

Ethics Opinion EF-23-01: Responding to Online Criticism

On June 22, 2023, the State Bar of Wisconsin Professional Ethics Committee issued Opinion EF-23-01, discussing whether and how lawyers might ethically respond to criticism posted in online forums.

Synopsis

A lawyer may not reveal information relating to the representation of a client in response to online criticism of the lawyer without the affected current, prospective, or former client's informed consent. A response to online criticism that reveals protected information is not permitted by the self-defense exception outlined in SCR 20:1.6(c)(4). In most instances, the committee believes that no response best serves both the interests of the client and the lawyer. However, if the lawyer decides to respond, they may not reveal protected information and should be restrained and proportional in their response. Suggested permissible responses are discussed at the end of this opinion.

Introduction

Social media postings have become a prevalent method for consumers to communicate about goods and services they have used or purchased, or to comment on issues that arise in business or society at large. The legal profession is no exception, and lawyers are regularly subject to online commentary and criticism. Online postings about lawyers may come from a variety of sources – prospective, current, or former clients, opponents, or third parties whom the lawyer has never represented or opposed. They may lack context, be wholly or partly inaccurate, and be harmful to the lawyer's reputation.

Basic notions of fair play suggest the lawyer should be allowed to respond to negative postings. However, the lawyer's duty of confidentiality imposes

substantial constraints on what a lawyer may do, constraints that do not apply to other professionals. In this opinion, the State Bar's Standing Committee on Professional Ethics (the "committee") discusses a lawyer's options and responsibilities when subject to online criticism.

The Scope of the Ethical Duty of Confidentiality

SCR 20:1.6(a) states, "[a] lawyer shall not reveal information relating to the representation of a client ..."

All information relating to the representation is protected regardless of its source or whether the information is publicly available. ABA Formal Ethics Op. 480 (2018).¹ The duty applies not only to current clients, but also prospective clients, SCR 20:1.18(b), and former clients, SCR 20:1.9(c). The ABA comment to the rule further provides:

This prohibition 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. ABA Model Rule 1.6 cmt. [4].

The rule's reach is significantly broader than the attorney-client privilege which protects only confidential communications between the lawyer and client made for the purpose of obtaining legal services. Wis. Stat. § 905.03. As an evidentiary rule, the attorney-client privilege is relevant only in formal proceedings in which the rules of evidence apply.

Examples of information that is protected by the rule but not

privileged include the identity of the client (Wisconsin Formal Ethics Op. EF-17-02 (2017), ABA Formal Ethics Op. 480 (2018)), the location of the client (Virginia Ethics Op. 929 (1987), Nebraska Ethics Op. 90-2, *cf. Suarez v. Hillcrest Dev. of South Florida Inc.*, 742 So. 2d 423 (Fla. Dist. Ct. App. 1999)), or litigation details even if publicly available (Rhode Island Ethics Op. 99-02 (1999)).

In addition to protecting publicly available information and information not covered by the attorney-client privilege, SCR 20:1.6 also protects information previously disclosed to others, information learned from third parties, and disclosures that would not be harmful to the client. Wisconsin Formal Ethics Op. EF-17-02 (2017).

Online complaints typically concern dissatisfaction with the lawyer's performance, the result obtained, or the fee charged, all topics protected by the duty of confidentiality. Absent the affected client's informed consent or the availability of an exception to the duty, there is little a lawyer can say in response to a complaint that would not involve disclosure of protected information.

Exceptions to the Duty of Confidentiality

The duty of confidentiality in Wisconsin is not absolute; there are situations in which a lawyer must disclose confidential information² and others in which they have discretion to do so.³

A. Implied Authority

SCR 20:1.6(a) allows for the disclosure of protected information absent a client's informed consent when "impliedly authorized in order to carry out the representation." Comment [5] explains, "[i]n some situations ... a lawyer may ... make a disclosure that facilitates a satisfactory conclusion to a matter." Similarly, § 61 of the Restatement (Third) of the Law Governing Lawyers (2000) allows disclosure of protected client information that furthers the client's interests. *See also* North Carolina Ethics

Op. 2015-5 (2015) (lawyer may provide former client's file to successor counsel to further the former client's interests). This exception would not apply when a lawyer is contemplating responding to a critical online comment as the lawyer's response is almost never necessary to advance the client's interests.

