

ATTORNEY ETHICS ADVISORY COMMITTEE

Thursday January 30, 2020

No. 5 Update and possible action regarding Ethics Opinion draft

o EO-19-0010

Committee members Hon. John Napper and Charles Thomson will present information at the meeting.

Draft Opinion 1

To: Ethics Opinion 19-0010 Subcommittee
From: WCT
Date: 12/27/2019

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?

RELEVANT ETHICS OPINIONS

State Bar of Arizona Ethics Opinion 93-02
ABA Formal Opinion 10-457

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).

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

(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

(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 situation in which a lawyer may disclose confidential information relating to a client or former client:

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

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

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

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 gray area in the middle of the spectrum require careful analysis by the lawyer. Given the numerous fact patterns that are likely to emerge in this context, an all-encompassing general rule cannot be articulated. That said, the lawyer is admonished to consider responding with the disclosure of protected information or communications only in the most extreme circumstances that lie much nearer to the serious allegation end of the spectrum.

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

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

It is emphasized that a lawyer is always entitled to respond to an online client comment, regardless of its content, by stating, in substance: “A lawyer’s duty to keep client confidences has few exceptions and in an abundance of caution I do not feel at liberty to respond in a point-by-point fashion in this forum. Suffice it to say that I do not believe that the post presents a fair and accurate picture of the events.”

A response along these lines should always be the first option considered when responding to *any* online comment. It is not too trite to say that lawyers should always in the first instance consider taking the proverbial high road. But, in those limited situations where disclosure of protected information or communications is both justified and necessary to respond to an online comment, a lawyer is permitted to make a proportionate and restrained response that includes protected information or communications in order to protect the reputation of the lawyer or

vindicate the lawyer's conduct. The concepts of "justification and necessity," on the one hand, and "proportionality and restraint," on the other, are not mere filler. Even if there is a "controversy," a lawyer is "justified" in disclosing protected information or communications only to the extent the client's online post waives the protection otherwise afforded to that information or those communications. The RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS recognizes that both the attorney-client privilege and the protection afforded to confidential client information can be waived by the client. See § 64, Cmt. f.; § 80, Cmt. c. ("A client who contends that a lawyer's assistance was defective waives the privilege with respect to the communications relevant to that contention. Waiver affords interested parties fair opportunity 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."

The majority of jurisdictions that have addressed this question answer it differently than does this Committee. See 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."); Florida Bar Staff Opinion 38049 (2018) ("[I]f the inquirer chooses to respond to the negative online review and the inquirer does not obtain the former client's informed consent to reveal confidential information, the inquirer must not reveal confidential information regarding the representation, but must only respond in a

general way, such as the inquirer disagrees with the with the client's statements."); ABA Formal Opinion 10-457 (2010) (Regarding Lawyer Websites, "Specific information that identifies current or former clients or the scope of their matters also may disclosed, as long as the clients or former clients give informed consent as required by Rule 1.6 (current clients) and Rule 1.9 (former clients)."). One commentator puts it even more succinctly: "Simply put, a client's mere use of an online review site to express criticism of the lawyer's representation does not give rise to a Rule 1.6(b)(5) 'controversy' or 'proceeding' in which the lawyer is entitled to reveal client confidences as part of his or her defense." Daniszewski, Robert M., *Coping With Negative Online Reviews*. See also Texas State Bar Ethics Opinion 662 (2016); San Francisco Bar Association Ethics Opinion 2014-1; Los Angeles County Bar Association Ethics Opinion 525 (2012).

This Committee acknowledges these different points of view 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.

Draft Opinion 2

DRAFT OPINION 2

A lawyer's ability to disclose protected information or communications is extremely limited. When that disclosure is not impliedly authorized to carry out the representation and that 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.

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 genuine controversy between the lawyer and a client or client's representative arises under E.R. 1.6(d), the only comment a lawyer may post in response to this controversy is:

"I am a lawyer in good standing with the State Bar of Arizona. I am ethically bound by the rule preventing me from disclosing confidential information about a current or former client. Therefore, I cannot respond to any particular comment related to any individual case. However, in my practice I have always followed the Rules of Professionalism, which include the duty to advocate on of my client. (Cite to the E.R.). The duty not to charge unreasonable fees (cite to the E.R) the duty of candor to the Court (Cite E.R.); the duty of candor to opposing counsel (Cite E.R.). I have always, and will continue, to follow the

ethical standards set for attorneys by the Arizona Supreme Court. Any allegations suggesting otherwise are entirely inaccurate."

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: *adc*

**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 12-0-3¹, 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 Marie 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
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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).

(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:

(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.

Formal Opinions of the Committee on the Rules of Professional Conduct are advisory in nature only and are not binding in any disciplinary or other legal proceedings.

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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.

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