Ethics of Online Reputation Management

Halftime Ethics
October 14, 2015
Michael Kennedy & Kevin Ryan

“Reputational Capital”

• A “measure of trust & goodwill in the marketplace”

• Reputation & goodwill are valuable assets

Online Reviews Matter

• When in need of an attorney:

<table>
<thead>
<tr>
<th></th>
<th>2005</th>
<th>2014</th>
</tr>
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<tbody>
<tr>
<td>Ask friend or relative:</td>
<td>65%</td>
<td>29%</td>
</tr>
<tr>
<td>Internet:</td>
<td>5%</td>
<td>38%</td>
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</tbody>
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Online Reviews Matter

• 90% of consumers more likely to buy if product has positive reviews
• 86% of consumers less like to buy if product has negative reviews
• 70% of clients who went online to find an attorney said they would be willing to commute farther to an attorney with positive reviews

What sites do potential clients trust?

• Percentage of users who rate a site as the “most useful”
  - Yelp! 58%
  - SuperLawyers 20%
  - Martindale-Hubbell 14%
  - Avvo 8%

Clients Most Likely to Find Lawyer Online

• NOT corporate/transactional clients
• More likely:
  » Middle to lower income groups
  » Younger
  » Facing high conflict
    • Conviction/incarceration
    • Financial loss
    • Family disruption
Lawyer Reviews Increasing

- Historically:
  - Amazon – consumer goods
  - Travel Industry
  - Restaurant Industry
  - Professional Services
    - Doctors
    - Teachers
    - Lawyers

Motivation to Post Review

- Anger/Dissatisfaction not primary drivers

- Most reviews of doctors/hotels/restaurants are positive

Motivation to Review Lawyer Online

- Perhaps less likely to be positive

- Reasons:
  - Emotionally charged
  - Most interactions also involve an opposing lawyer
  - Client’s only “voice”, especially for vast majority of clients who fear confrontation with lawyer
Risks for Lawyers

- Practical
  - Usually high sense of self-esteem/confidence in competence as a lawyer & professional identity
  - Not used to being criticized publicly
  - Potential harm to business success
- Ethical
  - Duty to maintain confidentiality of information related to the representation
  - Duty of loyalty to the client
  - Duty to refrain from dishonest conduct

Cue

BE NICE, THINK TWICE.

Practical – Be nice!

- Practical
  - While negative reviews impact choices, they do not impact as much as improvident responses
  - Consumers care more about professionalism than particular facts of somebody else’s experience
  - Consumers will not hire someone who responds defectively, aggressively, or who personally attacks a critic
Ethics – Think Twice

• As Kevin & I have often preached – Rule 1.6 protects all “information relating to the representation”
  • NO MATTER THE SOURCE
  • NO EXCEPTION FOR INFORMATION THAT IS PUBLIC
  • MUCH WIDER THAN THE A/C PRIVILEGE

Rule 1.9(c)

• A lawyer who has formerly represented a client shall not:
  • Use information relating to the representation to the disadvantage of the former client except as the rules permit or require, or when the information has become generally known; or
  • Reveal information relating to the representation except as the rules permit or require

In re Skinner, 758 S.E. 2d 788 (Ga. 2014)

• Divorce client fires lawyer for no work, post negative online reviews
• Lawyer responds with client’s identity, employer, total legal fee, fact that client has boyfriend.
• Public reprimand for violation Rule 1.6
• Rule 1.9(c) applies 1.6 principles beyond termination of representation
In re Tsamis, Illinois ARDC

- Client loses claim for unemployment benefits
- Gives lawyer negative online review:

  - “She 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. Now is billing me for an additional $1500 of her time.”

Response from Attorney Tsamis

- “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 unemployment. 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 over.”

Self-Defense Exception?

- Rule 1.6(c) allows a lawyer to reveal information relating to the representation:
  - To establish a claim or defense on behalf of the client 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.
NYSBA Ethics Opinion 1032
October 30, 2014

• Exception doesn’t apply online.

• Applies to “formal proceedings” in which a lawyer’s conduct has been placed in issue

• Proceeding must have judicial or quasi-judicial imprimatur, where sanction or penalty result

• Not our job to decide whether client’s negative review is a waiver of the a/c privilege

L.A. County Bar Association
Formal Opinion 525 (2012)

• Ethical to respond to online review only if
  
  – Attorney does not disclose confidential info

  – Attorney does not respond in a manner that will injure the former client in a matter involving the former representation

  – Attorney’s response is proportionate and restrained

New Hampshire Bar News – Tip
February 19, 2014

• Rule 1.6 only allows disclosure of confidential information that is necessary to such a defense.

