

Opinion 136

A Lawyer's Response to a Client's Online
Public Commentary Concerning the Lawyer

Adopted on April 15, 2019

Introduction

This opinion considers the ethical considerations that apply when a lawyer responds online to negative online reviews posted by the lawyer's current, former, or prospective client. As used in this opinion, "client" includes only these categories of critics.

Online reviews of a lawyer's performance are increasingly common and often impact prospective clients' choice of counsel. When a lawyer receives a negative review, the lawyer might want to respond, including to clarify the underlying circumstances, correct inaccurate statements contained in the review, or otherwise defend the lawyer's work for the reviewing client. Nevertheless, the Colorado Rules of Professional Conduct (Colo. RPC or the Rules), relevant opinions from the Colorado Supreme Court Office of the Presiding Disciplinary Judge (PDJ), and cases and ethics opinions in other jurisdictions indicate that a lawyer's ability to publicly respond to online criticism is limited.

The threshold question is whether a lawyer may *ever* respond to negative online reviews. The answer is "yes." No Colorado ethical rule specifically bars lawyers from responding to online reviews, but the duty of confidentiality contained in Colo. RPC 1.6 (applicable to current clients) and Colo. RPC 1.9(c) (applicable to former clients) prevents the lawyer from disclosing information related to the representation of a client, absent an exception to those Rules or the client's informed consent. Under the one potentially applicable exception to the general duty of non-disclosure, a lawyer may respond if the online criticism creates a "controversy" be-

tween the lawyer and the client and the lawyer's response is limited to information reasonably necessary to establish a claim or defense on behalf of the lawyer in that controversy.

Applicable Colo. RPC

Whether and, if yes, to what extent, a lawyer may respond to a client's negative online review implicates Rules 1.6 ("Confidentiality of Information"), 1.8(b) ("Conflict of Interest; Current Clients; Specific Rules"), 1.9 ("Duties to Former Clients"), and 1.18 ("Duties to Prospective Client"). The pivotal rule is Colo. RPC 1.6(a), which provides in pertinent part: "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)."

Rule 1.6(b) sets forth exceptions to Rule 1.6(a). Applicable here is Colo. RPC 1.6(b)(6), sometimes referred to as the self-defense exception, which allows a lawyer to disclose information related to the representation 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.

Several comments to Colo. RPC 1.6 explain these concepts. Comment [3] contrasts the lawyer's ethical duty of confidentiality with the

attorney-client privilege and the work-product doctrine: While the ethical duty of confidentiality applies to lawyers in all situations and covers a broad scope of information, the attorney-client privilege and the work-product doctrine apply primarily in litigation and have a far narrower scope:

The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work-product doctrine and the rule of confidentiality established in professional ethics. The attorney-client privilege and work-product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law.

Comment [10] elaborates on the self-defense exception stated in Colo. RPC 1.6(b)(6):

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 (b) (6) 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.

Other rules state the lawyer's duty of non-disclosure of client-related information in other contexts.

Colo. RPC 1.8(b) provides that "[a] lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules." Colo. RPC 1.9(c) applies these concepts to former clients:

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

- (1) use information relating to 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.

Colo. RPC 1.18(b), in turn, applies the strictures of Colo. RPC 1.9(c) to prospective clients: "Even when no client-lawyer relationship ensues, a lawyer who has learned information from a prospective client shall not use or reveal that information, except as Rule 1.9 would permit with respect to information of a former client."

The Colorado Bar Association Ethics Committee (Committee) analyzes whether and how a lawyer may respond to online criticism within the framework of these rules.

Analysis

Application of Colo. RPC 1.6(a) to a Lawyer's Online Responses to Client Reviews

No ethics rule or statute specifically precludes a lawyer from responding to online criticism. However, Colo. RPC 1.6 and 1.9 limit whether a lawyer may post and, if permissible, what a lawyer may disclose.

