# 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.*

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## ISSUE PRESENTED

When may a lawyer ethically divulge a former client's confidential information in responding to negative comments posted by that former client on a publicly accessible online forum -- for example on a public social media page -- regarding the lawyer's skills, integrity, or handling of a matter in which the lawyer represented them?

## 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.

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Comment

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[12] 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. Such a charge can arise in a civil, criminal, disciplinary or other 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. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (d)(4) 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 also applies, of course, where a proceeding has been commenced.

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[19] Paragraph (d) permits disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified. Where practicable, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose. If the disclosure will be made in connection with a judicial proceeding, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

**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

The rise of blogs and social media platforms on the internet enable a disgruntled client to spread information – and misinformation – about their former lawyer to a wider and more diverse audience than ever before, especially if readers choose to further disseminate the information. Most online reviews are also more or less permanent; even if they become less prominent over time, they may continue to show up in response to targeted searches for information about the lawyer. A lawyer who becomes aware that a former client has posted unflattering comments or reviews about the lawyer will therefore – understandably – want to respond. [1]

[1] This opinion addresses only the question of responding to online comments by a former client. While the ER 1.6 analysis would logically apply to a comment by a current client as well, issues of conflict-of-interest would likely

As an initial matter, lawyers are free to respond to online comments in any manner that does not reveal any confidential information or violate any other ethical or legal obligation of the lawyer. For example, a lawyer may respond to a specific criticism with general comments that express disagreement, affirm a commitment to quality representation, and redirect those reading to other information about their relevant office policies, representation practices, or comments by other clients expressing different views.

The question presented here, however, is whether there are any circumstances in which a lawyer may go beyond general responses to address the former client's criticism specifically, when doing so would reveal confidential information about the former client as part of the lawyer's response.

Information relating to a lawyer's representation of a client must be kept strictly confidential under ER 1.6(a), 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 is extended to former clients by ER 1.9(c). In the context of an unfavorable online comment or review by a former client, informed consent is exceedingly unlikely, which means that disclosure of confidential information will be improper unless permitted by one of the exceptions.

The only exceptions potentially applicable to the question presented here are found in ER 1.6(d)(4), which contains what are commonly referred to as the "self-defense" exceptions. This subsection allows a lawyer to disclose confidential information "to the extent the lawyer reasonably believes necessary" to do any of the following:

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

Because an online critique is not a formal "criminal charge or civil claim" or the initiation of a disciplinary proceeding, ethics opinions addressing the issue generally focus on whether negative online comments establish a "controversy" under the first self-defense exception and, if so, whether disclosure of confidential information can ever be considered reasonably necessary to establish a defense. Virtually all the ethics opinions that have addressed the issue, including ABA Formal Opinion 496, which was issued in 2021, answer "no" to one or both of those questions,

predominate if the comments are made by a current client. In addition, to the extent a lawyer wishes to terminate the lawyer-client relationship as a result of online comments by the client, analysis of the requirements of ER 1.16 is necessary. Those issues are beyond the scope of this Opinion.

typically because of the "informal" nature of an online critique.[2] Colorado may be the only state in which an official ethics opinion has been issued that concludes otherwise.[3]

This focus on the "informality" of the online comments is, however, questionable for two reasons. First, "controversy" has no specific defined meaning in the ethics rules. According to dictionary.com, "controversy" means "a prolonged public dispute, debate or contention; disputation concerning a matter of opinion" and "contention, strife, or argument." That clearly encompasses – indeed, aptly describes – a disagreement between a lawyer and the lawyer's former client about things like the lawyer's competence, ethics, diligence, responsiveness, performance, or billing practices, particularly when the client's negative opinions on such matters are expressed in a public forum.

Second, the language of the self-defense exceptions does not indicate that *any* of them applies only after some sort of "formal" legal or administrative proceeding has been commenced,[4] so the informality of online remarks should not be considered dispositive. The comment to the rule also makes this clear. It states that a lawyer may reveal confidential information about a former client as part of a response to a third party who has alleged that the lawyer has been guilty of misconduct, "for example, a person claiming to have been defrauded by the lawyer and client acting together." ER 1.6, cmt. ¶ 12. The comment notes that the self-defense exceptions do not "require the lawyer to await the commencement of an action or proceeding that charges such complicity" but instead that "the defense may be established by responding directly to [the] third party who has made [the] assertion," the right to respond having arisen "when [the] assertion of [misconduct] has been made." This could include a response not only to the alleged fraud victim in the example given, but also a lawyer for a former client alleging that the former lawyer committed malpractice, or bar counsel calling the lawyer to discuss a bar charge filed by a current or former client.

