

LAWYERS’ RIGHT OF PROFESSIONAL SELF-DEFENSE AND ITS LIMITS

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I. INTRODUCTION

Lawyers may be accused of professional negligence, breach of fiduciary duty, ethics violations, and other forms of wrongdoing by clients, former clients, and third parties, with such accusations sometimes giving rise to lawsuits, disciplinary complaints, motions for sanctions in litigation, and even criminal actions.¹ Moreover, claims against lawyers frequently involve

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1. Claims of professional negligence (commonly described as legal malpractice) and breach of fiduciary duty are typically asserted—and in many jurisdictions can only be made—

aspects of the attorney–client relationship that the lawyer can either establish or refute only by disclosing confidential client information.² Lawyers’ ability to so defend themselves, however, conspicuously butts up against their confidentiality obligations to both clients and former clients.³ Lawyers’ confidentiality obligations have two critical sources. First, there is the attorney–client privilege, which generally shields confidential attorney–client communications made for the purpose of obtaining or providing legal advice or services against discovery by third parties.⁴ Second, the ethical duty of confidentiality embodied in Rule 1.6(a) of the Model Rules of Professional Conduct and state equivalents prohibits lawyers from revealing information related to clients’ representations except in specified circumstances.⁵

by lawyers’ clients and former clients because of privity requirements. Douglas R. Richmond, *Professional Responsibilities of Co-Counsel: Joint Venturers or Scorpions in a Bottle?*, 98 KY. L.J. 461, 463–64 (2009–2010).

2. RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS. § 64 cmt. b (AM. L. INST. 2000).

3. Lawyers’ duty of confidentiality is a foundational element of the attorney–client relationship. See *In re Skinner*, 740 S.E.2d 171, 173 (Ga. 2013) (“That a lawyer maintain confidentiality of information relating to the representation is a fundamental principle in the client-lawyer relationship.”); *In re Lane’s Case*, 889 A.2d 3, 12–13 (N.H. 2005) (calling a lawyer’s duty of confidentiality “the foundation of the attorney–client relationship”); *State v. Aiken*, 129 A.3d 87, 92 (Vt. 2015) (asserting that confidentiality is the “cornerstone of the attorney–client relationship”); *State ex rel. Ash v. Swope*, 751 S.E.2d 751, 756 (W. Va. 2013) (“[I]t is a fundamental principle in the lawyer–client relationship that the lawyer maintain the confidentiality of information relating to the representation of a client.”).

4. *In re Grand Jury Subpoena*, 2 F.4th 1339, 1345 (11th Cir. 2021) (quoting *In re Grand Jury* (G.J. No. 87-03-A), 845 F.2d 896, 897 (11th Cir. 1988)); *State ex rel. Kilroy Was Here, LLC v. Moriarty*, 633 S.W.3d 406, 413–14 (Mo. Ct. App. 2021); see *State ex rel. Hogan Lovells U.S., L.L.P. v. Ohio Dep’t of Rehab. & Corr.*, 179 N.E.3d 1150, 1155 (Ohio 2021).

5. MODEL RULES OF PRO. CONDUCT r. 1.6(a) (AM. BAR ASS’N 2021) (“A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).”). Some jurisdictions extend their confidentiality rules. For example, California’s version of Rule 1.6(a) states: “A lawyer shall not reveal information protected from disclosure by Business and Professions Code section 6068, subdivision (e)(1) unless the client gives informed consent, or the disclosure is permitted by paragraph (b) of this rule.” CAL. RULES OF PRO. CONDUCT r. 1.6(a) (2021). The statute cited in the rule makes it a lawyer’s duty “[t]o maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.” CAL. BUS. & PROF. CODE § 6068(e)(1) (2021). New York’s version of Rule 1.6(a) prohibits lawyers from “knowingly reveal[ing] confidential information,” subject to certain exceptions. N.Y. RULES OF PRO. CONDUCT r. 1.6(a) (2021). The rule defines confidential information as “information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney–client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential.” *Id.*

As essential as they are, neither the attorney–client privilege nor lawyers' duty of confidentiality is absolute.⁶ Perhaps contrary to common belief, the attorney–client privilege is chock-full of exceptions.⁷ The privilege is also easily waived.⁸ On the legal ethics front, a lawyer may disclose client information when the disclosure is impliedly authorized to carry out representation.⁹ Additionally, Model Rule 1.6(b) lists seven exceptions to lawyers' duty of confidentiality established in Model Rule 1.6(a).¹⁰

It seems only fair that the attorney–client privilege and duty of confidentiality should yield to allow a lawyer to reveal confidential client communications and other information related to a client's representation when the client alleges that the lawyer acted wrongfully during the representation.¹¹ Lawyers accused of professional negligence, breach of fiduciary duty, ethical violations, or other misconduct by clients or former clients should not be hamstrung in defending against those claims by their confidentiality obligations under the attorney–client privilege or the jurisdiction's version of Rule 1.6(a). Equity dictates that a client or former client cannot be permitted to wield the privilege or the lawyer's duty of confidentiality as both a sword and a shield to prevent the lawyer from effectively resisting the client's or former client's claims.¹²

6. See *In re Est. of Rabin*, 474 P.3d 1211, 1221 (Colo. 2020) (“Like the attorney–client privilege, a lawyer’s duty of confidentiality is not absolute.”); *In re Est. of McAleer*, 248 A.3d 416, 425 (Pa. Super. Ct. 2021) (“Though a mainstay of our legal system, the privilege is not absolute.”); *In re Law Sols. Chi. LLC*, 629 S.W.3d 124, 128 (Tenn. Ct. App. 2021) (noting that the attorney–client privilege is not absolute).

7. *United States v. Schwimmer*, 892 F.2d 237, 243 (2d Cir. 1989).

8. See *Fed. Election Comm’n v. Christian Coal.*, 178 F.R.D. 61, 71 (E.D. Va. 1998) (“The attorney–client privilege is like quicksilver. Initially difficult to grasp, once in one’s possession it can easily slide through one’s fingers.”); 1 EDNA S. EPSTEIN, *THE ATTORNEY–CLIENT PRIVILEGE AND THE WORK-PRODUCT DOCTRINE* 508 (6th ed. 2017) (“Waiver can and does occur by operation of the law, despite the fact that the waiver may have been unknowing, involuntary, and unintentional.”).

9. See MODEL RULES OF PRO. CONDUCT r. 1.6(a) (AM. BAR ASS’N 2021) (indicating that a lawyer may reveal information related to a client’s representation if the client gives informed consent).

10. *Id.* r. 1.6(b)(1)–(7).

11. See, e.g., *Qualcomm Inc. v. Broadcom Corp.*, No. 05CV1958-RMB (BLM), 2008 WL 638108, at *3 (S.D. Cal. Mar. 5, 2008) (holding that the lawyers had a due process right to defend themselves in a sanctions hearing concerning alleged discovery misconduct where the client, which was also a sanctions target, was “critical of the services and advice” the lawyers provided regarding discovery); *Salsman v. Brown*, 51 A.3d 892, 895 (Pa. Super. Ct. 2012) (concluding that the clients’ allegation that the lawyer did not have authority to settle their case constituted an attack on the lawyer’s “integrity and professionalism” that triggered the self-defense exception to the attorney–client privilege).

12. See *United States v. Bilzerian*, 926 F.2d 1285, 1292 (2d Cir. 1991) (“[T]he attorney–client privilege cannot at once be used as a shield and a sword. . . . A [party] may not use the

Similarly, a lawyer should be allowed to breach the privilege and duty of confidentiality where a third party makes a claim against a lawyer based on the lawyer's advice or legal services provided to the lawyer's client. The lawyer's communications with the client are almost sure to be critical evidence in such a case.¹³ Allowing the client to control operation of the privilege and the lawyer's duty of confidentiality could strip the lawyer of the ability to successfully defend the third-party action.

Fortunately, lawyers do enjoy a self-defense exception to the attorney–client privilege and duty of confidentiality—at least within limits. For example, § 64 of the *Restatement (Third) of the Law Governing Lawyers* provides:

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 charge by any person that the lawyer or such associate or agent acted wrongfully in the course of representing a client.¹⁴

Furthermore, under § 83(2) of the *Restatement*:

The attorney–client privilege does not apply to a communication that is relevant and reasonably necessary for a lawyer to employ in a proceeding: . . . (2) to defend the lawyer or the lawyer's associate or agent against a charge by any person that the lawyer, associate, or agent acted wrongfully during the course of representing a client.¹⁵

With respect to lawyers' duty of confidentiality, Model Rule 1.6(b)(5) provides:

privilege to prejudice his opponent's case") (citations omitted); *Molina v. State*, 87 P.3d 533, 539 (Nev. 2004) ("We will not permit a defendant to use insufficient communication with his attorney as a sword to assert a claim of ineffective assistance of counsel, but then use a claim of attorney–client privilege as a shield to protect the content of his conversations with his attorney."); *Pappas v. Holloway*, 787 P.2d 30, 36 (Wash. 1990) ("[T]he Holloways cannot counterclaim against Pappas for malpractice and at the same time conceal from him communications which have a direct bearing on this issue simply because the attorney–client privilege protects them. To do so would in effect enable them to use as a sword the protection which the Legislature awarded them as a shield.").

13. See 4 RONALD E. MALLEEN, *LEGAL MALPRACTICE* § 37:177, at 2038–39 (2022) (describing malicious prosecution claims and alleged violations of securities laws as illustrating this point).

14. RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS. § 64 (AM. L. INST. 2000).

15. *Id.* § 83(2).

