ATTORNEY ETHICS ADVISORY COMMITTEE

Thursday February 20, 2020

No. 3 Update and possible action regarding Ethics Opinion drafts:

- EO-19-0010

Committee member Sheena Chiang will present information at the meeting.

ETHICS OPINION DRAFT

EO 19-0010

Draft Opinion for Larger Committee Review

February 10, 2020

This opinion addresses the ethical considerations that apply when a lawyer responds to any online review.

Online reviews of a lawyer's performance have become more common and may have an impact on prospective clients. When a lawyer comes across an online review, the lawyer may feel inclined to respond. However, a lawyer's ability to disclose protected information or communications is extremely limited.

There is no rule barring a lawyer from responding an online review, whether negative or positive. However, the lawyer must always adhere to the duty of confidentiality contained within E.R. 1.6.

E.R. 1.6 states:

> **(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the**
> **disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted or required by paragraphs (b),**
> **(c) or (d). or ER 3.3(a)(3).**
> **(b) A lawyer shall reveal such information to the extent the lawyer reasonably believes necessary to prevent the client from**
> **committing a criminal act that the lawyer believes is likely to result in death or substantial bodily harm.**
> **(c) A lawyer may reveal the intention of the lawyer's client to commit a crime and the information necessary to prevent the crime.**

(d) A lawyer may reveal such information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(2) to mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(3) to secure legal advice about the lawyer's compliance with these Rules;

(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; or

(5) to comply with other law or a final order of a court or tribunal of competent jurisdiction directing the lawyer to disclose such information.

(6) to prevent reasonably certain death or substantial bodily harm.

(7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

(e) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to,

information relating to the representation of a client.

Disclosing confidential client information in response to an online review is not impliedly authorized to carry out the representation. Furthermore, when the client has not consented to disclosure after consultation for purposes of ER 1.6(a); and further that no exception set forth in ER 1.6(b) or (c) or ER 3.3(a)(2) applies, and further that disclosure is not authorized "to establish a defense to a criminal charge against the lawyer based upon conduct in which the client was involved" or "to respond to allegations in any proceedings concerning the lawyer's representation of the client" under ER 1.6(d), a lawyer may not disclose confidential information.

Although the confidentiality rule provides an exception under 1.6(d) that authorizes a lawyer to disclose confidential information to "establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client" this exception is not applicable to the disclosure of information in response to an online reviews.

The rise of the internet, with its multiple methods of sharing or presenting information or comments, 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 commented upon 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, a lawyer may not disclose confidential information with regard the client's representation.

If a lawyer chooses to respond to an online review, a lawyer may only state the following:

"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, I do not believe that the post presents a fair and accurate picture of the events."

As it is impossible for an attorney to ascertain the identity of the person behind an online posting, an attorney may not disclose confidential information with regard to a controversy pursuant to E.R. 1.6(d). In other forums, disclosure may be permissible, but in the online forum due to the anonymity of postings, disclosure of protected information is expressly prohibited.

ETHICS OPINION REQUEST

(1)

FILED
OCT 28 2019
JANET JOHNSON
CLERK SUPREME COURT
BY:

BEFORE THE ATTORNEY ETHICS ADVISORY COMMITTEE OF THE SUPREME COURT OF ARIZONA

IN THE MATTER OF FORMER STATE BAR ETHICS COMMITTEE OPINION:	**EO-19-0010**
Op. 93-02	**NOTICE OF - REQUEST FOR ETHICS OPINION**

On September 26, 2019 the Attorney Ethics Advisory Committee of the Supreme Court of Arizona determined by a vote of 12-0-3[1], to review State Bar ethics opinion Op. 93-02. This motion is given for the purpose of docketing the opinion request.

DATED this 28 day of October 2019.

Judge Paul McMurdie, Chair
Attorney Ethics Advisory
Committee of the Supreme Court of Arizona

[1] Committee members Maria Hubbard, Hon. Kimberly Ortiz and Anne Schrock did not participate in this matter.

Original of the foregoing filed this 28 day of October 2019 with:

Supreme Court of Arizona
Court Clerk's Office
1501 West Washington, Suite #402
Phoenix, AZ 85007-3231
Phone: (602) 452- 3396

Copy of the foregoing filed this 28 day of October 2019 with:

Attorney Ethics Advisory Committee
Of the Supreme Court of Arizona
1501 West Washington Street, Suite 104
Phoenix, Arizona 85007
E-mail: aea@courts.az.gov

By: B. Farmer

State Bar of Arizona Ethics Opinions

93-02: Confidentiality; Former Client 3/1993

Lawyer may disclose confidential information to the extent necessary to refute former client's public assertions that the lawyer engaged in misconduct.

