Confidences Revealed

Defending Non-Client Charges

by Kim M. Jackson

Usually, an attorney reveals client confidences because a client has asserted a civil or Bar complaint. In those cases, the attorney-client privilege and duty of confidentiality are waived. A different concern arises, however, when the attorney's conduct in the course of his or her representation of a client is questioned by a third party to the relationship. For example, a party involved in a business relationship with the attorney's client might allege that it was defrauded by documents provided and prepared by the client, the attorney, or both. Other situations might involve an attorney defending against a claim of substandard conduct by an entity with the power to limit the attorney's practice before it. Frequently, the attorney finds him/herself involved in a civil or ethical claim that could affect the attorney's right to practice.

The rules regarding client confidentiality allow the attorney to defend him/herself without violating ethical rules, although rules do not permit unlimited disclosure for the attorney's benefit. The attorney must consider the client's interests, reveal only what is necessary, and limit disclosure to necessary parties and the least harmful conditions to the client.

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With the expansion of third-party claims against professionals, the conflict between defending claims or accusations and maintaining client confidences will only grow. The problem is worse when the client and the attorney are co-defendants, no claims exist between them, the client's defense is based (even in part) on blaming the attorney, and the client orders the attorney to protect all confidences. Attorneys must then decide whether to reveal confidences and be exposed to liability or to keep confidences and be exposed to liability. Fortunately for the attorney, the Model Rules permit a vigorous defense.

Rule 1.6 (b)(2) of the ABA Model Rules of Professional Conduct provides that an attorney may reveal "information relating to the 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:" *Compare, e.g.*, Georgia Rules of Professional Conduct, Rule 1.6(b)(1)(iii) (in which Rule 1.6 is modified, but which contains identical language as the above stated subsection of the rule).

Rule 1.6(b)(2) permits the attorney to reveal client confidences necessary to defend against a criminal charge or a civil claim "in which the client was involved." This provision does not require the criminal allegation or civil claim be brought by the client. Additionally, the attorney may "respond to allegations in any proceeding concerning the lawyer's representation of the client." Again, this confidentiality exception does not depend upon the client's involvement in the proceeding.

According to the Comments to the Model Rules, client confidentiality "should not prevent the lawyer from defending" against a civil, criminal, or professional disciplinary proceeding, based on a wrong "alleged by a third person." ABA Model Rule, 1.6, cmt. [19] (emphasis added). Where the attorney is involved in a legal claim involving the attorney's complicity in the client's conduct, the attorney "may respond to the extent the lawyer reasonably believes necessary to establish a defense." *Id.* While limiting the attorney to revelations the lawyer reasonably believes is necessary to establish the defense, this standard favors the attorney's rights over the client's.

An attorney clearly can defend him/herself against charges once a proceeding has been initiated. However, the attorney need not wait until a proceeding has begun. ABA Model Rule 1.6, cmt. [18]. Similar standards are provided in states operating under the Code. *See, e.g.*, Mass. Formal and Informal Opinions, No. 96-4 (attorney was advised that he may reveal the minimum amount of confidential information necessary to convince a prosecutor that the attorney had not committed any crime in the representation of an indicted client; applying the Code, but citing and relying on the Model Rule in reaching its decision).

The Comments to the ABA Model Rules also advise the attorney to inform her client of the claim and ask the client to respond.

> Where practicable and not prejudicial to the lawyer's ability to establish the defense, the lawyer should advise the client of the third party's assertion and request that the client respond appropriately. In any event, disclosure should be no greater than the lawyer reasonably believes is necessary to vindicate innocence, the disclosure

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should be made in a manner which limits access to the information to the tribunal or other persons having a need to know it, and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

ABA Model Rule 1.6, cmt. [19].

The Comments encourage the attorney to advise the client that a client's confidence may need to be disclosed before the disclosure, which gives the client an opportunity to protect its confidences by making disclosures that obviate the attorney's need to disclose or seeking protective orders. The attorney is also instructed to limit disclosures to the necessary parties and obtain protective orders as appropriate. None of this, however, is required if the attorney can establish that such safeguards were either "not practicable" or would "prejudice the lawyer's ability to establish the defense."