• Disclosure in response to a negative review, while effective in rebutting the allegations, is not absolutely necessary.

• Avvo’s General Counsel has written: “As I often tell attorneys, there are very effective ways to respond to negative reviews that don’t involve saying anything about the case and risking disclosure of client confidences. It’s less important to ‘set the record straight’ than it is to communicate that the lawyer is responsive, professional and takes client feedback seriously.”
Ethics of Astroturfing

- What is it?
- Paying for positive reviews that are not real
- 8.4(c)
- Probably violates Terms of Service
- Might violate FTC rules

Asking Clients to Post Positive Reviews

- It’s still info related to the representation that client might not want disclosed – you haven’t violated 1.6, but be aware of Rules 1.1 and 1.7
  
  » Competent advice
  
  » Your interest in a positive review vs. client’s interests in anonymity, keeping information private

Asking Clients for Positive Reviews

- Some providers discourage inviting reviews
- Yelp!
- Algorithms will try to weed out “planted” reviews
Asking Clients for Positive Reviews

Fee discount for a positive review?

Paying for Positive Reviews

• Rule 7.2(b)

• A lawyer shall not give anything of value to a person for recommending a lawyer’s services except a lawyer may:

  » Pay reasonable costs of ads
  » Pay charges of qualified, non-profit, lawyer referral plan
  » Pay for a law practice
  » Refer clients to another professional in exchange for referrals

NYSBA Ethics Opinion 1052

• A lawyer may give clients a $50 credit on their legal bills if they rate a lawyer on an internet website such as Avvo that allows clients to evaluate their lawyer, provided that:

  – Credit on bill not contingent on content of rating
  – Client is not coerced or compelled to rate the lawyer
  – Rating and reviews are done by the client, not the lawyer
Ethics Corner: Can Lawyers Respond to False Accusations Online?

QUESTION: Every two weeks, my administrative assistant searches my name online. Yesterday, she discovered a troubling post on the lawyer review site, Avvo. A client I represented at an administrative hearing posted a scathing review. The client wrote that, "I took her money ($2,500) for a hearing that I knew I could not win." This is simply not true. In fact, the client lied to me when we met.

Based on her statements and the tight time limit, I filed the appeal. After reviewing the file, I concluded that she had virtually no chance of winning the appeal and informed her of my opinion. She requested that I go forward anyway. I did not put on certain testimony that was not accurate, but still made the best case I could. Not surprisingly, we lost. I refused her demand that I return the fee, told her that I had done an effective job at the hearing in light of the facts, and pointed out that I had put in many more hours than I billed.

I want to post a reply with the facts above, but my partner says this might violate my duty of confidentiality. I can't believe that he is correct, but told him I would contact the Ethics Committee to find out. I recall from law school that I have a right to defend myself. Please advise.

ANSWER: Given the increasing importance of online rating services to prospective clients, this is a timely question. However, the Committee urges extreme caution should you decide to respond. For example, earlier this year, Illinois disciplinary counsel filed a complaint claiming that a lawyer's response to a negative website posting violated Illinois' version of Rule 1.9(c)(2) by disclosing confidential information without meeting one of the exceptions in Rule 1.6. The Illinois lawyer asserted that his conduct was authorized by the self-defense exception of Rule 1.6.

New Hampshire Rule of Professional Conduct 1.6(b)(3) provides that a lawyer may reveal confidential information to the extent that he or she reasonably believes necessary "to respond to allegations in any proceeding concerning the lawyer's representation of the client." The New Hampshire Rule and your questions raise two significant issues. First, there is a difference of opinion over whether there must be a pending or foreseeable formal "proceeding" before a lawyer may reveal confidential information to defend against public allegations made by a client, such as those posted on the lawyer rating website. Many leading legal ethicists read Rule 1.6 strictly in light of the importance of client confidentiality and suggest that a proceeding must have been commenced or foreseeable before confidence may be disclosed. See http://www.legalethicsforum.com/blog/2010/03/selfdefense-rules-v-code-not-what-you-think.html (last visited Sept. 23, 2013).

The ABA has also issued an opinion, in the context of ineffective assistance of counsel, which strictly limits permitted defensive disclosures by the lawyer to those that are made in a judicial proceeding, ABA Formal Opinion 10-456 (July 14, 2010).

In Louima v. City of New York, 2004 US Dist. LEXIS 13707 (2004) (which was decided under rules that were based on the prior Code of Professional Responsibility and not the Model Rules), the court stated, "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 unfounded."