What is problematic, therefore, about responding publicly to online allegations made by a former client is less the informality of the allegations or some imagined lack of a "controversy," but what

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[2] *See* ABA Formal Opinion 496, (January 13, 2021) (answering no to both questions based on the "informality" of online critiques); New Jersey Supreme Court Advisory Committee on Professional Ethics Opinion 738 (2020) ("an informal 'controversy' between a lawyer and a prospective or former client, arising from the posting of a negative online review, does not fall within the safe harbor" of the controversy exception); State Bar of Texas Opinion No. 662 (2016) ("It is the opinion of the Committee that each of the exceptions stated above applies only in connection with formal actions, proceedings or charges."); New York State Bar Association Ethics Opinion 1032 (2014) ("Unflattering but less formal comments on the skills of lawyers" do not justify disclosure of confidential information); 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.").

[3] Colorado Bar Association Ethics Committee Opinion 136, *A Lawyer's Response to a Client's Online Public Commentary Concerning the Lawyer* (April 15, 2019). There is also a disciplinary case, discussed in the Colorado opinion, in which the Supreme Court of Wisconsin held that a criminal defense lawyer accused by a former client's appellate counsel of ineffective assistance did not violate the ethics rules by writing a letter to the prost-conviction-proceeding judge that provided information defending his representation of the former client. *In re Disciplinary Proc. Against Thompson*, 847 N.W.2d 793 (2014). The Court noted that the better course would have been to wait to be subpoenaed and testify during a hearing in the post-conviction proceeding, but declined read into ER 1.6 a requirement that disclosures in the ineffective assistance context must be limited to a "court-supervised setting." Id., at 800, ¶ 37. Given the nature of the disclosure in that case and the fact that the letter was sent in a formal-proceeding-*adjacent* context, it is not relevant to the question addressed in this opinion.

[4] The phrase "criminal charges" does not necessarily mean the commencement of a formal prosecution and "civil claim" appears clearly intended to encompass more than a lawsuit that has already been filed.

it means to "establish a defense" in this context. The lawyer, by posting an online response to the former client's online comments is responding not only to the person making the allegations but to the members of the public before whom the accusations have been made. Unlike the alleged fraud victim, bar counsel, and malpractice lawyer in the above examples, these third parties – in the context of the internet, an unidentifiable and virtually limitless audience – are mere bystanders. Can a public response containing confidential information ever be "reasonably necessary" to "establish a defense" in such a situation?

We conclude that it may. A lawyer's duty of confidentiality is for the protection of the lawyer's client and the client can forfeit that protection. The self-defense exceptions make it clear that a client may not use confidentiality as both a sword and a shield in a formal legal or disciplinary proceeding. Similarly, the client should not be able to make public accusations of serious misconduct against their former lawyer and then invoke – or have a disciplinary authority invoke on the client's behalf – the lawyer's duty of confidentiality to prevent the lawyer from making an effective response or to punish the lawyer for having done so. An individual who elects to try their former lawyer in the court of public opinion rather than before a tribunal and makes serious accusations that put confidential information at issue assumes the risk that such information will be disclosed in the lawyer's response.

In addition, although the ABA Opinion correctly notes that online postings "may even contribute to the body of knowledge available about lawyers for prospective clients seeking legal advice," the internet – as recent history has taught us, at some cost – is also a very effective tool for spreading *dis*information; disinformation that causes genuine harm to both public and private interests. Untrue accusations of misconduct should be countered.

For these reasons, we conclude that a lawyer may reveal confidential client information to the extent reasonably necessary to respond to a former client's online remarks about the lawyer that constitute an accusation of serious misconduct or incompetency. This approach is consistent with the Restatement's analysis of the issue. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 64, cmt. e (2000) ("When a client has made a public charge of wrongdoing, a lawyer is warranted in making a proportionate and restrained public response.").

It is also consistent with State Bar of Ariz. Formal Op. 93-02 (1993). The lawyer who submitted the ethics inquiry addressed in that opinion had previously represented a criminal defendant in a prosecution for first degree murder that resulted in the defendant's conviction. Another individual who had been involved in the case later began writing a book about the case and, as part of that effort, interviewed the defendant. The defendant asserted that his lawyer had "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 then contacted the lawyer to get the lawyer's response to the allegations and the lawyer asked the State Bar of Arizona whether that response could include confidential information about the former client.

Though not entirely clear, the opinion's characterization of the former client's allegations as "public" implies an underlying assumption that those allegations, and the lawyer's response, would – or at least might – be publicly disseminated in the published book. The opinion nevertheless concludes that the lawyer could ethically disclose confidential information in this situation, which might fairly be characterized as an "analog" version of an online exchange. The opinion rejects

the notion that disclosure is only permitted in the context of formal proceedings and concludes instead that "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."

A lawyer contemplating the disclosure of confidential information in response to a former client's online accusations of serious misconduct must, however, carefully consider whether the circumstances truly justify such disclosure.

