Bad Review? Bad Response? Bad Idea.

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Social Media for Law Firms: An Overview[1]

By Jennifer Ellis

Social media has become a crucial part of the average American's life. As a result, whether they want to or not, attorneys must, at the very least, appreciate the impact of social media on their clients. Failure to understand how social media can impact clients' cases could lead to serious damage to a case which might result in a malpractice complaint. Further, wise attorneys will take advantage of social media to develop their practices through the networking and marketing opportunities provided by both their own websites and the various social media sites and applications.

The best way to appreciate how important social media has become in people's day-to-day lives is to look at some statistics for popular sites:

- Facebook – 1.393 billion users
- LinkedIn – 332 million users
- Pinterest – 70 million users
- YouTube – 4 billion views per day[2]
- Instagram – 300 million users[3]
- Google+ - Almost 600 million active users[4]
- Twitter – 550 million users[5]

It is also is also important to know that the number of people accessing social media sites via mobile technology (smartphones and tables) is increasing to the point where the majority of people (71%) use mobile devices to access social media.[6] This ease of access means people use social media on the go as a method to locate businesses they plan to hire. It also means people have a tendency to use social media to quickly share intimate details about their lives and

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[1] This document is a portion of Chapter 16 from the Solo and Small Firm Legal Technology Guide, Copyright ABA, All rights Reserved.

[2] Facebook, LinkedIn, Pinterest and YouTube statistics taken from http://expandedramblings.com/index.php/resource-how-many-people-use-the-top-social-media/ as of August, 2014.

[3] http://instagram.com/press/

[4] Active Google+ users as of August 25, 2014, http://www.internetlivestats.com/watch/google-plus-users/.

[5] Jeff Bullas, 22 Social Media Facts and Statistics You Should Know in 2014 (2014.) http://www.jeffbullas.com/2014/01/17/20-social-media-facts-and-statistics-you-should-know-in-2014/

[6] Ray Pun, Adobe 2013 Mobile Consumer Survey: 71% of People Use Mobile to Access Social Media (July, 2013.) http://blogs.adobe.com/digitalmarketing/mobile/adobe-2013-mobile-consumer-survey-71-of-people-use-mobile-to-access-social-media/

activities. The former shows the value of social media as a marketing tool. The latter shows the amount of information people are sharing which can be harmful to their cases.

Attorneys who seek to begin using social media should keep in mind that the ethical risks involved with social media, both in terms of evidence collection and marketing, are very real. Therefore a proper understanding of appropriate and ethical behavior is extremely important.

It is also important to understand that in certain areas of practice, it is now verging on malpractice, and the author would argue it *is* malpractice, to fail to communicate with clients about whether and how they use social media. Failing to warn the client to halt or at least limit social media use could result in that client posting materials that will harm his case. Failure to warn a client about evidence preservation could result in substantial sanctions for spoliation.[7] In addition, it is quite conceivable that the opposing party will post harmful information to his case and failure on the part of the attorney to seek out possible harmful posts can result in loss of a substantially greater bargaining position, or even loss of a case that might have been won.

Specific Sites and Applications

Social media essentially includes sites and applications that enable people to share information, pictures, videos, and the like at a rapid rate, and, in return, allows other people to respond to the shared content. In some cases social media is referred to as Web 2.0. Web 1.0 refers to sites that serve to provide one way communication, much like a newsletter or a book. Traditional websites are Web 1.0.

Currently, the most popular social media sites and applications in the United States include Facebook, Twitter, LinkedIn, Google+, Pinterest, YouTube and Instagram. Further, blogs are sometimes considered part of social media and so will be included in the discussion. At this point, there are over 150 million blogs on the web and almost 50% of Internet users read blogs.

Marketing and Networking

It is not always easy to understand how social media can increase the potential for bringing in new clients. It is therefore important to think of social media as having uses for practice building.

Advertising

Social media includes straight forward advertising. Sites such as Facebook, YouTube, LinkedIn and others provide the opportunity to purchase small ads which appear on the top or side of the page. These ads are controlled through varying means, demographics, keywords, areas of

[7] See Lester v. Allied Concrete Co., et al; order dated September 1, 2011.

interest, and so on. Generally, the cost of the ads is controlled through a bidding process known as pay-per-click. The site provides a suggested fee that its algorithm suggests will be successful. The purchaser identifies the amount he is willing to pay and competes against those who are seeking to advertise to the same individuals. Normally, the purchaser only pays when someone clicks on an ad.

