SUPREME COURT OF ARIZONA
ATTORNEY ETHICS ADVISORY COMMITTEE
Ethics Opinion File No. EO-19-0010

The Attorney Ethics Advisory Committee was created in accordance with Rule 42.1 and Administrative Order Nos. 2018-110 and 2019-168.

ISSUE PRESENTED

When may a lawyer ethically divulge confidential information or privileged communications (hereafter "protected information or communications") relating to a current or former client in response to negative comments by that client which are posted online or in social media and that refer to or discuss protected information or communications?

APPLICABLE ARIZONA RULES OF PROFESSIONAL CONDUCT

ER 1.6 Confidentiality of Information

(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are implicitly authorized in order to carry out the representation, and except as stated in paragraphs (b), (c) and (d) or ER 3.3(a)(3).

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(d) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

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(4) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

ER 1.9 Duties to Former Clients

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(c) A lawyer who has formerly represented a client in a matter shall not thereafter:

(1) use information relating the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

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OPINION

Discussions between a lawyer and their client concerning the client's case or matter must be kept strictly confidential according to ER 1.6(a), which prohibits a lawyer from disclosing "information relating to the representation" of a client unless the disclosure is impliedly authorized to carry out the representation, the client consents after consultation, or an exception set forth in ER 1.6(b), (c), (d) or ER 3.3(a)(3) applies. The duty to keep such information confidential extends to former clients through ER 1.9(c).

The only exception reasonably likely to be applicable to the question presented here is ER 1.6(d)(4). This sub-rule identifies three situations in which a lawyer may disclose confidential information relating to a client or former client:

- To establish a claim or defense on behalf of the lawyer *in a controversy between the lawyer or client,*

- To establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or

- To respond to allegations *in any proceeding concerning the lawyer's representation of the client.*

For purposes of this opinion we are assuming that no formal action or suit has been initiated or filed.

The rise of the internet, with its multiple methods of sharing or presenting information or comments (for example, Avvo or Yelp), social media in its many forms, and undoubtedly other means of expression that are too numerous to list or even predict, presents a unique challenge to a lawyer who is being negatively commented upon or reviewed by a client. Such online expressions may be anonymous and even those that have attribution may not themselves establish with certainty that the client is actually the source of the comments. Because of this, the first task for a lawyer who is considering a response is to satisfy them self that the client actually posted the comments in question or is otherwise responsible for them. The lawyer must establish this nexus with objective certainty. If the lawyer fails to make this connection to the client and then responds with the disclosure of protected information or communications, a disciplinary charge against the lawyer will be the likely result.

Having satisfied this requirement, the next step for the lawyer before responding is to determine whether the client comments rise to the level of a "controversy" under ER 1.6(d)(4). It is again emphasized that information and communications exchanged between a lawyer and client concerning representation of the client are, in the first instance, to be kept strictly confidential. Disclosure is the rare exception to this rule.

Comments posted in one form or another by a client online can cover a broad spectrum ranging from gripes about an outcome or the cost of the representation, for example, to serious charges of malpractice or unethical conduct. The two ends of that spectrum make for easy analysis.

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Comments amounting to a gripe rarely, if ever, create a controversy under ER 1.6(d)(4), but allegations of malpractice, unethical conduct, or other serious malfeasance frequently will. Comments in the grayer area in the middle of the spectrum require careful analysis by the lawyer. Given the numerous fact patterns that are likely to emerge in this context, an all-encompassing general rule cannot be articulated. That said, the lawyer is admonished to consider responding with the disclosure of protected information or communications only in the most extreme circumstances that lie much nearer to the serious allegation end of the spectrum.

ER 1.6(d)(4) refers to both "*a controversy between the lawyer and client*" and "*any proceedings concerning the representation of the client*." Some authorities suggest that a lawyer may disclose protected information or communications only in defense of a formal civil, criminal, disciplinary, or other action that has already been filed or in connection with which the intent to file it has been "manifested." *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 64, Cmt. c. We believe, however, that online assertions made against the lawyer by the client or former client to the effect, for example, that the lawyer acted incompetently or dishonestly or refused to follow instructions, etc., can in the proper circumstances themselves be sufficient to establish a "controversy" between the lawyer and client for purposes of ER 1.6(d)(4). Otherwise, use of the phrase "a controversy between the lawyer and client" would be superfluous in light of the breadth of "any proceedings concerning the representation of the client" also found in ER 1.6(d)(4).

