successful defamation action. However, just last year the Minnesota Court of Appeals denied the appeal, dismissing the Minneapolis lawyer Jeffrey C. Brown's lawsuit against an unhappy litigant for defamation over a negative online review stating, inter alia, that Brown "need [sic] to go back to law school." Yet, according to the court, the statement posted on Brown's Google My Business account was deemed "vague" and informal due to its placement on a platform notorious for what was called a "repository for opinions." *Jeffrey C. Brown Pllc v. Gold Star Taxi and Transp. Serv. Corp.,* A19-1812, 2020 WL 4743502 (MN Ct. of Appeals Aug. 17, 2020), *aff'd*, No. 27-CV-19-3939 (Bjorkman, J.). New York lawyers have also filed defamation lawsuits based on negative online postings. *See, e.g.*, *P.D. & Assoc. v. Richardson*, 64 Misc. 3d 763, 104 N.Y.S.3d 876 (Sup. Ct., Westchester Co. 2019); *Morelli v Wey*, 2016 N.Y. Misc. LEXIS 4706, 2016 NY Slip Op. 32487(U) (Sup. Ct., N.Y. Co. December 16, 2016).

Resisting the temptation to sue, there are those who may want to fight fire with fire by responding in kind to the negative review. Before hitting the "Send" button with a viscerally stinging and, perhaps justified, response, a lawyer needs to be mindful that doing so without understanding the parameters of his or her ethical and professional obligations can create potentially huge risks leading to additional problems that may be far worse than a negative internet posting. This is especially so if the lawyer discloses client confidential information or uses uncivil or intem-

perate language that may adversely reflect on their fitness to practice law. As we have noted in a prior Forum, the obligation of a lawyer to protect a client's confidential information is one of a lawyer's principal responsibilities. *See* Vincent J. Syracuse, Carl F. Regelmann & Alexandra Kamenetsky Shea, Attorney Professionalism Forum, N.Y. St. B.J., January/February 2019, Vol. 91, No. 1 (https://www.thsh.com/uploads/Handling-Confidential-Client-Information-JanFeb-Journal_2019.pdf). Thus, before proceeding, lawyers must be mindful that if they use confidential client information, they may run afoul of Rule 1.6 and inter alia, Rule 1.2 (g); Rule 3.1(b); and Rule 8.4(h). See also, 22 N.Y.C.R.R. § 1200 Appendix A - Standards of Civility.

RPC Rule 1.6 provides in pertinent part:

> (a) *A lawyer shall not knowingly reveal confidential information, as defined in this Rule, or use such information to the disadvantage of a client or for the advantage of the lawyer or a third person, unless:*
>
> (1) *the client gives informed consent, as defined in Rule 1.0(j);*
>
> (2) the disclosure is impliedly authorized to advance the best interests of the client and is either reasonable under the circumstances or customary in the professional community; or
>
> (3) *the disclosure is permitted by paragraph (b).*
>
> *"Confidential information" consists of information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed or (c) information that the client has requested be kept confidential. "Confidential information" does not ordinarily include (i) a lawyer's legal knowledge or legal research or (ii) information that is generally known in the local community or in the trade, field or profession to which the information relates.*
>
> (b) A lawyer may reveal or use confidential information to the extent that the lawyer reasonably believes necessary: . . .
>
> (5) (i) to defend the lawyer or the lawyer's employees and associates against an accusation of wrongful conduct; or
>
> (ii) to establish or collect a fee; . . .

RETAINING CLIENT CONFIDENTIALITY

Here, given Inda Limbo's animus and purposeful anonymity, it is unlikely that contacting her would result in getting consent allowing you to post a response. While you may be tempted to argue that there appears to be an exception at Rule 1.6 (b)(5)(i) and/or (ii) because a lawyer may reveal a confidence "to defend the lawyer or the lawyer's employees and associates against an accusation of wrongful conduct" or "to establish or collect a fee," Inda Limbo's words appear to be carefully chosen, i.e., "Attorney Stones and her staff are rude and beyond incompetent. They overcharged . . ." but did not come right out to say that you or any of your employees or associates have conducted wrongful, or even unethical, conduct. It is also unclear as to whether the fees were paid or whether Inda Limbo is contesting your fees. So, any response should not mention "information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential." Further, you are unsure as to who the client really is – "Inda Limbo" is obviously a fictitious name. Thus, even though you may believe that you have narrowed it down to two clients, the information you mention is likely to be detrimental to one of them if revealed – one former client "owes you a great deal of money" and the other client "possesses a criminal record." Indeed, based on the information you provided you have no way of knowing whether it is actually a third client or someone who may not have even been a client that published the negative commentary. Even assuming arguendo that the posting is an allegation that constitutes wrongful conduct, you risk revealing confidential information about the wrong client.

