Discretion Is the Better Part of Valor: Rebutting Negative Online Client Reviews

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"The better part of valor is discretion[.]"

William Shakespeare
Henry IV, Part 1, Act 5, Scene 4, Lines 119-120

PUBLIC criticism of lawyers is nothing new. President Theodore Roosevelt, for example, described lawyers as "hired cunning" during a commencement address at Harvard University in 1905.[1] What *is* new, however, are the many digital platforms now available for disgruntled former clients to publicly broadcast their criticism of individual lawyers.[2] The criticism involved often does not rise to the level of a threatened claim—with "he is a lousy lawyer" more common than "she committed malpractice." Given the importance of web-based marketing for many lawyers today, this kind of criticism can nonetheless pose a very real problem for a lawyer's reputation in the electronic marketplace.

When confronted with such public affronts, lawyers may contemplate responses that include revealing otherwise confidential information to "set the record straight." This course, however, risks compounding the problem because the lawyer may inadvertently expose him or herself to regulatory discipline. Historically, the so-called "self-defense" exception to the confidentiality rule[3] has been applied to threatened or actual malpractice claims

[1] John M. Altman, *Considering the A.B.A.'s 1908 Canons of Ethics*, 71 FORDHAM L. REV. 2395, 2403-2404 (2003).

[2] Rating agencies themselves have been accorded broad free speech rights over their opinions. *See* Browne v. AVVO, Inc., 525 F. Supp.2d 1249 (W.D. Wash. 2007) (granting lawyer rating service summary judgment in action by lawyers who argued they were not accurately rated).

[3] Under ABA Model Rule 1.6(a), there is no "expiration date" for a lawyer's confidentiality obligations and, therefore, they generally continue after the termination of an attorney-client relationship. The same generally holds true for the attorney-client privilege. *See* Swidler & Berlin v. United States, 524 U.S. 399, 118 S. Ct. 2081, 141 L.Ed.2d 379 (1998) (holding that the attorney-client privilege survives the death of then client concerned).

or bar complaints rather than simple public criticism. This leaves a lawyer with a dilemma over effectively—but "safely"[4]—rebutting negative online client reviews. This article will first survey the constraints imposed by the self-defense exception and will then turn to avenues for effectively rebutting such criticism from former clients[5] without violating the confidentiality rule.[6]

II. "Self-Defense" Is Generally No Defense

The self-defense exception is found in ABA Model Rule of Professional Conduct 1.6(b)(5):

> "(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
>
> . . . . .
>
> "(5) 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."[7]

Today's exception traces its lineage to Canon 37, which was adopted in 1928 as an addition to the ABA Canons of Professional Ethics that were originally promulgated in 1908.[8] When the Canons were replaced by the ABA Model Code of

[4] By "safely," I mean within acceptable practical levels of risk of avoiding a bar complaint or civil claim.

[5] In most instances, the criticism involved comes from former, rather than current, clients. Public criticism from current clients would likely trigger a conflict between the client and the business interest of the lawyer under state equivalents to ABA Model Rule 1.7(a)(2). *See generally* San Francisco Bar Association Opinion 2014-1 (2014) (concluding that any public response to a current client "may be inappropriate").

[6] In extreme cases, lawyers have sued clients for defamation for online reviews. *See, e.g.,* Pampattiwar v. Hinson, 756 S.E.2d 246 (Ga. App. 2014) (affirming jury verdict for lawyer who sued client for defamation after the client had described the lawyer as a "crook" and "extremely fraudulent" on an online business review site); *see also* Thomson v. Doe, ___ P.3d ___, 2015 WL 4086923 (Wash. App. 2015) (affirming denial of motion to compel lawyer rating service to disclose identity of anonymous source of negative online comments in context of defamation suit by the lawyer reviewed against source of the comments). Depending on the jurisdiction, however, unsuccessful defamation claims may be subject to a fee remedy under state "anti-SLAPP" statutes. *See* Laurel A. Rigertas, *How Do You Rate Your Lawyer? Lawyers' Responses to Online Reviews of Their Services*, 4 St. Mary's Journal on Legal Malpractice & Ethics 242, 269-272 (2014) (Rigertas).

[7] The attorney-client privilege includes a similar concept as does the Restatement. *See generally* Edna Selan Epstein, The Attorney-Client Privilege and the Work Product Doctrine 552-565 (5th ed. 2007); Restatement (Third) of the Law Governing Lawyers § 64 (2000) (Restatement).

[8] *See generally* Henry S. Drinker, Legal Ethics 131-132 (1953) (discussing the history of Canon 37). Canon 37 addressed confidentiality generally and framed the self-defense exception in the following terms: "If a lawyer is accused by his client, he is not precluded from disclosing the truth in respect to the accusation."

