SUPREME COURT OF ARIZONA
ATTORNEY ETHICS ADVISORY COMMITTEE

MEMORANDUM

TO: Supreme Court of Arizona

FROM: The Attorney Ethics Advisory Committee

DATE: January 28, 2021

RE: The Attorney Ethics Advisory Committee Ethics Opinion EO-19-0010

During the January 28, 2021 meeting of the Attorney Ethics Advisory Committee, formal opinion EO-19-0010 received a vote of 14-0-2 to submit the proposed opinion to the Supreme Court for review.

Pursuant to Rule 42.1(i), Ariz. R. Sup. Ct., the Committee shall submit proposed ethics opinions to the Supreme Court for review. The Supreme Court has 90 days to review a proposed ethics opinion and take such action as it deems appropriate.

The Attorney Ethics Advisory Committee has attached the proposed ethics opinion EO-19-0010, ethics opinion request, and submitted public comments.

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.

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 to an online review, whether negative or positive. However, the lawyer must always adhere to the duty of confidentiality contained within E.R. 1.6.

APPLICABLE ARIZONA RULES OF PROFESSIONAL CONDUCT ("ER _")

E.R. 1.6:

(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.

OPINION

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 review.

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 or former 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 respond by disclosing confidential information relating to representation of a client or former client.

If a lawyer chooses to respond to an online review, one possible acceptable response is as follows:

> "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."

This is not the only acceptable response a lawyer can provide consistent with ER 1.6, but a lawyer may never reveal confidential information related to client representation when responding to an online review.

Because 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 client controversy pursuant to E.R. 1.6(d). In other situations, such disclosures may be permissible, but in the online forum due to the anonymity of postings, disclosure of protected information is expressly prohibited.

State Bar of Arizona, Rules of Professional Conduct Committee, Ariz. Op. 93-02 interprets the concept of "client controversy" under ER 1.6(d)(4) in a way suggesting that confidential client information may be disclosed in response to a public allegation criticizing an attorney in representing a client To the extent Ariz. Op. 93-02 is inconsistent with the direction provided in this opinion, it is disapproved and superseded.

DISSENT[1]

The amount of misdirection, misstatement of fact, downright meanness, and, yes, even fake news, that appears daily on the internet is staggering. The legal profession is not immune from this phenomenon. Criticism may come to a lawyer from many quarters, and most certainly lawyers are frequently the target of on-line criticism from clients and former clients, sometimes fairly, sometimes unfairly. Proposed EO-19-0010 announces an inflexible rule that precludes a lawyer from responding to such criticism with anything but platitudes. This new EO will unequivocally bar lawyers from responding to even the most scurrilous accusations with anything that even approaches confidential information or privileged communications. The premise for this restriction, unstated in the EO, is the assumption that lawyers, if left unchecked, will unnecessarily reveal private and confidential information online they have learned about their clients, all to the client's detriment. The empirical data supporting this premise has yet to be presented for consideration. Taken to its extreme conclusion, under the proposed EO a lawyer could not even respond to an online comment acknowledging that the person who posted it is or was a client because the very fact of representation is itself confidential and cannot be disclosed without client consent.

The proposed EO hamstrings and harms lawyers who are the subject of unfair or untrue online attacks. In the long run, it also harms the consumers of legal services because they are never able to get "the rest of the story."

My suggestion is that an EO on this topic be crafted along the following lines, the intent of which is to protect clients first and foremost, but at the same time provide a means for lawyers to protect themselves from unjustified online attacks.

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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[1] The dissenting Committee members are Wm. Charles Thomson, Michael Aaron and Regina Nassen.

(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.

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.*

[Parenthetically, and for this Dissent only, I make the following observations about ER 1.6(d)(4):

Taking these "permitted disclosures" in reverse order, "any proceeding" presumably means just that, civil, criminal, administrative, disciplinary, and so on, that "concerns" the representation of the client. This category covers the water front of claims that can be filed somewhere by somebody.

The second exception is considerably narrower. It applies only to establishing "a defense by the lawyer to a criminal charge or civil claim based upon conduct in which the client was involved." Whatever this covers, it is by no means the entire water front as is the first exception discussed above, or anything close to that.

The last (but first stated) exception is, again, exceedingly broad. It permits disclosures of confidential information by a lawyer to establish either a claim or a defense "in a controversy with a client."