A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary: . . . (5) 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 client¹⁶

Indeed, lawyers must be able to disclose confidential client information to defend themselves against claims of wrongdoing or be left uniquely defenseless in litigation and disciplinary proceedings.¹⁷ To deny lawyers a self-defense exception to the privilege and their duty of confidentiality would leave them “defenseless against false charges in a way unlike that confronting any other occupational group.”¹⁸ Basic principles of fairness and due process demand more.¹⁹

This Article examines the self-defense exception to the attorney–client privilege and lawyers' duty of confidentiality in ways intended to be useful to courts, lawyers, and scholars alike. It begins in Part II with a brief overview of the attorney–client privilege and lawyers' duty of confidentiality under Model Rule 1.6(a). Although the attorney–client privilege and lawyers' duty of confidentiality under Model Rule 1.6(a) and state equivalents sometimes overlap, they are separate and distinct doctrines.²⁰ Lawyers must understand their obligations under each.

Next, Part III discusses the self-defense exception to the attorney–client privilege. It starts by exploring whether the self-defense exception to the privilege is, in fact, an exception or rather a form of implied waiver. After concluding that courts' interpretation of the self-defense exception is more important than their nomenclature, Part III looks at the permissible scope of disclosure under the exception. “Scope” here has two aspects. The first aspect relates to the limits on lawyers' disclosures in terms of how much or what client information they may disclose in their defense, and to whom. The second aspect deals with the client's confidential communications with lawyers who were co-counsel with the defending lawyer in the underlying litigation or transaction or who succeeded the defending lawyer in the client's

16. MODEL RULES OF PRO. CONDUCT r. 1.6(b)(5) (AM. BAR ASS'N 2021).

17. See RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS. § 64 cmt. b (AM. L. INST. 2000).

18. *Id.*

19. *Solin v. O'Melveny & Myers, LLP*, 107 Cal. Rptr. 2d 456, 463–64 (Ct. App. 2001).

20. See *Tenet Healthcare Corp. v. La. Forum Corp.*, 538 S.E.2d 441, 445 (Ga. 2000) (“An attorney's ethical . . . duty to maintain client secrets is distinguishable from the attorney–client privilege.”).

representation. In a nutshell, does the self-defense exception expose the client's communications with those lawyers to discovery? Part III then examines the self-defense exception to the privilege where a lawyer is sued or otherwise attacked by a third-party rather than by the lawyer's client.

Finally, Part IV probes the self-defense exception to the duty of confidentiality contained in Model Rule of Professional Conduct 1.6(b)(5) and state equivalents. In the process, Part IV first dissects the requirement that a lawyer reasonably believe that a disclosure of client information is necessary to prepare a defense in a controversy with a client, to defend against a criminal charge or civil claim based on conduct in which the client was complicit, or to respond to an allegation of wrongdoing in a proceeding arising out of the lawyer's representation of the client. To help illustrate these requirements, this Part discusses a recent case involving a lawyer's responses to a former client's negative online reviews of the lawyer's performance. Relatedly, it then looks at the requirement of a client "controversy," which is foundational for one of the key circumstances in which the self-defense exception may apply. Part IV ends with an analysis of the self-defense exception's application in a proceeding to which the defending lawyer is not a party.

II. AN OVERVIEW OF THE ATTORNEY–CLIENT PRIVILEGE AND LAWYERS' ETHICAL DUTY OF CONFIDENTIALITY

Understanding lawyers' right to reveal confidential client communications and information related to a client's representation to defend against misconduct allegations necessarily begins with recognizing essential aspects of the attorney–client privilege and lawyers' ethical duty of confidentiality.

A. *The Attorney–Client Privilege*

The attorney–client privilege applies to "(1) a communication (2) made between privileged persons (3) in confidence (4) for the purpose of obtaining or providing legal assistance for the client."²¹ "Privileged persons" include the client or prospective client, the lawyer, agents of the client or prospective client and the lawyer who facilitate communications between them, and agents of the lawyer who assist in the client's representation.²² The attorney–client privilege promotes "full disclosure by a client to his or her attorney in

21. RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS. § 68 (AM. L. INST. 2000).

22. *Id.* § 70.

order to facilitate the rendering of legal advice.”²³ Recognizing the privilege also encourages the public to seek early legal assistance.²⁴ In light of those goals, the application of the privilege does not depend on a communication’s importance to the client’s representation.²⁵ In other words, a confidential lawyer–client communication may be privileged even though the legal advice conveyed ultimately is inconsequential to the representation.²⁶

The attorney–client privilege belongs to the client.²⁷ When lawyers invoke the privilege to safeguard confidential client communications, they are acting as the client’s agent—not as a holder of the privilege.²⁸ Likewise, if lawyers waive the privilege, they do so as their clients’ agents.²⁹ Only the client has the power to waive the privilege.³⁰

The privilege attaches to initial consultations between attorneys and prospective clients, even if the client does not retain the attorney.³¹ Thereafter,

23. *State v. Robinson*, 209 A.3d 25, 46 (Del. 2019) (footnote omitted); *see also State ex rel. Ash v. Swope*, 751 S.E.2d 751, 756 (W. Va. 2013) (“The rationale for the privilege is to encourage a client to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter.”).

24. *Genova v. Longs Peak Emergency Physicians, P.C.*, 72 P.3d 454, 461–62 (Colo. App. 2003) (quoting *Nat’l Farmers Union Prop. & Cas. Co. v. Dist. Ct.*, 718 P.2d 1044 (Colo. 1986)); *McLaughlin v. Freedom of Info. Comm’n*, 850 A.2d 254, 258 (Conn. App. Ct. 2004).

25. *See United States v. Ackert*, 169 F.3d 136, 139 (2d Cir. 1999) (referring to the importance of full disclosure).

26. *Id.*

27. *Johnson v. 27th Ave. Caraf, Inc.*, 9 F.4th 1300, 1313 (11th Cir. 2021) (quoting *Knox v. Roper Pump Co.*, 957 F.3d 1237, 1248 (11th Cir. 2020)); *Vidos v. State*, 239 S.W.3d 467, 474 (Ark. 2006); *Fiduciary Tr. Int’l of Cal. v. Klein*, 216 Cal. Rptr. 3d 61, 67 (Ct. App. 2017) (quoting *Costco Wholesale Corp. v. Super. Ct.*, 219 P.3d 736 (Cal. 2009)); *Affiniti Colo., LLC v. Kissinger & Fellman, P.C.*, 461 P.3d 606, 614 (Colo. App. 2019); *Selby v. O’Dea*, 156 N.E.3d 1212, 1243 (Ill. App. Ct. 2020); *Att’y Grievance Comm’n of Md. v. Powers*, 164 A.3d 138, 151 (Md. 2017); *Crosmun v. Trs. of Fayetteville Tech. Cmty. Coll.*, 832 S.E.2d 223, 236 (N.C. Ct. App. 2019) (quoting *In re Miller*, 584 S.E.2d 772, 788 (N.C. 2003)); *Burnham v. Cleveland Clinic*, 89 N.E.3d 536, 541 (Ohio 2016); *Commonwealth v. McCullough*, 201 A.3d 221, 242 (Pa. Super. Ct. 2018); *In re Mt. Hawley Ins. Co.*, 427 S.C. 159, 168, 829 S.E.2d 707, 712 (2019); *Arnoldy v. Mahoney*, 791 N.W.2d 645, 657 (S.D. 2010); *Pagliara v. Pagliara*, 614 S.W.3d 85, 88 (Tenn. 2020); *In re XL Specialty Ins. Co.*, 373 S.W.3d 46, 49 (Tex. 2012); *WyoLaw, LLC v. Off. of Att’y Gen., Consumer Prot. Unit*, 486 P.3d 964, 979 n.3 (Wyo. 2021).

28. *See* 1 THOMAS E. SPAHN, *THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK PRODUCT DOCTRINE: A PRACTITIONER’S GUIDE* 42 (2013).

29. *See S.F. Residence Club, Inc. v. Baswell-Guthrie*, 897 F. Supp. 2d 1122, 1216 (N.D. Ala. 2012) (illustrating this point).

30. *People v. Cortez-Gonzalez*, 506 P.3d 835, 843 (Colo. 2022); *State v. Miller*, 427 P.3d 907, 935 (Kan. 2018); *Girl Scouts-W. Okla., Inc. v. Barringer-Thomson*, 252 P.3d 844, 847 (Okla. 2011); *Crosmun*, 832 S.E.2d at 236; *In re Cook*, 597 S.W.3d 589, 597 (Tex. App. 2020); *WyoLaw*, 486 P.3d at 979 n.3.

31. *Bivins v. Stein*, 759 F. App’x 777, 783 (11th Cir. 2018) (applying Florida law); *Bank of Am. v. Super. Ct.*, 151 Cal. Rptr. 3d 526, 543–44 (Ct. App. 2013); *Popp v. O’Neil*, 730 N.E.2d

the client may invoke the privilege at any time during the attorney–client relationship or after the relationship terminates.³² The privilege even survives the client’s death.³³

As important as the attorney–client privilege unquestionably is, there is no blanket privilege covering all attorney–client communications.³⁴ The party asserting the privilege generally bears the burden of establishing its application to a communication.³⁵ Whether the privilege attaches to a communication is a question of fact.³⁶

506, 511 (Ill. App. Ct. 2000); *Lovell v. Winchester*, 941 S.W.2d 466, 467 (Ky. 1997); *Mixon v. State*, 224 S.W.3d 206, 212 (Tex. Crim. App. 2007).

