

**LOS ANGELES COUNTY BAR ASSOCIATION
PROFESSIONAL RESPONSIBILITY AND ETHICS COMMITTEE**

OPINION NO. 525
December 6, 2012

**ETHICAL DUTIES OF LAWYERS IN CONNECTION WITH
ADVERSE COMMENTS PUBLISHED BY A FORMER CLIENT**

SUMMARY

This Opinion addresses whether, and if so how, an attorney may respond to a former client's adverse public comments about the attorney, when the former client has not disclosed any confidential information and there is no litigation or arbitration pending between the attorney and the former client. The Committee concludes that the attorney 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.

TABLE OF AUTHORITIES

Cases

Costco Wholesale Corp. v. Superior Court (2009) 47 Cal.4th 725

County of San Francisco v. Cobra Solutions, Inc. (2006) 38 Cal.4th 839

In the Matter of Dixon (Review Dept. 1999) 4 Cal. State Bar Ct. Rptr. 23

General Dynamics Corp. v. Superior Ct. (1994) 7 Cal.4th 1164

Oasis West Realty v. Goldman (2011) 51 Cal.4th 811

Oxy Res. California LLC v. Superior Court (2004) 115 Cal.App.4th 875

Styles v. Mumbert (2008) 164 Cal.App.4th 1163

Wutchumna Water Co. v. Bailey (1932) 216 Cal. 564

Statutes

California Business and Professions Code section 6068(e)

California Evidence Code section 912

California Evidence Code section 950, *et seq.*

Opinions

Los Angeles County Bar Ass'n Form. Opn. No. 396 (1982)

Los Angeles County Bar Ass'n Form. Opn. No. 452 (1982)

Los Angeles County Bar Ass'n Form. Opn. No. 498 (1999)

Los Angeles County Bar Ass'n Form. Opn. No. 519 (2007)

Cal. State Bar Form. Opn. 1983-71 (1983)

Rules

California Rules of Professional Conduct, Rule 3-100(A)

ABA Model Rules of Professional Conduct, Rule 1.6(b)(5)

Other Authorities

Restatement (Third) of the Law Governing Lawyers, section 64, comment e

FACTS

Attorney previously represented Former Client in a civil proceeding. Attorney no longer represents Former Client in any respect. Subsequent to the conclusion of the representation, Former Client posts a message on a website discussing lawyers, stating that Attorney was incompetent and over-charged him, and others should refrain from using Attorney. This Opinion assumes that no confidential information is disclosed in the message¹ and Former Client's conduct does not constitute a waiver of confidentiality or the attorney-client privilege.² There is no litigation or arbitration pending between Attorney and Former Client.

ISSUE

In what manner, if any, may Attorney publicly respond to disparaging public comments by Former Client, whether of malpractice or otherwise?

DISCUSSION

¹ For purposes of this Opinion, "confidential information" is defined to include both privileged information and information which, while not privileged, is nevertheless considered to be confidential under California Business and Professions Code section 6068(e)(1).

² This Opinion also assumes that the person making the website posting is a former client. The Opinion does not address those situations where the disparaging comment is posted by an unknown author.

An attorney “may not do anything which will injuriously affect [a] former client in any matter in which [the attorney] formerly represented [the client] ...” *Wutchumna Water Co. v. Bailey* (1932) 216 Cal. 564, 573-574. *See also Oasis West Realty v. Goldman* (2011) 51 Cal.4th 811, 821; *Styles v. Mumbert* (2008) 164 Cal.App.4th 1163, 1167 (“an attorney is forever forbidden from ... acting in a way which will injure the former client in matters involving such former representation.” [Citation omitted.]).³

An attorney also owes a duty of confidentiality to former clients as well as to current clients. California Business & Professions Code section 6068(e)(1) (it is the duty of an attorney “[t]o maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets of, his or her client.”); *see also* CRPC, Rule 3-100(A); *Wutchumna Water Co. v. Bailey, supra*, 216 Cal. at 573-574 (“nor may [the attorney] at any time use against [the] former client knowledge or information acquired by virtue of the previous relationship”); *Oasis West Realty v. Goldman, supra*, 51 Cal.4th at 821; *Styles v. Mumbert, supra*, 164 Cal.App.4th at 1167.

The attorney-client privilege under California Evidence Code section 950, *et seq.*, is not subject to the creation of exceptions other than as specified by statute. *See, e.g., Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725, 739; *OXY Res. California LLC v. Superior Court* (2004) 115 Cal.App.4th 874, 889 (courts may not “imply unwritten exceptions to existing statutory privileges.” [Internal citations omitted.] “The area of privilege ‘ “is one of the few instances where the Evidence Code precludes the courts from elaborating upon the statutory scheme.” ’ ” [Citation omitted.]

