back to Screen-Friendly page

THE BAR ASSOCIATION OF SAN FRANCISCO

## OPINION 2014-1

[Issue date: January 2014]

**ISSUE:**

May an attorney respond to a negative online review by a former client alleging incompetence but not disclosing any confidential information where the former client's matter has concluded? If so, may the attorney reveal confidential information in providing such a response? Does the analysis change if the former client's matter has not concluded?

**DIGEST:**

An attorney is not ethically barred from responding generally to an online review by a former client where the former client's matter has concluded. However, the duty of confidentiality prevents the attorney from disclosing confidential information about the prior representation absent the former client's informed consent or waiver of confidentiality. This Opinion assumes the former client's posting does not disclose any confidential information and does not constitute a waiver of confidentiality or the attorney-client privilege.[1] While the online review could have an impact on the attorney's reputation, absent a consent or waiver, disclosure of otherwise confidential information is not ethically permitted in California unless there is a formal complaint by the client, or an inquiry from a disciplinary authority based on a complaint by the client. Even in situations where disclosure is permitted, disclosure should occur only in the context of the formal proceeding or inquiry, and should be narrowly tailored to the issues raised by the former client. If the matter previously handled for the former client has not concluded, depending on the circumstances, it may be inappropriate for the attorney to provide any substantive response in the online forum, even one that does not disclose confidential information.

**AUTHORITIES INTERPRETED:**

Business & Professions Code §6068(e); Rules of Professional Conduct, Rule 3-100; Evidence Code §§955, 958; ABA Model Rules, Rule 1.6.

**STATEMENT OF FACTS**

A former client has posted a review on a free public online forum that rates attorneys. The review does not disclose any confidential information but is negative and contains a discussion in which the former client makes general statements that Attorney mismanaged the client's case, did not communicate appropriately with the former client, provided sub-standard advice and was incompetent. Attorney wishes to respond to the negative review by posting a reply in the electronic forum; and, if permitted, discuss the details of Attorney's management of the case, the frequency and content of communications Attorney had with the former client and the advice Attorney provided to the former client and why Attorney believes the advice was appropriate under the circumstances.

**DISCUSSION [2]**

**A. Duty of Loyalty**

As fiduciaries, attorneys owe a duty of loyalty to their clients. *Flatt v. Sup.Ct. (Daniel)* (1994) 9 Cal.4th 275, 289. After conclusion of the attorney-client relationship, an attorney continues to owe a residual duty of loyalty to a former client, which is narrow in scope. *See Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 821 (the duty of loyalty continues after termination of the attorney-client relationship to the extent that a lawyer may not act in a manner that will injure the former client with respect to the matter involved in the prior representation); *see also Wutchumna Water Co. v. Bailey* (1932) 216 Cal. 564, 573-574 ("[A]n attorney is forbidden to do either of two things after severing his relationship with a former client. He may not do anything which will injuriously affect his former client in any matter in which he formerly represented him, nor may he at any time use against his former client knowledge or information acquired by virtue of the previous relationship.").

If the matter Attorney previously handled has concluded, responding to the former client's review through statements that do not disclose any confidential information would not typically constitute a breach of loyalty, even though Attorney's response might be deemed "adverse" to the former client. Simply responding to the review and denying the veracity or merit of the former client's assertions (without disclosing confidential information) would not be likely to injure the former client with respect to any work Attorney previously did, or to undermine such work. Attorney would not be attacking his or her prior work. To the contrary, Attorney would be supporting the merit of such work.

If, on the other hand, the matter Attorney previously handled has *not* concluded, a response, even one that does not involve the disclosure of any confidential information, may be inappropriate. Attorney should conduct a fact specific analysis, taking into consideration: (1) the status and nature of the on-going proceedings, (2) the content of the Attorney's contemplated response, and (3) any negative impact the response could have on the on-going proceedings. The Committee can foresee the possibility that, at least in some situations, a response, even one not containing confidential information, could potentially undermine the attorney's prior work. For example, a statement by Attorney that his management of the case was reasonable given the former client's likelihood of success (while not disclosing confidential facts) could suggest weakness in the former client's position, and could negatively influence the opposing party's willingness to settle or litigation strategy.