If you do learn and confirm who actually published the negative social media posting in question, you must still be careful to limit what you say. Specifically, Rule 1.6's Comment [14] indicates that are limited parameters for the disclosure, and provides:

> Paragraph (b) permits disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified in paragraphs (b)(1) through (b)(6). *Before making a disclosure, the lawyer should, where practicable, first seek to persuade the client to take suitable action to obviate the need for disclosure. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose, particularly when accusations of wrongdoing in the representation of a client have been made by a third party rather than by the client.* If the disclosure will be made in connection with an adjudicative proceeding, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know the information, and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable. [Emphasis added].

Likewise, you must be mindful of the RPCs Rules regarding civility or the lack thereof, which provide no exception or justification for rude or intemperate behavior,

whether appearing before a court or talking to the media. The applicable RPC Rules provide in pertinent part:

Rule 1.2 (g): A lawyer does not violate these Rules by being punctual in fulfilling all professional commitments, by avoiding offensive tactics, and by treating with courtesy and consideration all persons involved in the legal process . . . .

Rule 3.1 (b): A lawyer's conduct is "frivolous" for purposes of this Rule if: . . . (2) the conduct has no reasonable purpose other than to delay or prolong the resolution of litigation, in violation of Rule 3.2, or serves merely to harass or maliciously injure another; or . . .

8.4 (h): A lawyer shall not engage in any other conduct that adversely reflects on the lawyer's fitness as a lawyer.

In at least one case, a lawyer was censured for making negative out-of-court public statements to the media about a judge. See *Matter of Golub*, 190 A.D.2d 110 (1st Dep't 1993). (Attorney censured for reckless comments to the press about a Supreme Court Justice after an adverse decision against his client in a highly publicized case. The court characterized the comments as "unprofessional, undignified, discourteous and degrading to the Judge and the court.") Notably, lawyers may also be subject to civil sanctions in a matter before the court for engaging in frivolous conduct that is "undertaken primarily to . . . harass or maliciously injure another." See the New York Rules of Court at 22 N.Y.C.R.R. § 130.1-1.

It is, therefore, critical to understand how to properly respond to negative postings to avoid engaging in internet warfare that may lead to unintended consequences, including further damage to your reputation, grievances and ultimately disciplinary proceedings. There are several bar association advisory opinions that offer some guidance that may help put you on a proper course.

ETHICS OF RESPONDING

The American Bar Association (ABA) recently issued Formal Opinion 496 on Jan. 13, 2021, "Responding to Online Criticism," which largely followed but also expanded upon the earlier NYSBA Ethics Opinion 1032 (2014). ABA 496 provides practical and proactive advice as to how a lawyer may professionally and prudently respond to online criticism, but NYSBA 1032 limits its advice to the inquiry as to whether the inquirer could reveal confidential information to counter a negative internet posting by a former client. Nonetheless, both Opinions emphasize that no matter what the response may be, lawyers cannot reveal confidential client information to do so. *See also*, Nassau County Bar Opinion 16-1 (2016), which largely followed and cited NYSBA 1032.

The ABA's Ethics Opinion 496 (2021) states that ". . . alone, a negative online review, because of its informal nature, is not 'controversy between the lawyer and the client'" within the meaning of Rule 1.6(b)(5), and therefore does not allow disclosure of confidential information relating to a client's matter. As stated in New York State Bar Association Ethics Opinion 1032 (2014), "[u]nflattering but less formal comments on the skills of lawyers, whether in hallway chatter, a newspaper account, or a website, are an inevitable incident of the practice of a public profession and may even contribute to the body of knowledge available about lawyers for prospective clients seeking legal advice." In analyzing the issue ABA Opinion 496 also states:

> The main ethical concern regarding any response a lawyer may make to an online review is maintaining confidentiality of client information. The scope of the attorney-client privilege, as opposed to confidentiality, is a legal question that this Committee will not address in this opinion. As this Committee itself concluded in ABA Formal Ethics Opinion 480 (2018), lawyers cannot blog about information relating to clients' representation without client consent, even if they only use information in the public record, because that information is still confidential."

NYSBA's Ethics Opinion 1032, also specifically advised:

> "Given the facts as presented, we need not consider whether a negative website posting might waive other kinds of confidentiality. Rather, we assume for present purposes that confidentiality has not been waived. It suffices to say that the mere fact that a former client has posted critical commentary on a website is insufficient to permit a lawyer to respond to the commentary with disclosure of the former client's confidential information."