In the first instance, a lawyer's duty of confidentiality "applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source." *People v. Albani*, 276 P.3d 64, 70 (Colo. O.P.D.J. 2011). Further, in *People v. Isaac*, Case No. 15PDJ099, 2016 WL 6124510, at n. 13 (Colo. O.P.D.J. Sept. 22, 2016), the PDJ noted that the duty of confidentiality included information relating to the client's identity and the nature of the lawyer's representation of the client, billing-related information, and information readily available from public sources. These cases offer valuable guidance, but they are not binding precedent. *In re Roose*, 69 P.3d 43, 47-48 (Colo. 2003).

Limitations on and Exceptions to Colo. RPC 1.6(a)

The duty of confidentiality imposed by Colo. RPC 1.6(a) is not absolute. The rule permits disclosure if (1) the client gives informed consent, (2) the disclosure is impliedly authorized in order to carry out the representation, or (3) the disclosure is authorized by an exception contained in subsection 1.6(b).

Express client consent is unlikely in the context of a lawyer's response to a negative online review. However, if the client provides the lawyer with express informed consent to publicly reveal information that the lawyer would otherwise be precluded from revealing under Colo. RPC 1.6(a), the lawyer may reveal such information, but only to the extent permitted by the client in his or her informed consent. Under the predecessor to Colo. RPC 1.6, DR 4-101(c)(1) of the Colorado Code of Professional

Responsibility, the Colorado Supreme Court held that informed consent cannot be implied. *People v. Lopez*, 845 P.2d 1153, 1155 (Colo. 1993) (DR 4-101(c)(1) "does not encompass 'implied' consent, even if the facts warrant[] a finding that [the client] by his conduct impliedly consented to [disclosure]."). Thus, an argument by the lawyer that the client provided implied informed consent by posting the online criticism in the first place or revealing his or her confidential information in the online post is likely to be unavailing. Even if it did prevail, it would be difficult for the lawyer to know in advance whether the lawyer's rebuttal complied with the client's informed consent.

In the Committee's judgment, it is even less likely that a lawyer's online response to a client's negative review would be "impliedly authorized in order to carry out the representation." Colo. RPC 1.6(a). A lawyer who publicly responds to a client's negative comments is generally attempting to defend the lawyer's performance in the representation—not "carry[ing] out the representation." Such an online defense bears no similarity to the examples of impliedly authorized disclosures provided in Colo. RPC 1.6, that is, "to admit a fact that cannot properly be disputed or to make a disclosure that facilitates a satisfactory conclusion to a matter." See Colo. RPC 1.6, cmt. [5].

Colo. RPC 1.6(b) recognizes three circumstances in which the self-defense exception to the lawyer's general duty of non-disclosure may apply: (1) in a *controversy* between the lawyer and client; (2) when a *criminal charge or civil claim* has been asserted against the lawyer based upon conduct in which the client was involved; or (3) in any *proceeding* concerning the lawyer's representation of the client. Because online criticism, standing alone, does not constitute a "criminal charge," "civil claim," or "proceeding," the remaining question is whether a negative online review creates a "controversy" between the lawyer and client as to which the lawyer may disclose otherwise protected client-related information in order "to establish a claim or defense."

Comment [10] to Colo. RPC 1.6(b)(6), quoted above, recognizes that a "controversy" that the lawyer is permitted to defend may exist before

an “action” or “proceeding” has commenced. It does not address, however, whether online criticism creates such a controversy. The PDJ considered this issue in *People v. Isaac*, where the lawyer disclosed numerous confidential, detailed items of client information while responding to two online client criticisms. 2016 WL 6124510, at *1–5. Without discussion, the PDJ assumed the existence of a “controversy” within the meaning of Colo. RPC 1.6(b)(6), but this might have been because the client in *Isaac* had filed a disciplinary complaint against the lawyer in addition to posting online criticisms. *Id.* at *1. Ultimately, the PDJ concluded that, assuming the existence of a controversy, the lawyer’s response was nevertheless inappropriate. The PDJ ruled that “[p]aragraph (b) permits disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to establish a defense.” *Id.* at *3.¹ In its summary judgment order, the PDJ held:

