

AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 496

January 13, 2021

Responding to Online Criticism

Lawyers are regularly targets of online criticism and negative reviews. Model Rule of Professional Conduct 1.6(a) prohibits lawyers from disclosing information relating to any client's representation or information that could reasonably lead to the discovery of confidential information by another. A negative online review, alone, does not meet the requirements of permissible disclosure in self-defense under Model Rule 1.6(b)(5) and, even if it did, an online response that discloses information relating to a client's representation or that would lead to discovery of confidential information would exceed any disclosure permitted under the Rule. As a best practice, lawyers should consider not responding to a negative post or review, because doing so may draw more attention to it and invite further response from an already unhappy critic. Lawyers may request that the website or search engine host remove the information. 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 by another, in the response. Lawyers may post an invitation to contact the lawyer privately to resolve the matter. Another permissible online response would be to indicate that professional considerations preclude a response.¹

I. Introduction

Lawyers regularly are the target of online (and offline) criticism. Clients, opposing parties, and others are increasingly taking to the internet to express their opinions of lawyers they have encountered. Lawyers are left in the quandary of determining whether and how they ethically may respond when the opinions posted are unflattering, and the facts presented are inaccurate or even completely untrue. This opinion addresses a lawyer's ethical obligations in responding to negative online reviews.

II. Analysis

The main ethical concern regarding any response a lawyer may make to an online review is maintaining confidentiality of client information. The scope of the attorney-client privilege, as opposed to confidentiality, is a legal question that this Committee will not address in this opinion. As this Committee itself concluded in ABA Formal Ethics Opinion 480 (2018), lawyers cannot blog about information relating to clients' representation without client consent, even if they only

¹ This opinion is based on the ABA Model Rules of Professional Conduct as amended by the ABA House of Delegates through August 2020. The laws, court rules, regulations, rules of professional conduct, and opinions promulgated in individual jurisdictions are controlling.

use information in the public record, because that information is still confidential. ABA Model Rule of Professional Conduct 1.6 prohibits a lawyer's voluntary disclosure of *any* information that relates to a client's representation, whatever its source, without the client's informed consent, implied authorization to disclose,² or application of an exception to the general rule. Model Rule 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 by paragraph (b).

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

(1) to prevent reasonably certain death or substantial bodily harm;

(2) 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;

(3) to prevent, 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;

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

(5) 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;

(6) to comply with other law or a court order; or

(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.

² Comment [5] of Rule 1.6 states "Except to the extent that the client's instructions or special circumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation." A client or former client's negative online comments do not create "implied authorization" for the lawyer to disclose confidential information in response to the online criticism because that is not required to carry out the representation.

Only subparagraph (b)(5) is implicated here, and there are three exceptions bundled into that provision, the first two of which are clearly inapplicable to online criticism. First, online criticism is not a “proceeding,” in any sense of that word, to allow disclosure under the exception “to respond to allegations in any proceeding concerning the lawyer's representation of the client.”³ Second, responding *online* is not necessary “to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved.” A lawyer may respond directly to a person making such a claim, if necessary, to defend against a criminal charge or civil claim, but making public statements online to defend such a claim is not a permissible response. Thus, the remaining question is whether online criticism rises to the level of a controversy between a lawyer and client and, if so, whether responding online to the criticism is reasonably necessary to defend against it.

The Committee concludes that, alone, a negative online review, because of its informal nature, is not a “controversy between the lawyer and the client” within the meaning of Rule 1.6(b)(5), and therefore does not allow disclosure of confidential information relating to a client’s matter.⁴ As stated in New York State Bar Association Ethics Opinion 1032 (2014), “[u]nflattering 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.”

The Committee further concludes that, even if an online posting rose to the level of a controversy between lawyer and client, a public response is not reasonably necessary or contemplated by Rule 1.6(b) in order for the lawyer to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client. Comment [16] to Rule 1.6 supports this reading explaining, “Paragraph (b) permits disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes stated.”

³ Definition of “proceeding” from NOLO’S PLAIN-ENGLISH LAW DICTIONARY, <https://www.nolo.com/dictionary> (last visited Jan. 4, 2021):

1) The ordinary process of a lawsuit or criminal prosecution, from the first filing to the final decision. 2) A procedure through which one seeks redress from a court or agency. 3) A filing, hearing, or other step that is part of a larger action. 4) A particular matter that arises and is dealt with in a bankruptcy case.