B. Informed Consent

A lawyer may also disclose protected information if the client gives informed consent, defined as "the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." SCR 20:1.0(f). See also cmt. [6].

Implicit in the requirement of informed consent is the need to focus on the interests of the client and not the lawyer. An adequate explanation must include whether disclosure of protected information would advance or harm the client's interests, and the proposed disclosure should ordinarily reveal no more information than is necessary to fairly respond to the criticism. When the lawyer has had a falling out with their client, it would be unlikely they would give the necessary informed consent to allow the lawyer to respond to the online criticism.⁴ In the case of a currently represented opponent posting online criticism, SCR 20:4.2 would prohibit responding directly or communicating to that person about the matter absent the consent of their lawyer.

C. The "Self-Defense" Exception

Most relevant to this opinion is the "self-defense" exception to confidentiality. SCR 20:1.6(c)(4)⁵ provides:

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

This provision allows disclosure of protected information in three situations:

- 1) "[T]o establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client ..."
- 2) To "establish a defense to a criminal charge or civil claim against the lawyer based on conduct in which the client was involved"
- 3) "[T]o respond to allegations in any proceeding concerning the lawyer's representation of the client ..."

Although confidentiality rules among the states vary, many have adopted the ABA "self-defense" provision. Without exception, all that have considered the issue have agreed that online criticism alone does not fall within the language that permits disclosure of protected information to "establish a defense to a criminal charge or civil claim ..." or to "respond to allegations in any proceeding ..."⁶ The committee agrees with this view.

The self-defense provision also allows for the disclosure of protected information "to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client ..."

The word "controversy" is defined as "a disagreement, often a public one, that involves different ideas or opinions about something."⁷ To be sure, common usage could embrace both formal disagreements involving litigation and informal disputes, such as social media disagreements. If the former, the self-defense provision would not allow disclosure of protected information on social media in response to online criticism. If the latter, lawyers could disclose protected information anytime a dispute arose, however minor.

For several reasons, the committee believes the term "controversy" should not be interpreted to include informal disagreements reflected in online criticisms. First, lawyers' relationships

with clients are often contentious and involve disagreements about matters large and small. This is not surprising; lawyers frequently deal with the most difficult of human experiences. To view any disagreement between a lawyer and client as a "controversy" which makes it necessary for the lawyer to disclose protected information would significantly diminish client protections. Such a view cannot be reconciled with the important role of confidentiality in the representation of clients.

Second, lawyer responses to online criticism are likely to be critical of the author. If that person is or was a client, as is often the case, allowing disclosure of negative information about the client would violate SCR 20:1.8(b), which cautions without exception that "[a] lawyer shall not use information relating to representation of a client to the disadvantage of the client ..."

Third, a response in kind to online criticism is unlikely to be necessary to serve any of the purposes underlying the exceptions to the duty of confidentiality. ABA Rule 1.6 cmt [16]. If the lawyer is faced with formal accusations their response will typically be a written answer or denial, not an online posting. And, if the criticism is not connected to any type of formal complaint the lawyer will have a variety of options that do not require public disclosure of protected information on social media.⁸ Fourth, limiting the interpretation of controversies to formal disagreements is consistent with the other exceptions outlined in SCR 20:1.6(c)(4).

The ABA commentary is consistent with this view of the "self-defense" provision:

[10] 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)(5) 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.

