

FORMAL OPINION NO 2022-201

Responding to Negative Online Comments and Reviews

Facts:

Attorney represented Former Client in a case. Former Client became dissatisfied with Attorney's representation. As a result, after Attorney's representation ended, Former Client began to openly criticize Attorney in various forums online. Former Client posts harsh comments regarding Attorney's competence and honesty on Attorney's personal social media page and on Attorney's firm's social media pages. Former Client also posts similar comments on online review sites, which are displayed when others search for Attorney using a web browser. Both the social media and review sites have sections that would permit Attorney to respond.

Attorney believes that these comments are false and defamatory and is concerned that they will affect Attorney's business in the future. Based on these concerns, Attorney wishes to respond to these comments.

Question:

May an attorney, consistent with the Oregon Rules of Professional Conduct (Oregon RPCs), respond to a former client's negative online reviews by confirming information or revealing additional information relating to the representation of the former client?

Conclusion:

See discussion.

Discussion:

Oregon RPC 1.6 governs the extent to which an attorney may divulge information related to a current or former client.

Oregon RPC 1.6 provides:

- (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:

....

(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[.]

“Information relating to the representation of a client”

Oregon RPC 1.0(f) defines “[i]nformation relating to the representation of a client” as “denot[ing] both information protected by the attorney-client privilege under applicable law, and other information gained in a current or former professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.” Information relating to the representation of a client is protected both during and after the professional relationship.¹

This term should be read broadly.² Any information learned from clients in the course of representing them is “gained in a current or former professional relationship.”³ Under the broad definition of this term,

¹ A lawyer is bound by the rules of professional conduct even after the termination of representation. OSB Formal Ethics Op No 2005-23 (rev 2014). Information relating to the representation of a former client is protected as is information relating to the representation of a current client.

² *In re Conry*, 368 Or 349, 362, 491 P3d 42 (2021).

³ *In re Phillips*, 338 Or 125, 138, 107 P3d 615 (2005) (decided under *former* DR 4-101(A) through (C), which prohibited revealing a client’s “secrets,” defined as “information [other than a confidence] gained in a current or former professional relationship . . . the disclosure of which . . . would be likely to be detrimental to the client.”) The definition of “*information relating to the representation of a client* in Oregon RPC 1.0(f) encompasses the definitions of *confidences* and *secrets* in *former* DR 4-101.” OSB Formal Ethics Op No 2005-23, at n 1 (rev 2014).

“information” can include even basic information such as the client’s name⁴ or information in the public record.⁵

Accordingly, it is assumed⁶ that the attorney’s response to the post includes information learned from a former client. However, that does not end the inquiry. To fall under the Oregon RPC 1.0(f) definition, the response must also be embarrassing or likely detrimental to the client.⁷

Embarrassing or likely detrimental

Whether a disclosure is embarrassing or likely detrimental is an inquiry that can depend on “[t]he nature of the disclosures, the overall tone of the [responses], and the circumstances surrounding [their] preparation.”⁸

⁴ *In re Conry*, 368 Or at 363 (“There is no dispute that respondent obtained client’s name and the associated information about his criminal convictions during the course of the representation. Accordingly, it is ‘information gained in a . . . former professional relationship.’”).

⁵ Consider ABA Formal Ethics Op No 480 (“Significantly, information about a client’s representation contained in a court’s order, for example, although contained in a public document or record, is *not* exempt from the lawyer’s duty of confidentiality under Model Rule 1.6. The duty of confidentiality extends generally to information related to a representation whatever its source and without regard to the fact that others may be aware of or have access to such knowledge.”).

⁶ This assumption is not necessary. It is possible for an attorney to respond to an anonymous review with no information gained in a current or former professional relationship. This response, however, addresses a question that assumes the response reveals such information.

⁷ Under the facts of this hypothetical, it is assumed that the attorney does not have the informed consent of the former client to disclose information relating to the former client’s representation. Because the representation has ended, it is also assumed that the disclosure will not help carry out the attorney’s representation of the client.

⁸ *In re Hoffman*, 328 Or 567, 581, 983 P2d 534 (1999). *See also In re Phillips*, 338 Or 125, 139, 107 P3d 615 (2005).

This element may be satisfied based on the information disclosed or, in a selective disclosure, based on information omitted.⁹

The Oregon Supreme Court, in *In re Conry*, discussed the disclosure of online information relating to the representation of the client. In *Conry*, the court determined that disclosure of the client’s name along with criminal convictions was embarrassing—both objectively and subjectively—even though the criminal convictions were a matter of public record.¹⁰

The court put weight on the fact that, even though the client’s name and criminal convictions were public record, the embarrassing information was now gathered and presented in a way that made it easier for the public to find.¹¹

Thus, there are several ways that a response to online criticism can constitute the disclosure of information embarrassing or detrimental to the client, even when the client has already made some disclosure.