The comments to ER 1.6 do not explain what a "controversy" entails. Comment [12] refers to "legal claim," "disciplinary charge," "claim," "charge," "a wrong alleged," "action," and "proceeding," but inexplicably does not mention the word "controversy."]

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 themself 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. 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).

[Presumably, the drafters of ER 1.6 did not intend "proceeding" and "controversy" to have the same meaning.]

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 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.

PUBLIC COMMENT

Five comments were received from the public regarding proposed EO-19-0010, all of which opposed its adoption in the present form. Included among the comments were the following observations:

- "There is no good reason to restrict a lawyer's ability to respond to a client's ***negative*** on-line or other public review with whatever information may be reasonably relevant or material to the claims made in the negative review. It should be considered that any client who makes any negative comment about an attorney in public, on any public forum, thereby waives her or his attorney-client privilege and duty of confidentiality with regard to the matter ***negatively*** reviewed."

- "[I]n the context of online reviews (and particularly when a dispute arises over the accuracy of the review), the general rule is that *more information is better than less information.* In other words, the public is generally always better served when they hear both sides of the story.

  "While there are certainly important policy reasons to limit a lawyer's ability to disclose information about a client without consent, those reasons do not justify withholding facts from the public when the client makes a public accusation against a lawyer."

- "After a year of research and study into misinformation and disinformation, the [Arizona Supreme Court] Task Force [on Countering Disinformation] understands that attacks on an individual's reputation can be unfounded or baseless and asserted for limitless reasons or no reason at all. Such allegations can harm not only an individual's reputation and livelihood but can cast the entire judicial system in an unfavorable or untrustworthy light.

  "The Task Force found that there are options allowing individuals to counter allegations with objective, factual information without violating confidences or through the 'proportionate and restrained' approach referenced in the opinion's dissent.

  "The Task Force encourages respecting the expression of individual opinion, both of attorneys and their clients. The Task Force strongly recommends adoption of the Dissent's approach, for the reasons stated therein."

- "I write to express opposition to proposed ethics opinion EO-19-0010 for the reasons expressed in the dissent and on two additional grounds. First, the proposed opinion's absolute prohibition of a lawyer's dissemination of confidential client information in response to an online review is predicated on the inaccurate view that establishing authorship is impossible. Second, the proposed opinion does not account for the principle that confidentiality is a shield, not a sword. The dissent's proposed opinion better accounts for these issues and should be adopted instead."

ETHICS OPINION REQUEST

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

IN THE MATTER OF FORMER STATE BAR ETHICS COMMITTIEE OPINION:	**NOTICE OF - REQUEST FOR ETHICS OPINION**
Op. 93-02	

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
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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.

PUBLIC COMMENTS

From: Scott Weible
Sent: Friday, October 23, 2020 8:39 AM
To: Attorney Ethics Advisory Committee
Subject: Proposed EO-19-0010

There is no good reason to restrict a lawyer's ability to respond to a client's ***negative*** on-line or other public review with whatever information may be reasonably relevant or material to the claims made in the negative review. It should be considered that any client who makes any negative comment about an attorney in public, on any public forum, thereby waives her or his attorney-client privilege and duty of confidentiality with regard to the matter ***negatively*** reviewed.

However, I do believe that all written fee agreements should address this subject, and notify the prospective client that all public, or on-line, reviews can result in the client's waiver of the attorney-client privilege and loss of confidentiality of the matters discussed with the client.

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Farmer, Brianna C

From: David Gingras < >
Sent: Wednesday, December 02, 2020 1:08 PM
To: Attorney Ethics Advisory Committee
Subject: Public Comment re: EO-19-0010

Hello Friends,

Can a lawyer respond publicly to an online review? No one disputes the answer is YES, of course the lawyer *can* respond.

But how far can the lawyer go? If the client accuses the lawyer of misconduct, negligence, or something else, can the lawyer "set the record straight"?

Ethics Opinion EO-19-0010 suggests *NO* – even when a client posts provably false statements of fact about a lawyer in a public forum, the lawyer *cannot* directly respond or refute those allegations. Even when the lawyer has clear, irrefutable proof that a client's online review contains false statements, the lawyer can't show that evidence to anyone. If they do, the lawyer can face discipline.

Folks, that is *crazy*. It's not just crazy, it's wrong.