On the other hand, Section 64(e) of the Restatement (Third) of the Law Governing Lawyers takes the opposite position and states that "[w]hen a client has made a public charge of wrongdoing, a lawyer is warranted in making a proportionate and restrained public response."

Arizona Ethics Op. 93-02 (1993) agreed that a client established a controversy with a lawyer, sufficient to trigger the self-defense exception, by telling an author writing a book about the client's murder conviction that counsel was incompetent and conspired with prosecution. In addition, the ABA Comment [10] to Model Rule 1.6 states that a lawyer may respond "to the extent the lawyer reasonably believes necessary to establish a defense" to a "legal claim or charge" that "alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer" and that the "lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (b)(5) [New Hampshire's section (b)(3)] 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."

We have no guidance as to how our New Hampshire Supreme Court would interpret the scope of the actions or proceedings that are necessary to justify a lawyer’s disclosure of confidential information in self-defense. Regardless of how one resolves that issue, however, there is a second issue that you must address.

Rule 1.6 only allows disclosure of confidential information that is necessary to such a defense. Disclosure of much of the information that you suggest, while effective in rebutting the allegations, is not absolutely necessary. The response of Avvo’s General Counsel to the question of how far an attorney is authorized to go to defend herself is helpful. He wrote: “As I often tell attorneys, there are very effective ways to respond to negative reviews that don’t involve saying anything about the case and risking disclosure of client confidences. It's less important to 'set the record straight' than it is to communicate that the lawyer is responsive, professional and takes client feedback seriously.” www.legalethicsforum.com (last visited Sept. 23, 2013). In light of the uncertainty over whether there must be a formal proceeding before a lawyer may disclose confidential information in self-defense, this advice seems particularly insightful.

One possibility to address what you feel is an injustice would be to file an action for defamation against your client. This would bring the matter clearly within the exception to the Model Rules. However, the standards of proof, cost, and other concerns may make this an unrealistic option.

The Committee notes that, while your inquiry relates to a web posting, the analysis in this response applies equally to other forms of public communication, such as newspapers, books, or oral comments. The Committee also observes that the issues raised by your inquiry would not be avoided by replying to your client’s allegations anonymously.

In light of the above, the Committee believes 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. We urge you to consider the advice offered by Avvo’s counsel prior to making any responsive disclosures.

The NH Bar Association Ethics Committee provides general guidance on the New Hampshire Rules of Professional Conduct and publishes brief commentaries in the New Hampshire Bar News. New Hampshire lawyers may contact the committee for confidential and informal guidance on their own prospective conduct or to suggest topics for Ethics Corner commentaries by emailing Rosemarie Atwood.
IN RE: Margrett A. SKINNER.

Supreme Court of Georgia.

IN RE: Margrett A. SKINNER.

No. S14Y0661.

Decided: May 19, 2014

William H. Noland, Childs & Noland, Macon, Georgia, for Margrett A. Skinner.

The State Bar of Georgia made a formal complaint against respondent Margrett A. Skinner (State Bar No. 6507948), alleging violations of Rules 1.3, 1.4, 1.5, and 1.16 of the Georgia Rules of Professional Conduct. Prior to an evidentiary hearing on the formal complaint, Skinner filed a petition for voluntary discipline, admitting that she violated Rule 1.6 by improperly disclosing confidential information about a former client, and in which she agreed to accept a Review Panel reprimand for the violation. The special master and the State Bar recommended that we accept the petition for voluntary discipline. We rejected the petition, however, noting that a Review Panel reprimand is "the mildest form of public discipline authorized. for the violation of Rule 1.6." in the Matter of Skinner, 292 Ga. 640, 642 (740 S.E.2d 171) (2013), and noting as well that the petition and accompanying record did not "reflect the nature of the disclosures (except that they concern unspecified personal and confidential information) or the actual or potential harm to the client as a result of the disclosures." Id. at 644, n. 6. Following our rejection of the petition, the special master conducted an evidentiary hearing, and he made his report and recommendation on December 18, 2013, in which he found that Skinner violated Rules 1.4 and 1.6 but not Rules 1.3 and 1.16. Neither party sought review of the report by the Review Panel, and the matter is again before this Court for decision.

In his report, the special master found that a client retained Skinner in July 2009 to represent her in an uncontested divorce, and she paid Skinner $900, including $150 for the filing fee. For six weeks, the client did not hear anything from Skinner, and after multiple attempts to contact Skinner, the client finally was able to reach Skinner again in October 2009. At that point, Skinner informed the client that Skinner had lost the paperwork that the client had given to Skinner in July. Skinner and the client then met again, and Skinner finally began to draft pleadings for the divorce. The initial drafts of the pleadings had multiple errors, and Skinner and the client exchanged several drafts and communicated by e-mail about the status of the case in October and early November. Those communications concluded by mid-November, and Skinner and the client had no more communications until March 18, 2010, when the client reported to Skinner that her husband would not sign the divorce papers without changes. In April 2010, both the client and her husband signed the papers.