Networking

Social media provides substantial opportunities for networking. It simply moves the networking from the bar association or educational program, to networking online. Providing information about interests, sharing day-to-day activities, responding to the posts of others - each of these behaviors is simply a way to connect with other people. Those people, in turn, may need an attorney or may need to refer someone else to an attorney just as in the offline world. Further, people tend to recommend individuals who they know, or feel they know, and social media allows the formation of that kind of relationship.

Content

Sharing useful content is a crucial part of social media for attorneys. Providing high quality content that informs users about the areas of law in which an attorney practices is an excellent way to bring attention to that attorney. The content can be as simple as commenting on a case on Facebook, sharing a useful link on Twitter, or providing a detailed analysis of a certain specific issue on a blog. This content shows potential clients that the attorney is knowledgeable in her area(s) of practice. Further, well-written content provides a substantial boost to search engine optimization and online reputation.

Specific Sites

Different social media sites provide different tools. Further, some sites are better utilized by attorneys who tend to represent businesses, while others are better utilized by attorneys who represent individuals. It is important to target the correct site or mixture of sites for the best return on investment of time and/or money.

Content of Posts

When you post on social media, you need to consider whether you are causing any ethical problems for yourself. Given the open nature of social media, a number of issues can arise when lawyers post. Two important issues to focus on include: Is social media advertising and are you forming an attorney/client relationship by answering questions?

Is Social Media Advertising?

When choosing what to write on social media, it is important to determine whether your post is advertising under model rule 7.2 (or whatever rule applies in your jurisdiction.) If your account is completely private and you share only with friends and family, chances are very good that your posts would not be considered advertising. However, the question becomes cloudier when you open up your account to a larger group. My position is that if you are not certain whether your post is advertising, assume it is and act accordingly as far as your jurisdiction's rules. Some jurisdictions define advertising very clearly. Others do not.

As noted previously, Twitter is a site that is problematic for states such as Florida, where any posting might be considered advertising. In its guidelines on social media, Florida's advertising standing committee states about Twitter that Pages of individual lawyers on social networking sites that are used solely for social purposes, to maintain social contact with family and close friends, are not subject to the lawyer advertising rules. Pages appearing on networking sites that are used to promote the lawyer or law firm's practice are subject to the lawyer advertising rules. These pages must therefore comply with all of the general regulations set forth in Rules 4-7.11 through 4-7.18 and 4-7.21." [8] This language means that many posts on Twitter would be considered advertising, simply because most people have their accounts entirely open and it is common for users to discuss a cross section of personal and work-related details of their lives.

Most problematic, given Twitter's 140 character limit, is that, in Florida, the Tweet must include geographic information as well as "the name of at least 1 lawyer in the firm." The attorney may use appropriate abbreviations for the geographic requirements which helps, to a degree. However, as soon as the poster puts both the full name of a lawyer and a geographic location, most of the allotted characters will be used up, substantially limiting the value of any tweet. Florida is not the only jurisdiction with special Twitter requirements, so be certain to check your state's rules before you Tweet. That said, many jurisdictions have not placed onerous requirements on lawyer's abilities to use Twitter and a well-written tweet can be an excellent way to drive traffic to your website or share useful information.

Pennsylvania's Analysis

In Formal Opinion 2014-300 (Ethical Obligations for Attorneys Using Social Media) the Pennsylvania Bar Association provides a detailed guidance opinion on social media use by attorneys. This includes analysis of what is acceptable for marketing purposes.

[8] The Florida Bar Standing Committee on Advertising Guidelines for Networking Sites (Revised April 16, 2013.) http://www.floridabar.org/TFB/TFBResources.nsf/Attachments/18BC39758BB54A5985257B590063EDA8/$FILE/Guidelines%20-%20Social%20Networking%20Sites.pdf?OpenElement

As related to advertising, and connecting with others on social media, the opinion offers the following:

1. Attorneys may advertise using social media.

   There is nothing in the rules that prevents attorneys utilizing social media for advertising purposes. In doing so, the attorney must follow all relevant ethical rules.

2. Attorneys may endorse other attorneys on social media

It is acceptable to endorse other lawyers, however, the endorsements must be accurate. If you choose to endorse a lawyer, it would be wise to make certain you actually know the lawyer and his or her skillset and abilities. Many attorneys on site such as Avvo and LinkedIn provide endorsement when they are complete strangers with the lawyer they are endorsing.