Nothing in the commentary suggests that informal social media disputes trigger the "self-defense" exception. All examples refer to some type of formal proceeding. And, although the comment does suggest a formal proceeding need not be pending to allow the lawyer to respond, this circumstance is framed to apply only to situations where a formal accusation is imminent.⁹

Most jurisdictions that have considered the issue have reached the conclusion that the self-defense exception does not permit disclosure of protected information because informal criticism of a lawyer does not constitute a controversy as that term is used in the rule and a response is therefore not necessary.¹⁰

The committee believes a narrow interpretation of SCR 20:1.6(c)(4) best complements the other relevant disciplinary rules and, as a practical matter, best avoids harm to the client's or lawyer's interests. In most instances, a lawyer response will not resolve the dispute, may simply draw more attention to the matter, and ultimately reflect poorly on the client, the lawyer, or both.

Informed Consent and Waiver of Privilege

It has been suggested that a client's decision to disclose protected

information in an online critique of their lawyer might operate as a waiver of confidentiality or constitute informed consent to disclose confidential information, at least as to the topics discussed. Such a view incorrectly confuses the significance of a client's disclosure of information to the evidentiary attorney-client privilege with the ethical duty of confidentiality.

The attorney-client privilege is an evidentiary rule that protects communications between a lawyer and client made for purposes of receiving legal services. Wis. Stat. § 905.03(1)(d), (2). A client's voluntary disclosure of communications with their lawyer is generally viewed as a waiver of the privilege as it suggests the client did not intend to keep the communications confidential, part of the statutory definition of what information is privileged.¹¹ Thus, a client's intentional posting of information about their lawyer on social media would operate to waive the privilege at

least as to the information posted.

However, whether information is privileged is not determinative of whether it is protected by SCR 20:1.6. This is because the privilege only protects communications between the lawyer and client whereas the disciplinary rule protects all information related to the representation, whatever its source. Moreover, there is no provision for "waiver" under SCR 20:1.6, as information that is disclosed for a permissible purpose under SCR 20:1.6 does not lose its protected status.¹² The client's disclosure of protected information has no bearing on whether their lawyer may likewise do so under SCR 20:1.6. Instead, lawyer disclosure is controlled by SCR 20:1.6(b), (c) and SCR 20:3.3.¹³

A Lawyer's Options when Subject to Online Criticism

While SCR 20:1.6 does not permit a lawyer to disclose information relating to the representation of the client in response to



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Sincerely,
Your State Bar of Wisconsin Advocacy Team

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online criticism, that does not necessarily mean that a lawyer facing such criticism may take no action whatsoever.

ABA Formal Ethics Opinion 496 makes several suggestions as to what a lawyer may do. The lawyer may ask the website or search engine to remove the post. The lawyer may contact the person who posted the criticism and seek to resolve the issue outside public view, including by asking the person to seek to remove or correct the post. The lawyer may also choose to simply ignore the criticism, understanding that most online postings lose their relevance quickly. In addition, experience teaches that one response can result in others, which may only make the parties'

positions more intractable and the dispute more visible.

If the lawyer believes a response is necessary, the committee suggests the following:

I do not believe the [post/comments] are fair or accurate. Professional obligations prevent me from commenting further.¹⁴

If the criticism is from a person who is not nor has ever been a client of the lawyer, the lawyer may note that fact.

Conclusion

While a limited response may be ethically permissible, the committee strongly believes that no response at all will almost always be the lawyer's best option. A response in kind will rarely be

beneficial to the lawyer and risks harm to and further estrangement from the client. Ignoring the criticism eliminates the risk of an ethics violation and minimizes the possibility of a prolonged and unproductive public dialogue. **WL**



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ENDNOTES

¹See *Restatement (Third) of the Law Governing Lawyers* § 59 (2000) (in contrast to the ABA and Wisconsin confidentiality rules, information "generally known" is not considered confidential under the Restatement provisions).

²SCR 20:1.6(b) requires the disclosure of confidential information "to the extent the lawyer reasonably believes necessary to prevent the client from committing a criminal or fraudulent act that the lawyer reasonably believes is likely to result in death or substantial bodily harm or in substantial injury to the financial interest or property of another." This requirement is not part of the ABA rule. In addition, SCR 20:3.3(c) also requires the disclosure of confidential information if necessary to correct a false statement or the presentation of false evidence. Unlike the ABA version of this rule, there is no Wisconsin time limit on this remedial responsibility.