⁴ See also *Louima v. City of New York*, No. 98 CV 5083 (SJ), 2004 WL 2359943 (E.D.N.Y. Oct. 5, 2004), *aff’d sub nom. Roper-Simpson v. Scheck*, 163 F. App’x 70 (2d Cir. 2006) (“mere press reports regarding an attorney's conduct do not justify disclosure of a client’s confidences and secrets even if the reports are false and the accusations are unfounded”); *Lawyer Disciplinary Bd. v. Farber*, 488 S.E.2d 460, 462 (1997) (lawyer’s disclosure of confidential information in motion to withdraw inappropriate); ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 476 (2016) (ABA Model Rule of Professional Conduct 1.6(b)(5) allows lawyer to disclose only such confidential information as is reasonably necessary for the court to make an informed decision on a motion to withdraw); Or. State Bar Formal Op. 2011-85 (2011) (lawyer may not disclose confidential information in motion to withdraw as “[n]either a disagreement between Lawyer and Client about how the client’s matter should be handled nor the client’s failure to pay fees when due” are considered a controversy triggering the self-defense exception).

There are a number of state ethics opinions that have analyzed this issue.⁵ The majority reach the conclusion that, even if the online posting was made by a client, the posting of criticism does not rise to the level of a controversy that would allow a lawyer to disclose confidential information in responding. The Committee notes that Colorado Ethics Opinion 136 (2019) specifically finds that *if* the online criticism rises to the level of a controversy between lawyer and client, the lawyer may ethically disclose limited information, yet urges caution in responding. This Committee disagrees with the Colorado opinion, to the extent it concludes that lawyers may disclose a limited amount of confidential information in a public response; a public posting that discloses confidential information goes beyond a direct response to the accuser allowed by Rule 1.6 and its explanatory Comments. District of Columbia Ethics Opinion 370 (2016) permits disclosure of confidential information in responding to online criticism but is based on a rule that is significantly different than ABA Model Rule 1.6.⁶ In addition to the ethics opinions addressing

⁵ See, e.g., Los Angeles County Bar Ass'n Prof'l Responsibility & Ethics Comm. Formal Op. 525 (2012) (lawyer may respond to online criticism only if the lawyer discloses no confidential information, the response does not harm the client, and the response is "proportionate and restrained"); Mo. Bar Informal Op. 2018-08 (2018) (negative online review by former client does not create sufficient controversy to permit lawyer to disclose confidential information in response and any response may not disclose confidential information but may acknowledge the lawyer's professional obligations); N.J. Advisory Comm. on Prof'l Ethics Op. 738 (2020) (in response to negative online review by client, a lawyer may state that the lawyer disagrees with the facts in the review but may not disclose information that relates to the representation except information that is "generally known" based on New Jersey's rule which permits disclosure of "generally known" information); Bar Ass'n of Nassau County Comm. on Prof'l Ethics Op. 2016-01 (2016) ("A lawyer may not disclose a former client's confidential information solely to respond to criticism of the lawyer posted on the Internet or a website by a relative of the former client or by the former client himself"); N.Y. State Bar Ass'n Comm. on Prof'l Ethics Op. 1032 (2014) (lawyer may not disclose confidential information just to respond to online criticism by the client on a rating site because the "self-defense" exception to confidentiality does not apply to informal criticism where there is no actual or threatened proceeding against the lawyer); Pa. Bar Ass'n Legal Ethics & Prof'l Responsibility Comm. Op. 2014-200 (2014) (lawyer may not give detailed response to online criticism of the lawyer by a client because the self-defense exception is not triggered by a negative online review and may choose to ignore the online criticism); State Bar of Tex. Prof'l Ethics Comm. Op. 662 (2016) (lawyer may not respond to client's negative internet review if the response discloses confidential information, but may "post a proportional and restrained response that does not reveal any confidential information or otherwise violate the Texas Disciplinary Rules of Professional Conduct"); W. Va. Ethics Comm. Advisory Op. 2015-02 (2015) (lawyer may respond to positive or negative online reviews, but may not disclose confidential client information while doing so, even in response to a review); San Francisco Ethics Comm. Op. 2014-1 (2014) (lawyer may respond to online review by client if matter has concluded and the lawyer discloses no confidential information in the response; if the client's matter is ongoing, lawyer may not be able to respond at all).