3. Attorneys may respond to endorsements and reviews and may solicit them.

In Pennsylvania, under Rule 7.2, "no advertisement or public communication shall contain an endorsement by a celebrity or public figure. In addition, if an endorsement is paid, this must be revealed. Both of these rules apply to social media use in Pennsylvania. The latter rule, involving paid endorsements, is common in most states.

Regardless of who provides the review or endorsement, it must be honest. It is the job of the attorney to correct the review if it contains improper information, is dishonest or is false or misleading. "If the lawyer is unable to correct or remove the listing, he or she should contact the person posting the information and request that the person remove or correct the item."[9] Attorneys in Pennsylvania may not pay for or offer anything of value in exchange for a review.

It is appropriate for an attorney to respond to a review, but, he must be careful how he responds to a negative review. "[L]awyers may not reveal client confidential information in response to a negative online review."[10] Interpret the concept of confidential client information broadly. In the author's experience, the best way to respond to a negative review is (1) no response at all, (2) a polite response asking for the person to phone or email so you can see if you can resolve the problem, (3) a general response stating that you are sorry the person was displeased. An attorney in Illinois was reprimanded due to sharing confidential information in response to a negative review. She was suspended when she revealed that the client had engaged in a physical altercation and other confidential information, and that was why the client lost the case.[11]

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[9] Formal Opinion 2014-300

[10] Formal Opinion 2014-300, citing Formal Opinion 2014-200.

[11] *In Re Tsamis*, Comm. File No 2013PR00095 (Ill. 2013)

California's Analysis

In Opinion 2012-176, the State Bar of California provides an excellent analysis of how to determine whether a post is advertising. While California's determination of what constitutes advertising is likely to be different from other jurisdictions, many of its rules as to what is acceptable are commonly shared throughout the various jurisdictions.[12]

In California, a communication is considered to be, "any message or offer made by or on behalf of a member concerning the availability for professional employment of a member or a law firm directed to any former, present or prospective client." Under the rules and articles of California, "[a]ny communication or solicitation shall not:

1. Contain any untrue statement; or
2. Contain any matter, or present or arrange any matter in a manner or format which is false, deceptive or which trends to confuse, deceive, or mislead the public; or
3. Omit to state any fact necessary to make the statements made, in the light of circumstances under which they are made, nor misleading to the public or
4. Fail to indicate clearly, expressly, or by context, that it is a communication or solicitation as the case may be; or
5. Be transmitted in any manner which involves intrusion, coercion, duress, compulsion, intimidation, threats or vexatious or harassing conduct."

The bar, using its Rule and Article as a basis for analysis, next examines several hypothetical posts. They are:

1. "Case finally over. Unanimous verdict! Celebrating tonight."
2. "Another great victory in court today! My client is delighted. Who wants to be next?"
3. "Won another personal injury case. Call me for a free consultation."
4. "Just published an article on wage and hour breaks. Let me know if you would like a copy."

In its analysis, the bar found posts 1 and 4 were not communications (i.e. advertising) but 2 and 3 did meet the requirements constituting a communication and therefore needed certain information that they lacked.

[12] California Rule 1-400 (Advertising and Solicitation,) California Article 9.5 (Legal Advertising.)

Post 1 was not considered a communication because it did not contain an offer concerning the availability for professional employment. Had the post used "Who wants to be next" as in hypothetical 2, the posting would have become advertising based on the attorney stating that he is seeking additional clients. Post 4 was not advertising because, again, it did not state that he was seeking clients, rather it was simply providing useful information.

Post 2 is a communication because it makes it clear that the lawyer is available for employment. Since the post is advertising, it now has several problems under California's rules. First, it does not contain a disclaimer. Second, it does not state it is an advertisement. Third, it offers a guarantee or prediction of winning. In order to make this particular post appropriate, a lawyer in California would need to add the required language. Such a post would become quite lengthy however, so a question would arise as to whether it would be worth it to share such information in the first place. It also would not be possible to share this particular post on Twitter in California. Post 3 is a communication/advertising for the same reason post 2 is. Asking for readers to call for a free consultation is clearly seeking employment from potential clients.

Remember, the rules in your jurisdiction(s) might be very different from California. However, the analysis in the bar opinion is one that you can apply to your posts. The first question is always going to be, is it advertising? The second question will be, if it is, does the post meet the ethical requirements. Be certain to give your posts the appropriate consideration.

