ETHICS WATCH

Defending Against Internet Criticism: "Silence is Golden"

By Nathan M. Crystal

The duty of confidentiality is one of the fundamental ethical obligations that lawyers owe to clients. The obligation is subject to a number of exceptions, generally grounded on the principle of protection of either others or the system of justice from harm. However, one of the exceptions protects lawyers. Rule 1.6(b)(5) states that a lawyer may reveal confidential information to the extent the lawyer reasonably believes to be necessary

> 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.

While the exception is often called the "self defense" exception, as the language of the rule makes clear, the exception can apply when a lawyer is asserting a claim as well as a defense, for example in an action to recover legal fees.

The leading case dealing with the self defense exception is *Meyerhofer v. Empire Fire & Marine Insurance Co.*, 497 F.2d 1190 (2d Cir.), *cert. denied*, 419 U.S. 998 (1974). *Meyerhofer* involved a securities fraud action alleging that Empire had marketed securities using a registration statement and prospectus that were materially false and misleading. The complaint named Empire's law firm and several of its partners as defendants. In addition, the complaint included as a defendant Stuart Goldberg, an attorney who had worked on the Empire matter but who had resigned from the firm in a dispute with the firm over the adequacy of disclosures being made in the Empire offering. On the same day that he resigned from the firm, Goldberg informed the SEC of his concerns about the offering; he subsequently filed a lengthy affidavit with the SEC about the matter.

When Goldberg was named as a defendant in the securities fraud litigation, he contacted plaintiffs' counsel, informed them of his non-involvement in the offering, and supplied them with a copy of the affidavit he filed with the SEC. As a result the plaintiffs dismissed Goldberg from the suit. Defendants then moved to disqualify plaintiffs' counsel from continuing in the case on the ground that they had received confidential information from Goldberg. The district court granted the disqualification motion, but the Second Circuit Court of Appeals reversed, concluding that Goldberg "had the right to make an appropriate disclosure with respect to his role in the public offering [and] to support his version of the facts with suitable evidence." The court noted the substantial financial and reputational damage that Goldberg would face from the plaintiffs' allegations.

Although the court expressed some concern with Goldberg's method of disclosure—turning over to plaintiffs' counsel a 30-page affidavit with 16 attached exhibits—the court concluded that his action was the "most effective way for him to substantiate his story." While Goldberg acted properly in revealing information to the plaintiffs' counsel in an effort to obtain dismissal of the suit filed against him, his earlier actions were questionable. Goldberg apparently informed the SEC and filed an affidavit with the agency before any allegations were made against him or were even imminent.

Meyerhofer was decided in the pre-Internet/social media world. In the current environment it is common for consumers to complain publicly on their social media, travel, or consumer sites about what they perceive to be improper treatment by businesses. Lawyers are not exempted from such criticism. Here's an example. In 2008 Illinois attorney Betty Tsamis agreed to represent a client in an effort to secure unemployment benefits from the client's former employer. The employer had terminated the client's employment because of an assault on a coworker. Tsamis participated in a telephone hearing before the Illinois Department of Employment Security. The Department denied the client's claim. The client subsequently discharged Tsamis and then posted the following review on the AVVO website:

> She (Respondent) only wants your money, claims "always on your side" is a huge lie. Paid her to help me secure unemployment, she took my money knowing full well a certain law in Illinois would not let me collect unemployment. [N]ow is billing me for an additional $1500 for her time.

Tsamis contacted the client and asked the client to remove the review, but the client refused unless Tsamis returned the file and the $1500 fee. Sometime later AVVO removed the review from its site. (The opinion does not say whether this occurred as a result of a request from Tsamis.)

The client then posted a sec-

ond negative review. This time Tsamis decided to respond with her own post:

> This is simply false. The person did not reveal all the facts of his situation up front in our first and second meeting. [sic] When I received his personnel file, I discussed the contents of it with him and informed him that he would likely lose unless the employer chose not to contest the unemployment (employers sometimes do is [sic]). Despite knowing that he would likely lose, he chose to go forward with a hearing to try to obtain benefits. I dislike it very much when my clients lose but I cannot invent positive facts for clients when they are not there. I feel badly for him but his own actions in beating up a female coworker are what caused the consequences he is now so upset about.

The Illinois Disciplinary Commission administered a reprimand to Tsamis for her conduct in this matter (and in another matter involving her trust account). The decision stated: "You are being reprimanded for revealing confidential information about your former client . . . in a public forum." (emphasis added). *In re Tsamis*, Ill. Atty. Reg. & Disc. Comm., No. 2013PR00095 (2014). *Accord* Pa. Bar Assn, Formal Op. 2014-300, §7.

