



NEW JERSEY STATE BAR ASSOCIATION

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August 15, 2023

Hon. Glenn A. Grant
Administrative Director of the Courts
Hughes Justice Complex / P.O. Box 037
Trenton, NJ 08625-0037

RE: Proposal for Guidance for Attorneys in
Responding to Negative Online Reviews

Dear Judge Grant:

The integrity and reputation of an attorney is critical to the attorney's ability to effectively represent their client's interests. Attorneys spend their entire careers building and protecting their reputations because that is ultimately how their true value is measured by clients, the courts and the public. Opinion 738 of the Advisory Committee on Professional Ethics (ACPE) allows disgruntled clients to tear down an attorney's well- and hard-earned reputation by posting misinformation about the attorney online to which the attorney is unable to accurately respond. The New Jersey State Bar Association (NJSBA) asks the Judiciary to address this growing issue by providing clarifying guidance under RPC 1.6(d)(2) to allow attorneys to respond to online reviews in an objective, measured fashion.

Pursuant to ACPE 738, attorneys may respond to online reviews posted by clients, former clients, or prospective clients expressing general disagreement, but that response cannot reveal "information relating to representation," except information that is "generally known," unless the client consents. RPC 1.6(d)(2) allows attorneys to respond more extensively but only if the lawyer reasonably believes it is necessary to "establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client or to establish a defense . . . based upon the conduct in which the client was involved." ACPE 738 makes clear that responding to negative online reviews does not fall within the safe harbor of the rules, and states that "lawyers may not disclose confidential information merely to protect their online reputation in response to negative comments of this type."

The NJSBA's Putting Lawyers First Task Force heard from numerous lawyers about how inaccurate negative online reviews affected their reputations and how they were left feeling frustrated and disheartened with no ability to correct the public misstatements. After reviewing information provided by the Task Force, the NJSBA believes that a balance has to be struck between the obligation lawyers have to refrain from sharing information about their representation and the widespread reputational harm an attorney could suffer from an unchallenged client's online review that places the representation in issue and is not factually accurate. Not only does leaving such information unchecked have the potential to unfairly harm practicing attorneys, it also has the potential to mislead the public, with no meaningful opportunity for the truth to be presented.

While the ACPE followed other states' leads in reaching its conclusion in Opinion 738, the NJSBA suggests that the tide is turning as online information becomes more prevalent and is more frequently relied upon as a relevant source of information. The NJSBA notes that the Supreme Court of Arizona's Attorney Ethics Advisory Committee issued an opinion last December noting the rise of blogs and social media platforms that allow disgruntled clients a wider and more diverse audience to spread information, or misinformation, and that most online content is permanent. (Supreme Court of Arizona Attorney Ethics Advisory Committee Ethics Opinion File No. EO-19-0010.) The opinion notes that an attorney's duty of confidentiality is to protect a client, but that a client may forfeit that protection. It further suggests that a client may not use confidentiality as both a sword and a shield in legal or disciplinary proceedings, and that should similarly not be permissible when making public accusations of misconduct.

The NJSBA asks that the Judiciary consider adopting a modified approach to the issue by combining the ACPE's conclusion with parameters for an additional, limited response that maintains client protections as much as possible but allows attorneys to correct misinformation. The NJSBA suggests the following guidance:

A lawyer should generally limit a response to negative online reviews in a restrained manner, as noted in ACPE Opinion 738, citing the following recommended response contained in Pennsylvania Bar Association Formal Opinion 2014-200:

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.

To the extent that lawyers wish to provide more information in a response to a negative online review posted by a client, however, including confidential client information, lawyers are permitted to do so in limited situations and subject to the following criteria:

1. Only where an objectively inaccurate factual statement directly impugns the lawyer's ability to represent clients, including honesty, competency, integrity, knowledge of the law and similar legal attributes, may a lawyer utilize confidential client information to respond.
2. Before a lawyer is permitted to utilize confidential client information, a written, thirty (30) day warning must be sent to the former client by certified mail, email with delivery receipt, or guaranteed overnight delivery capable of being tracked, identifying the objectively inaccurate information, explaining (and documenting, where feasible) why such information is inaccurate, requesting that the former client remove the online post, and warning that if the post is not removed within thirty (30) days, the former client may be subject to legal action and/or the release of the client's confidential information in order to rebut the online post.
3. The disclosure of confidential information must be narrowly tailored and limited to what is reasonably necessary in order to rebut the objectively inaccurate claim(s).
4. Lawyers can indicate their disagreement with the post only if it contains objectively inaccurate facts. More generalized comments or opinions about the lawyer would not constitute objectively inaccurate factual statements.

The NJSBA believes that adopting this approach and providing parameters for a response to online negative reviews will not meaningfully alter the intent and focus of ACPE Opinion 738 or RPC 1.6(d)(2); rather it will serve as much-needed guidance to attorneys about how to ethically and reasonably respond to attacks on their integrity and reputation.

The NJSBA thanks the Judiciary for considering this proposal, and remains ready to provide any additional information, analysis or assistance that is needed to adopt the approach advocated for.

Sincerely,

A handwritten signature in blue ink, appearing to read "Tim McGoughran". The signature is stylized with a large, looping initial "T" and "M".

Timothy F. McGoughran, Esq.
President

cc: William H. Mergner Jr., Esq., NJSBA President-Elect
Angela C. Scheck, NJSBA Executive Director