



LAWYER’S RESPONSE TO CLIENT’S NEGATIVE ONLINE REVIEW

FORMAL OPINION 2014-200

The PBA Legal Ethics and Professional Responsibility Committee has been asked whether the Pennsylvania Rules of Professional Conduct (“PA RPC”) impose restrictions upon a lawyer who wishes to publicly respond to a client’s adverse comments on the internet about the lawyer’s representation of the client. The Committee concludes that the lawyer’s responsibilities to keep confidential all information relating to the representation of a client, even an ungrateful client, constrains the lawyer. We conclude, therefore, that a lawyer cannot reveal client confidential information in response to a negative online review without the client’s informed consent.

We further believe that any decision to respond should be guided by the practical consideration of whether a response calls more attention to the review. Any response should be proportional and restrained. For example, a response could be, “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.”

Applicable Ethics Rules

PA RPC 1.6 provides, in pertinent part:

Rule 1.6 Confidentiality of Information

(a) A lawyer shall not reveal information relating to representation of a client unless the client gives informed consent, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b) and (c).

...

(c) A lawyer may reveal such information to the extent that 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 or disciplinary proceeding 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 [14] to Rule 1.6 states:

[14] Fifth, 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. If the lawyer is charged with wrongdoing in which the client's conduct is implicated, the rule of confidentiality should not prevent the lawyer from defending against the charge. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (c)(4) 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.

Under PA RPC 1.6(e), the duty of confidentiality survives the termination of the client-lawyer relationship.

Scope of Restricted Information

Rule 1.6(a) prohibits lawyers who do not have the client's informed consent from revealing information relating to "representation of a client" with certain limited exceptions. "Information relating to representation" is generally recognized to be very broad and is not limited to secrets or confidences." *Pennsylvania Ethics Handbook, 2011 Ed.*, § 3.3 at 51; *Iowa Supreme Court Att'y Discipline Bd. v. Marzen*, 779 N.W.2d 757, 765-67 (Iowa 2010) (concluding that "the rule of confidentiality is breached when an lawyer discloses information learned through the lawyer-client relationship even if that information is otherwise publicly available").

Exceptions to Confidentiality

Among the exceptions to the rule of confidentiality is the "self-defense exception," PA RPC 1.6(c)(4) (which is identical to 1.6(b)(5) in the Model Rules). That section permits, but does not require, a lawyer to reveal information 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;
- to establish a defense to a criminal charge or civil claim or disciplinary proceeding 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.

Oxford Dictionaries Online defines "controversy" as a "disagreement, typically when prolonged, public, and heated." <http://www.oxforddictionaries.com>. 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 [14] 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. Although a genuine disagreement might exist between the lawyer and the client, such a disagreement does not constitute a "controversy" in the sense contemplated by the rules to permit disclosures necessary to establish a "claim or defense." The literal language of Rule 1.6(c)(4) (the self-defense exception) does not authorize responding on the internet to criticism.

The Right to Defend Before an Action is Commenced

Comment [14] to Rule 1.6 states, in part:

Paragraph (c)(4) 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.

While comment [14] provides that "[p]aragraph (c)(4) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity" (wrongdoing in which the client's conduct is implicated), there must be an action or proceeding in contemplation.

The Restatement (Third) of the Law Governing Lawyers, Section 64 is the functional equivalent of PA RPC 1.6(c)(4). Comment c states: "A lawyer may act in self defense ... only to defend against 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. Imminent threats arise not only upon filing of such charges but also upon 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, Section 64, comment e states: "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.”

State Bar of Arizona Opinion 93-02 concluded that an attorney could disclose otherwise confidential information to the author of a book about the murder trial of a former client in response to assertions made by the former client that the attorney had acted incompetently. The opinion concluded that limiting the exception to situations where there is a formal claim or threat of a formal claim would render the language in Rule 1.6(c)(4) “to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client” largely superfluous.

In Opinion 2014-1, the San Francisco Bar Association commented:

[The Arizona opinion] is inconsistent with the logic of subsequent ABA Formal Opinion 10-456 which prohibited voluntary disclosure of confidential information outside a legal proceeding even though the former client had asserted an ineffective assistance of counsel claim. The Arizona opinion relies, in part, on a tentative draft comment to a section of the Restatement (Third) of the Law Governing Lawyers regarding the use or disclosure of information in a lawyer's self-defense which states: “Normally, it is sound professional practice for a lawyer not to use or reveal confidential client information, except in response to a formal client charge of wrongdoing with a tribunal or similar agency. *When, however, a client has made public charges of wrongdoing, a lawyer is warranted under this Section in making a proportionate and restrained response in order to protect the reputation of the lawyer.*” State Bar of Arizona Op. 93-02, pp. 4-5 (Emphasis added). This language is not part of the Restatement as adopted.