For purposes of context, I am a lawyer with a LOT of experience in this area. For the better part of the last 15 years, my practice has focused almost entirely on litigating Internet-related legal issues including representing websites that host consumer reviews, including negative reviews of lawyers, doctors, and other professionals. During that time, I have been personally involved in litigating more than 100 cases arising from online speech, and as in-house general counsel for a large consumer review website, I personally reviewed *thousands* of complaints/disputes over the accuracy of speech published online.

Based on that experience, there is no question that online reviews are powerful tools. That's true when the review is positive but also when the review is negative.

But in the context of online reviews (and particularly when a dispute arises over the accuracy of a review), the general rule is that *more information is better than less information*. In other words, the public is generally always better served when they hear both sides of the story.

While there are certainly important policy reasons to limit a lawyer's ability to disclose information about a client without consent, those reasons do not justify withholding facts from the public when a client makes a public accusation against a lawyer. As the existing (and excellent) dissent from Mr. Thompson explains, the Rules of Professional Conduct have *always* provided that when a client accuses a lawyer of misconduct, the lawyer has a right to respond.

And many lawyers do. One of the best-known examples of this is a case recently decided by the California Supreme Court; *Hassell v. Bird*, 5 Cal.5th 522 (Cal. 2018). *Hassell* arose from a negative review posted on Yelp.com regarding a lawyer (Dawn Hassell). Ms. Hassell claimed the review was false, so she sued the client for defamation. In doing so, Ms. Hassell revealed information about the client and the relationship which showed (allegedly) that the client's review was false.

No one questioned that Ms. Hassell had a lawful right to sue the client, and no one argued it was unethical for her to use evidence in court showing the client's review was untruthful. And clearly, if Ms. Hassell's case had been brought in Arizona, ER 1.6(d)(4) would have expressly authorized her to disclose *anything* reasonably necessary "to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client".

But rather than taking her case to court (which was frankly a bad idea for other reasons), what if Ms. Hassell had simply posted a response on Yelp explaining her side of the story? What's wrong with that? Why should we treat a response to an online review any differently than a claim presented in court?

Fear of technology (Eek! It's scary!) is not a valid reason. And if we all agree that a lawyer is allowed to bring suit against a former client and/or disclose information *in court* to respond to an allegation of wrongdoing by the lawyer, there is no reason not to apply the same standard to Internet speech.

To be sure – people who are criticized online can get *very* emotional. I have seen that personally more times than I can explain. Because of this, it's entirely possible that some lawyers might go a little too far and expose *more* information than is really needed to respond to the client's specific complaint. In that event, the lawyer can and should face discipline. But just because some lawyers might go too far is not a valid reason for preventing all lawyers from having the right to respond to a negative online review. This not only harms lawyers, it also harms the public by depriving them of the facts and their right to hear both sides of the story.

For that reason, I strongly support the dissenting analysis offered by Mr. Thompson. His explanation of the issues is dead-center correct, and the major's view is not. I agree lawyers must be extremely careful about safeguarding all client information, but when the client chooses to make a public accusation against the lawyer, the lawyer should be able to respond accordingly. Such a rule will benefit lawyers and public alike without impose any meaningful burdens on existing rules protecting confidential client information.

David Gingras, Esq.

From: Nash, Aaron
To: Attorney Ethics Advisory Committee Public
Subject: Comment: EO-19-0010
Date: Thursday, December 10, 2020 10:55:44 AM

Aaron Nash, Chair
Arizona Supreme Court Task Force on Countering Disinformation

The Arizona Supreme Court Task Force on Countering Disinformation (Task Force) makes the following comments in response to proposed Attorney Ethics Advisory Opinion EO-19-0010.

The proposed opinion directs against attorneys using attorney/client confidences when responding to clients' or former clients' online reviews of the attorney. After a year of research and study into misinformation and disinformation, the Task Force understands that attacks on an individual's reputation can be unfounded or baseless and asserted for limitless reasons or no reason at all. Such allegations can harm not only an individual's reputation and livelihood but can cast the entire judicial system in an unfavorable or untrustworthy light.

The Task Force found that there are options allowing individuals to counter allegations with objective, factual information without violating confidences or through the "proportionate and restrained" approach referenced in the opinion's dissent. For more information on the seriousness and extent of potential campaigns and the harm they can cause, see the Task Force's Report and Recommendations at https://www.azcourts.gov/Portals/74/DisinformationTF/CDTFReport%20FINAL2020.pdf.

The Task Force encourages respecting the expression of individual opinions, both of attorneys and their clients. The Task Force strongly recommends adoption of the Dissent's approach, for the reasons stated therein.