A disagreement developed about the fees and expenses of the divorce. Skinner asked the client for an additional $185 for certain travel expenses and the filing fee. In April and early May 2010, Skinner and the client exchanged several e-mails about the request for additional money. Then, on May 18, the client informed Skinner that she had hired another lawyer to complete her divorce, and she asked Skinner to deliver her file to new counsel and to refund $750. Skinner replied that she would not release the file unless she was paid. Although Skinner eventually refunded $650 to the client, Skinner never delivered the file to new counsel, contending that it only contained her "work product." New counsel completed the divorce within three months of her engagement.

Around this time, the client posted negative reviews of Skinner on three consumer Internet pages. When Skinner learned of the negative reviews, she posted a response on the Internet, a response that contained personal and confidential information about her former client that Skinner had obtained in the course of her representation of the client. In particular, Skinner identified the client by name, identified the employer of the client, stated how much the client had paid Skinner, identified the county in which the divorce had been filed, and stated that the client had a boyfriend. The client filed a grievance against Skinner, and in response to the
grievance, Skinner said in August 2011 that she would remove her posting from the Internet. It was not removed, however, until February 2012.

The special master found that Skinner violated Rule 1.4 when she failed between July and October 2010 to keep her client reasonably informed of the status of the divorce, and the special master found that Skinner violated Rule 1.6 when she disclosed confidential information about her client on the Internet. The special master found no violation of Rules 1.3 and 1.16.1. Turning to the appropriate discipline for these violations, the special master noted that Skinner had substantial experience as a practicing lawyer—she was admitted to the Bar in 1985—which is an aggravating circumstance. The special master also found, however, a number of mitigating circumstances, including that Skinner had no prior discipline, the absence of a dishonest or selfish motive for her improper conduct, that she refunded a substantial portion of her fee to the client even after doing work for the client, that she accepted responsibility for her misconduct by filing a petition for voluntary discipline, that she otherwise was cooperative in the disciplinary proceedings, and that she had expressed remorse for her misconduct. In addition, the special master found as mitigation that Skinner experienced a number of personal problems during her representation of the client and the subsequent time that she posted the confidential information about her client on the Internet, including colon surgery in April 2010, the diagnosis of both her mother and father with cancer (she was their primary caregiver), and the death of her father. For both violations, the special master recommended a public reprimand, with the additional condition that Skinner “be instructed to take advantage of the State Bar’s Law Practice Management services and recommendations with respect to internal office procedures, client files, and case tracking procedures.”

We have reviewed carefully the record and the very detailed report of the special master, and we agree with his recommendation of a public reprimand, as well as the additional condition that Skinner be instructed to take advantage of the State Bar’s Law Practice Management services and recommendations with respect to internal office procedures, client files and case tracking procedures. See In the Matter of Adams, 201 Ga. 775 (799 S.E.2d 312) (2012). Although other jurisdictions occasionally have disciplined lawyers more severely for improper disclosures of client confidences, we note that those cases involved numerous clients and violations of other rules, see Office of Lawyer Regulation v. Peshok, 334 Wis.2d 373 (798 NW2d 879) (2011) (no discipline), or the disclosure of especially sensitive information that posed serious harm or potential harm to the client, see In re Quillinan, 20 DB Rptr, 288 (Or.Disp.Bd.2006) (90–day suspension), available at www.ober.org/docs/obrport/dbr20.pdf. In this case, the improper disclosure of confidential information was isolated and limited to a single client, it does not appear that the information worked or threatened substantial harm to the interests of the client, and there are significant mitigating circumstances. Accordingly, we hereby order that Skinner receive a public reprimand in accordance with Bar Rules 4–102(b)(3) and 4–250 (c), and we order that she consult with the Law Practice Management Program of the State Bar as set forth above and implement its suggestions in her law practice.

Public reprimand.

FOOTNOTES

1. Joseph A. Boone was appointed as special master in this matter.

2. About Rule 1.16, the special master reported his belief that Skinner technically violated the rule by failing to deliver the file of her client to successor counsel based on a mistaken belief that signed pleadings in the file belonged to her as "work product." See Formal Advisory Opinion 87–5; Swift, Currie, McGhee & Hiers v. Henry, 276 Ga. 471 (581 S.E.2d 373) (2003). But the special master did not actually find a violation nor recommend any discipline under Rule 1.16. The special master reported that he made no such finding or recommendation because there was no clear and convincing evidence of prejudice, insofar as the client already had the documents contained in the file. As to the retention of unearned fees, the special master found the issue moot in light of the refund of $650 to the client.