Is a Social Media Post Legal Advice?

The line for what is and what is not legal advice is a bit blurry. Given this, it is important that you stay on the right side of the line to make certain you are not inadvertently creating an attorney/client relationship. An attorney/client relationship is formed when a client has reason to believe that the attorney is handling his legal interests. The relationship can be formed expressly or it can be implied. The implied relationship is the one that can cause trouble online. The standard in determining whether an attorney/client relationship has been formed is based on what is the objectively reasonable belief on the part of the client. If you answer questions online, make certain there is an appropriate disclaimer, such as can be found on sites like Avvo and Quora. In addition, limit yourself to providing broad answers that are educational in nature as opposed to providing specific advice that directly answers the asker's question. At this point, there have been no lawsuits involving attempts to claim a lawyer has formed an attorney/client relationship through an ask/answer site. Keep in mind, not only could you inadvertently form an attorney/client relationship, but if you provide legal advice in a state in which you are not licensed, you could be engaging in the unauthorized practice of law.

Recommendations/Testimonials

The rules around recommendations and testimonials vary greatly across the United States. As a result, it is difficult to provide specific guidelines. Given this, it is crucial that you refer to the state(s) in which you are licensed to make certain you follow the rules. In most states, it is perfectly acceptable to ask for testimonials. However, those testimonials must follow all relevant rules. When clients write recommendations, those recommendations must not create false expectations and they must be correct. If a client writes a recommendation that violates the rules, it is the attorney's obligation to correct it. In some cases, for example LinkedIn, the attorney will be able to control whether an improper testimonial is posted. In other cases, for example Google+, Avvo and Facebook, the attorney is not able to approve the testimonial. In such cases the attorney must ask the client to remove the recommendation, or provide a correction in the comments.

Negative reviews are a serious problem on social media. A negative review can be very harmful to a law firm. That said, no matter how negative the review, it is crucial that lawyers respond appropriately if a past client attacks them online. Most importantly, attorneys may not share confidential information about the client in a response to a negative review. For example, a lawyer from Illinois responded to a negative review on Avvo by providing confidential information about her client. The Hearing board found that she engaged in misconduct which included:

1. [R]evealing information relating to the representation of a client without the client's informed consent, in violation of Rule 1.6(a) of the Illinois Rules of Professional Conduct (2010);
2. [U]sing means in representing a client that have no substantial purpose other than to embarrass, delay, or burden a third person, in violation of Rule 4.4 of the Illinois Rules of Professional Conduct (2010); and
3. [C]onduct which is prejudicial to the administration of justice or which tends to defeat the administration of justice or to bring the courts or the legal profession into disrepute.[13]

The complaint against the attorney also involved a bounced check. For both the check and the comment on Avvo, the attorney was reprimanded by the disciplinary commission.[14] The best way to deal with a negative review is to provide a polite response. If you are too angry to give a polite response, the best response is none at all.

Specific Rules

[13] *In the Matter of Betty Tsamis*, Commission No. 2013PR00095 (August 26, 2013.) http://www.iardc.org/13PR0095CM.html

[14] http://www.iardc.org/HB_RB_Disp_Html.asp?id=11221

7.1. Honest Communication & 8.x Integrity

The first two rules for online behavior should be considered an umbrella under which all behavior is judged. First, attorneys should never be misleading in their communications in relation to their services. No communication should contain a material misrepresentation of either fact or law, nor should any statement omit facts necessary to make the statement appropriate under rule 7.1. This concept flows throughout all communications by attorneys when discussing their services. The second set of rules, 8.x, involve maintaining the integrity of the profession; in other words, not holding the profession up to ridicule through one's behavior.

7.2. Advertising

The first rule of which attorneys need to be aware relates directly to advertising and it is Model Rule 7.2. One of the issues that can be a problem under Rule 7.2 is that various states require attorneys to keep all ads for a certain period of time. In Pennsylvania, for example, attorneys must keep copies of ads for 2 years. Other states have longer requirements. It is also important to note that a specific attorney must take responsibility for the ad and its placement, so make certain that a specific attorney is responsible for every action, even if performed by a non-attorney. Fortunately, the various accounts are meant to stay intact, so it is easy to keep records. If a post needs to be deleted, grab a screenshot of it and store it where it will be easily located. Make certain to identify the attorney responsible for the item.