If the client discloses embarrassing information but does not disclose the client’s full name, a response revealing the client’s name is an embarrassing or detrimental disclosure.

A response based solely on the public record can also be an embarrassing or detrimental disclosure, including when the client has already disclosed information that would be embarrassing.¹² If the attorney’s response is likely to reach more members of the public than the client’s

⁹ *In re Phillips*, 338 Or at 137–39 (finding that information shared was likely detrimental to clients in part because of the “false impression” created when it failed to disclose the nature of the relationship between the attorney and the third party).

¹⁰ *In re Conry*, 368 Or at 363 (Attorney “revealed that client had been convicted, identified the specific criminal convictions, and (in the Avvo review) provided client’s full name. That information was embarrassing.”).

¹¹ *In re Conry*, 368 Or at 364 (“Client’s reviews did not include his identity, or the fact of his convictions, or the specific criminal charges for which he had been convicted. Those who read respondent’s posts might have been able to gather that information themselves, but they were unlikely to seek it, and they would have had difficulty determining which of the millions of criminal records on file around the nation referred to the author of the reviews.”).

¹² *See also* ABA Formal Ethics Op No 480.

post, the attorney risks revealing embarrassing information to individuals that the client’s disclosure would not otherwise have reached. Moreover, the fact that an attorney includes information about a client in response to a negative review may in itself suggest that the information is intended to discredit because it is embarrassing or detrimental to the client.¹³

Posting any response to negative online criticism is risky. Attorneys risk violating Oregon RPC 1.6 when summarizing, reframing, or even re-posting embarrassing or detrimental information unless revealing this information falls within an exception to 1.6.¹⁴

Further, Oregon RPC 1.6 may be violated even if the attorney deletes the post or response. Online communication is treated as analogous to written communication.¹⁵ Once the information is publicly posted online, the disclosure has been made.¹⁶ Even if the attorney engages in a fleeting disclosure by posting to an online site that automatically removes the post, the information has been revealed.

Self-Defense Exception of Oregon RPC 1.6(b)(4)

Disclosure of embarrassing or detrimental information is nevertheless allowed if it falls within the self-defense exception of Oregon RPC 1.6(b)(4). Oregon RPC 1.6(b)(4) allows a lawyer to reveal information related to the representation of the 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.”

¹³ *In re Conry*, 368 Or at 364 (“[I]f it could be expected that readers would go to such lengths to investigate the matter, then [attorney] would not have needed to include that information in his responses to the reviews; he could have taken it as a given that interested parties would obtain that information from the Bar.”).

¹⁴ *In re Conry*, 368 Or at 365. Given the court’s construction of the dictionary definition of the word *reveal*, as either “to make (something secret or hidden) publicly known” or “to open up to view: show plainly or clearly,” attorneys should consider this issue with caution.

¹⁵ OSB Formal Ethics Op No 2005-164.

¹⁶ *See* ABA Formal Ethics Op No 480, at 3-4.

“Controversy” is not defined in the Oregon Rules of Professional Conduct. *Conry* noted that a controversy may not be limited to formally commenced legal proceedings but ultimately did not decide that issue.¹⁷ Instead, the court resolved the applicability of the self-defense exception on other grounds.¹⁸

Additional guidance exists in the formal opinion issued by the American Bar Association just prior to the decision in *Conry*.¹⁹ The ABA found negative online reviews, alone, do not qualify as a “controversy” under Rule 1.6.²⁰ The ABA also found that a lawyer’s public response to negative online reviews is not reasonably necessary under the self-defense exception.²¹

The Disciplinary Board has previously found that responding to negative reviews posted online does not satisfy the claim or defense exception, noting that the attorney’s communication with the online review site “was not seeking to establish a claim or defense to a malpractice claim,

¹⁷ *In re Conry*, 368 Or at 366–67 (citing ABA Model RPC 1.6, cmt 10, www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_6_confidentiality_of_information/comment_on_rule_1_6 “(in context of third party alleging that client and attorney had colluded to defraud the party, ‘[t]he lawyer’s right to respond arises when an assertion of such complicity has been made’).”

¹⁸ “In this case, however, we need not resolve that question. As we will explain, even assuming for purposes of argument that there was a ‘controversy’ between respondent and client within the meaning of RPC 1.6(b)(4), we conclude that respondent revealed information that he did not ‘reasonably believe[] necessary’ for him to establish his claim or defense.” *In re Conry*, 368 Or at 367.

¹⁹ ABA Formal Ethics Op No 496.

²⁰ ABA Formal Ethics Op No 496 (“[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.”).

²¹ ABA Formal Ethics Op No 496 (noting “[A] public posting that discloses confidential information goes beyond a direct response to the accuser allowed . . . [T]here are also disciplinary cases in which lawyers have been sanctioned for disclosing confidential information online.”).