[T]he Court determines as a matter of law that Respondent could not have reasonably believed it necessary to disclose the full range of information he posted in his [online] responses. . . . In both instances, it appears that Respondent disclosed his clients’ [confidential information] simply to embarrass and discredit the clients. The Court therefore concludes as a matter of law that Respondent violated *Colo. RPC 1.6(a)* by posting [the] responses and that no exception [] authorized his conduct. *Id.* at *4 (italics in original).

A similar situation arose in *People v. Underhill*, 15PDJ040, 2015 WL 4944102, at *1 (Colo. O.P.D.J. August 12, 2015), in which the PDJ approved a conditional admission of misconduct and suspended a lawyer who twice issued online rebuttals that, as in *Isaac*, “publicly shamed the [clients] by disclosing highly sensitive and confidential information gleaned from attorney–client discussions,” and “publish[ed] an attorney–client communication and [made] uncomplimentary observations about and accusations against the [clients] based on confidential information related to the representation . . . in contravention of Colo. RPC 1.6(a) and Colo RPC 1.9(c)(2).” The conditional admission in *Underhill*, however,

did not address the Colo. RPC 1.6(b)(6) self-defense exception.

Thus, a lawyer may not respond to negative online reviews by needlessly disclosing sensitive and embarrassing information about current or former clients, but certain undefined disclosures of confidential information may be appropriate under Colo. RPC 1.6(b)(6) if the client’s online criticisms have created a controversy between the lawyer and the client and the lawyer’s disclosures are necessary for the lawyer to assert a claim or mount a defense in that controversy. In other words, the extant Colorado authorities delineate how a lawyer may *not* respond, but they provide little guidance as to how a lawyer *may* respond, consistent with Colo. RPC 1.6(b)(6). And they do not clarify whether online criticism can result in a “controversy” such that Colo. RPC 1.6(b)(6) could apply at all.

Other jurisdictions, however, have issued opinions that provide additional guidance with respect to how the self-defense exception applies to a lawyer’s online postings. For example, an Arizona ethics opinion addresses whether and to what extent a lawyer may disclose the substance of the lawyer’s discussions with a former client in order to refute the former client’s public allegations against the lawyer. State Bar of Ariz., Ethics Op. 93-02 (1993). The opinion first noted the confidentiality provisions of Rule 1.6 and then turned to the three circumstances described in Arizona’s self-defense exception, which is identical to Colo. RPC 1.6(b)(6). Focusing on whether allegations against the lawyer outside the context of a legal proceeding could constitute a “controversy” that permitted disclosure, the Arizona opinion states: “We believe that the assertions [of misconduct] made against the attorney by the former client . . . are sufficient to establish a ‘controversy’ between the attorney and his client.” *Id.* The Arizona opinion notes that the other two circumstances included in the self-defense exception require the existence of an “action” or a “proceeding,” and that interpreting a “controversy” to require a formal proceeding would render the controversy language “largely superfluous.” *Id.* The Arizona opinion concludes: We do not believe that the right to disclose is limited to a pending or imminent legal proceeding. Instead, an attorney may dis-

close confidential information pursuant to [Rule 1.6] 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.

Finally, like the Colorado PDJ in the *Isaac* case, the Arizona opinion “emphasize[s] that our conclusion should not imply that an attorney may simply open his or her file in response to any such derogatory allegation. [Disclosure] is permitted only to the extent the lawyer reasonably believes necessary to establish a claim or defense.” *Id.*

The Supreme Court of Wisconsin also has addressed the necessity of a “proceeding” when evaluating the “controversy” prong of the self-defense exception to Rule 1.6. In *In re Thompson*, 847 N.W.2d 793 (2014), the Court reviewed an ethics referee’s conclusion that the Wisconsin self-defense exception did not apply in the absence of “court-supervised proceedings.” *Id.* at 800. The Court noted that Wisconsin’s confidentiality rule (like Colorado’s) does not limit permitted disclosures to a “court-supervised” setting. Consequently, the Court declined to impose that restriction on the term “controversy” as used in the Wisconsin version of Colo. RPC 1.6(b)(6). *Id.* at 802–03.

