

THE STATE BAR OF CALIFORNIA

# FAMILY LAW NEWS

Issue 1, 2017 | Volume 39, No. 1

**MCLE Article: The Family Lawyer's Guide to Assisted  
Reproduction Law in 2016**

*By Deborah H. Wald, Esq. and Richard B. Vaughn, Esq.*

**Family Violence Appellate Project Finds Many Family  
Law Judicial Officers Fail to Respond Appropriately in  
Domestic Violence Cases**

*By Nancy K. D. Lemon and Jennafer Dorfman Wagner*

**Understanding Issues Affecting Transgendered Youth**

*By Avi Levy and Nathan Gabbard*



# When and How to Respond to Online Reviews

Stephen D. Hamilton



Stephen D. Hamilton has been an attorney for 22 years, with a practice devoted almost exclusively to family law for 20 of those years. He has been a Certified Specialist in Family Law since 2004. He is a member of ACFLS and serves on the ACFLS Outreach Committee. He is also the chairperson of the San Luis Obispo County Family Law Section, and is currently a member of the California Family Law Executive Committee and Assistant Editor of the Family Law News.

## Introduction

As potential clients increasingly rely on internet reviews of you or your firm when deciding to retain you, managing and potentially responding to negative reviews is becoming a necessity. But the question is, how can you respond? Unlike your neighborhood pharmacy or local eatery, attorneys are not free to respond to reviews with specific facts or other information because of the attorney-client privilege and other ethical considerations. This article addresses both legal and practical issues when you feel a negative review demands a response.

## What you Can and Cannot Do

The State Bar has not issued a formal opinion regarding directly addressing a former client's negative online review. However, the Standing Committee on Professional Responsibility and Conduct has issued Formal Opinion Number 2016-195, which provides some guidance and boundaries. It addresses the issue of whether an attorney is required to refrain from disclosing "potentially embarrassing or detrimental information about the client" learned while representing that client, even though that information is publicly available. For example, in responding to a negative online review by a former client, can you refer to a finding by a court that the former client was the subject of a domestic relations order because they beat their spouse? That information would be publicly available and would clearly undermine the reviewer's credibility. However, Formal Opinion 2016-195 concludes that you cannot provide it in response to the negative review.

The opinion notes that "[o]ne of the most important duties of an attorney to is to preserve the secrets of his client," citing *Wutchumma Water Co. V. Bailey*, 216 Cal. 564, 572 (1932)<sup>1</sup> and Rule 3-100 of the Rules of Professional Conduct. It states the duty of every attorney to "maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client."<sup>2</sup> This duty to maintain a client's confidence is paramount. The only codified exception is when an attorney believes that breach of the confidence is necessary to prevent a criminal act reasonably believed to result in death or substantial bodily harm to another.

This duty of confidentiality is broader than the attorney-client privilege<sup>3</sup>. It prohibits the attorney from disclosing facts or allegations that might cause a client or former client public embarrassment.<sup>4</sup> As Formal Opinion 2016-195 states in footnote 4, "... client information does not lose its confidential nature merely because it is publicly available." Thus, the opinion concludes:

A lawyer's duty of confidentiality is broader than the attorney-client privilege, and embarrassing or detrimental information learned by a lawyer during the course of his representation of a client must be protected as a client secret even if the information is publicly available. A lawyer's duty to preserve his client's secrets survives the termination of the representation. If, however, otherwise embarrassing or detrimental information was not learned by the lawyer by virtue of his representation of the client, it is not a client secret, and the lawyer is not bound to preserve it in confidence.

This conclusion, while advisory only, is clear about disclosing information from your file obtained while representing a former client who has posted a negative review: *do not do it*.

The Los Angeles County Bar Association Professional Responsibility and Ethics Committee (LACBA PREC) and the Bar Association of San Francisco (BASF) have both issued opinions regarding the ethical limitations in responding to online reviews. Both were published prior to Formal Opinion 2016-195. LACBA PREC Opinion Number 525 was published on December 6, 2012, and is entitled “Ethical Duties of Lawyers in Connection with Adverse Comments Published by a Former Client.” The opinion concludes that an attorney may publicly respond to online reviews, subject to three rules:

1. The response does not disclose any confidential information.
2. The response does not harm the client in any matter involving the prior representation.
3. The response is proportionate and restrained.

Those conclusions are predicated on two assumptions: 1) that the former client’s review does not disclose any confidential information and 2) that the former client’s conduct does not constitute a waiver of confidentiality or the attorney-client privilege. This leaves open the possibility of seeking an express written waiver of confidentiality and the attorney-client privilege from your former client. Of course, if your former client felt dissatisfied enough to post a negative review, he or she is unlikely to sign a waiver so that you can undermine their review.