32. See *O’Boyle v. Borough of Longport*, 94 A.3d 299, 309 (N.J. 2014) (noting that the privilege survives the termination of the attorney–client relationship); *CLL Acad., Inc. v. Acad. House Council*, 231 A.3d 884, 888 (Pa. Super. Ct. 2020) (“Notably, the attorney–client privilege does not end when representation ceases.”).

33. *Swidler & Berlin v. United States*, 524 U.S. 399, 407 (1998) (quoting *United States v. Osborn*, 561 F.2d 1334 (9th Cir. 1977)); *In re Est. of Rabin*, 474 P.3d 1211, 1218 (Colo. 2020); *Zook v. Pesce*, 91 A.3d 1114, 1119 (Md. 2014); *Morrison v. State*, 575 S.W.3d 1, 26 (Tex. App. 2019).

34. *DCP Midstream, LP v. Anadarko Petrol. Corp.*, 303 P.3d 1187, 1199 (Colo. 2013); *In re LeFande*, 919 F.3d 554, 563 (D.C. Cir. 2019) (quoting *In re Lindsey*, 158 F.3d 1263, 1270 (D.C. Cir. 1998)); *WyoLaw*, 486 P.3d at 977.

35. *Jacobson Warehouse Co. v. Schnuck Mkts., Inc.*, 13 F. 4th 659, 676 (8th Cir. 2021) (applying Missouri law); *Cencast Servs., L.P. v. United States* 91 Fed. Cl. 496, 502 (2010); *Clements v. Bernini ex rel. Cnty. of Pima*, 471 P.3d 645, 650–51 (Ariz. 2020); *O&C Creditors Grp. v. Stephens & Stephens XII, LLC*, 255 Cal. Rptr. 3d 596, 609 (Ct. App. 2019); *Fox v. Alfini*, 432 P.3d 596, 600 (Colo. 2018); *Harrington v. Freedom of Info. Comm’n*, 144 A.3d 405, 413 (Conn. 2016); *In re Appraisal of Dole Food Co.*, 114 A.3d 541, 561 (Del. Ch. 2014) (quoting *Moyer v. Moyer*, 602 A.2d 68, 72 (Del. 1992)); *Lender Processing Servs., Inc. v. Arch Ins. Co.*, 183 So. 3d 1052, 1059 (Fla. Dist. Ct. App. 2015); *Kirk v. Ford Motor Co.*, 116 P.3d 27, 34 (Idaho 2005); *Collins v. Braden*, 384 S.W.3d 154, 161, 163 (Ky. 2012); *Maldonado v. Kiewit La. Co.*, 152 So. 3d 909, 927 (La. Ct. App. 2014); *Harris Mgmt., Inc. v. Coulombe*, 151 A.3d 7, 16 (Me. 2016); *Att’y Gen. v. Facebook, Inc.*, 164 N.E.3d 873, 885 (Mass. 2021); *State ex rel. AMISUB, Inc. v. Buckley*, 618 N.W.2d 684, 694 (Neb. 2000); *State v. Kibby*, 169 A.3d 460, 463–64 (N.H. 2017); *Bhandari v. Artesia Gen. Hosp.*, 317 P.3d 856, 860 (N.M. Ct. App. 2013); *Ambac Assurance Corp. v. Countrywide Home Loans, Inc.*, 57 N.E.3d 30, 34–35 (N.Y. 2016); *Glob. Textile All., Inc. v. TDI Worldwide, LLC*, 847 S.E.2d 30, 34 (N.C. 2020); *State v. Tench*, 123 N.E.3d 955, 999 (Ohio 2018); *BouSamra v. Excelsa Health*, 210 A.3d 967, 982–83 (Pa. 2019); *In re Mt. Hawley Ins. Co.*, 427 S.C. 159, 168, 829 S.E.2d 707, 713 (2019); *In re E.I. DuPont de Nemours & Co.*, 136 S.W.3d 218, 223 (Tex. 2004); *Newman v. Highland Sch. Dist. No. 203*, 381 P.3d 1188, 1191 (Wash. 2016); *State ex rel. HCR Manorcare, LLC v. Stucky*, 776 S.E.2d 271, 282 (W. Va. 2015); *Dishman v. First Interstate Bank*, 362 P.3d 360, 367 (Wyo. 2015).

36. *Kerner v. Super. Ct.*, 141 Cal. Rptr. 3d 504, 529 (Ct. App. 2012); *State ex rel. Koster v. Cain*, 383 S.W.3d 105, 118 (Mo. Ct. App. 2012).

Finally, for now, courts narrowly or strictly construe the attorney–client privilege because it limits full disclosure of the truth.³⁷ For example, the privilege ordinarily does not protect a client’s identity.³⁸ Although the privilege protects the content of attorney–client communications from disclosure, it does not prevent disclosure of the facts communicated.³⁹ Those facts remain discoverable by other means.⁴⁰ Nor does the attorney–client privilege shield from discovery communications generated or received by a

37. *United States v. Ivers*, 967 F.3d 709, 716 (8th Cir. 2020) (quoting *Fisher v. United States*, 425 U.S. 391, 403 (1976)); *State v. Kosuda-Bigazzi*, 250 A.3d 617, 640 (Conn. 2020); *Hill, Kertscher & Wharton, LLP v. Moody*, 839 S.E.2d 535, 539 (Ga. 2020); *Ctr. Partners, Ltd. v. Growth Head GP, LLC*, 981 N.E.2d 345, 356 (Ill. 2012); *State v. Gonzalez*, 234 P.3d 1, 10 (Kan. 2010); *Clair v. Clair*, 982 N.E.2d 32, 40 (Mass. 2013); *In re Costs & Att’y Fees*, 645 N.W.2d 697, 704 (Mich. Ct. App. 2002); *Nelson v. City of Billings*, 412 P.3d 1058, 1069 (Mont. 2018); *Ambac Assurance Corp.*, 57 N.E.3d at 34; *Walton v. Mid-Atl. Spine Specialists, P.C.*, 694 S.E.2d 545, 549 (Va. 2010) (quoting *Commonwealth v. Edwards*, 370 S.E.2d 296, 301 (Va. 1988)).

38. *Margules v. Beckstedt*, 142 N.E.3d 325, 331 (Ill. App. Ct. 2019); *Pales v. Fedor*, 113 N.E.3d 1019, 1029 (Ohio Ct. App. 2018); *In re Conduct of Conry*, 491 P.3d 42, 58 (Or. 2021).

39. See *SodexoMAGIC, LLC v. Drexel Univ.*, 291 F. Supp. 3d 681, 685 (E.D. Pa. 2018); *Kan. City Power & Light Co. v. United States*, 139 Fed. Cl. 546, 560 (Fed. Cl. 2018); *Ex parte Alfa Ins. Corp.*, 284 So. 3d 891, 907 (Ala. 2019); *Hagans v. Gatorland Kubota, LLC/Sentry Ins.*, 45 So. 3d 73, 76 (Fla. Dist. Ct. App. 2010); *Collins v. Braden*, 384 S.W.3d 154, 159 (Ky. 2012); *Wynn Resorts, Ltd. v. Eighth Jud. Dist. Ct.*, 399 P.3d 334, 341 (Nev. 2017); *W. Horizons Living Ctrs. v. Feland*, 853 N.W.2d 36, 41 (N.D. 2014); *DeCurtis v. Visconti, Boren & Campbell, Ltd.*, 152 A.3d 413, 424 (R.I. 2017); *Snow, Christensen & Martineau v. Lindberg*, 299 P.3d 1058, 1070 (Utah 2013); *Newman*, 381 P.3d at 1191. As a California court thoughtfully explained:

[T]he privilege . . . may not be used to shield facts, as opposed to communications, from discovery. Relevant facts may not be withheld merely because they were incorporated into a communication involving an attorney, and knowledge that is not otherwise privileged does not become so by being communicated to an attorney. On the other hand, the privilege bars discovery of a privileged communication irrespective of whether it includes unprivileged material

Palmer v. Super. Ct., 180 Cal. Rptr. 3d 620, 629 (Ct. App. 2014) (citations omitted).

40. *Collins*, 384 S.W.3d at 159 (noting that “such facts are still discoverable through other discovery tools like depositions”).

lawyer acting in some other capacity,⁴¹ or communications in which a lawyer furnishes business advice rather than legal advice.⁴²

B. Lawyers' Ethical Duty of Confidentiality

Much like the attorney–client privilege, rules of professional conduct governing confidentiality are intended to encourage clients to trust their lawyers and to be candid with them.⁴³ Lawyers' duty of confidentiality, although not absolute,⁴⁴ is very broad.⁴⁵ Lawyers' duty of confidentiality attaches to initial consultations with prospective clients even if no attorney–client relationship results⁴⁶ and continues after a representation concludes.⁴⁷ Again like the attorney–client privilege, the duty of confidentiality survives the client's death.⁴⁸ Consistent with its purposes, the duty of confidentiality

41. *See, e.g., G & S Invs. v. Belman*, 700 P.2d 1358, 1365 (Ariz. Ct. App. 1984) (“The privilege does not apply where one consults an attorney not as a lawyer but as a friend or business advisor.”); *Palmer*, 180 Cal. Rptr. at 628 (“[N]o attorney-client relationship arises for purposes of the privilege if a person consults an attorney for nonlegal services or advice in the attorney’s capacity as a friend, rather than in his or her professional capacity as an attorney.”); *Nylen v. Nylen*, 873 N.W.2d 76, 80–81 (S.D. 2015) (rejecting the defendant’s claim of attorney–client privilege where the defendant communicated with the lawyer as a friend); *State v. Jackson*, 444 S.W.3d 554, 598–01 (Tenn. 2014) (upholding the trial court’s determination that the attorney–client privilege did not attach because the lawyer was acting as a friend and not as a lawyer).