Various states have other requirements, so attorneys should check Rule 7.2 in every state in which they are licensed.

Rule 7.3. Solicitation of Clients

Also implicated by use of social media for communication with potential clients is Model Rule 7.3. Attorneys may not solicit potential clients through real-time communication. This aspect of the rule does not apply to family members, current clients or other attorneys. Real-time communication includes telephone, in-person and real-time electronic chat. There is disagreement as to whether attorneys may solicit new clients through large chat rooms in which a large number of people are present, versus instant messages which are more personal and direct. Given this, it is safe to assume that starting a chat on Facebook is real-time communication and should be avoided. E-mail is considered written communication. To obey the rule, at a minimum, attorneys must label advertising as such and comply with Rule 7.1.

Attorneys may not solicit a client who has already made it clear he does not wish to be contacted, or if, "the solicitation involves coercion, duress or harassment." This means if someone has made it clear through social media that he desires not to be contacted, it would

be a violation of the rule to contact him. The tone of writing matters as well. If the content is seen as inappropriate, it violates the rule.

Multi-State Practice – Rule 8.5

An area in which it is easy to get in trouble, due to the vast and multi-jurisdictional nature of the internet, is multi-state practice. Attorneys must comply with their home states' rules in relation to:

- Where the office is located
- Where the attorneys' are admitted
- How they are seeking clients
- How they engage in advertising
- All states' rules in which they market

Additional Ethical Issues

Aside from advertising, communication with potential clients, and inappropriate use of social media in discovery, there are other ways in which legal professionals have gotten themselves in trouble using social media.

Confidentiality and Honesty

One potential area of trouble involves confidentiality, Rule 1.6. An attorney got herself in trouble by sharing share confidential information about a case in such a way as to make it possible to identify her client. She also provided information that suggested that she knew her client had lied on the stand and did nothing about it. In addition to Rule 1.6, the attorney was accused of violating other rules involving honesty, fraud, and more.[15] In the end, the attorney lost her job of 19 years[16] and was suspended for 90 days by two different jurisdictions.[17][18]

Another serious consequence the attorney suffered is that when searching her name online; page after page of results show her disciplinary problems. Though she has since opened her own firm, it is difficult to find anything positive about her on the web in a Google search.

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[15] In the Matter of Kristine Ann Peshek, Commission No. 09 CH 89, Illinois Attorney Registration and Disciplinary Commission (2009.)

16 Debra Cassens Weiss, Blogging Assistant PD Accused of Revealing Secrets of Little –Disguised Clients (2009.) http://www.abajournal.com/news/article/blogging_assistant_pd_accused_of_revealing_secrets_of_little-disguised_clie/

17 Illinois Supreme Court disbars 12, suspends 26, http://iln.isba.org/2010/05/18/illinois-supreme-court-disbars-12-suspends-26

[18] Office of Lawyer Regulation v. Peshek, 2011 WI 47 (2011.)

While it is perfectly acceptable to discuss one's life, and even one's professional activities, it is important to obey the ethical rules while doing so. Discussing a case on a blog while it is going on, outside of appropriate PR, is a bad idea. Failing to protect a client's confidentiality is even worse. And, of course, failing to properly inform the court of inappropriate conduct by the client was a serious mistake. Judgment is a critical part of both practicing law and posting online.

Jokes & Satire

Jokes can also be a serious problem online. It is impossible to see body language or hear the tone in a person's voice. Something one person might find amusing might not be so funny to another. As a result, joking through social media can be problematic, especially on a politically charged topic. An Indiana deputy attorney general learned this the hard way when he tweeted an unfortunate joke surrounding protests in Wisconsin in 2011. His tweet led to an argument with the editor of Mother Jones Magazine. In turn, the magazine researched the attorney and found similar comments on his blog. In the end, the price of the attorney's online behavior was his job.[19] The attorney general's office stated that it chose to fire the attorney after a "thorough and expeditious review;" noting that it respects First Amendment rights, but expects civility from its public servants.