⁶ D.C. Bar Op. 370 (2016) concludes that a lawyer may disclose confidential information in responding to any specific allegations in a former client's negative online review, but is based on D.C. Rule 1.6, which states: "A lawyer may use or reveal client confidences or secrets: (3) to the extent reasonably necessary to establish a defense to a criminal charge, disciplinary charge, or civil claim, formally instituted against the lawyer, based upon conduct in which the client was involved, or *to the extent reasonably necessary to respond to specific allegations by the client concerning the lawyer's representation of the client*" [emphasis added]. State Bar of Ariz. Formal Op. 93-02 (1993) does not address online criticism but concludes that a lawyer may agree to an interview and disclose confidential information to defend against accusations by a former client that the lawyer was incompetent and involved in a conspiracy against the client made to the author of a proposed book, even though there are no pending or imminent legal proceedings.

the issue, there are also disciplinary cases in which lawyers have been sanctioned for disclosing confidential information online.⁷

III. Best Practices

The Committee therefore offers the following best practices to lawyers who are the subject of negative online reviews.

A lawyer may request that the host of the website or search engine remove the post. This may be particularly effective if the post was made by someone other than a client. If the post was made by someone pretending to be a client, but who is not, the lawyer may inform the host of the website or search engine of that fact. In making a request to remove the post, unless the client consents to disclosure, the lawyer may not disclose any information that relates to a client's representation or that could reasonably lead to the discovery of confidential information by another,⁸ but may state that the post is not accurate or that the lawyer has not represented the poster if that is the case.

⁷ Illinois Disciplinary Board v. Peshek, No. M.R. 23794 (Ill. May 18, 2010) (assistant public defender suspended for 60 days for blogging about her clients' cases, on a website which was open to the public, including providing confidential information, some of which was detrimental to clients and some of which indicated that the lawyer may have knowingly failed to prevent a client from making misrepresentation to the court); Reciprocal discipline of 60-day suspension by Wisconsin in *In re Peshek*, 798 N.W.2d 879 (2011); *People v. Isaac*, No. 15PDJ099, 2016 WL 6124510 (Colo. O.P.D.J. Sept. 22, 2016) (lawyer suspended 6 months for responding to online reviews of former clients; lawyer revealed criminal charges made against clients, revealed that client wrote check that bounced, and revealed that client committed other unrelated felonies); *In re Quillinan*, 20 DB Rptr. 288 (2006) (Oregon disciplinary board approved a stipulation for discipline for 90-day suspension for lawyer who sent an e-mail disclosing to members of the Oregon State Bar's workers' compensation listserve personal and medical information about a client whom she named, indicating the client wanted a new lawyer); *In re Skinner*, 740 S.E.2d 171 (Ga. 2013) (Supreme Court of Georgia rejected a petition for voluntary discipline seeking a public reprimand for lawyer's violation of the confidentiality rule by disclosing confidential client information on the internet in response to client's negative reviews of lawyer, citing lack of information about the violation in the record and presumably feeling the public reprimand too lenient as it cited to the 60-day suspension in *Peshek* and 90-day suspension in *Quillinan* above); *In re David J. Steele*, No. 49S00-1509-DI-527 (Ind. 2015) (Among other violations, Indiana lawyer disbarred for, by his own description, "actively manipulate[ing his] Avvo reviews by monetarily incentivizing positive reviews, and punishing clients who wr[o]te negative reviews by publicly exposing confidential information about them" and including numerous false statements in the responses to the negative reviews); *In re Tsamis*, Commission No. 2013PR00095 (Ill. 2014) (public reprimand for lawyer who disclosed confidential information beyond that necessary to defend herself on Avvo in response to a client's negative reviews of the lawyer on Avvo: "I dislike it very much when my clients lose, but I cannot invent positive facts for clients when they are not there. I feel badly for him, but his own actions in beating up a female co-worker are what caused the consequences he is now so upset about"); *People v. Underhill*, 15PDJ040 (Colo. 2015) (lawyer suspended eighteen months for responding to multiple clients' online criticism by posting confidential and sensitive information about the clients).