42. *Adair v. EQT Prod. Co.*, 285 F.R.D. 376, 380 (W.D. Va. 2012) (applying Virginia law); *Costco Wholesale Corp. v. Super. Ct.*, 219 P.3d 736, 743 (Cal. 2009); *Morris v. Spectra Energy Partners (DE)*, No. 12-110 VCG, 2018 WL 2095241, at *2 (Del. Ch. May 7, 2018); *Gillard v. AIG Ins. Co.*, 15 A.3d 44, 78 n.8 (Pa. 2011).

43. *Honolulu Civil Beat Inc. v. Dep’t of Att’y Gen.*, 463 P.3d 942, 955 (Haw. 2020); *In re Disciplinary Proc. Against Schafer*, 66 P.3d 1036, 1041 (Wash. 2003).

44. *In re Est. of Rabin*, 474 P.3d 1211, 1221 (Colo. 2020); *Commonwealth v. Downey*, 793 N.E.2d 377, 382 (Mass. App. Ct. 2003).

45. *See People v. Braham*, 470 P.3d 1031, 1044 (Colo. 2017); *In re Bryan*, 61 P.3d 641, 656 (Kan. 2003).

46. Depending on the jurisdiction, a lawyer may owe *prospective* clients a more limited duty of confidentiality than clients. *See* MODEL RULES OF PRO. CONDUCT r. 1.18(b) (AM. BAR ASS’N 2021) (limiting lawyers’ duty of confidentiality to prospective clients).

47. *City & Cnty. of S.F. v. Cobra Sols., Inc.*, 135 P.3d 20, 25 (Cal. 2006); *Braham*, 470 P.3d at 1044; *Elkind v. Bennett*, 958 So. 2d 1088, 1090–91 (Fla. Dist. Ct. App. 2007); *In re Skinner*, 740 S.E.2d 171, 172 (Ga. 2013); *Goodrich v. Goodrich*, 960 A.2d 1275, 1279 (N.H. 2008); *Keller v. Loews Corp.*, 894 N.Y.S.2d 376, 377 (App. Div. 2010); *Cont’l Res., Inc. v. Schmalenberger*, 656 N.W.2d 730, 735 (N.D. 2003); *Kala v. Aluminum Smelting & Refin. Co.*, 688 N.E.2d 258, 262 (Ohio 1998); *Foley-Ciccantelli v. Bishop’s Grove Condo. Ass’n*, 797 N.W.2d 789, 812 n.68 (Wis. 2011) (quoting *T.C. Theatre Corp. v. Warner Bros. Pictures*, 113 F. Supp. 265, 268 (S.D.N.Y. 1953)).

48. *Kelley v. Buckley*, 950 N.E.2d 997, 1009 (Ohio Ct. App. 2011).

exists regardless of a request to that effect by the client.⁴⁹ Lawyers must vigorously protect the confidentiality of client information.⁵⁰

Despite some overlap,⁵¹ and as noted earlier, the attorney–client privilege and duty of confidentiality are discrete concepts or doctrines.⁵² Lawyers' duty of confidentiality is broader than the attorney–client privilege.⁵³ Under Model Rule 1.6(a), a lawyer's duty of confidentiality attaches not merely to information communicated in confidence by the client to the lawyer and vice versa but to all information related to the representation, regardless of the source.⁵⁴ For instance, lawyers' duty of confidentiality prevents them from revealing clients' identities or facts that clients share with them,⁵⁵ even though such information generally is not privileged.⁵⁶ Furthermore, lawyers may breach their duty of confidentiality under Model Rule 1.6(a) by revealing information available from sources other than their clients, including public information.⁵⁷ This last principle reflects the recognition that client

49. See *Hurley v. Hurley*, 923 A.2d 908, 911 (Me. 2007).

50. *In re Venie*, 395 P.3d 516, 524 (N.M. 2017).

51. See *State v. Gonzalez*, 234 P.3d 1, 11 (Kan. 2010) (“By definition, all communications protected by the attorney-client privilege will be confidential and covered by the ethical duty. . . . That overlap is the reason why the ethical duty of confidentiality requires an attorney to invoke the attorney-client privilege when it is applicable.”) (citation omitted).

52. See *Tenet Healthcare Corp. v. La. Forum Corp.*, 538 S.E.2d 441, 445 (Ga. 2000) (“An attorney’s ethical . . . duty to maintain client secrets is distinguishable from the attorney-client privilege.”).

53. *Elijah W. v. Super. Ct.*, 156 Cal. Rptr. 3d 592, 599 (Ct. App. 2013); *In re Est. of Rabin*, 474 P.3d 1211, 1219 (Colo. 2020); *Adams v. Franklin*, 924 A.2d 993, 996–97 (D.C. 2007); *In re Rules of Pro. Conduct & Insurer Imposed Billing Rules & Procs.*, 2 P.3d 806, 822 (Mont. 2000); *Pellegrino v. Oppenheimer & Co.*, 851 N.Y.S.2d 19, 23 (App. Div. 2008); *In re Conduct of Conry*, 491 P.3d 42, 52 (Or. 2021); *Off. of Disciplinary Couns. v. Baldwin*, 225 A.3d 817, 843 (Pa. 2020); ABA Comm. on Ethics & Pro. Resp., Formal Op. 480, at 2 (2018) [hereinafter ABA Formal Op. 480].

54. *State v. Tensley*, 955 So. 2d 227, 242 (La. Ct. App. 2007); *State ex rel. Okla. Bar Ass’n v. McGee*, 48 P.3d 787, 791 (Okla. 2002); *State v. Meeks*, 666 N.W.2d 859, 868 (Wis. 2003); ABA Formal Op. 480, *supra* note 53, at 3; MODEL RULES OF PRO. CONDUCT r. 1.6 cmt. 3 (AM. BAR ASS’N 2021).

55. See ABA Formal Op. 480, *supra* note 53, at 2 (noting that “[e]ven client identity is protected under Model Rule 1.6”); Utah Eth. Op. 21-01, 2021 WL 2188317, at *1 (Utah State Bar, Ethics Advisory Op. Comm. 2021) (“[A] lawyer may not reveal the identity of her client except to the extent allowed by Rule 1.6(a) or Rule 1.6(b).”). *But see* *Abdool v. Bondi*, 141 So. 3d 529, 553 (Fla. 2014) (“[A]n attorney may generally disclose the identity of a client or the generalities of a conflict without disclosing confidential information or violating the duty of confidentiality.”).

56. For support, please refer to *supra* notes 38–39 and accompanying text.

57. See, e.g., *People v. Braham*, 470 P.3d 1031, 1044 (Colo. 2017) (stating that Rule 1.6 “contains no exception permitting the disclosure of previously disclosed or publicly available information”); *In re Anonymous*, 654 N.E.2d 1128, 1129–30 (Ind. 1995) (holding that the lawyer violated Rule 1.6(a) by revealing information “readily available from public sources”);

information available somewhere in the public domain may not be known to, or ascertainable by, those from whom the client might want it kept.⁵⁸ Client information assumed to be known by others may, in fact, not be.

In conclusion, it is important to recognize that lawyers' duty of confidentiality does not have the evidentiary or procedural effect of the attorney–client privilege.⁵⁹ For example, lawyers cannot rely on their duty of confidentiality to resist subpoenas seeking client communications,⁶⁰ to quash administrative summonses seeking client information,⁶¹ to refuse to respond

Iowa Sup. Ct. Att'y Disciplinary Bd. v. Marzen, 779 N.W.2d 757, 766 (Iowa 2010) (holding that “confidentiality is breached when an attorney discloses information learned through the attorney–client relationship even if that information is otherwise publicly available”); *In re Bryan*, 61 P.3d 641, 651, 656 (Kan. 2003) (explaining that a former client’s alleged “history of making false claims” had been publicly disclosed in court pleadings did not mean that the lawyer’s disclosure regarding the same to a store manager and a loss prevention manager was not the disclosure of information protected as confidential by Rule 1.6); *Sullivan Cnty. Reg’l Refuse Disposal Dist. v. Town of Acworth*, 686 A.2d 755, 758 (N.H. 1996) (“[A]n attorney’s duty to protect confidential information gleaned from a client does not disappear simply because portions of that information have been included in public documents or discussed in public forums.”); *Law. Disciplinary Bd. v. McGraw*, 461 S.E.2d 850, 861–62 (W. Va. 1995) (“The ethical duty of confidentiality is not nullified by the fact that the information is part of a public record or by the fact that someone else is privy to it.”); ABA Formal Op. 480, *supra* note 53, at 3–4. *But see In re Lim*, 210 S.W.3d 199, 201–02 (Mo. 2007) (reasoning that the lawyer’s letter to the INS saying that his former clients “‘lack[ed] the good moral character needed to obtain immigration benefits’” because they had “‘lied and deceived’” him and owed him more than \$7,000 did not violate Rule 1.6(a) in part because “the outstanding debt was a matter of public record by virtue of the [lawyer’s] collection action”); *Hunter v. Va. State Bar ex rel. Third Dist. Comm.*, 744 S.E.2d 611, 620 (Va. 2013) (concluding that the lawyer had a First Amendment right to blog about his criminal defense clients’ court cases without their consent and that doing so did not violate the lawyer’s duty of confidentiality under Rule 1.6).

58. See ABA Comm. on Ethics & Pro. Resp., Formal Op. 479, at 5 (2017) (discussing Model Rule 1.9(c)(1) and stating that “[i]nformation that is publicly available is not necessarily generally known”); NY Eth. Op. 1125, 2017 WL 2639716, at *1 (N.Y. State Bar Ass’n, Comm. on Pro. Ethics 2017) (discussing the New York version of Rule 1.6 and stating that “information is not ‘generally known’ simply because it is in the public domain or available in a public file”).