Certain jurisdictions give lawyers more leeway when responding to negative internet postings. For instance, San Francisco Ethics Opinion 2014-1 (2014) states, "a lawyer may respond to online review by client if the matter has concluded and the lawyer discloses no confidential information in the response; if the client's matter is ongoing, lawyer may not be able to respond at all." Even so, no matter what jurisdiction the lawyer may practice in the consensus is that lawyers must adhere to Rule of Professional Conduct 1.6 (a) – "a lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent."

As to what a lawyer should do, we recommend that you review ABA Formal Ethics Opinion 496 which provides much needed practical guidance with basic guidelines as to the best practices to help evade unwanted conflict, specifically internet warfare. We summarize the ABA's recommendations with a few notes of our own below.

1. Consider not responding or ignoring a negative online posting to avoid more visits to the posting and/or invite a further negative response from an already unhappy client.

2. Before responding, deduce whether the negative comments implicate a formal complaint against you or your firm. Again, ABA Model Rule 1.6(b) explains which circumstances may be considered "formal" and justifiable to release client confidential information. We do not recommend guessing as to what constitutes formal allegations. See NYSBA Opinion 1032 and Nassau County 16-1 for a discussion of what constitutes a formal allegation. January 13, 2021.
3. If the comments/statements malign your reputation, you may ask that the website host or search engine remove the negative post from their site/platform.
4. If they refuse to remove the comments, you can respond by acknowledging that your professional obligations restrict you from replying to commentary.
5. If the comment cannot be removed, you may also collect testimonials from satisfied clients, which you can add (with their permission) to your website and/or have clients post their own positive reviews on that or other similar service-rating sites. By doing so, the negative review in question will be overshadowed by a myriad of positive experiences. *See* RPC's Rules 7.1(d)(3) and 7.1(e)(4) regarding the requirements as to testimonials.
6. If the poster is a former or current client, you may request to resolve the feud privately or offline in order to prevent future or additional comments.
7. If you know, for sure, the poster has never been a client of yours, you may simply respond by stating that you have not represented the poster in any prior, or current, matter.
8. Do not use uncivil language. *See* RPC's Rules 1.2(g); 3.1; 8.4(h) and the New York Rules of Court Rule 130.1-1.

Therefore, to avoid engaging in internet warfare lawyers can either ignore the negative internet posting, or if they choose to respond, the response should be circumspect to comport with the RPCs relating to confidential information and/or civility. It may be best to ignore the comments/statements posted online and not to engage in "internet warfare."

In conclusion, Styx N. Stones, if you think that the old adage mentioned earlier is inapplicable because the words posted on the internet will, in fact, hurt you and your reputation – you may choose to respond. However, Attorney Stones, be mindful of the Rules and advice discussed and explored throughout this Forum's response to you concerning your ethical and professional obligations as an attorney and member of the Bar. Engaging in internet warfare may be a bad idea that will end up backfiring.

Sincerely,
The Forum by
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QUESTION FOR THE NEXT FORUM

TO THE FORUM:

I am the founder and managing partner of a boutique criminal defense firm. An old law school classmate of mine who works for a not-for-profit public defender's office that represents criminal defendants as part of the county's assigned counsel program recently contacted me to tell me that the county has defunded the public defender's office and is moving to an alternate program. While many of their pending cases are being transferred to the new alternate program, the program has limited capacity, and he asked that I take on one of the outstanding client matters pro bono. I am always looking for an opportunity to help the underserved community through pro bono work and would be interested in taking on the matter, provided I am ethically permitted to do so. Do I have any ethical obligations with respect to taking on such representation?

In addition, my firm has been asked to represent another criminal defendant for the limited purpose of preparing for her upcoming trial. Given that I anticipate that the pro bono matter will substantially monopolize my time in the foreseeable future, I'd like the matter to be handled by an of counsel attorney at my firm. The engagement agreement would be limited in scope to obtaining a pretrial disposition and state that representation of the client at trial requires the client to separately engage the of counsel attorney for that purpose and we would pay him a flat fee for his services. Is such a limited scope retainer and flat fee payment permissible under the ethical rules? If so, are there any special precautions I must follow to make sure our firm is complying with the rules of professional conduct?

Sincerely,
Amy Advocate

1. Ms. Shkurtaj is employed at Scalise & Hamilton, PC. She is a senior at Fordham University, double majoring in journalism and digital technology and emerging media. She will graduate this May and hopes to attend law school in the fall.

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