The Arizona and Wisconsin opinions appear to harmonize with the Colorado PDJ’s opinion in *Isaac*. All three authorities either assume or recognize the potential viability of the self-defense argument even absent a formal proceeding. This is tempered, however, by the caveat that “disclosure [is permitted] only to the extent the lawyer reasonably believes the disclosure is necessary [to defend the lawyer].” *Isaac*, 2016 WL 6124510, *3.

The Restatement (Third) of the Law Governing Lawyers also speaks to the self-defense exception to Rule 1.6 confidentiality: “Charges against lawyers will often involve circumstances of client–lawyer relationships that can be proved only by using confidential information. Thus, in the absence of the exception stated in the Section, lawyers accused of wrongdoing would be left defenseless against false charges in a way unlike that confronting any other occupational

group." *Id.*, § 64, cmt. [b]. A formal charge or proceeding is not necessary before the self-defense exception can be invoked; a disgruntled client's manifestation of an intent to bring such a charge is sufficient. *Id.*, cmt. [c]. Finally, and significantly, Section 64 notes that "[t]here is little authority in point" relative to the types of charges falling within the self-defense exception.

Conclusion

Although *Isaac* and the other authorities cited above can provide guidance, given the absence of binding authority, a Colorado lawyer must be cautious when deciding whether and in what fashion to respond to online criticism. For the lawyer wanting to err on the side of caution, the Pennsylvania Bar Association suggests the following language as a potential response:

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.

Pa. Bar Ass'n Formal Op. 2014-200, "Lawyer's Response to Client's Negative Online Review" (2014). The Committee believes that this language would comport with Colo. RPC 1.6(b)(6). ^{CL}

NOTE

1. For this ruling, the PDJ cited Comment [14] to Rule 1.6. *Id.* Although that comment references Colo. RPC 1.6(b)(7), concerning disclosures to detect conflicts of interest, not Colo. RPC 1.6(b)(6), Rule 1.6(b) permits disclosures pursuant to any of its exceptions only "to the extent the lawyer reasonably believes necessary" to address the circumstances triggering the exception. Colo. RPC 1.6(b). See also Colo. RPC 1.6, cmt. [10] ("the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense").

Notwithstanding the copyright notice appearing in *Colorado Lawyer*, formal opinions of the CBA Ethics Committee may be reproduced in single or multiple copies: (1) by libraries for traditional multiple library use, including copies for reserve room use, extra copies for faculty-student dissemination, and interlibrary use; (2) by legal practitioners for their own use and the use of members and associates of the firm or office in which they practice; and (3) by individuals for classroom teaching purposes. All other copyright interests are expressly reserved, including, without limitation, the right to prohibit copying for resale purposes.



ZANER HARDEN LAW
YOUR STORY WILL BE TOLD

WE HAVE RECOVERED MILLIONS FOR OUR CO-COUNSELING PARTNERS.



We invite you to reach out for all of your **co-counseling** needs in personal injury, premises liability, and bad faith cases.

\$15.9 MILLION RECORD BREAKING VERDICT - October 2018

ZHL secures the largest premises liability verdict in the history of Colorado for client with CRPS.





RECENT HIGH PROFILE CO-COUNSELING CASES INCLUDE:

\$2.5 million verdict for victim killed by drunk driver as seen on the front page of the Denver Post

Confidential Products Liability Settlement from Car Manufacturer for mother of four trapped in her car for 6 days as seen on Good Morning America and World News Tonight

Contact Us

phone | (303) 563-5354

1610 Wynkoop St #120
Denver, CO 80202






Super Lawyers