**B. The Duty of Confidentiality**

The scenario presented also implicates Attorney's duty of confidentiality to his former client. "'One of the principal obligations which bind an attorney is that of fidelity … maintaining inviolate the confidence reposed in him by those who employ him, and at every peril to himself to preserve the secrets of his client …. This obligation is a very high and stringent one.'" *Flatt v. Sup.Ct. (Daniel)* (1994) 9 Cal.4th 275, 289, *quoting Anderson v. Eaton* (1930) 211 Cal. 113, 116.

In California, the duty of confidentiality is codified in the State Bar Act (Cal. Bus. & Prof. C. §6000 et seq.) and embodied in the California Rules of Professional Conduct ("CRPC"), Rule 3-100. Pursuant to Bus. & Prof.C. §6068(e) an attorney must "maintain inviolate the confidence, and at every peril to himself or herself [] preserve the secrets, of his or her client." *See also* Rule 3-100(A) ("A member shall not reveal information protected from disclosure by Business & Professions Code section 6068, subdivision (e)(1) without the informed consent of the client, or as provided in paragraph (B) of this rule.").

Maintaining a client's "confidence" means the lawyer may not do anything to breach the trust reposed in him or her by the client. It is "not confined merely to non communication of facts learned in the course of professional employment; for the section separately imposes the duty to 'preserve the secrets of his client.'" *In re Soale* (1916) 31 Cal. 144, 153; *see also* Cal. State Bar Form. Opns. 1993-133, 1988-96, 1986-87 & 1981-58. "Secrets" refers to other information gained in the professional relationship the client has requested be held inviolate or the disclosure of which would be embarrassing or likely detrimental to the client. Cal. State Bar Form. Opns. 1993-133; Los Angeles Bar Ass'n Form. Opns. 452 (1988). The duty to protect client secrets applies to all information relating to client representation, whatever its source. Los Angeles Bar Ass'n Form.Opn. 436 (1985). It even encompasses matters of public record communicated in confidence that might cause a client or former client public embarrassment. *Matter of Johnson* (Rev.Dept. 2000) 4 Cal. State Bar Ct.Rptr. 179, 189.

"Confidence" also refers to information protected by the attorney-client privilege. *See* Los Angeles Bar Ass'n Form. Opns. 386 (1980), 466 (1991); Cal. State Bar Form. Opns. 1980-52 & 1976-37. However, the duty of confidentiality prohibits disclosure of a much broader body of information than that protected by the attorney-client privilege. *See Goldstein v. Lees* (1975) 46 Cal.App.3d 614, 621; *Industrial Indemnity Co. v. Great American Ins. Co.* (1977) 73 Cal.App.3d 529, 536; Cal. State Bar Form. Opns. 2003-161, 1993-133; *see also* CRPC 3-100, Discussion [2] ("The principle of client-lawyer confidentiality applies to information relating to the representation, whatever its source, and encompasses matters communicated in confidence by the client, and therefore protected by the attorney-client privilege, matters protected by the work product doctrine, and matters protected under ethical standards of confidentiality, all as established in law, rule and policy."). Thus, in California, whether information is privileged is not dispositive as to whether it is confidential and whether an attorney may voluntarily disclose such information.

The duty of confidentiality survives the conclusion of the attorney-client relationship. *See Wutchumna*, *supra*,216 Cal. 564, 571 ("The relation of attorney and client is one of highest confidence and as to professional information gained while this relation exists, the attorney's lips are forever sealed, and this is true notwithstanding his subsequent discharge by his client."); *David Welch Co. v. Erskine & Tulley* (1988) 203 Cal.App.3d 884, 891.

The factual information Attorney would like to disclose is information obtained during the course of the prior representation. It includes details regarding the management of the case, the frequency and content of communications with the former client, and advice provided by Attorney. Such information falls within the definition of a "confidence." It also falls within the definition of "secrets," as the former client would not likely want the information publicly disclosed. The proposed disclosure could be particularly detrimental to the client if the former client's action is ongoing.

