

**Proposed Formal Ethics
Opinion Issued for
Publication**

**Proposed 2020 Formal Ethics Opinion 1
Responding to Negative Online Reviews
January 23, 2020**

Proposed opinion rules that a lawyer may post a proportional and restrained response to a negative online review but may not disclose confidential client information.

Inquiry:

Lawyer's former client posted a negative review of Lawyer's representation on a consumer rating website. Lawyer believes that the former client's comments are false. Lawyer believes that certain information in Lawyer's possession about the representation would rebut the negative allegations. The information in question constitutes confidential information as defined by Rule 1.6(a).

In what manner may Lawyer publicly respond to the former client's negative online review?

Opinion:

In response to the former client's negative online review, Lawyer may post a proportional and restrained response that does not reveal any confidential information. The protection of client confidences is one of the most significant responsibilities imposed on a lawyer. Rule 1.6(a) of the Rules of Professional Conduct provides that a lawyer may not reveal information acquired during the professional relationship with a client unless (1) the client gives informed consent; (2) the disclosure is impliedly authorized; or (3) one of the exceptions set out in Rule 1.6(b) applies. Rule 1.6(a) applies to all information acquired during the representation. Under Rule 1.9(c), a lawyer is generally prohibited from using or revealing confidential information of a former client. Therefore, Lawyer may not reveal confidential information in response to the negative online review unless the former client consents or an exception set out in Rule 1.6(b) applies. *See* 2018 FEO 1 (lawyers are cautioned to avoid disclosing confidential client information when responding to a negative review).

No exception in Rule 1.6(b) allows Lawyer to reveal confidential information in response to a former client's negative review. The only exception potentially applicable to the facts presented is the "self-defense exception" set out in Rule 1.6(b)(6). Rule 1.6(b)(6) permits a lawyer to reveal information to the extent the lawyer reasonably believes necessary:

[T]o 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.

Comment [11] to Rule 1.6 provides guidance as to the application of the self-defense exception. Pursuant to Comment [11]:

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.

Rule 1.6, [cmt] 11 (emphasis added). Thus, the self-defense exception applies to legal claims and disciplinary charges arising in civil, criminal, disciplinary or other proceedings. A negative online review does not fall within these categories and, therefore, does not trigger the self-defense exception.

This conclusion is consistent with other jurisdictions that have opined on this issue. In Penn. Bar Ass'n Ethics Comm. Op. 2014-200, the Pennsylvania Ethics Committee concluded that “[w]hile there are certain circumstances that would allow a lawyer to reveal confidential client information, a negative online client review is not a circumstance that invokes the self-defense exception.” The Committee states:

A disagreement as to the quality of a lawyer's services might qualify as a “controversy.” However, such a broad interpretation is problematic for two reasons. First, it would mean that any time a lawyer and a client disagree about the quality of the representation, the lawyer may publicly divulge confidential information. Second, [Comment [11]] makes clear that a lawyer's disclosure of confidential information to “establish a claim or defense” only arises in the context of a civil, criminal, disciplinary or other proceeding.

Id. Likewise, the Texas Bar determined that the self-defense exception “cannot reasonably be interpreted to allow public disclosure of a former client's confidences just because a former client has chosen to make negative comments about the lawyer on the internet.” Texas Center for Legal Ethics Op. 662 (2016). Similarly, the Nassau County Bar stated that the exception does not apply to “informal complaints such as posting criticisms on the Internet.” Bar Ass'n of Nassau County Comm. on Prof'l Ethics Op. 2016-1. Also, the New York State Bar opined that, “the mere fact that a former client has posted critical commentary on a website is insufficient to permit a lawyer to respond to the commentary with disclosure of the former client's confidential information. . . . 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.” New York State Bar Ass'n Comm. on Prof'l Ethics Op. 1032 (2014). The Restatement of the Law Governing Lawyers similarly states that the self-defense exception to the duty of confidentiality is

limited to “charges that imminently threaten the lawyer or the lawyer’s associate or agent with serious consequences, including criminal charges, claims of legal malpractice, and other civil actions such as suits to recover overpayment of fees, complaints in disciplinary proceedings, and the threat of disqualification[.]” Restatement (Third) of the Law Governing Lawyers § 64, cmt. c. (Am. Law Inst. 2000).¹

An online negative review is not a legal claim or disciplinary charge arising in a civil, criminal, disciplinary or other proceeding.

We note that Comment [11] to Rule 1.6 provides that a lawyer does not have to “await the commencement” of an action or proceeding to rely on the self-defense exception. Nonetheless, there must be an action or proceeding in contemplation for the exception to apply. Penn. Bar Ass’n Ethics Comm. Op. 2014-200. The Restatement provides that, in the absence of the filing of a charge, there must be “the manifestation of intent to initiate such proceedings by persons in an apparent position to do so, such as a prosecutor or aggrieved potential litigant.” The Restatement (Third) of the Law Governing Lawyers § 64. It is the “manifestation of intent” that makes the disclosure of confidential client information “reasonably necessary.” As noted in the Restatement:

Use or disclosure of confidential client information . . . is warranted only if and to the extent that the disclosing lawyer reasonably believes necessary. The concept of necessity precludes disclosure in responding to casual charges, such as comments not likely to be taken seriously by others. The disclosure is warranted only when it constitutes a proportionate and restrained response to the charges. The lawyer must believe that options short of use or disclosure have been exhausted or will be unavailing or that invoking them would substantially prejudice the lawyer’s position in the controversy.

Id. The posting of negative comments about a lawyer on the internet does not amount to the requisite “manifestation of intent” to initiate proceedings against the lawyer as contemplated by the Restatement or Comment [11] to Rule 1.6.

While Lawyer is not permitted to reveal confidential information in a response to the negative review, Lawyer is not barred from responding. Any response should be “proportional and restrained.” Penn. Bar Ass’n Ethics Comm. Op. 2014-200. The Pennsylvania State Bar Ethics Committee proposes the following generic response to a negative online review:

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.

¹ While the California Rules of Professional Conduct do not contain a “self-defense” exception to the duty of confidentiality, the California Evidence Code contains a self-defense exception to the attorney-client privilege. Cal. Code Evid. § 958 (no privilege as to a communication relevant to an issue of breach by lawyer of duty arising out of lawyer-client relationship.) Two ethics opinions from local California bar associations interpreting the exception conclude that a lawyer may not rely on the exception to disclose confidential information in response to a negative online review. San Francisco Bar Ass’n Legal Ethics Comm. Op. 2014-1; Los Angeles County Op. 525 (2012).

Id. Similarly, the San Francisco Bar opines that if the client's matter has ended, a simple response that denies the veracity or merit of the former client's assertions would not violate the duty of loyalty that lawyers owe to former clients. San Francisco Bar Ass'n Op. 2014-1. *See also* Los Angeles County Ethics Op. 525 (2012) (lawyer may make a "proportionate and restrained" response to his former client's negative review but may not reveal confidential information or damage the former client in relation to the representation); Texas State Bar Opinion 662 (2016) (lawyer may post a proportional and restrained response that does not reveal any confidential information or otherwise violate the rules of ethics).

Accordingly, Lawyer may post an online response to the former client's negative online review provided the response is proportional and restrained and does not contain any confidential client information.