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Delicate Art:
Responding to Negative On-Line Reviews

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In today's practice environment, having an electronic presence is a key component of a successful marketing plan. Especially in consumer-oriented practice areas like family law, potential clients often evaluate and select lawyers using web and other social media sites that include reviews of lawyers by former clients. Within this context, a highly critical review can be especially damaging and realistically needs to be addressed. At the same time, there are distinct constraints that limit what lawyers can say. In this column, we'll first survey the constraints and then examine some practical alternatives.

The Constraints

The primary constraint limiting what lawyers can say in rebutting negative on-line reviews is the confidentiality rule—RPC 1.6. The rule is framed around "information relating to the representation of a client," which broadly includes attorney-client privileged communications, work product and other confidential information learned during the course of a representation.

Moreover, there is generally no "expiration date" for our duty of confidentiality. Both the Washington and United States Supreme Courts have noted that the attorney-client privilege extends beyond the end of the attorney-client relationship in, respectively, *Martin v. Shaen*, 22 Wn.2d 505, 511, 156 P.2d

681 (1945), and *Swidler & Berlin v. United States*, 524 U.S. 399, 410-11, 118 S. Ct. 2081, 141 L. Ed.2d 379 (1998). RPC 1.9(c) makes this same point in outlining our continuing duties owed to former clients. Although RPC 1.9(c)(1) exempts information that has become "generally known," a recent ABA opinion—Formal Opinion 479 (2017)—counseled that this means more than simply "publically available" and is closer to widely known by the general public.

RPC 1.6(b)(5) includes a "self-defense" exception that allows a lawyer to reveal otherwise confidential information in responding to allegations of misconduct. Comment 10 to RPC 1.6, however, generally restricts the "self-defense" exception to malpractice claims, regulatory grievances, criminal charges and similar formal proceedings. Interpreting the ABA Model Rule counterpart on which Washington's rule is based, ABA Formal Opinion 10-456 (2010) noted in this regard "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[.]'" (at 3; emphasis in original). The Restatement (Third) of the Law Governing Lawyers (2000) takes a similar approach, with Comment c to Section 64 concluding that the self-defense exception applies to "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[.]"

Given the historical interpretation of the "self-defense" exception, most state and local bar associations that have looked at the issue have concluded that it does not apply to the comparatively informal setting of responding to negative on-line reviews. New York State Bar Ethics Opinion 1032 (2014), Pennsylvania Bar Association Formal Opinion 2014-200 (2014), and Texas State Bar Opinion 662 (2016) are examples of this approach. Disciplinary cases in several states have also taken this view, including *In re Skinner*, 758 S.E.2d 788 (Ga. 2014), *People v. Isaac*, 2016 WL 6124510 (Colo. O.P.D.J. Sept. 22, 2016), and *In re Tsamis*, 2013 PR 00095 (Ill. I.A.R.D.C. Jan. 15, 2014). The fact that on-line criticism is more often in the vein of "I didn't like my lawyer" rather than "my lawyer committed malpractice by missing the statute of limitation" highlights the practical distinction often present between negative on-line reviews and civil claims or bar grievances. District of Columbia Bar Ethics Opinion 370 (2016) notes, for example, that although the DC version of the "self-defense" exception is broader than the ABA Model Rule formulation used in many states (including Washington), lawyers there are still limited in using otherwise confidential information in rebutting negative on-line reviews to those that involve "specific

allegations by the client" rather general criticism. Pending further guidance in Washington, therefore, lawyers should not assume that RPC 1.6(b)(5) allows them to reveal otherwise confidential information in responding to a client's negative on-line review. The fact that many rating services today quickly include disciplinary notices on their sites adds a distinct risk for a lawyer contemplating "pushing the envelope" on this point.

Additional constraints effectively bar addressing post-representation criticism prospectively in engagement agreements. RPC 1.6(a) prohibits waiver of lawyer confidentiality "unless the client gives informed consent[.]" This would almost never be in the client's interest and would effectively inject a question from the outset about whether any nominal consent obtained was truly "informed." Moreover, the Consumer Review Fairness Act of 2016, 15 U.S.C. 45b, generally renders unenforceable provisions in "form contracts" limiting the ability of customers to provide reviews of the products or services involved. With law firms increasingly using standardized terms that likely fall within the definition of "form contracts," this new federal law effectively precludes the use of "non-disparagement" provisions in many lawyer fee agreements. The new law also specifically applies to any "electronic means" used by a customer to provide a review.

Practical Alternatives

In assessing practical alternatives, we should begin with two that lawyers should skip at the outset.

First, barring the most extreme circumstances, lawyers should not spend much time thinking about suing their former clients. Although there are a few reported decisions in which lawyers prevailed on defamation claims against former clients in this context, they usually involved reviews that misrepresented specific material facts. *Blake v. Giustibelli*, 182 So.3d 881 (Fla. App. 2016), and *Pampattiwar v. Hinson*, 756 S.E.2d 246 (Ga. App. 2014), are examples of this genre. More commonly, on-line criticisms have been classified as opinions protected by the First Amendment. *Spencer v. Glover*, 397 P.3d 780 (Utah App. 2017), and *Thompson v. Doe*, 189 Wn. App. 45, 356 P.3d 727 (2015), are illustrations of this more typical result. Rating services themselves have also been accorded First Amendment protection, with *Browne v. Avvo, Inc.*, 525 F. Supp.2d 1249 (W.D. Wash. 2007), a local example. Finally, as with any lawsuit by a lawyer against a former client, lawyers risk malpractice counterclaims over the services involved.

Second, lawyers should not threaten former clients with revealing confidential information in an attempt to have them remove the unflattering

reviews. In the analogous context of a fee dispute, the Washington Supreme Court in *In re Boelter*, 139 Wn.2d 81, 985 P.2d 328 (1999), disciplined a lawyer for threatening to reveal confidential information unless the client paid a bill.

Instead, three practical alternatives stand out.

First, lawyers with consumer-oriented practices where it is common for clients to evaluate lawyers using electronic tools should consider affirmatively building a strong digital presence so that any critical reviews are, in essence, preemptively rebutted by putting the lawyer or firm in a positive light. At the same time, lawyers need to be scrupulously accurate with the information posted—whether on their own sites or with rating services. WSBA Advisory Opinion 201402 (2014) counsels, for example, that a lawyer who claims a "profile" on a rating service is then charged with the responsibility for maintaining its accuracy. Lawyers should also be mindful of confidentiality when using other electronic platforms to build their web presence. Lawyers have been disciplined for revealing client confidential information in listservs and blog posts—with *In re Quillinan*, 20 D.B. Rptr. 288 (Or. 2006), an example of the former and *In re Peshek*, 798 N.W.2d 879 (Wis. 2011), illustrating the latter.

Second, consumer review web sites typically have terms of use that may open an avenue for requesting that a rating service withdraw a particular review

that appears to violate the terms involved. Not every minor criticism warrants exploring this option. But for a particularly egregious critique that is demonstrably false, challenging the item may be warranted.

Third, although confidentiality considerations constrain what a lawyer can say, RPC 1.6 does not prohibit responses altogether. Even without venturing into confidential information, lawyers can often respond very effectively by stressing the scope of their practice, their experience and their commitment to client service. In doing so, the lawyer should be careful to be both professional and proportionate. An "over the top" response that "fights fire with fire" may ironically only serve to confirm rather than dispel the negative review. By contrast, a tactful and measured response has a higher probability of both undercutting the credibility of the complainer and painting the lawyer favorably.

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