*Confirmation that the Former Client Posted the Comment*

Disclosure of a former client's confidential information is only justified when that former client is responsible for the public posting of the negative comment. A lawyer may not reveal protected information in response to critical comments made by others, such as an opposing counsel or party or even the family member or friend of the client, without client consent. Nor can a client be held responsible for a third party's posting of comments made by the client to that third party without any intent that they be further shared. Because online comments may be anonymous, and even those that have attribution may not themselves establish with certainty that the former client is actually the source of the comments, the first task for a lawyer who is considering responding in a manner that reveals any confidential information is to conduct appropriate due diligence to confirm that the client actually posted the comments in question or is otherwise responsible for the posting.

*Nature of the Allegations*

Comments posted online by an individual regarding the individual's former lawyer can cover a broad spectrum ranging from complaints about the outcome or cost of the representation, or the client's subjective opinion of the lawyer's skills, to serious charges of malpractice or unethical conduct. Any of these could establish a "controversy" between the lawyer and client, but a general expression of the former client's opinion of the lawyer – for example, "this lawyer is a real dummy and charges too much" or "this lawyer is an unethical jerk" – will not justify the disclosure of confidential information in response. Nor will expressions of displeasure at an outcome, such as "I can't believe this lawyer lost my case," justify such disclosure.

If, however, the online comments make specific allegations that appear credible on their face and, if true, would justify the filing of criminal or disciplinary charges or a malpractice claim against the lawyer – for example, "after this lawyer lost my case at trial, I found out that the other side had made a settlement offer that my lawyer never told me about," or "this lawyer tanked my case because they filed it after the statute of limitations had run" – they create a genuine threat that such charges could be forthcoming, and justify disclosure to the extent necessary to counter that threat.[5] Disclosure should be limited to these circumstances.

[5] It should be noted that bar counsel can initiate a disciplinary investigation based on information from any source; it need not be in response to the filing of a bar charge by a third party. Law enforcement agencies likewise can initiate an investigation based on any information they have.

Because lawyers have a duty to be truthful in all their dealings, a lawyer must, before posting an online response that contains confidential information, also have an objectively reasonable belief that the client's comments are in fact inaccurate.

*Necessity and Extent of Disclosure*

Before disclosing confidential information, a lawyer must "reasonably believe that options short of use or disclosure have been exhausted or will be unavailing or that invoking them would substantially prejudice the lawyer's position in the controversy." RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 64, cmt. e (2000). The lawyer should, for example, consider first asking the curator of the website to remove the comments, or asking the client to retract or correct the comments.

In addition, any confidential information that is disclosed must be carefully limited to what is truly necessary for a meaningful defense to the charges made, and of course the lawyer's assertions must be accurate. The lawyer must also scrupulously refrain from making comments or revealing extraneous information that, to a reasonable reader, would appear designed to intimidate or embarrass the client. And, if the matter being discussed is on-going, the lawyer must refrain from making any statements that have a reasonable likelihood of compromising the client's position in the matter.

Using the examples given above, a lawyer might, in response to an allegation that the lawyer failed to inform the client about a settlement offer, state – if true – that "In fact, I did inform the client of the offer a day after it was made, and we discussed it on several occasions." In response to an accusation that the lawyer missed a statute-of-limitations deadline, the lawyer can provide an explanation of why that is not accurate or, if accurate, why it was not the lawyer's fault. For example, if true, the lawyer might explain that "I calculated the limitations deadline based on information provided to me by the client and filed the lawsuit before that date. It was only later, during the course of discovery, that additional facts came to light showing that the information provided by the client was inaccurate and the limitations period had in fact ended earlier."

*Best Practices*

No lawyer, however stoic, can read negative online comments posted by a former client without having an emotional reaction and, if the comments are particularly outrageous or derisive, a desire to not just set the record straight but to respond in kind. That is understandable. But the ability to recognize and rise above one's emotional impulses and determine what is objectively justified is a necessary skill for a professional and ethical lawyer. A lawyer who is considering responding to online client comments in a manner that will reveal confidential information would be wise to seek the counsel of another lawyer or the State Bar of Arizona's Ethics Hotline to obtain a more dispassionate assessment of both the posted comments and the lawyer's proposed response.[6]

A lawyer in this situation should also seriously consider not responding at all. The ABA Opinion correctly observes that

[6] ER 1.6 permits a lawyer to reveal confidential information for the purpose of obtaining ethics advice from another lawyer.

Any response frequently will engender further responses from the original poster. Frequently, the more activity any individual post receives, the higher the post appears in search results online. As a practical matter, no response may cause the post to move down in search result rankings and eventually disappear into the ether. Further exchanges between the lawyer and the original poster could have the opposite effect.

*Conclusion*

We recognize that this opinion does not enunciate a bright-line rule and that it reaches a conclusion contrary to most other opinions addressing the same question. But we decline to interpret ER 1.6(d)(4) in way that rigidly prohibits a lawyer from responding to online remarks by a former client no matter how inaccurate and inflammatory. Such an interpretation is required neither by the language of the rule itself nor considerations of public policy.