³See SCR 20:1.6(c)(1)-(6). Of the various situations allowing discretion to disclose confidential information only the "self-defense" exception, SCR 20:1.6(c)(4), is relevant to the issue of responding to online criticism.

⁴If the criticism was from an opponent or other non-client complainant about the case outcome it may be that the client or former client would give informed consent to a minimal disclosure by their lawyer.

⁵The text of Wisconsin's self-defense exception is identical to the ABA version. The only difference is their numbering. Wisconsin's exception is found in SCR 20:1.6(c)(4) whereas the ABA version is Rule 1.6(b)(5).

⁶For example, ABA Formal Opinion 496 provides, "[o]nly 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.' 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. See also ABA Formal Opinion 10-456; Texas Prof. Ethics Comm. 662 (2016); N.J. Advisory Comm. on Prof. Ethics 738 (2020).

⁷<https://dictionary.cambridge.org/us/dictionary/english/controversy>.

⁸See pp. 6-7 *infra*.

⁹ABA Model Rule 1.6 cmt. [14]; Penn. Bar Assoc. Formal Op. 2014-200 at 3-4. See also *Restatement (Third) of the Law Governing Lawyers* § 64 cmt. c (2000).

¹⁰Penn. Bar Assoc. Formal Op. 2014-200; Texas Prof. Ethics Comm. Op. 662 (2016); New York State Bar Assoc. Op. 1032 (2014); Bar Assoc. of San Francisco Op. 2014-1 (2014); Los Angeles County Bar Assoc. Prof. Responsibility and Ethics Comm. Op. 525 (2012); Bar Assoc. of Nassau County Comm. on Prof. Ethics Op. 2016-01 (2015); West Virginia Legal Ethics Op. No. 2015-02 (2015). See also *In re Skinner*, 758 S.E.2d 788 (Ga. 2014).

It should be noted that there is contrary authority. See Colorado Bar Ass'n Opinion 136 (2019) and State Bar of Ariz. Ethics Op. 93-02. The former is quite cautious in its view and the latter opinion was overruled by State Bar of Ariz. Ethics Op. 19-0010. As authority for disclosure outside of a formal proceeding, the Colorado opinion cites a Wisconsin case - *In re Thompson*, 2014 WI 25, 353 Wis. 2d 556, 847 N.W.2d 793 (2014). In that case, a lawyer faced with a claim of ineffective assistance of counsel obtained court permission to disclose substantial confidential information in a letter to the court prior to an evidentiary hearing. Under the circumstances, the supreme court concluded the lawyer's actions did not violate SCR 20:1.9(c). The committee believes the unique circumstances of the Thompson case suggests it does not support a lawyer's right to disclose confidential information anytime the lawyer receives online criticism as a lawyer is unlikely to have court permission to respond to online criticism.

¹¹See Wis. Stat. § 905.03(1)(d); *Restatement (Third) of the Law Governing Lawyers* § 79 (2000).

¹²See Wisconsin Formal Ethics Op. EF-17-02 (2017).

¹³Disclosure of confidential information by the lawyer involving a client with diminished capacity is controlled by SCR 20:1.14(c).

¹⁴Several other jurisdictions have provided sample responses: *Professional obligations do not allow me to respond as I would wish.* [ABA Formal Ethics Op. 496 at 6].

My professional and ethical responsibilities do not allow me to reveal confidential client information in response to public criticism. [Kentucky Bar Assoc. Ethics Op. KBA E-448 at 1].

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. [Penn. Bar Assoc. Formal Op. 2014-200 at 1. Cited with approval: Ariz. Ethics Op. 19-0010; Texas Ethics Op. 622; Florida Bar Ethics Op. 20-01; Colo. Ethics Op. 136].

As an attorney, I am constrained by the Rules regulating the [Florida Bar] from responding in detail, but I will simply state that it is my belief that the [comments/post] present neither a fair nor accurate picture of what occurred and I believe that the [comments/post] [is/are] false. [Florida Bar Ethics Op. 20-10 at 3]. **WL**