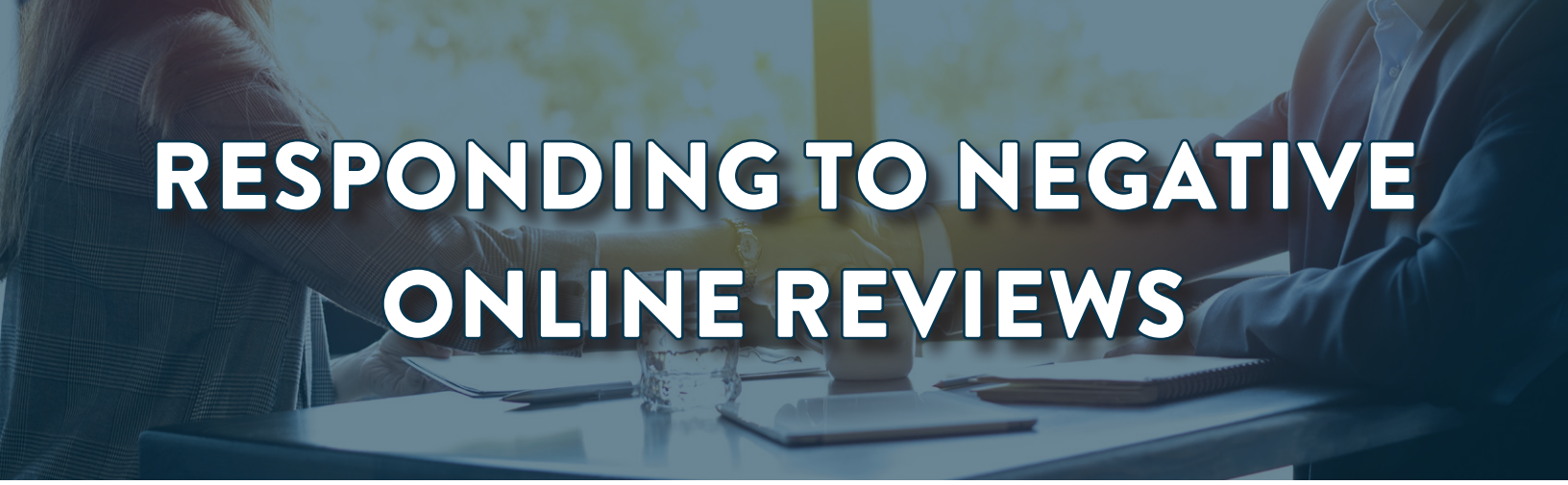

RESPONDING TO NEGATIVE ONLINE REVIEWS

The scenes you've reviewed today captured a difficult situation for lawyers, but they also reinforced some basic and fundamental principles that are important in the everyday life of a lawyer, even those without an online or social media presence.

Did you catch them? Larry and Erica were working quickly, so let's review some of the basic rules and principles that drove their analysis and then dive into that analysis.

A. THE BASICS

RULE 4-1.6, CONFIDENTIALITY OF INFORMATION

This rule regulates confidentiality of information and is regularly misunderstood by both young and experienced attorneys.

It is particularly significant in part because it comes up on a regular basis. A lawyer may go months without having to evaluate whether a particular representation presents a conflict of interest, but on a near-constant basis encounters information protected by the confidentiality obligations of Rule 1.6.

So, what does the rule provide?

- Rule 4-1.6(a) Consent Required to Reveal Information. A lawyer must not reveal information relating to a client's representation except as stated in subdivisions (b), (c), and (d), unless the client gives informed consent.
- Before turning to the exceptions later in the rule, let's focus on the breadth of the general obligation. Absent informed consent of the client or one of the specific and enumerated exceptions, all "information relating to a client's representation" is considered confidential and "must not" be revealed by a lawyer.
- As explained in the comments, "A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation."

COMMON MISUNDERSTANDINGS ABOUT THE SCOPE OF 4-1.6

- Information need not be attorney-client privileged or work product to constitute confidential information subject to protection under Rule 4-1.6.
- Information need not be communicated by a client to constitute confidential information subject to protection under Rule 4-1.6. Information obtained from the Court, or even opposing counsel, can constitute protected information.

- As explained in the comments: "The principle of confidentiality is given effect in 2 related bodies of law, the attorney-client privilege (which includes the work product doctrine) in the law of evidence and the rule of confidentiality established in professional ethics. The attorney-client privilege applies in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. **The confidentiality rule applies not merely to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source**" (emphasis added).
- Information need not be actually "confidential," as that word is commonly used to be protected under the rule. Even information in the public court docket or otherwise "known" is protected under the rule where it relates to representation of a client.