PER CURIAM.

All the Justices concur.
New York State Bar Association
Committee on Professional Ethics

Opinion 1032 (10/30/2014)

Topic: Responding to a former client’s critical commentary on a website

Digest: A lawyer may not disclose confidential client information solely to respond to a former client’s criticism of the lawyer posted on a lawyer-rating website.

Rules: 1.6(a); 1.6(b); 1.9(c)

FACTS

1. The inquirer, a New York law firm, believes that a “disgruntled” former client has unfairly characterized the firm’s representation of the former client on a website that provides reviews of lawyers. A note posted by the former client said that the former client regretted the decision to retain the firm, and it asserted that the law firm provided inadequate services, communicated inadequately with the client, and did not achieve the client’s goals. The note said nothing about the merits of the underlying matter, and it did not refer to any particular communications with the law firm or any other confidential information. The former client has not filed or threatened a civil or disciplinary complaint or made any other application for civil or criminal relief.

2. The law firm disagrees with its erstwhile client’s depiction of its services and asserts that the firm achieved as good a result for the client as possible under the difficult circumstances presented. The firm wishes to respond to the former client’s criticism by telling its side of the story if it may do so consistently with its continuing duties to preserve a former client’s confidential information.

QUESTION

3. When a lawyer’s former client posts accusations about the lawyer’s services on a website, may the lawyer post a response on the website that tends to rebut the accusations by including confidential information relating to that client?

OPINION

4. The Internet and social media today provide a number of sites that ask visitors to state their views of and experiences with lawyers, presumably to provide other visitors with information on which to base their choice of counsel. Our survey of a few of these sites did not reveal any protocols to monitor the accuracy of the commentary, except to assure that the very lawyers being reviewed are not the source. In this respect, the sites differ from other lawyer-rating agencies—Chambers, Super Lawyers, Best Lawyers in America, Martindale-Hubbell and the like—which claim to base their ratings on a canvass of clients and other members of the bar.
5. The inquiry concerns a negative posting on such a site by a former client. The inquiring firm believes that certain information about its representation of that client would tend to rebut the posted allegations. The information in question constitutes “Confidential information” as defined by Rule 1.6(a) of the Rules of Professional Conduct (the “Rules”). Under Rule 1.6(c), a lawyer is generally prohibited from using or revealing confidential information of a former client.

6. There is, however, a “self-defense” exception to the duty of confidentiality set forth in Rule 1.6, which as to former clients is incorporated by Rule 1.9(c). Rule 1.6(b)(5)(i) says that a lawyer “may reveal or use confidential information to the extent that the lawyer reasonably believes necessary ... to defend the lawyer or the lawyer’s employees and associates against an accusation of wrongful conduct.” When applicable, this exception permits, but does not require, disclosure of confidential information, and only to the extent the lawyer reasonably believes necessary to serve the purpose of self-defense. See Rule 1.6, Cmmts. [12] & [14].

7. The inquiry raises the question whether a lawyer may rely on this exception to disclose a former client’s confidential information in response to a negative web posting, even though there is no actual or threatened proceeding against the lawyer. We do not believe that a lawyer may do so.

8. The language of the exception suggests that it does not apply to informal complaints such as this website posting. The key word is “accusation,” which has been defined as “[a] formal charge against a person, to the effect that he is guilty of a punishable offense,” Black's Law Dictionary 21 (5th ed. 1979), or a “charge of wrongdoing, delinquency, or fault,” Webster's Third International Dictionary Unabridged 22 (2002). See Roy D. Simon, Simon's New York Rules of Professional Conduct Annotated 230 (2013 ed.) (“An accusation means something more than just casual venting.”)

9. Comment [10] to Rule 1.6 supports this conclusion. It says that “[w]here a claim or charge alleges misconduct of the lawyer related to the representation of a current or former client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense.” In the context of a set of legal standards, the words “claim” and “charge” typically suggest the beginning of a lawsuit, criminal inquiry, disciplinary complaint, or other procedure that can result in a sanction. Comment [10] continues by saying: “Such a claim may 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, such as a person claiming to have been defrauded by the lawyer and client acting together or by the lawyer acting alone.” Each of these examples involves a formal proceeding in which the lawyer’s conduct has been placed in issue.

