

Everyone's a critic: Ethics in the world of online reviews

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No one likes a critic, particularly when the criticism is unjustified.

Worse still, in the world of online reviews, criticism can be seen by all who care to look. The temptation to refute online criticism with an online reply may be overwhelming, but lawyers should understand the ethical issues involved before posting a response.

Confidentiality of information

Lawyers have a duty to keep client information confidential under Rule 4-1.6.¹ This ethical duty applies to *all* information the lawyer has about the client, whatever the source, and is therefore much broader than the attorney-client privilege: it is not limited to matters the client has communicated in confidence to the lawyer.²

The duty of confidentiality continues beyond the termination of the attorney-client relationship, and even applies to prospective clients, based upon the interplay within rules. Rule 4-1.18, the rule regarding duties to *prospective clients*, allows a lawyer to reveal information learned in a consultation only as the rules would permit with respect to a *former client*.³ Rule 4-1.9, the rule regarding duties to *former clients*, only allows a lawyer to reveal information relating to the representation “as these Rules would permit or require with respect to a client.”⁴ Consequently, the prospective client and former client rules lead us back to Rule 4-1.6 and its restrictions on revealing client information.

Case in point

A number of disciplinary cases have resulted from lawyers responding to online reviews and, in so doing, violating the duty of confidentiality. A Colorado lawyer was suspended for six months after he posted online responses to two negative client reviews on the internet.⁵ One review called him the “worst attorney in Denver” and stated that he took \$3,500 and “did nothing.”⁶ The attorney’s response stated that the client was charged with felony theft and included details of the representation.⁷ The second review asserted that the lawyer was late and unprepared for hearings and never used evidence given to him.⁸ In response, the lawyer revealed that the client was charged with felony assault, felony eluding of police, and driving under the influence of alcohol. The lawyer also disclosed that the client had paid him with

a \$4,000 insufficient-funds check, and then “committed two criminal offenses” by forging fabricated affidavits and notarizing the forged signatures when she was no longer commissioned as a notary public.⁹

At the disciplinary hearing, the lawyer testified that he posted the responses to give anyone who saw the reviews “an opportunity to assess for themselves the credibility of the postings,” and that he was trying to save his practice.¹⁰ He stressed that he had the confidentiality rule in mind when he drafted the responses, but that he thought the rule permitted him to disclose information relating to a client if that information was publicly known. The court noted the lawyer’s “efforts to shoehorn his disclosures into this exception are risible,” and further rejected as irrelevant that certain information was already public because the rule “applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source.”¹¹

What about self-defense?

Some lawyers facing discipline have argued that revealing information related to the representation in an online response is permitted by subparagraph (b)(3) of the confidentiality rule, Rule 4-1.6. That subparagraph provides that a lawyer may reveal information relating to the representation of a client 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 proceeding* concerning the lawyer’s representation of the client.”¹²

In Formal Opinion 496, the American Bar Association (ABA) Standing Committee on Ethics and Professional Responsibility addressed the applicability of this subparagraph (which is 1.6(b)(5) of the Model Rules) to online criticism responses. It rejected outright the idea that online criticism is a “proceeding,” and therefore maintained that disclosure would not be allowed under the exception covering responses to allegations in any proceeding concerning the lawyer’s representation of the client. The committee further opined that making public statements online is not a reasonably necessary or permissible response to defend against a criminal charge or civil claim; and that the lawyer may respond directly to the person making such a claim, if necessary. Finally, the committee concluded that a negative online review, because

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of its informal nature, is not a “controversy between the lawyer and the client” within the meaning of the subparagraph and, even if it were, a public response is not reasonably necessary or contemplated in order for the lawyer to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and client.

The Missouri Legal Ethics Counsel, in an earlier Informal Advisory Opinion, reached the same conclusion: “A negative online review generally does not constitute a ‘controversy’ sufficient to trigger the exception in Rule 4-1.6(b)(3) and permit a lawyer to reveal confidential information to the extent reasonably necessary to establish a defense to a controversy between the lawyer and the client.”¹³ The opinion noted that Rule 4-1.6 protects all information related to the representation, whatever the source, and also prohibits disclosures by a lawyer that do not reveal protected information but could reasonably lead to the discovery of such information by a third person.¹⁴ In response to the question of whether a lawyer could respond to a negative online review if the lawyer confines the response to comments directed to information already disclosed by the client in the client’s review, the opinion advises that if the lawyer “chooses to post a response to an online review, the response may acknowledge an attorney’s obligation to comply with the professional obligations and must reveal no information related to the representation in violation of Rule 4-1.6.”¹⁵

What about implied authorization?

Rule 4-1.6(a) permits a lawyer to reveal information relating to the representation of a client if “the disclosure is impliedly authorized in order to carry out the representation.” ABA Formal Opinion 496 addressed the question of whether implied authorization exists for disclosure of confidential information in response to online criticism. The committee stated in the opinion that “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.”¹⁶

Guidance


The client posting the critical review is not subject to the ethical rules, but the same is not true for the lawyer responding. While recognizing that there is no one answer to the problem, ABA Formal Opinion 496 provides the following suggestions to lawyers who are subject to online criticism:

1. Request that the website host remove the post, particularly if made by a non-client. If the posting is by a client, former client, or prospective client, the lawyer cannot disclose any information to the website host that relates to the representation or consultation, but may state that the post is not accurate.¹⁷
2. Consider not responding to the negative online review.¹⁸
3. Request a conversation offline with the person to discuss their concerns.¹⁹
4. If the person is not a client, former client, or prospective client, state that in the response. But if the negative

comments are from a former opposing party or opposing counsel, the lawyer cannot disclose in response any information relating to the representation without the client’s informed consent as “even a general disclaimer that the events are not accurately portrayed may reveal that the lawyer was involved in the events mentioned.”²⁰

5. Consider responding directly to the person posting the negative review.²¹
6. Acknowledge in the response that a lawyer’s professional obligations “do not allow me to respond as I would wish.”²²

Conclusion

The breadth of the information covered by the confidentiality rule, combined with the inapplicability of the rule’s exceptions, makes responding to critical online reviews tricky. So, like our mothers and Ethics professors told us, we should count to 100 and carefully read the rules before reacting in anger – especially online. 

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Endnotes

- 1 Missouri Rule of Professional Conduct 4-1.6. Under Rule 4-1.6, lawyers “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 Rule 4-1.6(b).”
- 2 Missouri Rule of Professional Conduct 4-1.6, Comment 3.
- 3 Missouri Rule of Professional Conduct 4-1.18. Rule 4-1.18(b) states that, “[e]ven when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client, shall not use or reveal information learned in the consultation, except as Rule 4-1.9 would permit with respect to information of a former client.”
- 4 Missouri Rule of Professional Conduct 4-1.9. Rule 4-1.9(c)(2) prohibits a lawyer who has formerly represented a client to “reveal information relating to the representation except as these Rules would permit or require with respect to a client.”
- 5 *People v. Isaac*, 470 P.3d 837, 838 (Colo. 2016).
- 6 *Id.* at 839.
- 7 *Id.*
- 8 *Id.*
- 9 *Id.* at 840.
- 10 *Id.* at 842.
- 11 *Id.* at 848, fn. 20.
- 12 Missouri Rule of Professional Conduct 4-1.6(b)(3) (emphasis added).
- 13 Mo. Informal Advisory Op. 2018-08.
- 14 *Id.*
- 15 *Id.*

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