RULE 4-1.9, CONFLICT OF INTEREST; FORMER CLIENT

This rule deals with former clients. As pertaining to confidential information, subsections (b) and (c) specifically provide that a lawyer who has formerly represented a client must not:

> (b) use information relating to the representation to the disadvantage of the former client except as these rules would permit or require with respect to a client or when the information has become generally known; or
> (c) reveal information relating to the representation except as these rules would permit or require with respect to a client.

Thus, the confidentiality obligations and exceptions of Rule 4-1.6 are incorporated into the rule dealing with former clients as well. Under subsection (c) the lawyer's prohibition against revealing confidential information is the same as applicable to a current client.

B. SO, WHEN IS DISCLOSURE AUTHORIZED?

Returning to Rule 4-1.6, which we now know governs disclosure of information for both current and former clients, when can a lawyer disclose confidential information as it is broadly defined in the rule?

- Either (1) an exception applies to the rule of **confidentiality**, or
- (2) the client has **consented**.

Let's discuss in reverse order.

CONSENT

Consent must be "informed consent."

- (See general terminology) "'Informed consent' denotes 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."

- ✦ So must have adequate information and explanation to client.
- ✦ Often advisable to get in writing. An example: Lawyer formerly represented party "A" and obtained summary judgment on his behalf in a lawsuit. Lawyer would like to disclose the case and its outcome as a representative matter that she has handled. Even though the summary judgment result is a matter of public record, it was obtained in the course of and relates to the representation of party "A" and therefore is confidential. However, if the lawyer appropriately explains to client (*e.g.*, this will let others know you were sued, and why, but will also explain you prevailed as a matter of law), the client may choose to consent.
- ✦ Commentary, including one of the exceptions we will discuss later, also recognizes certain limited "implied consent." That exception is outlined in 4-1.6(c)(1), which permits disclosure of confidential information "to the extent the lawyer reasonably believes necessary . . . to serve the client's interest unless it is information the client specifically requires not to be disclosed."

According to the comments for Rule 4-1.6: "A lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation, except to the extent that the client's instructions or special circumstances limit that authority." For example: In litigation, a lawyer may disclose information by admitting a fact that cannot properly be disputed or in negotiation by making a disclosure that facilitates a satisfactory conclusion.

Further down in the same comments for Rule 4-1.6: Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

Note that the types of implied consent can be limited by specific circumstances or limitations from the client. For example, a client can ask that information be limited to lawyer handling the case and not be shared with other attorneys.

Beyond the scope of our discussion today, note that if the client refuses to consent to disclosure of information that the lawyer believes should be disclosed, that can create an issue that the lawyer will need to evaluate and address and may lead to withdrawal.

EXCEPTIONS

Exceptions to the confidentiality rule refer to disclosure even without informed consent of the client or former client. There are two categories: mandatory and permissive.

Rule 4-1.6 (b) dictates mandatory disclosure and states:

- (b) A lawyer must reveal confidential information to the extent the lawyer reasonably believes necessary to: (1) prevent a client from committing a crime; or (2) prevent a death or substantial bodily harm.

Rule 4-1.6(c) deals with when a lawyer may reveal information, or permissive disclosure and states:

- (c) A lawyer may reveal confidential information to the extent the lawyer reasonably believes necessary to:
  - (1) serve the client's interest unless it is information the client specifically requires not to be disclosed;
  - (2) establish a claim or defense on the lawyer's behalf in a controversy between the lawyer and client;
  - (3) establish a defense to a criminal charge or civil claim against the lawyer based on conduct in which the client was involved;
  - (4) respond to allegations in any proceeding concerning the lawyer's representation of the client;
  - (5) comply with the Rules Regulating The Florida Bar;
  - (6) detect and resolve conflicts of interest between lawyers in different firms arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney client privilege or otherwise prejudice the client; or
  - (7) respond to specific allegations published via the internet by a former client (e.g. a negative online review) that the lawyer has engaged in criminal conduct punishable by law.

LIMITATIONS

Each set of exceptions are limited by subsection Rule 4-1.6(f): Limitation on Amount of Disclosure. When disclosure is mandated or permitted, the lawyer must disclose no more information than is required to meet the requirements or accomplish the purposes of this rule.

OTHER ASPECTS OF 4-1.6

Subsection (d) allows exhaustion of appellate remedies where disclosure is compelled by a tribunal: (d) Exhaustion of Appellate Remedies. When required by a tribunal to reveal confidential information, a lawyer may first exhaust all appellate remedies.

Subsection (e) discusses inadvertent disclosure and reasonable safeguards a lawyer must take: (e) Inadvertent Disclosure of Information. A lawyer must make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the client's representation.