Personal v. Private

Sometimes attorneys will develop both a private and public persona on the web, believing the two will remain separate. Unfortunately, this is simply not the case. It takes very little effort to perform research on the web and to connect the public and private behaviors of someone who has written something offensive or upsetting. In an infamous case, an assistant Michigan attorney general was fired due to his online (and perhaps offline) behavior surrounding the student body president of the University of Michigan. The attorney argued that his speech was political and also had nothing to do with his work as an assistant attorney general. But in the end, the public and private became much too intertwined, and the attorney general was left with no choice but to fire him. Recently the student won a verdict of $4.5 million for invasion of privacy, defamation, abuse of process, and intentional infliction of emotional distress.[20]

The attorney in this case did not hide who he was, but he did try to argue that his actions had nothing to do with his work. However, as a public servant and as an attorney, it was simply impossible to separate the public employee from the (not so) private behavior, and that cost

19 Indiana state prosecutor fired over remarks about Wisconsin protests (2011.)
http://www.cnn.com/2011/US/02/23/indiana.ammo.tweet/
20 Kevin Dolak, Attorney Andrew Shirvell Ordered to Pay 4.5 Million for Attacks on Gay Student (2012.)
http://abcnews.go.com/US/attorney-andrew-shirvell-ordered-pay-45-million-attacks/story?id=17028621

him his job. He was fired for, "violat[ing] office policies, engag[ing] in borderline stalking behavior," and more. The attorney sometimes posted his online attacks while at work, and engaged in behavior that was, "not protected by the First Amendment…"[21] Much of his behavior was offline, but it was his online behavior that brought an incredible amount of attention to what he was doing, so much so that he ended up on TV shows including *Anderson Cooper* on CNN.[22]

It is unwise to believe that anyone can live two separate lives online. If one engages in controversial behavior, the result will be a magnifying glass of attention. In turn, it is virtually impossible for the individual to keep his private and public online lives from colliding.

21 David Jesse, Andrew Shirvell fired from job at Michigan Attorney General's Office (2010.) http://www.annarbor.com/news/andrew-shirvell-fired-from-job-at-attorney-generals-office/#.UFQIPVEQd60
22 Anderson Cooper: Andrew Shirvell Responsible For His Firing Not 'Liberal Media,' http://www.huffingtonpost.com/2010/11/09/anderson-cooper-andrew-sh_n_780874.html

Conclusion

Understanding how the public uses social media is important for attorneys so they can appreciate the types of evidence they might find online to help their cases, and so they can appropriately warn their clients about social media use. Knowing the benefits and risks of social media in terms of networking and marketing can help an attorney grow her firm without harming her hard-earned reputation through improper online activities. Being aware of how judges and juries use social media and how that use might affect a case is important, so attorneys can be prepared to respond accordingly.

There is no doubt that social media can be a serious minefield in terms of day-to-day practice and ethical requirements. On the other hand, the substantial benefits available in terms of evidence, research, marketing, and networking cannot be overstated. With the number of people using social media increasing every day, social media will continue to impact the legal profession in every imaginable way, and perhaps some unimaginable ways too. As a result it is crucial for attorneys to embrace the technology and determine how they can use it both in their practice of law and in their efforts to grow their client base.

LAWYER'S RESPONSE TO CLIENT'S NEGATIVE ONLINE REVIEW

FORMAL OPINION 2014-200

The PBA Legal Ethics and Professional Responsibility Committee has been asked whether the Pennsylvania Rules of Professional Conduct ("PA RPC") impose restrictions upon a lawyer who wishes to publicly respond to a client's adverse comments on the internet about the lawyer's representation of the client. The Committee concludes that the lawyer's responsibilities to keep confidential all information relating to the representation of a client, even an ungrateful client, constrains the lawyer. We conclude, therefore, that a lawyer cannot reveal client confidential information in response to a negative online review without the client's informed consent.

We further believe that any decision to respond should be guided by the practical consideration of whether a response calls more attention to the review. Any response should be proportional and restrained. For example, a response could be, "A lawyer's duty to keep client confidences has few exceptions and in an abundance of caution I do not feel at liberty to respond in a point-by-point fashion in this forum. Suffice it to say that I do not believe that the post presents a fair and accurate picture of the events."

Applicable Ethics Rules

PA RPC 1.6 provides, in pertinent part:

Rule 1.6 Confidentiality of Information

(a) A lawyer shall not reveal information relating to representation of a client unless the client gives informed consent, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b) and (c).

. . .

(c) A lawyer may reveal such information to the extent that 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 or disciplinary proceeding 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.

Comment [14] to Rule 1.6 states:

> [14] Fifth, 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. If the lawyer is charged with wrongdoing in which the client's conduct is implicated, the rule of confidentiality should not prevent the lawyer from defending against the charge. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (c)(4) 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.