BASF Opinion 2014-1 framed the issue as follows: “May an attorney respond to a negative online review by a former client alleging incompetence but not disclosing any confidential information where the former client’s matter has concluded?” It also addresses the disclosure of confidential information in the response and whether the analysis changes if it is a current, not former, client who has posted the negative online review. It concluded that a response is not prohibited by the duty of loyalty owed to a former client and that the attorney can respond “generally to an online review by a former client where the former client’s matter has concluded.” However, an attorney’s “ongoing duty of confidentiality prohibits [the attorney] from disclosing any confidential information about the prior representation absent the former client’s informed consent or a waiver of confidentiality.”

The opinion limited the application of California’s statutory self-defense exception<sup>5</sup> and does not permit disclosure of confidential or privileged information in the response. The opinion also echoed LACBA PREC Opinion Number 525, finding that “the disclosure must be narrowly tailored to the issues raised by the former client.” It leaves unresolved whether a response is allowed under any circumstances if the review is posted by an existing client. However, I suspect that most attorneys would make that *existing* client a *former* client in short order if the client posted a negative online review while the representation was ongoing.

### **[A More Aggressive Approach: \*Hassell v. Bird\*, 247 Cal. App. 4th 1336 \(2016\)](#)**

Attorney Dawn Hassell took a more aggressive approach when dealing with an allegedly false and defamatory review about her services as a personal injury attorney: she sued a former client/reviewer for defamation and prevailed after the former client defaulted. She also obtained an order from the trial court directing Yelp to remove the negative review even though Yelp was neither a named party nor served with the defamation suit prior to the issuance of the injunctive order, which was upheld on appeal.

In her complaint, Hassell included a prayer for “injunctive relief prohibiting Defendant Ava Bird from continuing to defame plaintiffs as complained of herein, and requiring Defendant Ava Bird to remove each and every defamatory review published by her about plaintiffs, from Yelp.com and from anywhere else they appear on the internet.” The suit did not name Yelp, Inc. as a defendant, which was a critical fact in the appellate decision. At the default prove-up hearing, Hassell obtained a monetary judgment against Bird as well as the injunctive relief she requested. The default judgment also included an order directing Yelp.com, a non-party to “remove all reviews posted by AVA BIRD under user names ‘Birdzeye B.’ and ‘J.D.’ attached hereto as Exhibit A and any subsequent comments of these reviewers within 7 business days of the date of the court’s order.” On appeal, Division Four of the First District upheld the injunctive order issued by the trial court directed at Yelp, with modifications. After addressing some procedural issues, it held that a non-party could be subjected to an injunctive order in appropriate circumstances. After summarizing the applicable authority, the panel stated that “a trial court does have the power to fashion an injunctive decree so

that the enjoined party may not nullify it by carrying out the prohibited acts with or through a nonparty to the original proceeding.”

Yelp next argued that the injunctive order violated its First Amendment rights. To the extent the trial court order directed Yelp to remove future postings, the panel held that injunctive order was improper as an overly broad prior restraint on speech. The case was remanded with a direction to the trial court to modify its order accordingly. However, the Fourth District upheld the injunctive order as to the *prior* statements made by Bird that the trial court had determined to be defamatory.

The First District panel held that Yelp was “the administrator of a forum that Bird used to publish her defamatory reviews...,” rather than a “publisher.” That distinction was important because it meant that Yelp could not successfully argue that the negative reviews specifically identified by the Court were protected speech under the First Amendment. Citing *Balboa Island Village Inn, Inc. V. Lemen*, 40 Cal. 4th 1141, 1148 (2007), the *Hassell* court held that defamation is not protected by the First Amendment: “an injunction issued following a trial that determined that the defendant defamed the plaintiff that does no more than prohibit the defendant from repeating the defamation, is not a prior restraint and does not offend the First Amendment.”