C. BACK TO OUR SCENES FROM EARLIER

Now that we've reviewed the rules more in depth, let's return to the Social Media issue from the scenes we watched earlier and discuss the practical application, and some lessons learned:

1) Hopefully you are comfortable from our earlier discussion that Erica and Larry correctly concluded

that the information Larry wanted to disclose about the Court's Order permitting him to withdraw was protected from disclosure as "confidential."

2) Under Rules 4-1.6 and 4-1.9 that was information relating to his representation of the former client and was thus considered confidential.

3) Our hypothetical was drawn from the facts of a Florida Bar Advisory Ethics Opinion, which reached the same conclusion.

   a) Facts: "The inquirer received a negative online review and would like to respond to the former client's negative review that the inquirer 'took her money and ran.'"

   b) The inquirer wanted to include "an objectively verifiable truthful statement that the Court entered an order authorizing the inquirer to withdraw as counsel for the former client."

   c) The ethics opinion reached the same conclusion as Erica (and eventually Larry), that the statement about the Court's order was not permissible: "In the instant inquiry, the inquirer does not meet an exception to confidentiality under 4- 1.6(c). Because confidentiality covers all information regarding the representation, whatever the source, and because this duty applies to former as well as current clients, the inquirer must not disclose confidential information without the client's informed consent. . . . . Therefore, if the inquirer chooses to respond to the negative online review and the inquirer does not obtain the former client's informed consent to reveal confidential information, the inquirer must not reveal confidential information regarding the representation, but must only respond in a general way, such as that the inquirer disagrees with the client's statements. The inquirer should not disclose that the court entered an order allowing the inquirer to withdraw because that is information relating to the client's representation and the client did not give informed consent for the inquirer to disclose."

D. BUT WHY DIDN'T AN EXCEPTION APPLY?

The Florida ethics opinion states that no exception applies. Why not?

Returning to Rule 4-1.6. It's clear that none of the mandatory exceptions apply. Disclosure of the court's order permitting withdrawal was not necessary to prevent the former client from committing a crime or to prevent any death or substantial bodily harm.

It's also clear that permissive exceptions in (c) 1, 5, and 6 do not apply. Disclosure of the court's order permitting withdrawal was not necessary:

- To serve the former client's interest (1)
- To comply with the Florida Bar Rules (5)
- Or to detect and resolve conflicts of interest between lawyers in different firms arising from a change in employment or composition of a firm (6)

What about exceptions 2-4?

(2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and client;

(3) to establish a defense to a criminal charge or civil claim against the lawyer based on conduct in which the client was involved;

(4) to respond to allegations in any proceeding concerning the lawyer's representation of the client.

ABA FORMAL OPINION 496

Though not addressed in detail in the Florida ethics opinion, ABA Formal Opinion 496 has some helpful analysis on why these exceptions are not applicable when applying the similarly worded Model Rule to the issue presented.

Going in reverse order, and per the discussion in the ABA Formal Opinion, which is consistent with the implicit analysis in the Florida ethics opinion:

- As to FL Bar Rule 4-1.6(c)(4), the ABA opinion notes that "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."
- As to FL Bar Rule 4-1.6(c)(3), it is not entirely clear that this would be a criminal charge or civil claim, but regardless the ABA opinion notes that "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."
- Finally, as to FL Bar Rule 4-1.6(c)(2), the Committee concluded "that, alone, a negative online review, because of its informal nature, is not a 'controversy between the lawyer and the client'" within the meaning of the similarly worded model rule "and therefore does not allow disclosure of confidential information relating to a client's matter." In addition, the Committee further concluded that, *even if* an online posting rose to the level of a controversy between lawyer and client, "a public response is not reasonably necessary or contemplated" by the rule "in order for the lawyer to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client."
- See also Rule 4-1.6 (f), discussed earlier. "When disclosure is mandated or permitted, the lawyer must disclose no more information than is required to meet the requirements or accomplish the purposes of this rule."

The bottom line is, standing alone, a negative online review does not meet the requirements for permissible disclosure. And *even if it did*, a public and online response would exceed the limited extent of any disclosure permitted under the Rules.

Notably, the Florida Bar Rules were amended after the ethics opinion to specifically address response to negative online reviews. The amendments create a new permissive-disclosure exception, but it

is very narrow. Specifically, and as explained in the comments:

Subdivision (c)(7) allows a lawyer to respond to specific allegations published via the internet by a former client (e.g. a negative online review) that the lawyer has engaged in criminal conduct punishable by law. However, under subdivision (f), even when the lawyer is operating within the scope of the (c)(7) exception, disclosure must be no greater than the lawyer reasonably believes necessary to refute the specific allegations

E. SO, WHAT CAN THE LAWYER SAY?

Completing the analysis, because the Court's order permitting withdrawal was protected confidential information not subject to an exception, it was not appropriate for disclosure in any response from the lawyer.