FACTS

The inquiring attorney formerly represented a criminal defendant who was charged with first degree murder. The defendant was convicted and sentenced to death in 1981.

Recently, a state employee involved in the case began work on a book about the murderer, the murder and the subsequent trial. The author interviewed the defendant, who asserted that the inquiring attorney acted incompetently, refused to follow instructions, failed to call certain witnesses, and engaged in a conspiracy with the prosecution to ensure his conviction. The author has now requested an interview with the inquiring attorney to give him an opportunity to dispute these allegations.

QUESTION

To what extent may the inquiring attorney ethically divulge to the author the substance of discussions between himself and his former client, in order to refute the allegations his client has made against him?

ETHICAL RULES INVOLVED

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 impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b), (c) and (d) or ER 3.3(a) (2).

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(d) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary 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 proceedings concerning the lawyer's representation of the client.

ER 1.9. Conflict of Interest: Former Client

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

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(b) use information relating to the representation to the disadvantage of the former client except as ER 1.6 would permit with respect to a client or when the information has become generally known.

OPINION

Discussions between an attorney and his or her client concerning the client's case must be kept strictly confidential according to ER 1.6(a), which prohibits an attorney from disclosing "information relating to 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) (2) applies. The duty to keep such information confidential extends to former clients through ER 1.9(b).

The only exception potentially applicable to the inquiring attorney's question here is ER 1.6(d). This rule identifies three situations in which a lawyer may disclose confidential information relating to a client or former client:

(1) To establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client;

(2) To establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved; and

(3) To respond to allegations in any proceedings concerning the lawyer's representation of the client.

We believe that the assertions made against the attorney by the former client to the effect that he acted incompetently, refused to follow instructions, failed to call certain witnesses, and engaged in a conspiracy with the prosecution to ensure his conviction, are sufficient to establish a "controversy" between the attorney and his former client.

The use of the words "claim or defense" in the rules have been interpreted by some as a limitation on the applicability of the rule to situations in which formal civil, criminal or disciplinary charges have been filed against the lawyer or where a lawyer must disclose confidential information in order to prevent the filing of such charges. See Pennsylvania Ethics Opinion 88-57 (ABA/BNA Lawyers' Manual on Professional Conduct at 901:7313); Maryland State Bar Ethics Opinion 81-41 (ABA/BNA Lawyers' Manual, supra, at 801:4309). However, we believe that such an interpretation would render the language "to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client" largely superfluous (emphasis supplied).

The Comment to ER 1.6 reads, in pertinent part:

"Dispute Concerning Lawyer's Conduct

"Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (b) (2)[1] does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend, of course, applies where a proceeding has been commenced. Where practicable and not prejudicial to the lawyer's ability to establish the defense, the lawyer should advise the client of the third party's assertion and request that the client respond appropriately. In any event, disclosure should be no greater than the lawyer reasonably believes is necessary to vindicate innocence, the disclosure should be made in a manner which limits access to the information to the tribunal or other persons having a need to know it, and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

"If the lawyer is charged with wrongdoing in which the client's conduct is implicated, the rule of confidentiality should not prevent the lawyer from defending against the charge. Such a charge can arise in a civil, criminal or professional disciplinary proceeding, and can be based on a wrong allegedly committed by the lawyer against the client, or on a wrong alleged by a third person; for example, a person claiming to have been defrauded by the lawyer and client acting together. A lawyer entitled to a fee is permitted by paragraph (b) (2)[2] to prove the services rendered in an action to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary. As stated above, the lawyer must make every effort practicable to avoid unnecessary disclosure of information relating to a representation, to limit disclosure to those having the need to know it, and to obtain protective orders or make other arrangements minimizing the risk of disclosure."

Section 116 of Tentative Drafts Nos. 2 and 3 of the proposed Restatement of the Law Third, The Law Governing Lawyers, is instructive. The proposed § 116 reads:

"Using or Disclosing Information in Lawyer's Self-Defense

"A lawyer may use or disclose confidential client ' information to the extent that the lawyer reasonably believes necessary in order to defend the lawyer against a charge by any person that the lawyer or a person for whose conduct the lawyer is responsible acted wrongfully during the course of representing a client."