What is my advice to lawyers about responding to client criticism on the Internet? First, for both ethical and practical reasons, do not respond publicly using confidential information. *Ethically,* in states that have adopted the ABA version of Rule 1.6(b)(5), as South Carolina has done, it is very likely that a lawyer would act unethically by disclosing confidential client information to respond to a client's criticism of the lawyer on the Internet. Keep in mind that the scope of the duty of confidentiality is broad—"any information relating to the representation of a client." SCRPC 1.6(a).

Moreover, the language of the rule seems to contemplate some form of proceeding, either civil, criminal, or disciplinary, in which the lawyer's conduct is in issue. There is authority that the self-defense exception does not require lawyers to wait until formal proceedings are instituted against them. See Model Rule 1.6, comment 10 (comment 11 in South Carolina), but it is unclear how broadly this comment could be read. Indeed, the *Meyerhofer* case expressed concern about the propriety of Goldberg's disclosure to the SEC well before he was accused of wrongdoing. For a discussion of the conflicting views about whether the self-defense exception requires a proceeding, see N.H. Bar Assn., *Ethics Corner: Can Lawyers Respond to False Accusations Online* (Bar News, February 19, 2014).

In addition to the requirement of a "proceeding," the lawyer's response must be limited to the extent the lawyer "reasonably believes necessary." Usually, a public response by the lawyer is unnecessary. The lawyer can and should first contact the client in an effort to persuade the client to remove the criticism. Angry clients may demand return of their fees or some other form of compensation, which lawyers may be unwilling to give, particularly if they strongly believe that they have acted properly. A more effective course of action may be to contact the Internet platform that hosted the criticism to try to persuade it to remove the offending comments. This approach will often be effective, particularly in the new environment in which courts are recognizing a "right to be left alone." The lawyer can also turn to IT specialists to use search engine optimization (SEO) techniques to try to drive the offending criticism lower on search engine results.

Some states may have more restrictive versions of Rule 1.6. California is a notable state that has not adopted the self-defense exception. In Opinion 525 the Los Angeles County Bar Association Committee advised that a lawyer could respond to public criticism by a client but only if the lawyer's response did not

disclose confidential information, did not injure the former client in a matter involving the former representation, and was proportionate and restrained. *Accord* San Francisco Bar Assn. Op. 2014-1. On the other hand, New York's version of the self-defense exception allows a lawyer to reveal confidential information to the extent the lawyer reasonably believes necessary "to defend the lawyer or the lawyer's employees and associates from an accusation of wrongful conduct." NYRPC 1.6(b)(5)(i). Arguably, the concept of an "accusation" would not require a legal proceeding, either actual or contemplated, although the New York rule does limit disclosure to situations that the lawyer reasonably believes to be necessary.

Practically, a public response by the lawyer even if ethical is likely to do more harm than good. The lawyer's response will probably produce counter-responses by the client, which further publicize the client's criticism. The client may use the lawyer's response as the basis for disciplinary action, as the client did in *Tsamis*. In addition, a client might consider a breach of fiduciary duty or unfair trade practices action in which the client seeks actual and penal damages, plus attorney fees.

Second, a lawyer could consider a general denial like the following: "[Client] has posted a criticism of my services in representing him. I take very seriously any comments and criticisms I receive from my clients. Ethically, I am precluded from revealing any client information in responding to this charge. However, I can say that first, [Client's] description of situation is materially inaccurate, and second, I have represented [Client] competently and ethically." I have doubts about the wisdom of such a general denial because it may be unconvincing to readers and may also further publicize and emphasize the offending material. However, if a lawyer decides to make a general denial of this type, I suggest that the lawyer make it only once.

Third, as noted above, contacting the platform where the client published the criticism, asking removal of the offending material, will often be effective. If it is not, search engine optimization techniques may be fruitful.

Here is another idea: The Los Angeles Committee mentioned the possibility that the client might have waived the protections of the ethical duty of confidentiality or the attorney-client privilege by publishing the criticism. What about making the client's waiver explicit through a provision in your engagement agreement? However, this approach also has problems. Some clients may find such a provision offensive, off-putting, or a violation of their "Internet liberty." In addition, while a client can consent to disclosure of confidential information, the consent must be "informed" under Rule 1.6. So all things considered, perhaps a proverbial saying provides the best guidance for lawyers in dealing with Internet criticism: "Silence is Golden." ⚖