

EO 19-0010

Draft Opinion for Larger Committee Review

May 28, 2020

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

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

There is no rule barring a lawyer from responding 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.

E.R. 1.6 states:

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted or required by paragraphs (b),

(c) or (d). or ER 3.3(a)(3).

(b) A lawyer shall reveal such information to the extent the lawyer reasonably believes necessary to prevent the client from committing a criminal act that the lawyer believes is likely to result in death or substantial bodily harm.

(c) A lawyer may reveal the intention of the lawyer's client to commit a crime and the information necessary to prevent the crime.

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

necessary:

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

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

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

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

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

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

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

(e) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

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

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

Arizona Ethics Opinion 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 EO 93-02 is inconsistent with the direction provided in this opinion, it is disapproved and superseded.