59. See *Adams v. Franklin*, 924 A.2d 993, 999 n.6 (D.C. 2007).

60. See, e.g., *In re Grand Jury*, 475 F.3d 1299, 1306 (D.C. Cir. 2007) (referring to a grand jury subpoena); *Pace-O-Matic, Inc. v. Eckert Seamans Cherin & Mellott, LLC*, No. 1:20-cv-00292, 2021 WL 602733, at *5 (M.D. Pa. Feb. 16, 2021) (involving a non-party subpoena), *rev’d on other grounds*, 2021 WL 1264323 (M.D. Pa. Apr. 6, 2021); *In re Grand Jury Subpoena*, 533 F. Supp. 2d 602, 604–06 (W.D.N.C. 2007) (discussing a grand jury subpoena); *In re Est. of Rabin*, 474 P.3d 1211, 1219 (Colo. 2020) (referring to subpoenas); *State ex rel. Kaminski v. Evans*, No. 15–1100, 2016 WL 1411730, at *8 (W. Va. Apr. 7, 2016) (concluding that the trial court correctly held that Rule 1.6 did not prevent a lawyer from complying with a subpoena in a civil case).

61. See *United States v. Servin*, 721 F. App’x 156, 159–60 (3d Cir. 2018).

to discovery requests,⁶² or to avoid testifying at depositions.⁶³ Likewise, Rule 1.6 “does not operate to render information inadmissible at a judicial proceeding.”⁶⁴ Accordingly, lawyers may not rely on their duty of confidentiality to avoid testifying at hearings or trials.⁶⁵ If a lawyer is to avoid testifying, it must be because the court upholds the attorney–client privilege.⁶⁶

III. THE SELF-DEFENSE EXCEPTION TO THE ATTORNEY–CLIENT PRIVILEGE

Lawyers' defenses against clients' and third-parties' allegations of wrongdoing regularly implicate attorney–client communications and, by extension, the attorney–client privilege.⁶⁷ The self-defense exception to the attorney–client privilege is a disclosure rule that permits lawyers to reveal their confidential communications with clients or former clients to defend themselves against allegations of wrongdoing.⁶⁸ It is intended to place lawyers “on the same plane as other civil defendants” and thereby level the playing field with plaintiffs by enabling lawyers to disclose confidential client communications and information in appropriate circumstances.⁶⁹

62. See *Burke v. Messerli & Kramer, P.A.*, No. 09-1630 (ADM/AJB), 2010 WL 2520615, at *2 (D. Minn. June 15, 2010).

63. See, e.g., *Zino v. Whirlpool Corp.*, No. 5:11CV1676, 2012 WL 5197377, at *5 (N.D. Ohio Oct. 19, 2012) (concluding that a lawyer's duty of confidentiality did not prevent him from testifying at a deposition about matters not otherwise protected by the attorney–client privilege or work product immunity); *Adams*, 924 A.2d at 999–1000 (rejecting the lawyer's claim that the Rule 1.6 duty of confidentiality expanded the scope of the attorney–client privilege); *In re Est. of Wood*, 818 A.2d 568, 573 (Pa. Super. Ct. 2003) (holding that a lawyer could not invoke his duty of confidentiality to avoid testifying at a deposition).

64. *Peterson v. State*, 118 A.3d 925, 956 (Md. 2015).

65. If a lawyer were to invoke the duty of confidentiality to avoid testifying at a hearing or trial, the court could simply order the lawyer to testify and thereby excuse the lawyer's duty of confidentiality. See MODEL RULES OF PRO. CONDUCT r. 1.6(b)(6) (AM. BAR ASS'N 2021) (providing a “court order” exception to the duty of confidentiality).

66. See *Newman v. State*, 863 A.2d 321, 332 (Md. 2004) (“Rule 1.6 prohibits the disclosure of any information pertaining to the representation of a client, but does not operate to render information inadmissible at a judicial proceeding. Only communications subject to the attorney–client privilege cannot be disclosed under judicial compulsion.”) (citation omitted).

67. See, e.g., *Daily v. Greensfelder, Hemker & Gale, P.C.*, 98 N.E.3d 604, 616–17 (Ill. App. Ct. 2018) (finding that certain communications were relevant to causation element of breach of fiduciary duty claim and that the client had waived the privilege by placing the communications at issue).

68. *Cook v. Bradley*, No. 15CA010726, 2015 WL 8150949, at *3 (Ohio Ct. App. Dec. 7, 2015).

69. *Id.*

A. *Exception to the Attorney–Client Privilege or Implied Waiver?*

Although courts generally recognize lawyers’ right to defend themselves through the disclosure of otherwise attorney–client privileged communications when they are sued by clients, they disagree over whether lawyers’ right of self-defense reflects an exception to the privilege as it is commonly labeled,⁷⁰ or whether by attacking the lawyer, the client has impliedly waived the privilege.⁷¹ Indeed, courts frequently explain that clients who accuse their lawyers of wrongdoing waive their attorney–client privilege.⁷²

Analytically or operationally, “exception” and “waiver” are at least in theory different concepts in the attorney–client privilege context.⁷³ If the self-defense exception truly is an exception to the privilege, then the privilege never attached to the relevant communications in the first place, and there is no need to consider whether it has been waived.⁷⁴ Characterizing the self-defense exception as an exception to the attorney–client privilege rather than as a form of implied waiver is perhaps technically most accurate where it is created by statute or court rule.⁷⁵ For example, California Evidence Code § 958 states that “[t]here is no privilege under this article as to a communication relevant to an issue of breach, by the lawyer or by the client,

70. *See, e.g.*, *Constr. Unlimited Corp. v. Woodfield*, No. CV-91-0503795, 1992 WL 157511, at *2 (Conn. Super. Ct. June 17, 1992); *Stepka v. McCormack*, 66 N.E.3d 32, 40 (Ohio Ct. App. 2016); *Salsman v. Brown*, 51 A.3d 892, 895 (Pa. Super. Ct. 2012).

71. Some courts say that a lawyer who asserts the self-defense exception waives the attorney–client privilege. *See, e.g.*, *George v. Siemens Indus. Automation, Inc.*, 182 F.R.D. 134, 139 (D.N.J. 1998) (“Counsel may waive [the] client’s privilege in order to defend himself against accusations of wrongful conduct.”). That position contradicts the well-established view that only the client may waive the attorney–client privilege.

72. *See, e.g.*, *Hartleib v. Weiser Law Firm, P.C.*, 861 F. App’x 714, 720–21 (10th Cir. 2021) (applying Kansas law); *Christenbury v. Locke Lord Bissell & Liddell, LLP*, 285 F.R.D. 675, 682 (N.D. Ga. 2012) (quoting *Waldrip v. Head*, 532 S.E.2d 380, 386 (Ga. 2000), *overruled by Duke v. State*, 829 S.E.2d 348 (Ga. 2019)) (applying Georgia law); *360 Constr. Co. v. Atsalis Bros. Painting Co.*, 280 F.R.D. 347, 352 (E.D. Mich. 2012) (quoting *People v. Houston*, 532 N.W.2d 508, 516 (Mich. 1995)); *Shedrick v. Trantolo & Trantolo*, No. CV044000834S, 2005 WL 1758621, at *2 (Conn. Super. Ct. June 9, 2005); *Zabin v. Picciotto*, 896 N.E.2d 937, 955 (Mass. App. Ct. 2008).

73. *See Allen v. LeMaster*, 267 P.3d 806, 814 (N.M. 2011).

74. *Ellibee v. Hazlett*, No. 03–3023–JAR, 2006 WL 1360488, at *4 (D. Kan. May 16, 2006) (applying Kansas law); *Allen*, 267 P.3d at 815; *Squire, Sanders & Dempsey L.L.P. v. Givaudan Flavors Corp.*, 937 N.E.2d 533, 543 (Ohio 2010).

75. *See, e.g., Allen*, 267 P.3d at 814 (discussing New Mexico’s attorney–client privilege statute); *HAW. R. EVID. 503(d)(7)* (“There is no privilege under this rule: . . . As to a communication the disclosure of which is required or authorized by the Hawaii rules of professional conduct for attorneys.”).

of a duty arising out of the lawyer-client relationship.”⁷⁶ The Florida attorney-client privilege statute provides that “[t]here is no lawyer-client privilege” under the statute when “[a] communication is relevant to an issue of breach of duty by the lawyer to the client or by the client to the lawyer, arising from the lawyer-client relationship.”⁷⁷ Even more pointedly, the Kansas attorney-client privilege statute establishes in a subpart titled “Exceptions” that the privilege “shall not extend to a communication . . . relevant to an issue of breach of duty by the attorney to such attorney’s client, or by the client to such client’s attorney.”⁷⁸ But a court may also recognize common law exceptions to the privilege, as the Ohio Supreme Court did in *Squire, Sanders & Dempsey L.L.P. v. Givaudan Flavors Corp.*⁷⁹

Beginning in 2003, the law firm then known as Squire, Sanders & Dempsey, L.L.P. (Squire Sanders) represented Givaudan Flavors Corp. (Givaudan) in toxic tort litigation stemming from the use of butter flavoring in popcorn.⁸⁰ Frederick King, who was Givaudan’s chief legal officer at the time, hired Squire Sanders and thereafter approved payment of the firm’s bills.⁸¹ In 2007, Givaudan replaced King with Jane Garfinkel, who believed that the Squire Sanders lawyers defending the butter flavoring litigation were unqualified, were mismanaging the litigation, and were charging excessive fees.⁸² She thus terminated Squire Sanders’s representation of Givaudan without paying any of the firm’s outstanding invoices for its work, which exceeded \$1.8 million.⁸³ The firm sued Givaudan to collect those fees, and Givaudan counterclaimed for breach of contract, breach of fiduciary duty, fraud, legal malpractice, and unjust enrichment.⁸⁴

In discovery, Squire Sanders requested the production of documents related to its defense of Givaudan, including its lawyers’ performance, litigation management, and case budgeting and staffing, as well as the company’s decision to end its representation.⁸⁵ Givaudan objected on attorney-client privilege grounds.⁸⁶ Givaudan also asserted the attorney-client privilege when Squire Sanders attempted to depose King and Garfinkel on the same subjects and when the firm’s lawyers tried to question Garfinkel

76. CAL. EVID. CODE § 958.

77. FLA. STAT. § 90.502(4)(c) (2018).

78. KAN. STAT. ANN. § 60-426(b)(3) (2022).

79. *Squire Sanders*, 937 N.E.2d at 533.