ABA Formal Opinion 10-456 states:

In general, a lawyer must maintain the confidentiality of information protected by Rule 1.6 for former clients as well as current clients and may not disclose protected information unless the client or former client gives informed consent. The confidentiality rule “applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source.”

...

The self-defense exception applies in various contexts, including when and to the extent reasonably necessary to defend against a criminal, civil or disciplinary claim against the lawyer. The rule allows the lawyer, to the extent reasonably necessary, to make disclosures to a third party who credibly threatens to bring such a claim against the lawyer in order to persuade the third party that there is no

basis for doing so. For example, the lawyer may disclose information relating to the representation insofar as necessary to dissuade a prosecuting, regulatory or disciplinary authority from initiating proceedings against the lawyer or others in the lawyer's firm, and need not wait until charges or claims are filed before invoking the self-defense exception. Although the scope of the exception has expanded over time, the exception is a limited one, because it is contrary to the fundamental premise that client-lawyer confidentiality ensures client trust and encourages full and frank disclosure necessary to an effective representation. Consequently, it has been said that "[a] lawyer may act in self-defense under [the exception] only to defend against charges that *imminently* threaten the lawyer or the lawyer's associate or agent with *serious* consequences. . . ."

Ethics Opinions

The New Hampshire Bar Association Ethics Committee was asked whether a lawyer could post a detailed response to a client's online comment that the lawyer took the client's money for a hearing that he knew he could not win. The Committee advised that "while you may be permitted to make some sort of limited response to your client's postings, you are not authorized to make the disclosures that you propose." NH Bar News, Feb. 19, 2014.

The Los Angeles County Bar Association Professional Responsibility and Ethics Committee issued Opinion 525 on December 6, 2012 on Ethical Duties of Lawyers in Connection with Adverse Comments Published by a Former Client. It concluded:

The lawyer may publicly respond to such comments as long as the rebuttal: (1) does not disclose any confidential information; (2) does not injure the former client in any matter involving the prior representation; and (3) is proportionate and restrained.

The San Francisco Bar Association opined:

Lawyer is not barred from responding generally to an online review by a former client where the former client's matter has concluded. Although the residual duty of loyalty to the former client does not prohibit a response, Lawyer's on-going duty of confidentiality prohibits Lawyer from disclosing any confidential information about the prior representation absent the former client's informed consent or a waiver of confidentiality. California's statutory self-defense exception, as interpreted by California case law, has been limited in application to claims by a client (against or about a lawyer), or by an lawyer against a client, in the context of a formal or imminent legal proceeding. Even in those circumstances where disclosure of otherwise confidential information is permitted, the disclosure must be narrowly tailored to the issues raised by the former client. San Francisco Bar Association Op. 2014-1.

Disciplinary Actions

In December 2006, the Supreme Court of Oregon approved a stipulation for discipline suspending a lawyer for 90 days for sending an email message to members of a bar listserv in which the lawyer disclosed confidential information about a former client who had fired the lawyer in an effort to warn colleagues that the former client was “attorney shopping.” *In re Quillinan*, 20 DB Rptr 288 (Or. 2006).

The Supreme Court of Wisconsin, in June 2011, suspended the license of a lawyer who wrote and published an Internet blog in which the lawyer revealed confidential information about current and former clients that was sufficiently detailed to identify those clients using public sources. *Office of Lawyer Regulation v. Peshek*, 798 N.W.2d 879 (Wis. 2011).

The Georgia Supreme Court in a March 2013 ruling rejected as inadequate a recommendation of the Georgia State Bar General Counsel seeking a review panel reprimand for lawyer for violating Rule 1.6. The lawyer admitted to posting on the internet confidential information about the lawyer’s former client in response to negative reviews about the lawyer the client had posted on consumer websites. *In re Skinner*, 740 S.E.2d 171 (Ga. 2013).

A Chicago lawyer was reprimanded by the Illinois Lawyer Registration and Disciplinary Commission for revealing client communications in response to a former client who posted a negative review of the lawyer on Avvo. The parties’ stipulated that the lawyer exceeded what was necessary to respond to the client’s accusations by revealing in her response to a negative review that the client had beaten up a co-worker. *In re Tsamis*, Commission File No. 2013PR00095 (Ill. 2013).

Conclusion

While it is understandable that a lawyer would want to respond to a client’s negative online review about the lawyer’s representation, the lawyer’s responsibilities to keep confidential all information relating to the representation of a client, even an ungrateful client, must constrain the lawyer. We conclude that a lawyer cannot reveal client confidential information in a response to a client’s negative online review absent the client’s informed consent.

CAVEAT: THE FOREGOING OPINION IS ADVISORY ONLY AND IS NOT BINDING ON THE DISCIPLINARY BOARD OF THE SUPREME COURT OF PENNSYLVANIA OR ANY COURT. THIS OPINION CARRIES ONLY SUCH WEIGHT AS AN APPROPRIATE REVIEWING AUTHORITY MAY CHOOSE TO GIVE IT.