Under PA RPC 1.6(e), the duty of confidentiality survives the termination of the client-lawyer relationship.

Scope of Restricted Information

Rule 1.6(a) prohibits lawyers who do not have the client's informed consent from revealing information relating to "representation of a client" with certain limited exceptions. "Information relating to representation" is generally recognized to be very broad and is not limited to secrets or confidences." *Pennsylvania Ethics Handbook, 2011 Ed.,* § 3.3 at 51; *Iowa Supreme Court Att'y Discipline Bd. v. Marzen*, 779 N.W.2d 757, 765–67 (Iowa 2010) (concluding that" the rule of confidentiality is breached when an lawyer discloses information learned through the lawyer-client relationship even if that information is otherwise publicly available").

Exceptions to Confidentiality

Among the exceptions to the rule of confidentiality is the "self-defense exception," PA RPC 1.6(c)(4) (which is identical to 1.6(b)(5) in the Model Rules). That section permits, but does not require, a lawyer to reveal information to the extent the lawyer reasonably believes 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 or disciplinary proceeding 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.

Oxford Dictionaries Online defines “controversy” as a “disagreement, typically when prolonged, public, and heated.” http://www.oxforddictionaries.com. A disagreement as to the quality of a lawyer’s services might qualify as a “controversy.” However, such a broad interpretation is problematic for two reasons. First, it would mean that any time a lawyer and a client disagree about the quality of the representation, the lawyer may publicly divulge confidential information. Second, Comment [14] makes clear that a lawyer’s disclosure of confidential information to “establish a claim or defense” only arises in the context of a civil, criminal, disciplinary or other proceeding. Although a genuine disagreement might exist between the lawyer and the client, such a disagreement does not constitute a “controversy” in the sense contemplated by the rules to permit disclosures necessary to establish a “claim or defense.” The literal language of Rule 1.6(c)(4) (the self-defense exception) does not authorize responding on the internet to criticism.

The Right to Defend Before an Action is Commenced

> Comment [14] to Rule 1.6 states, in part:
>
> Paragraph (c)(4) 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.

While comment [14] provides that “[p]aragraph (c)(4) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity” (wrongdoing in which the client’s conduct is implicated), there must be an action or proceeding in contemplation.

The Restatement (Third) of the Law Governing Lawyers, Section 64 is the functional equivalent of PA RPC 1.6(c)(4). Comment c states: “A lawyer may act in self defense ... 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. Imminent threats arise not only upon filing of such charges but also upon the manifestation of intent to initiate such proceedings by persons in an apparent position to do so, such as a prosecutor or aggrieved potential litigant.”

The Restatement (Third) of the Law Governing Lawyers, Section 64, comment e states: “Use or disclosure of confidential client information ... is warranted only if and to the extent that

the disclosing lawyer reasonably believes necessary. The concept of necessity precludes disclosure in responding to casual charges, such as comments not likely to be taken seriously by others. The disclosure is warranted only when it constitutes a proportionate and restrained response to the charges. The lawyer must believe that options short of use or disclosure have been exhausted or will be unavailing or that invoking them would substantially prejudice the lawyer's position in the controversy."

State Bar of Arizona Opinion 93-02 concluded that an attorney could disclose otherwise confidential information to the author of a book about the murder trial of a former client in response to assertions made by the former client that the attorney had acted incompetently. The opinion concluded that limiting the exception to situations where there is a formal claim or threat of a formal claim would render the language in Rule 1.6(c)(4) "to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client" largely superfluous.

In Opinion 2014-1, the San Francisco Bar Association commented:

> [The Arizona opinion] is inconsistent with the logic of subsequent ABA Formal Opinion 10-456 which prohibited voluntary disclosure of confidential information outside a legal proceeding even though the former client had asserted an ineffective assistance of counsel claim. The Arizona opinion relies, in part, on a tentative draft comment to a section of the Restatement (Third) of the Law Governing Lawyers regarding the use or disclosure of information in a lawyer's self-defense which states: "Normally, it is sound professional practice for a lawyer not to use or reveal confidential client information, except in response to a formal client charge of wrongdoing with a tribunal or similar agency. *When, however, a client has made public charges of wrongdoing, a lawyer is warranted under this Section in making a proportionate and restrained response in order to protect the reputation of the lawyer."* State Bar of Arizona Op. 93-02, pp. 4-5 (Emphasis added). This language is not part of the Restatement as adopted.

