NEW YORK STATE BAR ASSOCIATION
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New York State Bar Association
Committee on Professional Ethics

Opinion 1032 (10/30/2014)

Topic: Responding to a former client's critical commentary on a website

Digest: A lawyer may not disclose confidential client information solely to respond to a former client's criticism of the lawyer posted on a lawyer-rating website.

Rules: 1.6(a); 1.6(b); 1.9(c)

FACTS

1. The inquirer, a New York law firm, believes that a "disgruntled" former client has unfairly characterized the firm's representation of the former client on a website that provides reviews of lawyers. A note posted by the former client said that the former client regretted the decision to retain the firm, and it asserted that the law firm provided inadequate services, communicated inadequately with the client, and did not achieve the client's goals. The note said nothing about the merits of the underlying matter, and it did not refer to any particular communications with the law firm or any other confidential information. The former client has not filed or threatened a civil or disciplinary complaint or made any other application for civil or criminal relief.

2. The law firm disagrees with its erstwhile client's depiction of its services and asserts that the firm achieved as good a result for the client as possible under the difficult circumstances presented. The firm wishes to respond to the former client's criticism by telling its side of the story if it may do so consistently with its continuing duties to preserve a former client's confidential information.

QUESTION

3. When a lawyer's former client posts accusations about the lawyer's services on a website, may the lawyer post a response on the website that tends to rebut the accusations by including confidential information relating to that client?

OPINION

4. The Internet and social media today provide a number of sites that ask visitors to state their views of and experiences with lawyers, presumably to provide other visitors with information on which to base their choice of counsel. Our survey of a few of these sites did not reveal any protocols to monitor the accuracy of the commentary, except to assure that the very lawyers being reviewed are not the source. In this respect, the sites differ from other lawyer-

rating agencies – *Chambers*, *Super Lawyers*, *Best Lawyers in America*, *Martindale-Hubbell* and the like – which claim to base their ratings on a canvass of clients and other members of the bar.

5. The inquiry concerns a negative posting on such a site by a former client. The inquiring firm believes that certain information about its representation of that client would tend to rebut the posted allegations. The information in question constitutes "Confidential information" as defined by Rule 1.6(a) of the Rules of Professional Conduct (the "Rules"). Under Rule 1.9(c), a lawyer is generally prohibited from using or revealing confidential information of a former client.

6. There is, however, a "self-defense" exception to the duty of confidentiality set forth in Rule 1.6, which as to former clients is incorporated by Rule 1.9(c). Rule 1.6(b)(5)(i) says that a lawyer "may reveal or use confidential information to the extent that the lawyer reasonably believes necessary … to defend the lawyer or the lawyer's employees and associates against an accusation of wrongful conduct." When applicable, this exception permits, but does not require, disclosure of confidential information, and only to the extent the lawyer reasonably believes necessary to serve the purpose of self-defense. *See* Rule 1.6, Cmts. [12] & [14].

7. The inquiry raises the question whether a lawyer may rely on this 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.

8. The language of the exception suggests that it does not apply to informal complaints such as this website posting. The key word is "accusation," which has been defined as "[a] formal charge against a person, to the effect that he is guilty of a punishable offense," *Black's Law Dictionary* 21 (5th ed. 1979), or a "charge of wrongdoing, delinquency, or fault," *Webster's Third International Dictionary Unabridged* 22 (2002). *See* Roy D. Simon, *Simon's New York Rules of Professional Conduct Annotated* 230 (2013 ed.) ("An accusation means something more than just casual venting.")

9. Comment [10] to Rule 1.6 supports this conclusion. It says that "[w]here a claim or charge alleges misconduct of the lawyer related to the representation of a current or former client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense." In the context of a set of legal standards, the words "claim" and "charge" typically suggest the beginning of a lawsuit, criminal inquiry, disciplinary complaint, or other procedure that can result in a sanction. Comment [10] continues by saying: "Such a claim may 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, such as a person claiming to have been defrauded by the lawyer and client acting together or by the lawyer acting alone." Each of these examples involves a formal proceeding in which the lawyer's conduct has been placed in issue.

10. Case law supports our conclusion. New York cases permitting disclosure of confidential information under Rule 1.6(b)(5)(i) and its nearly identical predecessor DR 4-101(C)(4) have invariably involved allegations of lawyer wrongdoing in formal proceedings such as legal

malpractice or other civil actions, disqualification proceedings, or sanctions motions.[1] Those cases stand in contrast to those in which lawyers have not been permitted to use a client's confidential information to initiate actions against former clients (other than lawsuits to collect legal fees, for which Rule 1.6(b)(5)(ii) provides a different exception to confidentiality).[2] Thus under the case law, a lawyer is not authorized to reveal confidential information whenever helpful in a dispute, but rather only when facing some kind of formal proceeding.[3]

11. In at least one case, discipline has been imposed for the kind of conduct in question here. *In re Tsamis*, Joint Stipulation and Recommendation ¶¶ 4-10 & Reprimand ¶ 1, No. 2013PR00095 (Hearing Board, Ill. Att'y Reg. & Disc. Comm. 2014) (reprimanding lawyer for revealing confidential information about her former client in response to client's negative review on AVVO legal referral website). Ethics opinions from other jurisdictions have reached varying results on the question facing us, but their relevance is limited by differences in the ethical rules in force in those jurisdictions.[4]

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[1] *See, e.g., Meyerhofer* v. *Empire Fire and Marine Ins. Co.*, 497 F.2d 1190, 1195 (2nd Cir.), *cert. denied*, 419 U.S. 998 (1974); *First Fed. Sav. & Loan Ass'n of Pittsburgh* v. *Oppenheim, Appel, Dixon & Co.*, 110 F.R.D. 557, 567-68 (S.D.N.Y. 1986); *Creditanstalt Inv. Bank AG* v. *Chadbourne & Parke LLP*, 39 A.D.3d 201, 201 (1st Dep't 2007); *Nesenoff* v. *Dinerstein & Lesser, P.C.*, 12 A.D.3d 427, 429 (2nd Dep't 2004); *In the Matter of Koeppel*, 32 Misc.3d 1245(A) (Surr. Co. N.Y. Co. 2011); *General Realty Assoc.* v. *Walters*, 136 Misc. 2d 1027, 1029 (Civ. Ct. N.Y.C. 1987).