10. Case law supports our conclusion. New York cases permitting disclosure of confidential information under Rule 1.6(b)(5)(i) and its nearly identical predecessor DR 4-101(C)(4) have invariably involved allegations of lawyer wrongdoing in formal proceedings such as legal malpractice or other civil actions, disqualification proceedings, or sanctions motions. Those cases stand in contrast to those in which lawyers have not been permitted to use a client’s confidential information to initiate actions against former clients (other than lawsuits to collect legal fees, for which Rule 1.6(b)(5)(i) provides a different exception to confidentiality). Thus under the case law, a lawyer is not authorized to reveal confidential information whenever helpful in a dispute, but rather only when facing some kind of formal proceeding.

11. In at least one case, discipline has been imposed for the kind of conduct in question here. In re Tsamis, Joint Stipulation and Recommendation ¶¶ 4-10 & Reprinmand ¶ 1, No. 2013PR000006 (Hearing Board, Ill. Att’y Reg. & Disc. Comm. 2014) (reprimanding lawyer for revealing confidential information about her former client in response to client’s negative review on AVVO egal referral website).

12. Ethics opinions from other jurisdictions have reached varying results on the question facing us, but their relevance is limited by differences in the ethical rules in force in those jurisdictions.

13. We note a New York opinion that addressed the predecessor to Rule 1.6(b)(5)(i), though in a different context. In N.Y. County 732 (2004), a client threatened to file a disciplinary complaint against a lawyer if the lawyer did not release funds in an IOLA account, the proper disposition of which was a part of the lawyer’s inquiry to the Committee. The Committee opined that in the event of such a complaint, “the law firm would be entitled to disclose confidences or secrets necessary to defend itself against the client’s accusations.” The Committee concluded that the “rules permitting disclosure of client confidences should be read restrictively” but that the law firm may disclose protected client information “if the client files a complaint or claim against the law firm.”

14. Nor do we consider the question of whether and when a negative website posting may effect a waiver of a client’s right to confidentiality, because that question is not raised by the facts as presented in the inquiry. If there were facts raising the question of waiver, it would be necessary to consider separately the possible waivers of attorney-client privilege and of other kinds of confidentiality under Rule 1.6(a). Waiver of attorney-client privilege turns on questions of law beyond our jurisdiction. See, e.g., 1050 Tenants Corp. v.
Lapidus, 12 Misc. 3d 1118, 1123-25 (Civ. Ct. N.Y.C. 2006). Given the facts as presented, we need not consider whether a negative website posting might waive other kinds of confidentiality. Rather, we assume for present purposes that confidentiality has not been waived. It suffices to say that the mere fact that a former client has posted critical commentary on a website is insufficient to permit a lawyer to respond to the commentary with disclosure of the former client’s confidential information.

15. This result properly respects the vital purpose of Rule 1.6(a) in preserving client confidentiality and fostering candor in the private communications between lawyers and clients, and it does not unduly restrict the self-defense exception. That exception reflects the fundamental unfairness of a current or former client – or others – being able to make consequential accusations of wrongful conduct against a lawyer, while the lawyer is disabled from revealing information to the extent reasonably necessary to defend against such accusations. Unflattering but less formal comments on the skills of lawyers, whether in hallway chatter, a newspaper account, or a website, are an inevitable incident of the practice of a public profession, and may even contribute to the body of knowledge available about lawyers for prospective clients seeking legal advice. We do not believe that Rule 1.6(b)(5)(i) should be interpreted in a manner that could chill such discussion.

CONCLUSION

16. A lawyer may not disclose client confidential information solely to respond to a former client’s criticism of the lawyer posted on a website that includes client reviews of lawyers.

(1-14)


3 See N.Y. City 2005-03 (noting recognition by courts that “an attorney may use client confidences or secrets to defend himself or herself from a claim or counterclaim brought by the client, or as evidence in a fee collection dispute, but may not necessarily be permitted to use that same information affirmatively in a different type of claim against a client’); Restatement (Third) of the Law Governing Lawyers § 64, comment c (2000) (noting that a lawyer may act under the Restatement’s self-defense provision “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”).