ABA Formal Opinion 10-456 states:

> In general, a lawyer must maintain the confidentiality of information protected by Rule 1.6 for former clients as well as current clients and may not disclose protected information unless the client or former client gives informed consent. The confidentiality rule "applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source."
>
> . . .
>
> The self-defense exception applies in various contexts, including when and to the extent reasonably necessary to defend against a criminal, civil or disciplinary claim against the lawyer. The rule allows the lawyer, to the extent reasonably necessary, to make disclosures to a third party who credibly threatens to bring such a claim against the lawyer in order to persuade the third party that there is no

> basis for doing so. For example, the lawyer may disclose information relating to the representation insofar as necessary to dissuade a prosecuting, regulatory or disciplinary authority from initiating proceedings against the lawyer or others in the lawyer's firm, and need not wait until charges or claims are filed before invoking the self-defense exception. Although the scope of the exception has expanded over time, the exception is a limited one, because it is contrary to the fundamental premise that client-lawyer confidentiality ensures client trust and encourages full and frank disclosure necessary to an effective representation. Consequently, it has been said 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. . . ."

Ethics Opinions

The New Hampshire Bar Association Ethics Committee was asked whether a lawyer could post a detailed response to a client's online comment that the lawyer took the client's money for a hearing that he knew he could not win. The Committee advised that "while you may be permitted to make some sort of limited response to your client's postings, you are not authorized to make the disclosures that you propose." NH Bar News, Feb. 19, 2014.

The Los Angeles County Bar Association Professional Responsibility and Ethics Committee issued Opinion 525 on December 6, 2012 on Ethical Duties of Lawyers in Connection with Adverse Comments Published by a Former Client. It concluded:

> The lawyer may publicly respond to such comments as long as the rebuttal: (1) does not disclose any confidential information; (2) does not injure the former client in any matter involving the prior representation; and (3) is proportionate and restrained.

The San Francisco Bar Association opined:

> Lawyer is not barred from responding generally to an online review by a former client where the former client's matter has concluded. Although the residual duty of loyalty to the former client does not prohibit a response, Lawyer's on-going duty of confidentiality prohibits Lawyer from disclosing any confidential information about the prior representation absent the former client's informed consent or a waiver of confidentiality. California's statutory self-defense exception, as interpreted by California case law, has been limited in application to claims by a client (against or about a lawyer), or by an lawyer against a client, in the context of a formal or imminent legal proceeding. Even in those circumstances where disclosure of otherwise confidential information is permitted, the disclosure must be narrowly tailored to the issues raised by the former client. San Francisco Bar Association Op. 2014-1.

Disciplinary Actions

In December 2006, the Supreme Court of Oregon approved a stipulation for discipline suspending a lawyer for 90 days for sending an email message to members of a bar listserv in which the lawyer disclosed confidential information about a former client who had fired the lawyer in an effort to warn colleagues that the former client was "attorney shopping." *In re Quillinan,* 20 DB Rptr 288 (Or. 2006).

The Supreme Court of Wisconsin, in June 2011, suspended the license of a lawyer who wrote and published an Internet blog in which the lawyer revealed confidential information about current and former clients that was sufficiently detailed to identify those clients using public sources. *Office of Lawyer Regulation v. Peshek,* 798 N.W.2d 879 (Wis. 2011).

The Georgia Supreme Court in a March 2013 ruling rejected as inadequate a recommendation of the Georgia State Bar General Counsel seeking a review panel reprimand for lawyer for violating Rule 1.6. The lawyer admitted to posting on the internet confidential information about the lawyer's former client in response to negative reviews about the lawyer the client had posted on consumer websites. *In re Skinner,* 740 S.E.2d 171 (Ga. 2013).

A Chicago lawyer was reprimanded by the Illinois Lawyer Registration and Disciplinary Commission for revealing client communications response to a former client who posted a negative review of the lawyer on Avvo. The parties' stipulated that the lawyer exceeded what was necessary to respond to the client's accusations by revealing in her response to a negative review that the client had beaten up a co-worker. *In re Tsamis,* Commission File No. 2013PR00095 (Ill. 2013).

Conclusion

While it is understandable that a lawyer would want to respond to a client's negative online review about the lawyer's representation, the lawyer's responsibilities to keep confidential all information relating to the representation of a client, even an ungrateful client, must constrain the lawyer. We conclude that a lawyer cannot reveal client confidential information in a response to a client's negative online review absent the client's informed consent.