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Protecting Yourself: The Self-Defense Exception to Lawyer Confidentiality

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The difficult economic times of recent years sharpened the financial tensions between lawyers and their clients in many ways. In some instances, those tensions led lawyers to withdraw and to assert passive attorney liens against nonpaying clients. In others, the tensions erupted into outright disputes over the fees charged and the work performed. Underlying this spectrum is a rule that is often little noticed until lawyers find themselves in the uncomfortable position of a dispute with a client: the so-called “self-defense” exception to the confidentiality rule, RPC 1.6(b)(4), and its counterpart to the attorney-client privilege, OEC 503(4)(c).

In this column, we’ll first examine the broad contours of the exception and survey the common situations where it comes into play. We’ll then turn to the sometimes difficult application of the exception and practical steps available to protect yourself when invoking the right of self-defense. Throughout, we’ll emphasize that because this is an exception to our bedrock duty of confidentiality, courts and regulatory agencies have traditionally construed this exception narrowly and lawyers who attempt to push beyond its boundaries usually do so at their peril.

Contours of the Exception

The self-defense exception rests on twin pillars.

RPC 1.6(b)(4) creates an exception to the confidentiality rule:

(b) A lawyer may reveal information relating to the representation of a client to the extent 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 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[.]

RPC 1.6(b)(4) is generally similar to former Oregon DR 4-101(C)(4). It is patterned on ABA Model Rule 1.6(b)(5), but, as we'll discuss further, does not have the benefit of the comments that accompany the ABA version.

OEC 503(4)(c) creates a corresponding exception to the attorney-client privilege, which in Oregon is both a rule of evidence and a statute (ORS 40.225(4)(c)):

(4) There is no privilege under this section:

...

(c) As to a communication relevant to an issue of breach of duty by the lawyer to the client or by the client to the lawyer[.]

The Court of Appeals in *Peterson v. Palmateer*, 172 Or App 537, 541-44, 19 P3d 364 (2001), explained that OEC 503(4)(c) creates an *exception* to the attorney-client privilege rather than a *waiver*. The Court reasoned, therefore, that OEC 511, which deals with the broader concept of waiver of the attorney-client privilege, does not apply. This approach is similar to RPC 1.6(b)(4), which, as quoted above, is cast in terms of an exception rather than a waiver.

Both variants of the exception have been held to apply to direct actions between a lawyer and client and to matters involving third parties in which the lawyer's services for the client are at issue. *In re Robeson*, 293 Or 610, 625-26, 652 P2d 336 (1982), makes this point under the confidentiality rule and *Peterson*, 172 Or App at 541-44, reaches this same conclusion under the attorney-client privilege.

Situations Invoking the Exception

The exception can arise in many different circumstances. *Peterson* and *Robeson* illustrate two of the most common: respectively, malpractice claims (whether framed as such or analogous claims for breach of fiduciary duty or ineffective assistance of counsel) and bar complaints.¹ Disqualification can be another depending on the particular facts involved. *PGE v. Duncan, Weinberg, Miller & Pembroke, P.C.*, 162 Or App 265, 272, 986 P2d 35 (1999), for example, turned, in relevant part, over an (otherwise confidential) agreement between the

plaintiff client and its former lawyers over the scope of the matters they could handle adverse to the client at their new firm.

Fee disputes provide both yet another ready example and a cautionary note.

OSB Formal Ethics Opinion 2005-104 (2005) makes plain that a fee dispute arising out the client's contention that the services rendered were defective falls within the exception.

The cautionary note relates to situations where the client simply won't or can't pay. For a time (albeit not at the point we transitioned from the DRs to the RPCs in 2005), former Oregon DR 4-101(C)(4) included an exception for "confidences or secrets necessary to establish or collect . . . [the lawyer's] fee[.]" (*In re Jordan*, 300 Or 430, 434 n.1, 712 P2d 97 (1985).) When Oregon moved to the RPCs in 2005, RPC 1.6(b)(4) mirrored its ABA Model Rule counterpart (ABA Model Rule 1.6(b)(5)) in not including simple fee collection in the text of the exception. Instead, the ABA Model Rule incorporates this concept into an accompanying comment: "A lawyer entitled to a fee is permitted by . . . [the exception] . . . to prove the services rendered in an action to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary." (ABA Model Rule 1.6, Comment 11.) Oregon, however, is among the minority of states that have not adopted the ABA comments to go along with the ABA Model Rules.

Therefore, the OSB concluded in Formal Ethics Opinion 2011-185 (2011) (at 561) that simple nonpayment does *not* fall within the Oregon exception: “[T]he client’s failure to pay fees when due [does not] constitute a ‘controversy between the lawyer and the client’ within the meaning of Oregon RPC 1.6(b)(4).” This doesn’t mean that Oregon lawyers can’t sue or lien for fees. But, it does mean that any bills or time entries included in this context need to be redacted to exclude material otherwise falling within the confidentiality rule in the same way that they would be submitted to a court or other third party. OSB Formal Ethics Opinion 2005-157 (2005) addresses general practical protections when providing billing entries to third parties.

Application of the Exception

A central tenet in applying the exception is built around the prefatory phrase “reasonably necessary.” The Supreme Court in *In re Huffman*, 328 Or 567, 581, 983 P2d 534 (1999), emphasized that the “necessity” must arise within boundaries of the specific matter in dispute: “That exception is limited, by its terms, to disclosures that are *necessary* to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client.” (Emphasis in original.)

In short, lawyers should use a “minimalist” approach in applying the exception. For example, if there is only a dispute over a discrete aspect of a case, *Huffman* counsels limiting the exception to that portion of the case (at least

until reaching a stipulation with opposing counsel or entry of a protective order). When a dispute with a client triggers the need to withdraw, OSB Formal Ethics Opinion 2011-185 suggests limiting the reason stated in public motion papers to “professional considerations” and then providing the court with a fuller explanation if required *in camera* and under seal in light of the associated duty under RPC 1.16(d) to effect withdrawal in a way that “to the extent reasonably practicable . . . protect[s] a client’s interests[.]” In this regard, *Frease v. Glazer*, 330 Or 364, 4 P3d 56 (2000), holds that submitting otherwise confidential material to a reviewing court under seal does not waive privilege.

Exceeding the Scope of the Exception

Huffman—where the lawyer was suspended—illustrates the regulatory consequences of exceeding the scope of the exception. Beyond (but not mutually exclusive with) discipline, it is important to remember that under *Kidney Association of Oregon v. Ferguson*, 315 Or 135, 144, 843 P2d 442 (1992), violation of a professional rule can translate into a breach of the underlying fiduciary duty reflected by the rule. In this setting, the underlying fiduciary duty of confidentiality is one of our foremost obligations as lawyers. Accordingly, it is not hard to imagine that an asserted misapplication of the exception might well bring a breach of fiduciary claim in response. (See, e.g., *Galpern v. De Vos & Co. PLLC*, No. 10-CV-1952 (CBA) (JMA), 2011 WL 4597491 (EDNY Sept 30, 2011) (unpublished)). Given that the attorney-client relationship either has unraveled or

is on its way to unraveling when the exception typically arises, lawyers need to carefully consider its application so that they don't inadvertently hand their now disaffected (former) client a readymade counterclaim.

ABOUT THE AUTHOR

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¹ OSB Formal Ethics Opinion 2005-136 (2005) addresses the specialized circumstance of in-house counsel litigating wrongful termination claims against their former corporate employers.