80. *Id.* at 535.

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.* at 536.

86. *Id.* Givaudan also objected based on work product immunity. *Id.* The work product doctrine and any related self-defense exception are beyond the scope of this Article.

about her negative opinions of the firm and its defense of the popcorn-buttering litigation.⁸⁷ Squire Sanders moved to compel Givaudan to produce the requested documents and to permit King and Garfinkel to testify based on the “self-protection exception” to the privilege.⁸⁸ The trial court granted the firm’s motion.⁸⁹

Givaudan appealed to a district appellate court, which reversed the trial court’s ruling.⁹⁰ The appellate court held that the Ohio attorney–client privilege statute provided the sole means for a client’s waiver of the attorney–client privilege with respect to testimony and that the statute did not include a self-protection exception.⁹¹ As for Squire Sanders’s document requests, any privilege waiver there was governed by a common law test that the trial court failed to apply.⁹² Squire Sanders then appealed to the Ohio Supreme Court, which summarized the firm’s arguments this way:

Squire Sanders . . . contend[s] that the common-law self-protection exception to the attorney-client privilege is recognized both in American jurisprudence and in Ohio law and is incorporated into the attorney-client privilege codified in [the Ohio privilege statute]. According to Squire Sanders, when the exception applies, there is no privilege for the client to assert or waive It also contends that the court of appeals erred in relying on cases dealing with waiver of the attorney-client privilege, which would be relevant only if no exception applied. And it further asserts that . . . the communications it sought fell outside the attorney-client privilege⁹³

Consistent with the firm’s contentions, the court framed the key issue as “whether Ohio recognize[d] the self-protection exception to the attorney-client privilege permitting an attorney to testify concerning attorney-client communications to establish a claim or defense on behalf of the attorney in connection with litigation against a client or a former client.”⁹⁴ The court concluded that it did.⁹⁵

The *Squire Sanders* court explained that it had previously recognized exceptions to Ohio’s statutory attorney–client privilege that were not codified

87. *Id.* Again, Givaudan also objected based on work product immunity. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *See id.* (referring to OHIO REV. CODE § 2317.02(A)).

92. *Id.*

93. *Id.* at 536–37.

94. *Id.* at 537.

95. *Id.* at 544, 546–47.

in the statute.⁹⁶ These specifically included the crime-fraud exception, a lack-of-good-faith exception, and the joint-representation exception.⁹⁷ Although the three exceptions were not included in the statute, they were well-established under the common law.⁹⁸ Furthermore, they helped define the scope of the statutory attorney–client privilege because “the privilege does not attach’ [to a communication] when an exception applies.”⁹⁹

As for the common law self-protection exception, Ohio courts acknowledged it as early as 1939.¹⁰⁰ Although Ohio courts originally recognized the exception in a fee dispute,¹⁰¹ it also applies under Ohio law when the client puts the representation at issue by accusing the lawyer of professional negligence, breach of fiduciary duty, or other malfeasance.¹⁰² Moreover, because the attorney–client privilege is intended to promote the administration of justice, it must yield to other considerations when justice so dictates.¹⁰³ Lawyers’ ability to defend themselves when accused of wrongful conduct by clients is one such circumstance.¹⁰⁴

Givaudan argued that the court had consistently refused to create waivers and exceptions to testimonial privilege statutes, citing the court’s 2006 decision in *Jackson v. Greger*¹⁰⁵ for support.¹⁰⁶ But Givaudan read *Jackson* too broadly, the *Squire Sanders* court explained.¹⁰⁷ *Jackson* “dealt only with a *waiver* of the attorney-client privilege,” while here the court was focused on “a common-law *exception* to the privilege, the self-protection exception.”¹⁰⁸ Plus, Givaudan’s argument ignored the court’s prior embrace of common law exceptions to Ohio’s statutory attorney–client privilege.¹⁰⁹

In the same vein, the court reminded the parties that it had never declined to recognize entrenched common law exceptions to the statutory attorney–client privilege, as compared to balking at common law privilege waivers.¹¹⁰

96. *Id.* at 538.

97. *Id.* at 538–41.

98. *Id.* at 541 (quoting and citing treatises on Ohio law).

99. *Id.* (quoting *Moskovitz v. Mt. Sinai Med. Ctr.*, 635 N.E.2d 331, 349 (Ohio 1994)).

100. *See id.*

101. *See id.* at 541–42.

102. *Id.* at 542.

103. *Id.* (quoting *Moskovitz*, 635 N.E.2d at 349).

104. *Id.* at 543 (quoting *Mitchell v. Bromberger*, 2 Nev. 345, 349 (1866)).

105. 854 N.E.2d 487 (Ohio 2006).

106. *Squire Sanders*, 937 N.E.2d at 543.

107. *See id.*

108. *Id.*

109. *See id.*

110. *See id.*

Unlike *waiver*, which involves the client's relinquishment of the protections of [the Ohio privilege statute] once they have attached, an *exception* to the attorney-client privilege falls into the category of situations in which the privilege does not attach to the communications in the first instance and is therefore excluded from the operation of the statute.¹¹¹

For that matter, Ohio law already recognized the common law self-protection exception to the privilege.¹¹²

To finish, the self-defense exception to the privilege plainly applied in this case.¹¹³ The *Squire Sanders* court consequently reversed the lower appellate court's judgment and remanded the case to the trial court for further proceedings.¹¹⁴

Whether the self-defense exception to the privilege—as lawyers' right to disclose otherwise privileged information in their own defense is almost always described—truly is an exception to the attorney-client privilege or instead refers to a type of implied waiver is debatable. Some courts reason that the self-defense exception, despite its name, is in fact, a form of at-issue waiver.¹¹⁵ That is, the client waived the privilege with respect to relevant communications by putting those communications at issue when it sued the lawyer.¹¹⁶ Thinking about *Squire Sanders*, when the Ohio Supreme Court previously recognized exceptions to the attorney-client privilege, the communications to which those exceptions applied, such as lawyer-client conversations and correspondence in furtherance of a client's planned crime or fraud, were deemed unworthy of protection.¹¹⁷ In contrast, most confidential lawyer-client communications that a lawyer needs to disclose to defend against a client's claims of wrongdoing cannot be similarly classified; in fact, until the client sued the lawyer, those communications were certainly worthy of privilege protection. In other words, the "exception" characterization does not fit because the privilege attached to the disputed communications "in the first instance."¹¹⁸

At the same time, "waiver" does not seem like a valid description of the loss of privilege where it is not the client asserting a claim against the lawyer

111. *Id.*

112. *Id.* at 544.

113. *Id.*

114. *Id.* at 547.

115. *See, e.g., Selby v. O'Dea*, 156 N.E.3d 1212, 1247 (Ill. App. Ct. 2020); *Zabin v. Picciotto*, 896 N.E.2d 937, 955 (Mass. App. Ct. 2008).

116. *Selby*, 156 N.E.3d at 1247; *Zabin*, 896 N.E.2d at 955.

117. *Squire Sanders*, 937 N.E.2d at 539.

118. *Id.* at 543.

but instead a third party.¹¹⁹ In that instance, the client did not place the lawyer's communications at issue; the loss of the privilege through the lawyer's defense is beyond the client's control.¹²⁰ "Waiver" is an apt description of the client's loss of the privilege in this situation only if you accept that, when applied to the attorney–client privilege, the term is but "a loose and misleading label for . . . a collection of different rules addressed to different problems[.]"¹²¹ or you recall that the privilege can be waived by operation of law.¹²² Even then, describing lawyers' right to reveal confidential client communications in defending against third-party claims as an exception to the attorney–client privilege seems preferable.

At base, terminology probably matters little. As a concurring justice noted in *Squire Sanders*, "an exception, like a waiver, arises because of some action taken by the client."¹²³ As she saw matters, "common-law exceptions are really no different from common-law waivers."¹²⁴ Some observers might view the concurring justice's analysis of departures from privilege as overly simplistic, but it is certainly true from a practical perspective that courts' interpretation of the self-defense exception to the attorney–client privilege is more important than their nomenclature.

B. The Permissible Scope of Disclosure

Regardless of how it is described or classified, lawyers' right to reveal confidential client communications in their own defense is not boundless; to the contrary, courts construe the self-defense exception narrowly.¹²⁵ This is true regardless of whether the exception is statutorily-recognized or honored as a matter of common law.¹²⁶ A lawyer who invokes the self-defense exception must limit the disclosure of otherwise-privileged communications to those that are relevant to the subject of the lawsuit or other proceeding.¹²⁷

119. *See infra* Part III.D.