Attorney's duty of confidentiality to the former client would therefore apply to all information Attorney possesses by virtue of the former representation including, but not limited to, privileged attorney-client communications and attorney work product. Absent consent of the former client, waiver or an exception to the duty of confidentiality and/or attorney-client privilege, Attorney has an affirmative obligation not to disclose otherwise confidential information,[3] and to assert the attorney-client privilege on behalf of the former client. *See* Ev.C. §955*; Glade v. Sup.Ct. (Russell)* (1978) 76 Cal.App.3d 738, 743. Whether an applicable exception to the duty of confidentiality and/or attorney-client privilege exists is discussed in detail below.

**C. The Self-Defense Exception**

Whether Attorney may disclose otherwise confidential information turns on whether there is an applicable exception to the duty of confidentiality or attorney-client privilege that would permit such disclosure. Unlike the ABA Model Rules of Professional Conduct, and the numerous jurisdictions that have adopted versions of the ABA Model Rules, California's rules of professional conduct do not have an express exception to the duty of confidentiality that permits a lawyer to disclose otherwise confidential information in disputes with a client or former client. *See, e.g.*, ABA Model Rule 1.6(b)(5) (a lawyer may reveal information relating to representation of a client 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 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"); *see also* Los Angeles Bar Ass'n Form. Opn. 525 (2012) (absent the client's waiver of confidentiality or privilege, there is no statutory exception to the duty of confidentiality or the attorney-client privilege that would permit an attorney to counter client accusations by disclosing confidential information where no litigation or arbitration is pending between the attorney and former client); Restatement (Third) the Law Governing Lawyers, §64 ("A lawyer may use or disclose confidential client information when and to the extent that the lawyer reasonably believes necessary to defend the lawyer or the lawyer's associate or agent against a charge or threatened charges by any person that the lawyer or such associate or agent acted wrongfully in the course of representing a client.").

**1. Cal. Evidence Code Section 958**

To the extent there is a "self-defense" exception in California, it is statutory and its scope and application are defined by case law. California Evidence Code §958 provides: "There is no privilege under this article as to a communication relevant to an issue of breach, by the lawyer or by the client, of a duty arising out of the lawyer-client relationship." California courts have generally applied this exception to situations where a client or former client asserts a legal claim against a lawyer, or the lawyer asserts a fee claim against the former client. *See, e.g.*, *Carlson, Collins, Gordon & Bold v. Banducci* (1967) 257 Cal.App.2d 212, 228 (action for fees brought by lawyer); *Smith, Smith & Kring v. Sup. Ct. (Oliver)* (1997) 60 Cal.App.4th 573, 580 (malpractice action by client); *Schlumberger Ltd. v. Sup.Ct. (Kindel & Anderson)* (1981) 115 Cal.App.3d 386, 392 (malpractice action by client); *see also Styles v. Mumbert* (2008) 164 Cal.App.4th

1163, 1168 (refusing to apply exception where no malpractice claim or fee dispute existed).
The rationale behind the "exception" is that when a client or attorney claims the other breached a duty arising out of the professional relationship, it would be "unjust" to allow the claimant to invoke the privilege so as to prevent the other from producing evidence in defense of the claim. *See* Cal. Ev. C. §958, Law Revision Commission Comments; *Glade*, *supra*,76 Cal.App.3d at 746.

In this situation, the former client has made assertions in a public forum suggesting Attorney violated his duty of communication, did not competently handle the case and provided services that were below the standard of care. Although the former client alleged Attorney breached professional duties to the former client, a formal legal claim or proceeding has not been brought against Attorney

The rationale supporting the exception arguably has merit even outside the presentation of a formal legal claim or proceeding. It is possible, for example, that the harm to Attorney from the online review could be as damaging to Attorney as a formal claim by the client (which might be refuted, dismissed, etc., on substantive legal grounds). The Committee notes that because Ev.C. §958 relates to the admissibility of evidence in the context of a legal proceeding, it is doubtful it would have any lawful application outside a formal legal or administrative proceeding.