Bar complaint or fee dispute.”²² A response to negative reviews online, posted solely to discredit a client, is unlikely to fall within the claim or defense exception that would allow an attorney to reveal information relating to the representation of a client.²³

Given this background, one should assume that any online disclosure is not a case or controversy and that the self-defense exception will be applied sparingly, if at all.

To summarize, a broad view should also be taken as to whether information would be “embarrassing” or likely “detrimental” to the client. Even if the information is publicly available elsewhere, the redisclosure of that information may cause further harm and embarrassment to the client. In addition, confirming embarrassing information may provide additional gravitas to the disclosure. While there may be instances in which disclosure is not embarrassing, embarrassment is both objective and subjective. In some instances, even the fact that a former client had an attorney may

²² *In re Heinzelman*, 33 DB Rptr 6, 16 (2019), available at www.osbar.org/_docs/dbreport/dbr33.pdf. See also, generally, *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 email disclosing to members of the Oregon State Bar’s Workers’ Compensation Section listserv personal and medical information about a client whom she named, indicating the client wanted a new lawyer).

²³ A demand letter, like a malpractice claim, Bar complaint, or fee dispute, likely qualifies as a controversy. The ABA’s Model Rule 1.6(b)(5) is identical to the “self-defense” exception that would be at issue in Oregon. Comment 10 to ABA Model Rule 1.6 says an attorney may reveal client confidences to respond to “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 need not “await the commencement of an action or proceeding” where, for example, a third party alleges the lawyer and client were jointly complicit in wrongdoing, as this “right to respond arises when an assertion of such complicity has been made.” ABA Model RPC 1.6, cmt 10. When in doubt, however, the attorney should consider whether the question can first be submitted to a judge or other referee to resolve whether the “self-defense” exception applies. Moreover, even if there is a controversy, the disclosure must be necessary (e.g., essential or indispensable) to establish a claim or defense, for the “self-defense” exception to apply.

cause embarrassment. In addition, a disclosure is unlikely to fall within the self-defense exception as a case or controversy.

Appropriate Responses to Online Reviews

A lawyer is not without remedy. A lawyer may respond to a negative online review by requesting that the person posting contact the lawyer to discuss any concerns. A lawyer may respond by directing the reader to positive reviews by other clients. Consistent with Oregon RPC 1.6, a lawyer may also report that the person posting was not a client, if this statement is accurate.²⁴ Some sites that allow professional service reviews may remove reviews upon receipt of a report that the reviewer was not an actual client or customer.

Consistent with Oregon RPC 1.6, the attorney may also make generic, truthful statements about the lawyer's practice. As long as the response does not reveal information relating to the representation of a client, the post does not implicate Oregon RPC 1.6.²⁵ The attorney may acknowledge publicly that the attorney does not respond to posts due to ethical obligations. The attorney may also seek the client's informed consent enabling the attorney to respond.

Oregon RPC 1.6 is not, without more, a bar to the attorney's ability to seek legal redress, such as a claim for defamation. Oregon RPC 1.6(b)(4) applies to a "claim or defense on behalf of a lawyer in a controversy between the lawyer and the client." If disclosure is reasonably necessary

²⁴ The attorney may not falsely deny having represented the client to get the post taken down. Such a misrepresentation to a third party for the attorney's own purpose would constitute dishonesty or a misrepresentation in violation of Oregon RPC 8.4(a)(3). *See In re Heinzelman*, 33 DB Rptr 6, 14 (2019) (attorney's statement to online site that she never represented the client, in order to get the negative reviews removed, was both false and material, in violation of Oregon RPC 8.3), available at www.osbar.org/_docs/dbreport/dbr33.pdf.

²⁵ The attorney also may not accurately report that the client lied to the attorney during the representation, as this would reveal information relating to the representation of the client that would be embarrassing or detrimental to the client. *See In re Heinzelman*, 33 DB Rptr 6, 24 (2019) (attorney may not disclose that the client failed polygraph tests).

to establish a legally viable and nonfrivolous claim, the information may be disclosed.²⁶ While the court in *In re Conry* did not decide whether a formally commenced legal proceeding is necessary to invoke the “self-defense” provision,²⁷ an attorney may seek judicial review in a formal legal proceeding if the application of the “self-defense” provision is in question.

Approved by Board of Governors, November 2022.

²⁶ OSB Formal Ethics Op No 2005-136 (rev 2014).

²⁷ *In re Conry*, 368 Or at 367.

COMMENT: For additional information on this general topic and other related subjects, see *The Ethical Oregon Lawyer*, § 6.2 to § 6.2-5 (OSB Legal Pubs 2015); *Restatement (Third) of the Law Governing Lawyers* §§ 59, 60, 64, 83 (2000).