120. *See* MALLEN, *supra* note 13, § 37:177, at 2041 (referring to the client's lack of control).

121. *United States v. Mass. Inst. of Tech.*, 129 F.3d 681, 684 (1st Cir. 1997).

122. EPSTEIN, *supra* note 8, at 508.

123. *Squire Sanders*, 937 N.E.2d at 547 (Lanzinger, J., concurring).

124. *Id.*

125. *Fraidin v. Weitzman*, 611 A.2d 1046, 1076 (Md. Ct. Spec. App. 1992); *Longo v. Premo*, 326 P.3d 1152, 1158–60 (Or. 2014).

126. *See Longo*, 326 P.3d at 1159 (construing the Oregon statutory self-defense exception narrowly and noting that a narrow construction mirrored the common law approach).

127. *MCC Mgmt. of Naples, Inc. v. Arnold & Porter LLP*, Nos. 2:07-cv-387-FtM-29SPC, 2:07-cv-420-FtM-29DNF, 2010 WL 1817585, at *3 (M.D. Fla. May 5, 2010) (applying Florida law); *Fraidin*, 611 A.2d at 1076; *Longo*, 326 P.3d at 1158; RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS, § 83 cmt. e (AM. L. INST. 2000).

The lawyer must maintain the privilege with respect to communications that are not relevant to the plaintiff's claims against the lawyer.¹²⁸

There are several justifications for construing the self-defense exception narrowly. First, all exceptions to the attorney–client privilege have limits.¹²⁹ By limiting disclosure of communications under the self-defense exception to those that are relevant to the plaintiff's claims, a court can accommodate the lawyer's need for a robust defense while preserving the essential purposes of the privilege—the promotion of full disclosure by clients to their lawyers to facilitate the rendering of legal advice and encouraging the public to seek early legal assistance.¹³⁰ Second, if a court treats the self-defense exception as an implied waiver of the attorney–client privilege by the client, implied waivers are generally construed narrowly.¹³¹ While an implied waiver of the privilege in this context is a subject matter waiver, that means only that the lawyer is empowered to disclose all communications that are relevant to the subject of the lawsuit, not that all confidential communications with the client or former client are fair game.¹³² Third, the self-defense exception to the attorney–client privilege may be analogized to the self-defense exception to the duty of confidentiality contained in Model Rule 1.6(b)(5) and state equivalents.¹³³ Exceptions to the duty of confidentiality are construed narrowly.¹³⁴ Model Rule 1.6(b)(5) restricts a lawyer's disclosure of information related to a client's representation to that which “the lawyer reasonably believes necessary to establish a defense.”¹³⁵ Thus, the self-defense exception to the attorney–client privilege should correspondingly limit the disclosure of

128. See *Procacci v. Seitlin*, 497 So. 2d 969, 969–70 (Fla. Dist. Ct. App. 1986); *Longo*, 326 P.3d at 1158; RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS, § 83 cmt. e (AM. L. INST. 2000).

129. See, e.g., *Solis v. Food Emps. Lab. Rels. Ass'n*, 644 F.3d 221, 228 (4th Cir. 2011) (“In now recognizing the fiduciary exception, we acknowledge that it is not without limits.”).

130. *Longo*, 326 P.3d at 1159; see also *supra* notes 23–24 and accompanying text (identifying the purposes of the attorney–client privilege).

131. *In re Lott*, 424 F.3d 446, 453 (6th Cir. 2005).

132. See 2 SPAHN, *supra* note 28, at 738 (“A client impliedly waiving the privilege by suing a former lawyer for malpractice triggers a subject matter waiver.”).

133. See, e.g., *Oorah, Inc. v. Kane Kessler, P.C.*, 17 Civ. 7175 (PAE), 2020 U.S. Dist. LEXIS 127419, at *2–3 (S.D.N.Y. July 20, 2020) (quoting New York Rule 1.6(b)(5) in applying the self-defense exception to the attorney–client privilege); *Grassmueck v. Ogden Murphy Wallace, P.L.L.C.*, 213 F.R.D. 567, 572 (W.D. Wash. 2003) (citing the self-defense exception in Washington's version of Rule 1.6 in concluding that the self-defense exception justified the law firm's disclosure of confidential communications to defend itself against a lawsuit and criminal investigation); *Kelly v. Clark*, 531 N.W.2d 455, 463 (Wis. Ct. App. 1995) (citing the self-defense exception in Wisconsin's version of Rule 1.6 for the proposition that “[w]hen an attorney's representation is attacked as negligent or unethical, the privilege does not attach”) (emphasis added).

134. *In re Bryan*, 61 P.3d 641, 656 (Kan. 2003).

135. MODEL RULES OF PRO. CONDUCT r. 1.6 cmt. 10 (AM. BAR ASS'N 2021).

otherwise confidential communications to those reasonably necessary to the lawyer's defense.

C. Multiple Lawyers and Successor Counsel

The scope of the self-defense exception has another aspect in the sense that courts often must decide whether it applies to the client's communications with lawyers besides the defending lawyer. For instance, did the client engage co-counsel in the underlying litigation or transaction whose communications with the client allegedly may be critical to the accused lawyer's defense? Assuming the client replaced the defending lawyer with a different lawyer or law firm, are the client's privileged communications with successor counsel within the scope of the self-defense exception?

A client's privileged communications with successor counsel are generally not within the scope of the self-defense exception and are therefore off-limits to the defending lawyer unless the client has otherwise waived the privilege or another exception to the privilege applies.¹³⁶ This rule equally applies to other lawyers who the client consulted about the first lawyer's allegedly deficient performance but never retained.¹³⁷ The self-defense exception may, however, entitle a defending lawyer to discover a client's confidential communications with other lawyers who concurrently represented the client in the underlying transaction or litigation.¹³⁸ As the

136. *See, e.g., Windsor Secs., LLC v. Arent Fox LLP*, 273 F. Supp. 3d 512, 519–23 (S.D.N.Y. 2017) (applying New York law); *Christenbury v. Locke Lord Bissell & Liddell, LLP*, 285 F.R.D. 675, 684–86 (N.D. Ga. 2012) (applying Georgia law); *Sann v. Mastrian*, 280 F.R.D. 437, 439 (S.D. Ind. 2011) (applying Indiana law); *Woodbury Knoll, LLC v. Shipman & Goodwin, LLP*, 48 A.3d 16, 37–38 (Conn. 2012) (rejecting the defendants' waiver argument); *United Servs. Auto. Ass'n v. Law Off. of Herssein & Herssein, P.A.*, 233 So. 3d 1224, 1229 (Fla. Dist. Ct. App. 2017) (limiting the self-defense exception "to communications between the client and the lawyer being sued"); *Fischel & Kahn, Ltd. v. Van Straaten Gallery, Inc.*, 727 N.E.2d 240, 246 (Ill. 2000) (concluding that the defendant's communications with successor counsel were protected by attorney–client privilege); *Stepka v. McCormack*, 66 N.E.3d 32, 41 (Ohio Ct. App. 2016) (concluding that the self-defense exception does not apply where the defending lawyer seeks disclosure of successor's counsel's files); *Krahenbuhl v. Cottle Firm*, 427 P.3d 1216, 1218–19 (Utah Ct. App. 2018) (agreeing with the plaintiffs that "they did not waive the attorney-client privilege with respect to communications with Successor Counsel simply by retaining Successor Counsel in the underlying lawsuit and filing this malpractice action"); *Dana v. Piper*, 295 P.3d 305, 309–13 (Wash. Ct. App. 2013) (analyzing implied waiver of the privilege); *Dyson v. Hempe*, 413 N.W.2d 379, 386–87 (Wis. Ct. App. 1987) (interpreting the scope of Wisconsin's statutory self-defense exception to the privilege).

137. *See Miller v. Super. Ct.*, 168 Cal. Rptr. 589, 591 (Ct. App. 1980); *Ferrari v. Vining*, 744 So. 2d 480, 481–82 (Fla. Dist. Ct. App. 1999); *Dyson*, 413 N.W.2d at 387.

138. *See, e.g., Bieter Co. v. Blomquist*, 156 F.R.D. 173, 179 (D. Minn. 1994) (applying the federal common law attorney–client privilege); *Zabin v. Picciotto*, 896 N.E.2d 937, 955

Georgia Supreme Court held in *Hill, Kertscher & Wharton, LLP v. Moody*,¹³⁹ “when a client sues his former attorney for legal malpractice, the implied waiver of the attorney–client privilege extends to the client’s communications with other attorneys who represented the client with respect to the same underlying transaction or litigation.”¹⁴⁰

In *Moody*, Daryl Moody and two affiliated businesses, Mast Nine, Inc. (MNI), and UAS Investments, LLC (UAS), were investors in Leucadia Group, LLC (Leucadia), a California company partly owned by Robert Miller.¹⁴¹ Moody, MNI, and UAS retained two lawyers at Hill, Kertscher & Wharton, LLP (collectively HKW) to advise them on replacing Miller as Leucadia’s president.¹⁴² HKW formulated and prepared a multi-step corporate strategy that Moody, MNI, and UAS snuck by Miller and which culminated in his termination as Leucadia’s president.¹⁴³ HKW also advised Moody, MNI, and UAS to sue Miller and Leucadia in Georgia, which they did, represented by HKW.¹⁴⁴ Miller then sued Moody in California.¹⁴⁵ HKW represented Moody in the California case but botched key defenses.¹⁴⁶ Additionally, HKW did not obtain Miller’s informed consent to the firm’s conflict of interest attributable to its prior representation of him and Leucadia.¹⁴⁷ Miller thus successfully moved to disqualify HKW as counsel for Moody, MNI, and UAS in the Georgia litigation, which prompted HKW to withdraw from Moody’s defense in the California litigation.¹⁴⁸ The California court eventually voided HKW’s strategy for jettisoning Miller.¹⁴⁹

Although HKW was front and center in representing Moody, MNI, and UAS, Moody and the companies were also concurrently represented in the corporate removal of Miller and in the Georgia and California cases by Holland & Knight LLP.¹⁵⁰ Moody allegedly directed HKW to take direction

(Mass. App. Ct. 2008) (“[W]e agree with the cases from other jurisdictions . . . holding that in cases . . . in which a client sues a former attorney for malpractice, the attorney–client privilege is waived as to communications with all attorneys involved in the underlying litigation in which the malpractice allegedly occurred.”); *Pappas v. Holloway*, 787 P.2d 30, 36 (Wash. 1990) (finding an implied waiver of the attorney–client privilege as to all the lawyers who helped defend the clients in the underlying litigation).