**2. Model Rule 1.6**

The Model Rules, which are instructive, especially where the California rules of professional conduct are silent on a matter, suggest disclosure of otherwise confidential information may be appropriate in certain circumstances outside a formal legal proceeding. *See, e.g.*, ABA Model Rule 1.6, Comment [10] (the exception "does not require the lawyer to await 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."). [4]

At least one federal district court in California has adopted the Model Rule's self-defense exception (1.6(b)(5)) based on the premise that the California Rules of Professional Conduct contain no provision specifically governing self-defense and therefore the Model Rules are an "an appropriate standard to guide the conduct of members of its bar." *See In re Nat'l Mortg. Equity Corp. Mortg. Pool Certificates Sec. Litig.*, 120 FRD 687, 690-91 (C.D. Cal. 1988). The *National Mortgage* decision, however, decided whether a self-defense exception existed based on federal common law.

California state courts have rejected the argument that a privilege exception can exist outside the specific parameters of the Evidence Code. *See McDermott, Will & Emery v. Sup. Ct.*, 83 Cal.App.4th 378, 385 (2000) (rejecting privilege exception for shareholder derivative actions: "longstanding California case authority has rejected this application of the federal doctrine, noting it contravenes the strict principles set forth in the Evidence Code of California which precludes any judicially created exceptions to the attorney-client privilege."); Ev. C. §911 ("Except as otherwise provided by statute … (b) No person has a privilege to refuse to disclose any matter or refuse to produce any writing, object or other thing."). Accordingly, the Committee does not find *In re Nat'l Mortg*. and Model Rule 1.6 dispositive on the issue of whether a disclosure of otherwise confidential information would be permitted in California in a public online forum.

Moreover, comment [10] to Rule 1.6 (even if applicable) implicates a situation in which a "third party" claims an attorney is complicit in the wrongdoing of a client. As explained in detail in Los Angeles Bar Ass'n Form.Opn. 519 (2007), neither California case law nor Ev.C. §958 recognize a self-defense exception for claims made by third parties. Model Rule 1.6(b)(5) is broader than any self-defense exception recognized under California law. Moreover, the comment to Rule 1.6 has been applied only to those situations in which the third party has the authority to take action against the attorney and there is an imminent threat of such action with serious consequences. Here, no third party has made any inquiry, and it is not clear that a formal claim or disciplinary inquiry is imminent.

**3. Application of Exception to Ineffective Assistance of Counsel Claims**

Section 958 has been held applicable to a criminal defendant's claim of ineffective assistance of counsel in a habeas proceeding: "[a] trial attorney whose competence is assailed by his former client must be able to adequately defend his professional reputation, even if by doing so he relates confidences revealed to him by the client." *In re Gray* (1981) 123 Cal.App.3d 614, 616. This holding tends to support the proposition that Ev.C. §958 could apply outside a formal or direct action between the former client and attorney. However, in *Grey* the claim was still being made by the client in a formal legal proceeding, albeit not a civil or disciplinary proceeding against the attorney himself. Thus, *Grey* is not dispositive as to the issue of whether Ev.C. §958 can be applied outside the context of a formal legal proceeding.

The ABA Standing Committee on Ethics and Professional Responsibility suggests that under Model Rule 1.6(b)(5), disclosure of otherwise confidential information may not be appropriate outside a formal legal proceeding, or an inquiry from a regulatory or disciplinary authority, absent the informed consent of the client. ABA Form. Opn. 10-456. The Committee opines that Comment [10] to Rule 1.6 should be construed narrowly. The Committee addresses whether a former lawyer of a client claiming ineffective assistance of counsel can disclose otherwise confidential information in response to a prosecution request *prior* to a court supervised response by way of testimony or otherwise. The Committee concludes that under Rule 1.6(b)(5), a lawyer may have a reasonable need to disclose relevant client information in a judicial proceeding to prevent harm to the lawyer that may result from a finding of ineffective assistance of counsel, but it is highly unlikely that a "non-supervised" disclosure in response to a prosecution request would be justified. ABA Form. Opn. 10-456, p. 1.