⁸ MODEL RULES OF PROF'L CONDUCT R. 1.6, cmt. [4] reads, in part, "Paragraph (a) ... also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person."

Lawyers should give serious consideration to not responding to negative online reviews in all situations.⁹ 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.

Lawyers may respond with a request to take the conversation offline and to attempt to satisfy the person, if applicable. For example, a lawyer might post in response to a former client (or individual posting on behalf of a former client), “Please contact me by telephone so that we can discuss your concerns.” A lawyer whose unhappy former client accepts such a request may offer to refund or reduce the lawyer’s fees in the matter. As a practical matter, this approach is not effective unless the lawyer has the intent and ability to try to satisfy the person’s concerns. A lawyer who makes such a post but does nothing to attempt to assuage the person’s concerns risks additional negative posts.

If the poster is not a client or former client, the lawyer may respond simply by stating that the person posting is not a client or former client, as the lawyer owes no ethical duties to the person posting in that circumstance. However, a lawyer must use caution in responding to posts from nonclients. If the negative commentary is by a former opposing party or opposing counsel, or a former client’s friend or family member, and relates to an actual representation, the lawyer may not disclose any information relating to the client or former client’s representation without the client or former client’s informed consent. Even a general disclaimer that the events are not accurately portrayed may reveal that the lawyer was involved in the events mentioned, which could disclose confidential client information. The lawyer is free to seek informed consent of the client or former client to respond, particularly where responding might be in the client or former client’s best interests. In doing so, it would be prudent to discuss the proposed content of the response with the client or former client.

If the criticism is by a client or former client, the lawyer may, but is not required to, respond directly to the client or former client. The lawyer may wish to consult with counsel before responding. The lawyer may not respond online, however.

An additional permissible response, including to a negative post by a client or former client, would be to acknowledge that the lawyer’s professional obligations do not permit the lawyer to respond. A sample response is: “Professional obligations do not allow me to respond as I would wish.” The above examples do not attempt to provide every possible response that a lawyer would

⁹ *The Economist Explains What is the Streisand Effect?*, THE ECONOMIST (Apr. 16, 2013), <https://www.economist.com/the-economist-explains/2013/04/15/what-is-the-streisand-effect>. The social phenomenon known as the Barbara Streisand effect recognizes that efforts to suppress a piece of online information may actually call more attention to its existence.

be permitted to make, but instead provide a framework of analysis that may be of assistance to lawyers faced with this issue.

IV. Conclusion

Lawyers are frequent targets of online criticism and negative reviews. ABA Model Rule of Professional Conduct 1.6(a) prohibits lawyers from disclosing information relating to any client's representation or information that could reasonably lead to the discovery of confidential information by another. A negative online review, alone, does not meet the requirements for permissible disclosure under Model Rule 1.6(b)(5) and, even if it did, an online response would exceed any disclosure permitted under the Rule.

Lawyers who are the subject of online criticism may request that the website or search engine host remove the information but may not disclose information relating to any client's representation, or information that could reasonably lead to the discovery of confidential information by others. Lawyers should consider ignoring a negative post or review because responding may draw more attention to it and invite further response from an already unhappy critic. 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 by others. Lawyers may post an invitation to contact the lawyer privately to resolve the matter. Another permissible response would be to indicate that professional considerations preclude a response. A lawyer may respond directly to a client or former client who has posted criticism of the lawyer online but must not disclose information relating to that client's representation online.

AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

321 N. Clark Street, Chicago, Illinois 60654-4714 Telephone (312) 988-5328

CHAIR: Lynda Shely, Scottsdale, AZ ■ Melinda Bentley, Jefferson City, MO ■ Lonnie T. Brown, Athens, GA ■ Doug Ende, Seattle, WA ■ Robert Hirshon, Ann Arbor, MI ■ David M. Majchrzak, San Diego, CA ■ Thomas B. Mason, Washington, D.C. ■ Norman W. Spaulding, Stanford, CA ■ Keith Swisher, Scottsdale, AZ ■ Lisa D. Taylor, Parsippany, NJ

CENTER FOR PROFESSIONAL RESPONSIBILITY: Mary McDermott, Senior Counsel

©2021 by the American Bar Association. All rights reserved.