Legal Ethics & Responses to Online Reviews

Judge Ed Moss
CBA Family Law Section
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"The general definition of confidential client information is broad, and the prohibition against adverse use or disclosure is rigorous."

Restatement (3rd) of the Law Governing Lawyers § 64 (2000)

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A. A good way to approach online responses

"Marketing experts outside of the legal field have offered plenty of good advice for responding to online reviews. Specifically, they advise against attempting to contradict or discredit an online review, and they suggest that any reply offered should be limited to what they term a "Triple A" response:

> acknowledging the customer's concern, accounting for what happened (within limits), and explaining what corrective action will be taken to correct the problem."
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> Robertson, *Online Reputation Management in Attorney Regulation*, 29 Geo. J. Legal Ethics 97, 121 (2016).

B. Some Rules of Professional Conduct

Rule 1.9(c), Duties to Former Clients

"(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter . . .

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client."

Rule 1.0(e), terminology, informed consent

"(e) 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."

Comment [6]: "The lawyer must make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision. Ordinarily, this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct and a discussion of the client's or other person's options and alternatives. In some circumstances it may be appropriate for a lawyer to advise a client or other person to seek the advice of other counsel."

Rule 1.6, Confidentiality of information – Comments [2] and [3]

Comment [3]: "The principle of client-lawyer confidentiality is given effect by related bodies of law:

- the attorney-client privilege,
- the work-product doctrine, and
- the rule of confidentiality established in professional ethics.

"The attorney-client privilege and work-product doctrine apply 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, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law."

Comment [2]: "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***."

Rule 1.6(a), Confidentiality of information – the basic rule

"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)."

"Privilege is narrower than the confidentiality rules ... Billing information, fee agreements, and client identity are generally not protected by the evidentiary attorney-client privilege (with rare exceptions), while the confidentiality rules compel lawyers to keep such information secret."

Stevenson, *Against Confidentiality*, 48 U.C. Davis L.Rev. 337, 385-386 (2014).

C. Rule 1.6 confidentiality is very broad

"The scope of information subject to the restrictions in Colo.RPC 1.6(a) is broad."

People v. Albani, 276 P.3d 64 (Colo. OPDJ, 2011).

Publically available information:

***People v. Isaac*, 2016 WL 6124510 (Colo. O.P.D.J. 2016)** (six month suspension) (client information confidential "even though the information "was readily available from public sources and not confidential in nature").[1]

***Iowa Sup. Ct. Disciplinary Bd. v. Marzen*, 779 N.E.2d 757 (Iowa, 2010)** ("the rule of confidentiality is breached when an attorney discloses information learned through the attorney-client relationship even if that information is otherwise publicly available.") (during TV interview about former client's claim that she and lawyer had sex, lawyer refers to court criminal record where client claimed that she had sex with her probation officer).

ABA Annotated Model Rules of Professional Conduct ("Rule 1.6 contains no exception permitting disclosure of information previously disclosed or publicly available").

Oregon State Bar Bulletin, Responding to Negative Online Reviews (July, 2017) (there is no exception in RPC 1.6 or 1.0(f) for information that is otherwise publicly available.").

D. Waiver of attorney-client privilege not determinative

Rule 1.6 "is a much broader protection than the attorney-client privilege, which is limited to client communications and can be waived through disclosure to a third party." Robertson, *Online Reputation Management in Attorney Regulation*, *supra.*

E. The "self-defense" exception

Restatement (3rd) of the Law Governing Lawyers § 64 (2000)

"A lawyer may use or disclose confidential client information when and to the extent that the lawyer reasonably believes necessary to defend the lawyer ... against a charge or threatened charge by any person that the lawyer ... acted wrongfully in the course of representing a client."

Rule 1.6(b)(6)

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

(6) to establish a claim or defense on behalf of the lawyer in **a controversy** between the lawyer and the client…."

- Scope, Note [14]: Comments do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules.

- **CONTROVERSY:** a discussion marked especially by the expression of opposing views : DISPUTE
  https://www.merriam-webster.com/dictionary/

Rule 1.6, Comment [10]: "Where a **[i] legal claim or [ii] 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

[iii] civil, **[iv] criminal**, **[v] disciplinary or [vi] other proceeding**

and can be based on a wrong allegedly committed by the lawyer against the client…."

F. What is a "controversy" with a client?

1. Response to formal legal "claims" and disciplinary "charges"

Rule 1.6, Comment [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. . . . Such a charge can arise in a civil, criminal, disciplinary or **other proceeding**….

***Iowa Sup. Ct. Disciplinary Board v. Marzen,* 779 N.E.2d 757 (Iowa, 2010)** : "Comment [10] to the rule makes clear that the ability to defend arises in criminal and civil proceedings, including disciplinary actions."

Restatement (3rd) of the Law Governing Lawyers* § 64 (2000), Reporter's Note *(c), Kinds of charges within the exception.
"A lawyer may act in self-defense under this Section only to defend against charges that imminently threaten the lawyer, 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."

2. Response to investigations in advance of formal charges and claims:

Rule 1.6, Comment [10]: . . . Paragraph (b)(6) 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.

N.Y.S. Bar Assoc. Ethics Op.1032 (2014): "There may be circumstances in which the material threat of a proceeding would give rise to the right [to disclose confidences]. See N.Y. City 1986-7 (in-house lawyer may disclose …to prosecutors who have identified the lawyer as the subject of a grand jury investigation in which … witnesses have made incriminating statements about the lawyer.)."