The Committee emphasizes:

Outside judicial proceedings, the confidentiality duty is even more stringent. Even if information clearly is not privileged and the lawyer could therefore be compelled to disclose it in legal proceedings, it does not follow that the lawyer may disclose it voluntarily. In general, the lawyer may not voluntarily disclose any information, even non-privileged information, relating to the defendant's representation without the defendant's informed consent …. *A client's express or implied waiver of the attorney-client privilege has the legal effect of foregoing the right to bar disclosure of the client's prior confidential information in a judicial or similar proceeding. Standing alone, however, it does not constitute 'informed consent' to the lawyer's voluntary disclosure of client information outside such a proceeding*.

ABA Form. Opn. 10-456, p. 2 (emphasis added).

The Committee approves of disclosure reasonably necessary in advance of an actual proceeding in response to a party who credibly threatens to bring a civil, criminal or disciplinary claim against the lawyer, such as a prosecuting, regulatory or disciplinary authority, to try to persuade the party not to do so. The Committee cautions, however, that although the self-defense exception has broadened over time, it is a limited exception because "it is contrary to the fundamental premise that client-lawyer confidentiality ensures client trust and encourages the full and frank disclosure necessary to an effective representation." ABA Form. Opn. 10-456, p. 3. Thus, a lawyer may only act in self-defense under the exception to defend against charges that *imminently* threaten the lawyer with *serious* consequences. *Id.*; *see also* Restatement (Third) of the Law Governing Lawyers §64 cmt. c. A habeas proceeding is not a controversy between the client and lawyer, and the lawyer's disclosure is not necessary to establish a defense to a criminal charge or civil claim against the lawyer. ABA Form. Opn. 10-456, pp. 3-4; *see also* Model Rule 1.6(b)(5).

The Committee further acknowledges that the language of Rule 1.6(b)(5), permitting disclosure "to respond to allegations in any proceeding concerning the lawyer's representation of the client," permits a lawyer to defend him or herself as reasonably necessary against allegations of misconduct in proceedings "comparable to those involving criminal or civil claims against a lawyer." ABA Form. Opn. 10-456, p. 4. The Committee concludes that a voluntary disclosure to the prosecution outside a court-supervised proceeding would not be reasonably necessary: "It is not enough that the lawyer genuinely believes the particular disclosure is necessary; the lawyer's belief must be objectively reasonable." *Id.* Here, although Attorney has an interest in his or her reputation, a disclosure of confidential information is not necessary to establish a claim against the former client or to prevent the imposition of liability or some restriction on the Attorney's conduct.

As the Committee notes, the self-defense exception is tempered by a lawyer's obligation to take steps to limit "access to the information to the tribunal or other persons having a need to know it" and to seek "appropriate protective orders or other arrangements … to the fullest extent practicable." Model Rule 1.6.(b)(5), cmt. 14. That obligation is undermined if the disclosure is made in a public forum where there is no adjudicatory oversight: "[T]here would be a risk that trial counsel would disclose information that could not ultimately be disclosed in the adjudicative proceeding. Disclosure of such information might prejudice the defendant in the event of a retrial. Further, allowing criminal defense lawyers voluntarily to assist law enforcement authorities by providing them with protected client information might potentially chill some future defendants from fully confiding in their lawyers." ABA Form. Opn. 10-456, p. 5. A disclosure by Attorney in the online forum, raises similar concerns.

Here, Attorney's disclosure in a public online forum has no judicial supervision and is accessible to anyone. Although the former client's assertion could impact Attorney's reputation, it is the Committee's opinion that such potential impact, by itself, is not of a nature that reasonably requires Attorney to disclose in a public forum what would otherwise be confidential information. Attorney may seek to mitigate any potential impact from the negative review by submitting a response that generally disagrees with the former client's assertions and notes that Attorney is not at liberty to discuss details regarding confidential client matters unless the information comes within Bus. & Prof. C. §6068(e)(2). This approach strikes an appropriate balance between the rationale for the self-defense exception, the need to limit disclosures to information reasonably necessary to defend the lawyer, and the importance of maintaining a client's confidential information and promoting full and candid disclosure of information by clients to their attorneys.

**4. The Restatement Approach**

We believe this conclusion is also commensurate with the approach recommended in the Restatement (Third) of the Law Governing Lawyers. The Restatement looks to the concepts of "necessity" and "reasonableness" in determining what disclosure may be appropriate. 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 it 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.