4 In California there is no ethical counterpart to New York Rule 1.6(b)(5)(i), but the Evidence Code contains a self-defense exception to attorney-client privilege. Opinions interpreting that exception have concluded that California law does not permit a lawyer “to disclose otherwise confidential information in an attorney online review forum, absent client consent or a waiver.” San Francisco Opinion 2014-1; see Los Angeles County Opinion 525 (2012) (attorney may respond to former client’s internet posting if (1) “response does not disclose confidential information”; (2) response will not injure former client in matter involving the former representation; and (3) response is proportionate and restrained). An Arizona opinion concluded that the right to disclose was not limited to “a pending or imminent legal proceeding,” relying on a provision found in the Arizona rule (and in the ABA Model Rule) but not in the New York rule. Arizona Opinion 93-02 (reasoning that one category of cases within the exception, for a claim or defense "in a controversy" between the lawyer and the client, would include cases not covered by another category within the exception, for “allegations in any proceedings”).

http://www.nysba.org/CustomTemplates/Content.aspx?id=52969

10/12/2015
ETHICS OPINION 1052

CLE / CLE / CONTINUING LEGAL EDUCATION / HOME / EVENTS / STORE / CALENDAR / SCHEDULE / ASPX?EXCLUDEEVENTTYPE=X

SECTIONS & COMMITTEES / SECTIONS AND COMMITTEES / PUBLICATIONS / CUSTOM TEMPLATES / SECONDARY STANDARD / ASPX?ID=43579

PRACTICE RESOURCES / PRACTICE RESOURCES / LEADERSHIP & ADVOCACY / LEADERSHIP AND ADVOCACY / MEMBERSHIP / REVISED MEMBERSHIP / HOME / MEMBERS ONLY / CUSTOM TEMPLATES / SECONDARY STANDARD / ASPX?ID=2180

Home / Ethics Opinion 1052 (CustomTemplates/Content.aspx?id=55648)

New York State Bar Association
Committee on Professional Ethics

Opinion 1052 (3/25/15)

Topic: Compensating clients to rate lawyer on Internet website.

Digest: A lawyer may give clients a $50 credit on their legal bills if they rate the lawyer on an Internet website such as Avvo that allows clients to evaluate their lawyers, provided the credit against the lawyer's bill is not contingent on the content of the rating, the client is not coerced or compelled to rate the lawyer, and the ratings and reviews are done by the clients and not by the lawyer.

Rules: 7.1(a)-(d), 7.2(a), and 8.4(c)

FACTS

1. A lawyer would like more of his clients to rate him on Avvo, a website that allows clients to rate their lawyers with one to five stars. To rate a lawyer, a client would visit the Avvo website, look up the lawyer by name, and submit a review. A sample review might say, "I could not be more pleased with Ms. X. She is thorough, honest, caring and available. Her prices are reasonable compared to others. She specializes in elder law and knows her specialty," or "Attorney Z did a great job on my case. He was very upfront about what to expect and got very good results. Highly recommended." (Many reviews are longer.) Clients also rate the lawyer on a scale of 1 to 5 for five categories: "Overall rating," "Trustworthy," "Responsive," "Knowledgeable," and "Kept me informed," and clients either check or do not check a box saying that they would "recommend" the lawyer. (For more information about Avvo ratings and how they are calculated, see http://www.avvo.com/support/avvo_rating.)

2. After a client writes a review online, the review is read internally at Avvo before it is posted on the website. Once Avvo has approved a review, it will be posted under the heading "Client Reviews" on the attorney's page on the Avvo website and will become part of the attorney's profile. The inquiring attorney is apparently confident that if clients take the time to rate him, he will receive high ratings and positive reviews, which will help to boost his reputation and encourage other clients to hire him. The inquirer therefore wants to offer clients a $50 credit on their bills for legal fees if they rate him on Avvo. The credit would not be contingent on the content of a review, the scores in the ratings, or whether a client checks the box recommending the lawyer to others.

QUESTION

3. May a lawyer give clients a $50 credit on their legal bills if they rate the lawyer on an Internet website that allows clients to evaluate their lawyers?

OPINION

4. The inquiry raises issues under several provisions of the New York Rules of Professional Conduct (the "Rules"). We take these
issues in turn.

A. Rule 7.2(a). Giving a person something of value to recommend the lawyer

5. The first issue is whether giving clients a $50 credit against their legal bills if they rate the lawyer would violate Rule 7.2(a), which provides, in pertinent part, as follows:

A lawyer shall not compensate or give anything of value to a person or organization to recommend or obtain employment by a client, or as a reward for having made a recommendation resulting in employment by a client ....

Rule 7.2(a) also has certain exceptions that do not apply here.

6. Rule 7.2(a) does not apply because the inquirer is asking for a rating, not a recommendation. The inquirer says he will give a $50 credit to any client who rates the lawyer, without regard to the content of the rating and without regard to whether the client recommends the lawyer to others. A client thus remains free to give the lawyer a bad rating and remains free not to check the box saying that she would recommend the lawyer to others. Moreover, the inquirer is not making the $50 credit contingent on whether some future person retains the lawyer as a result of the rating. Thus, the credit is not a "reward" for making a recommendation "resulting in employment by a client."