There has not been a great deal of litigation or ethical guidance on the application of Rule 1.6 (b)(2) or its state equivalent. What guidance there is has favored the rights of the attorney to establish defenses to accusations of wrongdoing. SC Bar Advisory Op. 94-23 (Attorney under investigation by the Social Security Administration for possible misconduct in connection with a disability claim may reveal such confidential information as may be necessary to respond to or defend against the allegations.); Ill. For. and Inf. Op. No. 94-10 (11/94) (The attorney would be permitted to reveal client confidences to defend himself from the accusation of wrongful conduct in support of a civil motion for new trial.); S.C. Bar Advisory Op. 94-24 (Attorney terminated by a director of a legal services agency for substandard performance may reveal client confidences in an appeal of the Director's decision to the agency board.); Mass. For. and Inf. Op. No. 96-4 (Attorney advised that client confidences could be revealed as necessary to stave off a criminal indictment.) Also, the disclosure of confidential information may be used to either establish "a claim." Thus, an attorney may be permitted to reveal client confidences to the extent reasonably necessary to pursue a fee or other claim against a former client. *See*, ABA Formal Op. 01-424 (Former in-house attorney may pursue a wrongful discharge claim against her former corporate employer, and may reveal necessary information subject to the considerations discussed in comments 18 and 19.); Ala. For. and Inf. Op. RO-00-01 (Same facts and findings as ABA Formal Op. 01-424.); S.C. Bar Ethics Advisory Op. 98-38 (Attorney may appear in Bankruptcy Court and reveal confidences as necessary to "defend" against client's discharge of attorney's claim for fees.). FD

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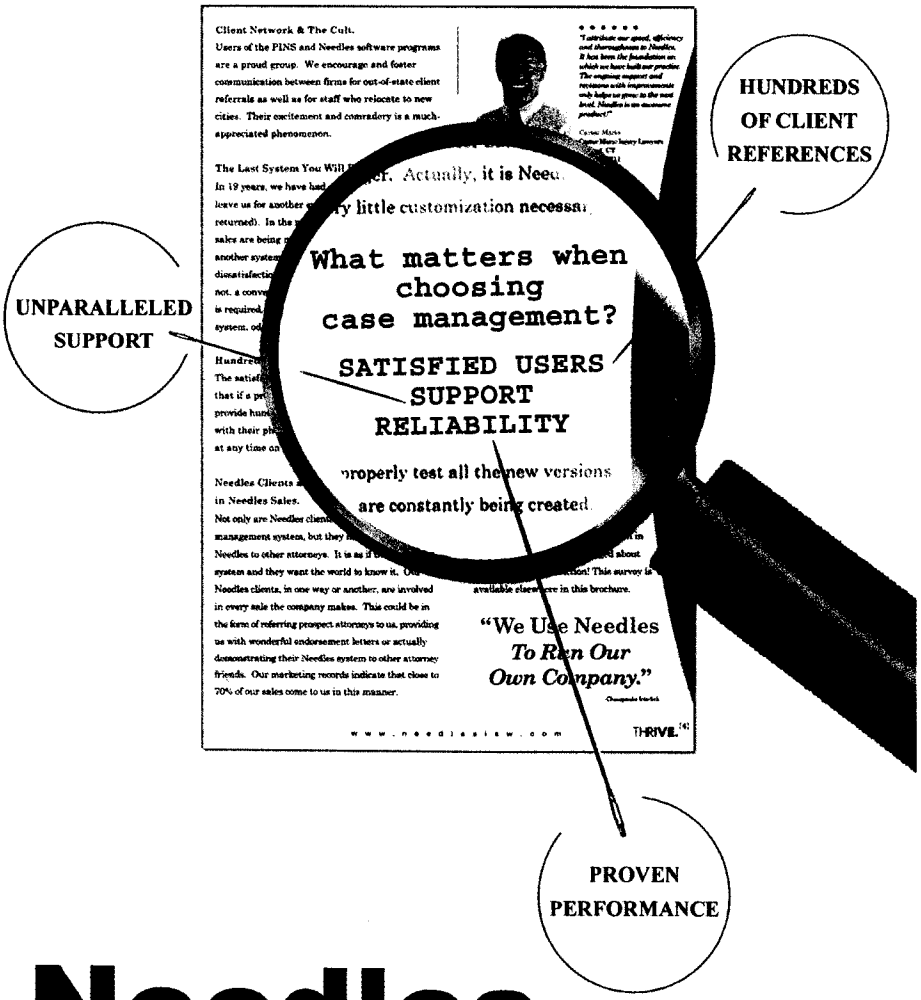

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