Professional Responsibility in 1969,[9] the self-defense exception was carried over into Model DR 4-101(C)(4).[10] When, in turn, the Model Code was replaced by the ABA Model Rules in 1983,[11] the exception continued as Model Rule 1.6(b)(2) and was then renumbered to its current position in 2003 as a part of the "Ethics 2000" amendments.[12]

Comment 10 to ABA Model Rule 1.6 rounds out the text of the exception and focuses on civil claims, disciplinary charges and similar proceedings[13] involving "a wrong allegedly committed by the lawyer":

> "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. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (b)(5) 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."[14]

Because the self-defense exception is oriented around claims and the equivalent, state and local bar association ethics committees that have examined the issue have generally concluded that online negative reviews or similar comments that do not amount to a threatened or actual claim do not trigger the excep-

[9] See ABA, Model Code of Professional Responsibility and Code of Judicial Conduct xi (1985).

[10] "A lawyer may reveal . . . [c]onfidences or secrets necessary to establish or collect his fee or to defend himself or his employees or associates against an accusation of wrongful conduct."

[11] See ABA, *The Legislative History of the Model Rules of Professional Conduct: Their Development in the ABA House of Delegates*, 2 (1987)

[12] See ABA, *A Legislative History: The Development of the ABA Model Rules of Professional Conduct 1982-2013*, 105-152 (2013).

[13] For its application to ineffective assistance of counsel claims in the criminal context, see ABA Formal Opinion 10-456 (2010). *See also* Jenna C. Newmark, *The Lawyer's "Prisoner's Dilemma": Duty and Self-Defense in Postconviction Ineffectiveness Claims*, 79 FORDHAM L. REV. 669 (2010).

[14] The Restatement takes the same general approach in Comment c to Section 64: "A lawyer may act in self-defense under this Section 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[.]"

tion.[15] In doing so, these recent opinions generally follow earlier authority under state variants of the ABA Model Code or the ABA Canons that distinguished between claims and criticism in the pre-social media era notwithstanding the use of the somewhat broader term "accusation" in the ABA Canons and the ABA Model Code.[16]

The same result has occurred in the disciplinary realm. *In re Skinner*,[17] for example, involved a lawyer whose former client had posted negative reviews on three consumer-oriented web sites. The lawyer responded online and, in doing so, disclosed otherwise confidential information. The Georgia Supreme Court disciplined the lawyer for violating Georgia's version of ABA Model Rule 1.6. Similarly, in *In re Tsamis*,[18] a lawyer's former client posted negative reviews of the lawyer on a web-based lawyer rating site. The lawyer responded in kind and, in doing so, revealed otherwise confidential information. The former client filed a bar complaint and the lawyer stipulated to a violation of the Illinois counterpart to ABA Model Rule 1.6.[19]

Beyond discipline, confidentiality is generally considered one of a lawyer's fiduciary duties to a client.[20] Some states recognize civil damage claims for breach of a lawyer's fiduciary duties.[21] It would not

[15] *See, e.g.,* New York State Bar Association Ethics Op. 1032 (2014); Pennsylvania Bar Association Formal Op. 2014-300 (2014); Los Angeles County Bar Association Op. 525 (2012); San Francisco Bar Association Op. 2014-1 (2014). The New York and Pennsylvania opinions are based on their respective state equivalents of the ABA Model Rules. As the California opinions note, California (which has not adopted the ABA Model Rules) does not have a provision in its professional rules analogous to ABA Model Rule 1.6(b)(5). The California opinions further observe that, to the extent a self-defense exception exists, it is conceptually closer to a waiver by the former client by bringing a claim in a public forum.

[16] *See, e.g.,* New York County Lawyers' Association Ethics Op. 722 (1997) (involving oral criticism of a lawyer to a neighbor); *see also* ABA Formal Op. 250 (1943) (noting that the self-defense exception applies to "'an action against the attorney for negligence or misconduct[.]'" (citation omitted)); Louima v. City of New York, No. 98CV5083, 2004 WL 2359943 (E.D.N.Y. Oct. 18, 2004) (unpublished) at *73 ("Mere press reports regarding an attorney's conduct do not justify disclosure of a client's confidences and secrets even if the reports are false and the accusations are unfounded."); *see also* Raymond L. Wise, LEGAL ETHICS 160 (1966) ("The lawyer may disclose confidential communications in subsequent litigation between the attorney and client where it becomes necessary so to do to protect the lawyer's rights."). *But see* Arizona State Bar Ethics Op. 93-02 (1993) (where a former client's accusations to an author amounted to a charge of negligence against a former attorney, the former attorney was allowed to properly invoke the self-defense exception).

[17] 758 S.E.2d 788 (Ga. 2014).

[18] 2013 PR 00095 (I.A.R.D.C. Jan. 15, 2014).