Comment (c) to § 116 reads:

"Kinds of charges within the exception. A lawyer may act in self-defense under this Section only to defend against charges that imminently threaten the lawyer with serious consequences. Included are actual filings of criminal charges, or legal malpractice or other civil actions such as suits to recover overpayment of fees, or of complaints to lawyer disciplinary agencies or administrative agencies empowered to bring formal disciplinary proceedings. Also included are clear threats of such proceedings by persons in an apparent position to carry them out, such as a prosecutor or an aggrieved potential litigant. On responding to informal, public charges made by a client, see Comment f hereto."

Comment (f) to § 116 (in Tentative Draft No. 2) reads:

> "Defense against charges by client. If the lawyer's client files a formal charge of wrongdoing, the client thereby waives the attorney-client privilege with respect to information relevant to the client's claim. See § 130, Comment d. This Section, in effect, recognizes a counterpart waiver concerning confidential client information (see § 112) that includes information not subject to the privilege and that permits the lawyer to respond in ways in addition to testifying. The waiver thus permits a lawyer to defend against an informal client charge, such as that made in a letter complaint to a lawyer disciplinary agency, and through means other than formal testimony, as by the lawyer discussing the charge with a disciplinary investigator.
>
> "Normally, it is sound professional practice for a lawyer not to use or reveal confidential client information except in response to a formal client charge of wrongdoing with a tribunal or similar agency. When, however, a client has made public charges of wrongdoing, a lawyer is warranted under this Section in making a proportionate and restrained response in order to protect the reputation of the lawyer." (emphasis supplied)

At least one ethics committee appears to be in accord with this view. Los Angeles County Bar Association Opinion 396 (April 1, 1982) (ABA/BNA Lawyers' Manual, supra, at 801:1706) concluded that an attorney may disclose confidential information when a former client has accused him of misconduct, even though formal proceedings against the attorney were neither pending nor impending. The Los Angeles Committee determined that the attorney could provide a factual response when his former client publicly attacked his integrity, good faith, performance of duty, or authority.

We do not believe that the right to disclose is limited to a pending or imminent legal proceeding. Instead, an attorney may disclose confidential information pursuant to ER 1.6(d) when the client's allegations against him or her are of such a nature that they constitute a genuine controversy between the attorney and the client which could reasonably be expected to give rise to legal or disciplinary proceedings. In the present case, the former client's allegations against the inquiring attorney, if true, constitute the basis for a disciplinary proceeding or a claim of ineffective assistance of counsel. On the other hand, if they are false, they are defamatory and are grounds for a civil action by the attorney against his former client. Under these circumstances, we believe disclosure is permitted even though the actual filing of any legal claims or charges has not occurred and is not immediately imminent.

We emphasize that our conclusion should not imply that an attorney may simply open his or her file in response to any such derogatory allegations. ER 1.6(d) permits disclosure only "to the extent the lawyer reasonably believes necessary" to establish a claim or defense. Therefore, an attorney must determine whether he or she can adequately establish a claim or defense against accusations of misconduct without disclosing information protected by ER 1.6(a). Whether disclosure is "reasonably necessary" for the purposes of ER 1. 6 (d) is ultimately within the independent judgment of the attorney involved, after a careful assessment of the facts and the nature of the controversy.

When a controversy has not been directly verified or corroborated by the former client, the attorney should contact the former client to corroborate and attempt to resolve any controversy. We believe that any attorney must make a reasonable effort to corroborate the existence and nature of any controversy between attorney and client, especially in a situation such as the one presented here, where the attorney becomes aware of the controversy through a third party. If the allegations, because of their nature, involve a genuine controversy between the attorney and the client such as the one presented here, the plain language of ER 1.6(d) permits the attorney to establish a defense through the disclosure of only so much confidential information as is necessary

to vindicate the attorney's innocence. However, if the dispute between the attorney and the client does not involve such a controversy, the attorney may not rely on ER 1.6(d) to permit the disclosure of confidential information.

In conclusion, if the inquiring attorney's former client in fact made allegations to the effect that the inquiring attorney represented him incompetently and engaged in a conspiracy with the prosecution, we believe the inquiring attorney is permitted to disclose confidential information pursuant to ER 1.6(d) to the extent reasonably necessary to defend himself.

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[1] ER 1.6 (b) (2) of the Model Rules of Professional Conduct was adopted as ER 1.6(d) in Arizona but the Comment was not changed accordingly.

[2] ER 1.6(b) (2) of the Model Rules of Professional Conduct was adopted as ER 1.6 (d) in Arizona but the Comment was not changed accordingly.