In the absence of waiver of confidentiality and the attorney-client privilege by Former Client (*see, e.g.,* Cal. Evid. Code § 912), there is no statutory exception to the duty of confidentiality under Business & Professions Code section 6068(e)(1) or the attorney-client privilege under Evidence Code section 950, *et seq.*, that would permit an attorney to defend himself or herself by disclosing confidences or privileged information.⁴ *See General Dynamics Corp. v. Superior Ct.* (1994) 7 Cal.4th 1164, 1190 (“Except in those rare instances when disclosure is explicitly permitted or mandated by an ethics code provision or statute, it is never the business of the lawyer to disclose publicly the secrets of the client”); *see also* Los Angeles County Bar Ass’n Form. Opn. No. 519 (there is no self-defense exception to the lawyer’s duty of confidentiality under Business & Professions Code section 6068(e) that would allow an attorney to disclose confidential client information to defend against a lawsuit brought by a non-client against the attorney).

³ It should be noted that, while instructive concerning the duties owed to a former client, none of the holdings of these three cases was based on facts involving an attorney’s response to a former client’s adverse public comments about the lawyer.

⁴ This Committee’s opinion in Los Angeles County Bar Ass’n Form. Opn. No. 396 (1982) is not to the contrary. In that opinion, the Committee opined that a lawyer, in a formal legal proceeding involving alleged malpractice by him, could provide a declaration disclosing certain privileged communications in order to rebut claims being made by a former client against the attorney. Unlike the factual scenario underpinning Opn. No. 396, this Opinion does not involve a judicial proceeding based upon a claim of malpractice or otherwise.

This Opinion assumes there has been no waiver of any confidential information Former Client provided to Attorney while Attorney represented Former Client. Thus, absent a statutory exception allowing Attorney to reveal confidential communications in response to Former Client's public statement, Attorney remains obligated to preserve Former Client's confidential information, and Attorney cannot disclose such information in response to that public statement unless authorized to do so by a court's ruling in a judicial proceeding.⁵

The bar on Attorney revealing confidential information in responding to Former Client's internet posting does not mean Attorney cannot respond at all. If Attorney does not disclose confidential or attorney-client privileged information, and does not act in a way that will injure Former Client in a matter involving the prior representation, he/she may respond.

However, the Attorney's response also must be proportionate and restrained. *See* Restatement (Third) of the Law Governing Lawyers, section 64, comment e (referencing a "proportionate and restrained" public response). In other words, not only must Attorney refrain from revealing any confidential information (because it is assumed that there has been no waiver by Former Client), and avoid saying anything that would injure Former Client in a matter related to the prior representation, he/she may say no more than is necessary to rebut the public statement made by Former Client. This rule has been recognized in other contexts where the extent of an attorney's ability to respond to a statement made by a former client has been considered. *See, e.g.*, Los Angeles County Bar Ass'n Form. Opn. No. 498 (1999) (lawyer may disclose confidential information in a fee dispute with a former client only if relevant to the dispute, if reasonably necessary due to an issue raised by the former client, and if the lawyer avoids unnecessary disclosure); Los Angeles County Bar Ass'n. Form. Opinion No. 452 (1988) (lawyer may file a creditor's claim in former client's bankruptcy proceeding but may not prosecute objections to discharge); *In the Matter of Dixon* (Review Dept. 1999) 4 Cal. State Bar Ct. Rptr. 23, 58-59 (former client's malpractice suit against lawyer does not wholly waive lawyer's duties under the lawyer-client privilege, but constitutes waiver only to the extent necessary to resolve the suit; attorney may not disclose more than is essential to preserve the attorney's rights.)

Therefore, under these circumstances, Attorney may respond to Former Client's internet posting, so long as:

- (1) Attorney's response does not disclose confidential information;
- (2) Attorney does not respond in a manner that will injure Former Client in a matter involving the former representation; and
- (3) Attorney's response is proportionate and restrained.

⁵ There are some authorities from outside California that suggest an exemption to an attorney's duties of loyalty and confidentiality may exist in certain circumstances when necessary in "self-defense." *See, e.g.*, Rule 1.6(b)(5) of the ABA Model Rules of Professional Conduct. It is important to bear in mind, however, that California has not adopted the ABA Model Rules, and they may be consulted for guidance only when there is no California rule directly applicable. *See, e.g., County of San Francisco v. Cobra Solutions, Inc.* (2006) 38 Cal.4th 839, 852; Cal. State Bar Formal Opn. 1983-71.

This Opinion is advisory only. The Committee acts on specific questions submitted *ex parte*, and its opinion is based on the facts set forth in the inquiry submitted.