Comment c to section 64 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 threat arises 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.
Here, although the former client has asserted that Attorney's conduct fell below the standard of care, the former client has not manifested an affirmative intent to bring a formal claim against Attorney. Even if such a claim were directly threatened, a response in the online forum would not be reasonably necessary to establish a defense or claim on behalf of Attorney. Attorney would have the ability to make an appropriate disclosure in the context of the impending legal proceeding. An additional online disclosure would not have any substantive impact on the issue of the lawyer's potential liability in the legal proceeding.

While comment f to section 64 provides that an attorney may, in appropriate circumstances, respond to an informal but "public" accusation, it appears limited to the context of responding to a letter of grievance to a disciplinary authority. In that context, the charge (albeit informal) has been made to a body that clearly has the authority to formalize and prosecute the charge. It is not clear the Restatement would permit disclosure in response to a public accusation that is not made to or before a body with some ability to impose liability or otherwise restrict the attorney's conduct. Notably, comment e of section 64 provides: "[t]he lawyer may divulge confidential client information only to those persons with whom the lawyer must deal in order to obtain exoneration or mitigation of the charges."

**5. Application of Exception to Facts Presented**

Here, the assertions against Attorney, albeit general in nature, go beyond casual charges not likely to be taken seriously by others. They have been posted on a forum that is publicly available and dedicated to providing reviews of attorneys. Absent a response from Attorney, it is possible that a party might give the review credence and question Attorney's professional skills, thus impacting his or her potential retention. Notwithstanding this fact, Attorney's proposed response would be in a public forum that has no ability to impose any restriction or liability on Attorney. The Committee does not believe applicable California law permits a lawyer to disclose otherwise confidential information in an online attorney review forum, absent client consent or a waiver.[5]

Disclosure is not, in the Committee's view, reasonably necessary, or sufficiently tailored to establishing a self-defense. The absence of the inclusion of any self-defense exception in California's Rules of Professional Conduct, the longstanding policy in California that precludes judicial exceptions to the attorney-client privilege, and the breadth of California's duty of confidentiality (which goes beyond the evidentiary privilege) is further support for the conclusion that Ev.C. § 958 would not apply under the facts presented.[6]

525. That opinion considered the situation of a former client posting adverse comments about a lawyer, where the client did not disclose any confidential information and no litigation or arbitration was pending between the lawyer and former client. The committee concluded that the attorney may publicly respond as long as he or she does not disclose any confidential information, does not injure the client with respect to the subject matter of the prior representation, and is “proportionate and restrained.”

**6. Any Permissible Response Must Be Narrowly Tailored to the Issues Raised by the Former Client**

Even where the self-defense exception applies and a response is reasonably necessary to establish a defense or claim on behalf of the attorney, the disclosure of any confidential information must be narrowly tailored to respond to the specific issues raised by the former client. In such situations, disclosure is therefore limited to relevant communications between the client and the attorney whose services gave rise to the breach of duty claim. *See Schlumberger Ltd.*, *supra*, 115 Cal.App.3d at 392; Los Angeles Bar Ass'n Form.Opn. 452 (1988) (on collecting a fee or defending against a malpractice action an attorney may disclose both confidential information and client secrets, but only to the extent necessary to the action"); *In re Rindlisbacher* (9th Cir. BP 1998) 225 B.R. 180, 183 (exception did not permit attorney to disclose in discharge proceeding client's admission that he had lied at dissolution trial; the attorney's disclosure was not relevant to the attorney's protection of his own rights against a breach of a duty by the debtor); *see also* Los Angeles Bar Ass'n Form.Opn. 519 (2007) (disclosure under section 958 must comply with the "relevancy" requirement of the section and the ethical directive that an attorney's disclosure pursuant to the exception be limited to the necessities of the case and its issues). Indeed, in California, disclosing confidential information not bearing on the issues of breach can subject a lawyer to discipline. *See Dixon v. State Bar* (1982) 32 Cal.3d 728, 735 (lawyer's declaration, in response to client lawsuit, that included gratuitous and embarrassing information about the client that "was irrelevant to any issues then pending before the court" and was found to have been made for the purposes of "harassing and embarrassing" the former client was grounds for discipline).