[19] In other online variants, lawyers were disciplined for revealing client confidential information in, respectively, a listserve post and a blog in *In re* Quillinan, 20 Oregon D.B. Rptr. 288 (2006), and *In re* Peshek, 798 N.W.2d 879 (Wis. 2011).

[20] *See, e.g.,* Galpern v. De Vos & Co. PLLC, No. 10-CV-1952, 2011 WL 4597491 (E.D.N.Y. Sept. 30, 2011) (unpublished) at *8 ("One fiduciary duty an attorney owes to his or her client centers upon maintaining the confidentiality of the information obtained during a representation."). *See also* Shaw Resources Ltd., L.L.C. v. Pruitt, Gushee & Bachtell, P.C., 142 P.3d 560, 567-568 (Utah App. 2006) (discussing a law firm's duty of confidentiality in fiduciary terms).

[21] *See, e.g.,* Eriks v. Denver, 824 P.2d 1207, 1209-1213 (Wash. 1992); Pereira v. Thompson, 217 P.3d 236, 245-248 (Or. App. 2009).

be a stretch of the legal imagination, therefore, to see a lawyer's use of confidential information in rebutting a negative online client review rebound in the form of a civil claim for breach of the fiduciary duty of confidentiality.

III. Practical Alternatives

Given the constrains imposed on the self-defense exception, lawyers are ill advised to combat negative online criticism that does not amount to at least a threatened claim by revealing otherwise confidential information. The recent disciplinary cases noted highlight the regulatory risk involved. Moreover, if a lawyer is publically disciplined, online services are typically quick to discover and incorporate that information into their lawyer directories. I invite readers, for example, to run the name of a local lawyer who was publically disciplined in their jurisdiction through Avvo's web site. The name will usually be shown with the disclaimer: "This lawyer was disciplined by a state licensing authority."[22] In short, "fighting fire with fire" can often mean that a lawyer's digital reputation is simply burned further.

At the same time, state versions of ABA Model Rule 1.6 do not prohibit lawyers from responding altogether. But, in doing so, there are three cardinal rules:

First, be professional. Avvo's general counsel, for example, has offered the following very practical advice:

> "'Negative commentary can be a golden marketing opportunity. By posting a professional, meaningful response to negative commentary, an attorney sends a powerful message to any readers of that review. Done correctly, such a message communicates responsiveness, attention to feedback and strength of character. The trick is to not get defensive, petty, or feel the need to directly refute what you perceive is wrong with the review . . . [A] poorly-handled response to a negative review is much worse than no response at all. It makes you look thin-skinned and defensive.'"[23]

In a related slide presentation available on-line,[24] Avvo's general counsel provided excellent examples of both effective and less-than-effective responses highlighting the important differences between being professional and being petty. A professional response can undermine the criticism involved by presenting the lawyer in context. A petty response will likely reinforce the former client's negative review.

Second, be proportionate. In discussing the self-defense exception, the Restatement makes the point that any use of client confidential information should be "pro-

[22] Avvo web site as of July 2015. The Avvo site includes a general explanation of the kind of disciplinary sanction imposed. Many state bar associations also now post public discipline online and include it in their own lawyer directories. *See, e.g.,* Oregon State Bar web site at www.osbar.org; Washington State Bar Association web site at www.wsba.org.

[23] Josh King, *Your Business: Someone Online Hates You*, THE RECORDER (Aug. 16, 2013), quoted in Rigertas, *supra* note 6, at 256.

[24] Available at http://www.slideshare.net/JoshKing1/someone-online-hates-you-ethical-approaches-to-online-reputation-management-for-lawyers-17210356.

portionate'' to rebutting the client's charge.[25] That is equally prudent advice beyond the narrow confines of the self-defense exception. A lawyer who responds to a perceived on-line slight with a "nuclear" approach will likely fall into the trap of appearing thin-skinned and defensive as noted by Avvo's general counsel.

Third, be honest. State variants of ABA Model Rule 8.4(c) prohibit dishonest conduct. Lawyers have been disciplined under this rule for false on-line postings.[26] A lawyer who is on the receiving end of a negative on-line review needs to resist the temptation to right the perceived wrong by planting false laudatory reviews in a misguided effort to "balance the scales."

IV. Conclusion

In an era where a reputation in the electronic marketplace can be influenced heavily by on-line reviews, lawyers are understandably concerned when a former client posts less than flattering comments. Lawyers must understand, however, that many such comments do not rise to the comparatively high trigger point for the self-defense exception to the confidentiality rule. Instead, lawyers in this position need to respond judiciously—both to avoid potential regulatory discipline for violating the confidentiality rule and to project a counter narrative that places them in the best light under the circumstances. In short, this is an area where "discretion is the better part of valor."

[25] Restatement, § 64, comment e at 489.

[26] *See, e.g., In re* Carlson, 833 N.W.2d 402 (Minn. 2013); *In re* Carpenter, 95 P.3d 203 (Or. 2004).