The final requirement, assuming the preceding analysis otherwise would allow disclosure of protected information or communications, is to determine the permissible, and proper, substance of any response.

It is emphasized that a lawyer is always entitled to respond to an online client comment, regardless of its content, by stating, in substance: "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."

A response along these lines should always be the first option considered when responding to *any* online comment. It is not too trite to say that lawyers should always in the first instance consider taking the proverbial high road. But, in those limited situations where disclosure of protected information or communications is both justified and necessary to respond to an online comment, a lawyer is permitted to make a proportionate and restrained response that includes protected information or communications in order to protect the reputation of the lawyer or vindicate the lawyer's conduct. The concepts of "justification and necessity," on the one hand, and "proportionality and restraint," on the other, are not mere filler. Even if there is a "controversy," a lawyer is "justified" in disclosing protected information or communications only to the extent the client's online post waives the protection otherwise afforded to that information or those communications. The RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS recognizes that both the attorney-client privilege and the protection afforded to confidential client information can be waived by the client. See § 64, Cmt. f.; § 80, Cmt. c. ("A client who contends that a lawyer's assistance was defective waives the privilege with respect to the communications relevant to that contention. Waiver affords interested parties fair opportunity

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to establish the facts underlying the claim.") An online post by the client would be the kind of "subsequent disclosure" recognized as a waiver. *Id.*, § 79, Cmt. b. ("Voluntary disclosure of a privileged communication [or confidential information] is inconsistent with a later claim that the communication [or information] is to be protected.")

Comment e. to § 64 of the RESTATEMENT further states, "When a client has made a public charge of wrongdoing, a lawyer is warranted in making a proportionate and restrained public response." The concept of proportionality works as a governor that limits the extent of the lawyer's disclosure. ER 1.6(d)(4) permits disclosure by the lawyer of only so much confidential information or privileged communications as is reasonably necessary under the existing circumstances to respond directly to the client's online comment or allegations. We emphasize that a lawyer may not simply open up their file in response to such a client "controversy." The lawyer must first determine whether they can adequately respond without disclosing protected information or communications. Ultimately, whether disclosure is "reasonably necessary" for purposes of ER 1.6(d)(4) is within the independent judgment of the lawyer involved after careful assessment of the facts and the nature of the controversy.

In conclusion, we do not believe that a lawyer's right to disclose protected information or communications in these circumstances is limited only to responding to a pending or imminent formal proceeding. Section 64 of the RESTATEMENT, Cmt. a., recognizes an exception to the general confidentiality rule that gives a lawyer limited permission to employ protected client information or communications. Otherwise, Comment a. further notes "lawyers accused of wrongdoing would be left defenseless against false charges in a way unlike that confronting any other occupational group."

Many jurisdictions that have addressed this question answer it differently than does this Committee. *See, e.g.,* New York State Bar Association Ethics Opinion 1032 (2014) ("Unflattering 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. We do not believe that Rule 1.6(b)(5)(i) should be interpreted in a manner that could chill such discussion."); Pennsylvania State Bar Association Formal Opinion 2014-200 ("We conclude that a lawyer cannot reveal client confidential information in a response to a client's negative online review absent the client's informed consent."); and, most recently, ABA Formal Opinion 496 (January 13, 2021) ("Lawyers who choose to respond online must not disclose information that relates to a client matter, or that could reasonably lead to the discovery of confidential information, in the response.")

This Committee acknowledges the foregoing (and other) different points of view from around the country and agrees with them to the extent they emphasize the seriousness of a lawyer revealing protected client information or communications and the very limited circumstances in which it is appropriate. Our disagreement is over whether there are, in fact, ever proper circumstances in which limited disclosure of such information or communications in response to an online post or comment is "reasonably necessary," and we believe as discussed herein that there are.

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