[2] *See, e.g., Eckhaus* v. *Alfa-Laval, Inc.*, 764 F. Supp. 34, 37-38 (S.D.N.Y. 1991) (defamation); *Wise* v. *Con. Edison Co. of N.Y., Inc.*, 282 A.D.2d 335, 336 (1st Dep't 2001) (wrongful discharge). *See also* D.C. Opinion 363 (2012) (in-house lawyer may not disclose confidential information in retaliatory discharge claim).

[3] *See* N.Y. City 2005-03 (noting recognition by courts that "an attorney may use client confidences or secrets to defend himself or herself from a claim or counterclaim brought by the client, or as evidence in a fee collection dispute, but may not necessarily be permitted to use that same information affirmatively in a different type of claim against a client"); Restatement (Third) of the Law Governing Lawyers § 64, comment (c) (2000) (noting that a lawyer may act under the Restatement's self-defense provision "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").

[4] In California there is no ethical counterpart to New York Rule 1.6(b)(5)(i), but the Evidence Code contains a self-defense exception to attorney-client privilege. Opinions interpreting that exception have concluded that California law does not permit a lawyer "to disclose otherwise confidential information in an online attorney review forum, absent client consent or a waiver." San Francisco Opinion 2014-1; *see* Los Angeles County Opinion 525 (2012) (attorney may respond to former client's internet posting if (1) "response does not disclose confidential information"; (2) response will not injure former client in matter involving the former representation; and (3) response is proportionate and restrained). An Arizona opinion concluded that the right to disclose was not limited to "a pending or imminent legal proceeding," relying on a provision found in the Arizona rule (and in the ABA Model Rule) but not in the New York rule. Arizona Opinion 93-02 (reasoning that one category of cases within the exception, for a claim or defense "in a controversy" between the lawyer and the client, would include cases not covered by another category within the exception, for "allegations in any proceedings").

12. We note a New York opinion that addressed the predecessor to Rule 1.6(b)(5)(i), though in a different context. In N.Y. County 732 (2004), a client threatened to file a disciplinary complaint against a lawyer if the lawyer did not release funds in an IOLA account, the proper disposition of which was a part of the lawyer's inquiry to the Committee. The Committee opined that in the event of such a complaint, "the law firm would be entitled to disclose confidences or secrets necessary to defend itself against the client's accusations." The Committee concluded that the "rules permitting disclosure of client confidences should be read restrictively" but that the law firm may disclose protected client information "if the client files a complaint or claim against the law firm."

13. We do not mean to say that a formal proceeding must be actually commenced to trigger the authorization of disclosure by Rule 1.6(b)(5)(i). There may be circumstances in which the material threat of a proceeding would give rise to that right. *See* N.Y. City 1986-7 (in-house lawyer may disclose confidential information to government prosecutors who have identified the lawyer as the subject of a grand jury investigation in which other witnesses have made incriminating statements about the lawyer). We do not need to reach that question here because no material threat of a proceeding has been made on the website posting that is the subject of this inquiry.

14. Nor do we consider the question of whether and when a negative website posting may effect a waiver of a client's right to confidentiality, because that question is not raised by the facts as presented in the inquiry. If there were facts raising the question of waiver, it would be necessary to consider separately the possible waivers of attorney-client privilege and of other kinds of confidentiality under Rule 1.6(a). Waiver of attorney-client privilege turns on questions of law beyond our jurisdiction. *See, e.g., 1050 Tenants Corp.* v. *Lapidus*, 12 Misc. 3d 1118, 1123-25 (Civ. Ct. N.Y.C. 2006). Given the facts as presented, we need not consider whether a negative website posting might waive other kinds of confidentiality. Rather, we assume for present purposes that confidentiality has not been waived. It suffices to say that the mere fact that a former client has posted critical commentary on a website is insufficient to permit a lawyer to respond to the commentary with disclosure of the former client's confidential information.

15. This result properly respects the vital purpose of Rule 1.6(a) in preserving client confidentiality and fostering candor in the private communications between lawyers and clients, and it does not unduly restrict the self-defense exception. That exception reflects the fundamental unfairness of a current or former client – or others – being able to make consequential accusations of wrongful conduct against a lawyer, while the lawyer is disabled from revealing information to the extent reasonably necessary to defend against such accusations. Unflattering but less formal comments on the skills of lawyers, whether in hallway chatter, a newspaper account, or a website, are an inevitable incident of the practice of a public profession, and may even contribute to the body of knowledge available about lawyers for prospective clients seeking legal advice. We do not believe that Rule 1.6(b)(5)(i) should be interpreted in a manner that could chill such discussion.

CONCLUSION

16. A lawyer may not disclose client confidential information solely to respond to a former client's criticism of the lawyer posted on a website that includes client reviews of lawyers.

(1-14)