Even assuming Ev.C. §958 could apply in a public, non-legal forum, Attorney would have to limit any response to the general issues raised by the former client. In the Committee's view, disclosing the details and content of communications, the advice provided to the client, and the rationale for such advice, is not reasonably necessary to respond to and defend oneself from generalized assertions of malfeasance.

**CONCLUSION**

Attorney 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 owed to the former client does not prohibit a response, Attorney's on-going duty of confidentiality prohibits Attorney 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 an attorney), or by an attorney 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. If the matter previously handled for the former client has not concluded, it may be inappropriate under the circumstances for Attorney to provide any substantive response in the online forum, even one that does not disclose confidential information.

**Footnotes**

1. For purposes of this Opinion, "confidential information" is understood to include both attorney-client privileged information and information which, although not privileged, is nonetheless considered confidential under California Business & Professions Code section 6068(e)(1).

2. The Committee recognizes there are First Amendment implications with regard to the scenario presented in this Opinion. The First Amendment's application to this scenario is beyond the purview of this Committee. While not opining on the issue, the Committee does note that California case law has recognized the potential for limitations on an attorney's speech where such speech implicates the attorney's duties of loyalty or confidentiality to an existing or former client. *See, e.g.*, *Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811.

The Committee also recognizes that the scenario presented could raise tort issues with regard to the former client's or Attorney's speech. The Committee does not opine on such issues.

3.The Committee assumes the exception in Bus. & Prof. C. §6068(e) does not apply for the purpose of this opinion.

4. *See also* CRPC 1-100(A) ("Although not binding, opinions of ethics committees in California should be consulted by members for guidance on proper professional conduct. Ethics opinions and rules and standards promulgated by other jurisdictions and bar associations may also be considered."); *General Dynamics Corp. v. Sup. Ct.* (1994) 7 Cal.4th 1164, 1190, fn. 6; *Cho v. Sup. Ct.* (1995) 39 Cal.App.4th 113, 121, fn. 2.

5. The Los Angeles County Bar Association Professional Responsibility and Ethics Committee reached similar conclusions in Los Angeles Bar Ass'n Form. Opn. 525. That opinion considered the situation of a former client posting adverse comments about a lawyer, where the client did not disclose any confidential information and no litigation or arbitration was pending between the lawyer and former client. The committee concluded that the attorney may publicly respond as long as he or she does not disclose any confidential information, does not injure the client with respect to the subject matter of the prior representation, and is “proportionate and restrained.”

6. The Committee does not find L.A. County Bar Assoc. Formal Opinion 397 (1982) or State Bar of Arizona Opinion 93-02 dispositive.

L.A. County Bar Assoc. Formal Opinion 397 opines that where a former client has indicated that a malpractice action is being contemplated, an attorney may provide opposing counsel with a declaration that includes otherwise confidential information about the former client's knowledge regarding matters affecting a default judgment entered against the former client. The opinion, however, contains little substantive analysis, and is distinguishable since the disclosure was made in the context of a supervised legal proceeding in which the former client was asserting that it was "uninformed" with regard to the legal affairs being handled by the attorney. A finding by the court that the client was not appropriately informed could have a tangible effect on the attorney's potential exposure to the malpractice claim the former client affirmatively indicated he was contemplating.

State Bar of Arizona Opinion 93-02 concludes that an attorney can disclose otherwise confidential and privileged information to the author of a book regarding the murder trial of a former client, in response to assertions made by the former client to the author that the attorney had acted incompetently. The Arizona opinion involved an ethics rule patterned after Model Rule 1.6(d), which has not been adopted in California. The State Bar of Arizona concludes that limiting the exception's application to situations where there is a formal claim or threat of a formal claim would render the language in Rule 1.6(d) "to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client" largely "superfluous." Although Arizona's rule is patterned on Model Rule 1.6, its 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 Opn. 93-02, pp. 4-5 (Emphasis added). This language is *not* part of the Restatement as presently adopted.