Per the Florida Bar Ethics Opinion: "Therefore, if the inquirer chooses to respond to the negative online review and the inquirer does not obtain the former client's informed consent to reveal confidential information, the inquirer must not reveal confidential information regarding the representation, but must only respond in a general way, such as that the inquirer disagrees with the client's statements. The inquirer should not disclose that the court entered an order allowing the inquirer to withdraw because that is information relating to the client's representation and the client did not give informed consent for the inquirer to disclose."

What is the type of "general" response that a lawyer can give without disclosing confidential information? The Ethics Opinion gives two examples. The first is drawn from a Texas ethics opinion addressing the same subject: "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."

Alternatively, the Florida Bar offered an alternate sample response (which is similar to the response Erica proposed to Larry):

"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".

Because these general responses are proportional, restrained, and do not reveal any confidential information, they would be permissible.

F. PRACTICAL CONSIDERATIONS

Now that we've unpacked what a lawyer *can* say in response to an online negative review, let's return to Erica's practical and sensible question: what *should* an employee say?

1) Both the Florida and ABA opinion suggest that the best response might be silence.

2) The Florida opinion makes this point subtly: "Therefore, if the inquirer chooses to respond to the negative online review . . . ."
3) The ABA opinion is more direct:

a) "Lawyers should give serious consideration to not responding to negative online reviews in all situations. Any response frequently will engender further responses from the original poster. Frequently, the more activity any individual post receives, the higher the post appears in search results online. As a practical matter, no response may cause the post to move down in search result rankings and eventually disappear into the ether. Further exchanges between the lawyer and the original poster could have the opposite effect."

G. OTHER BEST PRACTICES

Ignoring the post might be the best solution, but are there any other options?

The ABA offers a few other best practices to consider:

- "A lawyer may request that the host of the website or search engine remove the post. This may be particularly effective if the post was made by someone other than a client. If the post was made by someone pretending to be a client, but who is not, the lawyer may inform the host of the website or search engine of that fact."
  - ✦ Caution: "In making a request to remove the post, unless the client consents to disclosure, the lawyer may not disclose any information that relates to a client's representation or that could reasonably lead to the discovery of confidential information by another, but may state that the post is not accurate or that the lawyer has not represented the poster if that is the case."
- "Lawyers may respond with a request to take the conversation offline and to attempt to satisfy the person, if applicable. For example, a lawyer might post in response to a former client (or individual posting on behalf of a former client), 'Please contact me by telephone so that we can discuss your concerns.'"
  - ✦ Note that this approach will not be effective, as a practical matter, unless the lawyer intends and is able to try to satisfy the concerns. "A lawyer who makes such a post but does nothing to attempt to assuage the person's concerns risks additional negative posts."
- "If the poster is not a client or former client, the lawyer may respond simply by stating that the person posting is not a client or former client, as the lawyer owes no ethical duties to the person posting in that circumstance."
  - ✦ Note the distinction and potentially broader response available in the case of someone pretending to be a client, as this is neither a client nor former client and thus not subject to the same confidentiality protections

- ✦ However, a lawyer must still use caution in responding to posts from nonclients. Remember, confidential information includes information relating to the representation regardless of source. So, if "negative commentary is by a former opposing party or opposing counsel, or a former client's friend or family member, and relates to an actual representation, the lawyer may not disclose any information relating to the client or former client's representation without the client or former client's informed consent."

- If criticism is from a client or former client, the lawyer may consider responding directly (and not publicly) to that person.

H. FINAL PRACTICAL POINT

There was one other practical point embedded in Larry's consultation with Erica that does not relate specifically to negative social media posts but should not be overlooked. Larry apparently knew from a prior consultation with Erica to try to step back from a difficult situation and avoid responding when emotions are high. This is good advice that can apply to a variety of circumstances, including communications with clients, opposing lawyers, and even coworkers or attorneys in the same firm.

Particularly when dealing with difficult issues, rarely is your first draft your best draft, and rarely should you say everything you might want to say.

Larry didn't know all the answers here, but he avoided a problem by taking the time to calm himself and seek guidance on an issue where he knew he needed it. Lucky for Larry he used his resources, time and ethics counsel, to his advantage.

When you have the advantage take the advantage. Take a walk. Sleep on it. Ask ethics counsel. Or call The Florida Bar Hotline (800-235-8619).