7. If the inquirer made the credit contingent on receiving a positive review or high scores, or if the inquirer made the credit contingent on being retained by a new client as a result of the rating, then the credit would violate Rule 7.2(a). Those are not the facts before us.

B. Rules 7.1(a), (d), and (e) and Rule 8.4(c): Testimonials from clients

8. Rule 7.1(d)(3) allows lawyers to advertise testimonials from current and former clients – but Rule 7.1(e)(4) requires that "in the case of a testimonial or endorsement from a client with respect to a matter still pending, the client gives informed consent confirmed in writing." The term "testimonial" is not defined in the Rules of Professional Conduct, but the term "advertisement" is defined in Rule 1.0(e) as follows:

"Advertisement" means any public or private communication made by or on behalf of a lawyer or law firm about that lawyer or law firm's services, the primary purpose of which is for the retention of the lawyer or law firm. It does not include communications to existing clients or other lawyers. [Emphasis added.]

9. A client's freely given review or rating is not an "advertisement" within the definition in Rule 1.0(e) because the review is not made "by or on behalf" of the lawyer.

10. If the inquirer were to coerce or compel a client to rate the lawyer with respect to a pending matter, then the rating (i.e., testimonial) would be "on behalf of the lawyer, and would hence be an "advertisement" subject to Rule 7.1(e)(4). And if the lawyer, rather than the client, were to write the review or fill in the ratings, then they would be "by ... the lawyer," and would be advertisements under Rule 1.0(a) subject to Rule 7.1(a), which prohibits advertisements that are "false, deceptive or misleading." A rating that purports to be made by a client but was actually made by the lawyer would be deceptive and misleading (and perhaps false as well). See N.Y. State 661 (1994) ("a dramatization using a fictional client testimonial is unethical because it is inherently false, deceptive and misleading").

11. Moreover, a coerced rating would violate Rule 7.1(e)(4) because the lawyer would lack the client's "consent." Consent must be voluntary – it cannot be compelled. But according to the inquirer, clients can freely choose whether to rate the lawyer. The only inducement is a $50 credit to those who do so. That is not coercion or compulsion; it is an incentive. Cf. N.Y. State 873 (2011) (Rules of Professional Conduct do not prohibit an attorney from offering a prize to join the attorney's social network as long as the prize offer is not illegal).

12. Furthermore, Rule 8.4(c) provides that a lawyer or law firm shall not "engage in conduct involving dishonesty, fraud, deceit or misrepresentation." Even as to testimonials from former clients – which are not subject to Rule 7.1(e)(4)'s requirement of informed consent – a coerced rating, or one written by the lawyer, would constitute not only an advertisement subject to Rule 7.1(a) but also conduct involving deceit and misrepresentation. In violation of Rule 8.4(c), attempting to pass off the lawyer's words and opinions as the former client's. See Rule 7.1, Cmt. [6] ("all communications by lawyers, whether subject to the special rules governing lawyer advertising or not, are governed by the general rule that lawyers may not engage in conduct involving dishonesty, fraud, deceit or misrepresentation"); N.Y. State 873 ¶ 15 (2011) ("Whether or not the prize offer is an advertisement, the inquirer must be honest").

13. Since the inquirer has not asked about advertising the Avvo rating, we do not address whether Avvo ratings are "bona fide professional ratings" within the meaning of Rule 7.1(b)(1), or how other advertising provisions might apply if the inquirer were to advertise his Avvo rating. Nor do we address whether Rule 8.4(c), which prohibits a lawyer from engaging in conduct involving dishonesty, fraud, deceit or misrepresentation, requires the inquirer to disclose that he has given certain clients a $50 inducement to rate him on Avvo.
Finally, we do not address whether the inquirer’s plan complies with the Federal Trade Commission’s Guides Concerning the Use of Endorsements and Testimonials in Advertising, 16 C.F.R. Part 255. (The FTC Guides are available online at http://1.usa.gov/1CkwjJ.) Whether a lawyer’s conduct complies with FTC guidelines is a question of law beyond our jurisdiction.

CONCLUSION

14. A lawyer may give clients a $50 credit on their legal bills if they rate the lawyer on an Internet website such as Avvo that allows clients to evaluate their lawyers, provided the credit against the lawyer’s bill is not contingent on the content of the rating, the client is not coerced or compelled to rate the lawyer, and the ratings and reviews are done by the clients and not by the lawyer.

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