If an attorney wishes to take a similar approach to address a negative online review that constitutes defamation and seek an injunction against the web site that is hosting the review, do not name the web site as a defendant. This was a critical aspect of the *Hassell* decision. Yelp argued that it could not be the subject of an injunctive order because of section 230 of the Communications Decency Act of 1996 (CDA) (47 U.S.C. § 230). Under the CDA, a provider or user of interactive computer services shall not be treated as a publisher of any information provided by “another information content provider” and “[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.”<sup>6</sup>

Courts have construed section 230 broadly to “afford interactive service providers broad immunity from tort liability for third party speech.”<sup>7</sup> Thus, if *Hassell* had named Yelp as a party, the suit against Yelp would have been barred under the CDA. However, by naming only the former client and limiting Yelp to the injunctive order, she successfully avoided the application of the CDA:

Neither party cites any authority that applies section 230 to restrict a court from directing an Internet service provider to comply with a judgment which enjoins the originator of defamatory statements posted on the service provider’s Web site.

...

As we have pointed out, *Hassell* did not allege any cause of action seeking to hold Yelp liable for Bird’s tort. The removal order simply sought to control the perpetuation of judicially declared defamatory statements. For this reason, Yelp seriously understates the significance of the fact that *Hassell* obtained a judgment which establishes that three reviews Bird posted on Yelp.com are defamatory as a matter of law, and which includes an injunction enjoining Bird from repeating those three reviews on Yelp.com. Indeed, that injunction is a key distinction between this case and the CDA cases that Yelp has cited, all of which involved *allegations* of defamatory conduct by a third party, and not a judicial determination that defamatory statements had, in fact, been made by such third party on the Internet service provider’s Web site.<sup>8</sup>

After my initial draft of this article, the California Supreme Court granted Yelp, Inc.’s petition for review of the First District’s decision. However no other orders were made by the Supreme Court. Thus under Cal. Rules of Court, Rule 8.1115(e)(1), the First District decision in *Hassell* “has no binding or precedential effect” but “may be cited for potentially persuasive value only.”

### **Practical Advice from an Internet Review Provider**

I reached out to AVVO, which touts itself as “consumer facing web site” that reviews and rates attorneys based on a variety of factors. A significant factor includes reviews from clients, both the quantity and the quality of those reviews. What do you do if you have stellar reviews except for one outlier? Leave it there, according to AVVO. Their research indicates that a negative review legitimizes the positive reviews and that the profile actually performs better. In other words, the one outlier review comes off as an unreliable source compared to the other glowing reviews you may have. However, if you feel compelled to respond, an AVVO attorney advocate gave me the following specific advice:

- Do not attack the reviewer, regardless of how egregious their claims are;
- Demonstrate a learning lesson saying that you will use their criticism to improve your process or communication in the future;
- Refute the claim with facts (so long as you do not breach attorney client privilege) without being inflammatory; and
- Keep it short and simple; do not write a novel.

An additional point I would add: if you asked for the client's waiver to respond to the post and he or she ignored or declined your request, mention that fact in the review a neutral fashion. "I am unable to provide a specific factual response to this review due to my former client asserting their attorney-client privilege, preventing me from releasing any privileged or confidential information."

### Conclusion

How and whether to respond to a negative online review can be summarized as follows:

1. If it is one isolated, outlier review, ignore it.
2. If you feel compelled to respond to a review, write a short, simple and non-inflammatory

response that does not disclose confidential or privileged information and addresses how you have changed your practices to prevent future similar complaints.

3. If the review is false and defamatory, you can sue. Make sure to include a carefully-tailored request for injunctive relief and do not name the internet service provider that is hosting the review as a defendant. However, do include the host in the injunctive orders.

### Endnotes

- 1 *Wutchumna*: "No rule in the ethics of the legal profession is better established nor more rigorously enforced than this one."
- 2 CAL. BUS. & PROF. CODE § 6068(e)(1).
- 3 *In the Matter of Johnson*, 4 Cal. State Bar Ct. Rptr. 179, 189 (Rev. Dept. 2000).
- 4 *Dietz v. Mesinheimer & Herron*, 177 Cal. App. 4th 771, 786 (2009).
- 5 CAL. EVID CODE § 958.
- 6 47 U.S.C. § 230(e)(3).
- 7 *Hassell v. Bird*, 247 Cal. App. 4th at 1362 [citations omitted].
- 8 *Hassell v. Bird*, 247 Cal. App. 4th at 1363-1365.

## GET INVOLVED!

The Legislative Liaisons study pending family law legislation, make recommendations to FLEXCOM and propose affirmative legislation. They also coordinate Section MCLE programs, contribute articles for The Family Law News, comment on Judicial Council proposals, and provide a forum for Section members to discuss case law and Family Law and Section policies and procedures. Becoming a Legislative Liaison also provides networking opportunities.

*If you would like more information or want to be involved, contact the chair or co-chair in your jurisdiction listed at the end of this issue and join them in reviewing family law legislation. Make a difference in family law!*