ABA Formal Ethics Op. 10-456: The self-defense 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."

G. What isn't a "controversy" with a client?

1. Accusations levied during an election campaigns

***Iowa Sup. Ct. Disciplinary Board v. Marzen,* 779 N.E.2d 757 (Iowa, 2010).** During election campaign, former client claimed she and lawyer engaged in sexual relationship.

2. Critical commentary on a website

New York State Bar Association Ethics Op. 1032 (2014)
(Note: New York rules refer to "accusation" rather than "controversy"].
"The inquiry raises the question whether a lawyer may rely on [the self-defense] exception to disclose a former client's confidential information in response to a negative web posting, even though there is no actual or threatened proceeding against the lawyer. We do not believe that a lawyer may do so. The language of the exception suggests that it does not apply to information complaints such as this website posting. . . . [A] lawyer is not authorized to reveal confidential information whenever helpful in a dispute, but rather only when facing some kind of formal proceeding.

"[T]he mere fact that a former client has posted critical commentary on a website is insufficient to permit a lawyer to respond . . . with disclosure of the former client's confidential information."

Pennsylvania Bar Association Formal Ethics Op. 2014-200.
"The literal language of … the self-defense exception [ ] does not authorize responding on the internet to criticism."

H. Responses must be "proportional and restrained"

"Any response must be proportional and restrained."

Penna. Bar Association Formal Ethics Op. 2014-200.

"When a client has made a public charge of wrongdoing, a lawyer is warranted in making a proportionate and restrained public response."

***Restatement (3rd) of the Law Governing Lawyers* §64 (2000), Comment (e).**

***In re: Tsamis,* Ill. Lawyer Registration and Disciplinary Comm'n. No. 2013PR95 (2013).** After former client posted negative review on AVVO, lawyer posts that client had assaulted a co-worker. Stipulation that lawyer's post exceeded what was necessary to respond. (facts described in *Penna. Formal Op. 2014-200, supra.*).

***In re: Skinner,* 758 S.E.2d 788 (Ga. 2014).** Former divorce client posted negative reviews on three consumer websites. Attorney posted a response that identified the client's name, identified the client's employer, disclosed the legal fees paid by the client, identified the county where the client's divorce was filed, and disclosed that the client had a boyfriend. Attorney admitted Rule 1.6 violation.

I. If you respond what should you say?

YELP recommends:

"Yelp allows businesses to respond publicly and privately to user reviews. However, contacting reviewers should be approached with care; Internet messaging is a blunt tool and good intentions sometimes come across badly."

Responding to Reviews, https://biz.yelp.com/support/responding_to_reviews [http://perma.cc/5F6A-7JTM] , quoted in *Robertson, supra.*

AVVO recommends:

"We're sorry you had a bad experience with our firm. This matter does not sound familiar, and we strive for the utmost client satisfaction in every case. Please contact me directly to discuss your specific concerns."

What if I get a negative Client Review? http://www.avvo.com/support/What_if_I_get_a_negative_Client_Review [http://perma.cc/9GBC-MDLZ] (last visited August 29, 2017).

Pennsylvania Bar Ass'n Ethics Committee Formal Ethics Op.2014-200 suggests:

> "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.' "

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[1] Attorney Isaac posted these two responses:

"[CLIENT A] actually retained me twice, on the same case, in which he was charged with felony theft. He had been referred, to me, by a colleague, who is a former judge, deputy district attorney, mediator and private practitioner. After terminating my services, the first time, because I was unable to force the prosecutor to do his bidding, he came to realize that no lawyer has a magic wand, and rehired me on the case.

As he had, before my first withdrawal, [CLIENT A] became nothing but abusive, demanding, insulting and offensive, and I decided to terminate my representation, as the result of his conduct. In order to earn my $3,500.00 disposition fee, I telephoned the district attorney, on numerous occasions but, as is common, among many prosecutors, the deputies never actually answered my call, and almost never returned it.

It was necessary to travel outside the Denver metropolitan area, multiple times, for hearings and other court proceedings. I litigated the motion that [CLIENT A] insisted that I file, i.e. to dismiss, for destruction of evidence, and prosecutorial misconduct. He was not even able to substantiate the alleged facts that he presented to me, in my struggle to prevail, upon the motion.

As with all ethical lawyers, it is inherently inimical, to me, to engage in conduct so base as calling either my clients, or their spouses, 'names.' As for the practice of losing one's temper, I commend the reader to [CLIENT A's] own 'review' which constitutes nothing but defamation."

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I never appeared late, for any court appearance, on behalf of [CLIENT B], and was always fully prepared, to conduct the business at hand. Logic and common sense dictate that, if I were to attempt to leave a hearing before the court had concluded it, the judge would, as it were, "have my head." No such thing occurred.

Likewise, it is nonsensical that a lawyer would refuse to use relevant evidence helpful to his client, especially if it is "handed to him." [CLIENT B] cannot corroborate anything that she claims, because it did not happen. For all of the many hours that I spent, in vigorous defense of her, against felony assault, felony eluding of police, and driving under the influence of alcohol, [CLIENT B] paid me, with a $4,000.00 insufficient-funds check.

She then committed two criminal offenses, by fabricating "affidavits," which were, purportedly, executed by former (and current) relatives, forging their signatures to them, then "notarizing" the forged signatures, when she was no longer commissioned, as a notary public. [CLIENT B's] dishonest, fraudulent and criminal conduct speak for themselves.