139. 839 S.E.2d 535 (Ga. 2020).

140. *Id.* at 536.

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.* at 536–37.

145. *Id.* at 537.

146. *See id.*

147. *Id.*

148. *See id.*

149. *Id.*

150. *Id.* at 538.

from Holland & Knight in all aspects of the Leucadia matter.¹⁵¹ Holland & Knight also allegedly confirmed the advice that HKW gave Moody, MNI, and UAS.¹⁵²

Moody, MNI, UAS, and another company involved in the Leucadia takeover plan sued HKW for legal malpractice and breach of fiduciary duty in a Georgia state court.¹⁵³ In discovery, HKW sought a variety of information from Holland & Knight concerning the latter's representation of the plaintiffs in the Leucadia matter.¹⁵⁴ The plaintiffs and Holland & Knight sought a protective order based on the attorney–client privilege.¹⁵⁵ The trial court found that Holland & Knight and HKW had jointly represented Moody in the Leucadia matter and that the plaintiffs had consequently waived the attorney–client privilege with respect to Holland & Knight by suing HKW.¹⁵⁶ The plaintiffs promptly appealed, and the Georgia Court of Appeals reversed the trial court.¹⁵⁷ The court of appeals acknowledged “that when a client sues his former attorney for legal malpractice, the client impliedly waives the attorney–client privilege to the extent necessary for the attorney to defend against the legal malpractice claim[,]” but rejected the idea “that the implied waiver extends to other attorneys who represented the client in the same underlying matter.”¹⁵⁸ HKW successfully petitioned the Georgia Supreme Court for a writ of certiorari.¹⁵⁹

In resolving the privilege issue, the *Moody* court observed that Holland & Knight had never disputed that the information HKW sought from it was relevant to the subject matter of the plaintiffs' lawsuit.¹⁶⁰ The court further noted that Georgia courts narrowly construe the attorney–client privilege and that the privilege is rife with exceptions.¹⁶¹ Plus, roughly eighty years of Georgia law established that the privilege does not apply where a client sues its lawyer for “negligence or malpractice, or fraud, or other professional misconduct. In such cases it would be a manifest injustice to allow the client to take advantage of the rule of privilege to the prejudice of his attorney.”¹⁶² On this last point, the court concluded that a “similar rationale” required it to

151. *Id.* at 537.

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.* at 538 (quoting the trial court).

157. *Id.*

158. *Id.*

159. *See id.* at 535 (noting the grant of certiorari).

160. *Id.* at 538–39.

161. *Id.* at 539.

162. *Id.* (quoting *Daughtry v. Cobb*, 5 S.E.2d 352, 355 (Ga. 1939)).

extend such an “implied waiver of the attorney-client privilege” to Holland & Knight.¹⁶³ As the court explained:

[B]y suing HKW for legal malpractice, Plaintiffs have put at issue questions of proximate causation, reliance, and damages, all of which may have been affected by other attorneys who represented Plaintiffs in the same matters underlying Plaintiffs’ malpractice complaint. As the Washington Supreme Court stated in one of the leading cases in this area, plaintiff-clients should not be allowed to file a claim for malpractice against a former attorney “and at the same time conceal from him communications which have a direct bearing on this issue simply because the attorney–client privilege protects them. To do so would in effect enable them to use as a sword the protection which the Legislature awarded them as a shield.”¹⁶⁴

The court concluded that the court of appeals erred by reversing the trial court’s attorney–client privilege ruling in favor of HKW.¹⁶⁵ The *Moody* court therefore reversed the court of appeals and remanded the case to the lower court for further proceedings.¹⁶⁶

Moody reflects the correct approach in malpractice and breach of fiduciary duty cases arising out of joint representations. Where the defending lawyer had co-counsel in the underlying matter, the second lawyer’s communications with the client may well show that the defending lawyer owed or breached no duty to the client, or that any alleged breach did not proximately cause the client’s claimed damages. To allow the client to bar the lawyer from using such communications in the lawyer’s defense would be tremendously unfair.

D. The Self-Defense Exception When Lawyers Are Sued by Third Parties

In addition to being accused of wrongdoing or sued by clients, lawyers also may be targeted by third parties.¹⁶⁷ For example, investors who allege they were defrauded by the lawyer’s client may sue the lawyer for aiding and

163. *Id.*

164. *Id.* at 539–40 (quoting *Pappas v. Holloway*, 787 P.2d 30, 36 (Wash. 1990)).

165. *Id.* at 540.

166. *Id.* at 540–41.

167. See 1 MALLEN, *supra* note 13, § 6:1, at 617 (“Nonclients bring over 20 percent of all claims against attorneys that arise out of the rendition of legal services.”).

abetting the client's fraud.¹⁶⁸ An opposing party who prevails in litigation brought by the client may sue the client and the lawyer for malicious prosecution.¹⁶⁹ The buyer of a business may allege that the seller's lawyer made fraudulent or negligent misrepresentations to inflate the purchase price or to close the deal.¹⁷⁰ In some jurisdictions, a lawyer who prepares a will or trust for a client may be sued for malpractice by beneficiaries who claim they were denied their due.¹⁷¹ In all these cases, communications between the lawyer and client may be essential to the lawyer's defense.

There are, however, three concerns about recognizing the self-defense exception in third-party litigation. First, in at least some cases, the client may not have created the situation that supposedly necessitates the lawyer's disclosure of their confidential communications. The balance of fairness that otherwise justifies recognition of the self-defense exception is therefore missing. Second, there is some chance that plaintiffs will name lawyers as co-defendants in lawsuits against their clients solely to expose otherwise undiscoverable lawyer-client communications.¹⁷² Such tactics aggravate and complicate litigation, increase all parties' costs, and consume judicial resources. Third, clients who perceive this threat to the attorney-client privilege may withhold some information from their lawyers when seeking legal advice or services.¹⁷³

On the other side of the coin, there are three equally valid reasons for recognizing the self-defense exception in this context. First, lawyers sued for alleged misconduct in connection with clients' representations have obvious and weighty interests in effectively defending themselves.¹⁷⁴ Second, the

168. See generally Douglas R. Richmond, *A Primer on Lawyer Liability for Aiding and Abetting Clients' Misconduct*, PRO. LAW., no. 25(2), 2018, at 20 (discussing lawyers' liability for aiding and abetting clients' misconduct).

169. See, e.g., *Seltzer v. Morton*, 154 P.3d 561, 569–70, 614–15 (Mont. 2007) (affirming a \$1.1 million compensatory damage award and a \$9.9 million punitive damage award against a law firm for malicious prosecution and abuse of process).

170. See Douglas R. Richmond, *Fraud and Misrepresentation Claims Against Lawyers*, 16 NEV. L.J. 57, 59–60 (2015) (describing one such case).

171. See, e.g., *Litvack v. Artusio*, 49 A.3d 762, 768 (Conn. App. Ct. 2012) (stating that “the intended beneficiary of a will may have a cause of action for the improper preparation of a testamentary document”); *Blair v. Ing*, 21 P.3d 452, 468 (Haw. 2001) (holding that a lawyer owed duties to trust beneficiaries); *Ferguson v. O'Bryan*, 996 N.E.2d 428, 432–33 (Ind. Ct. App. 2013) (holding that relatives of testator who were known third-party beneficiaries could sue the lawyer who drafted the testator's will); *MacLeish v. Boardman & Clark LLP*, 924 N.W.2d 799, 801 (Wis. 2019) (“[A] non-client who is a named beneficiary in a will has standing to sue an attorney for malpractice if the beneficiary can demonstrate that the attorney's negligent administration of the estate thwarted the testator's clear intent.”).

172. MALLEY, *supra* note 13, at 2041.

173. *Id.*

174. *First Fed. Sav. & Loan Ass'n of Pittsburgh v. Oppenheim, Appel, Dixon & Co.*, 110 F.R.D. 557, 565 (S.D.N.Y. 1986).

lawyer's self-defense interest may outweigh the client's interest in continued confidentiality, especially if any disclosures will not harm the client.¹⁷⁵ Third, permitting disclosure enhances "the truth-finding function of the litigation process" and is consistent with courts' practice of construing the attorney-client privilege narrowly.¹⁷⁶

Courts have generally proven willing to recognize the self-defense exception in cases against lawyers brought by third parties.¹⁷⁷ *Meyerhofer v. Empire Fire & Marine Insurance Co.*¹⁷⁸ is generally considered to be the leading case in this area, but it was a disqualification case in which the lawyer's alleged violations of ethics rules were at issue.¹⁷⁹ The *Meyerhofer* court never discussed the attorney-client privilege.¹⁸⁰ *First Federal Savings & Loan Association of Pittsburgh v. Oppenheim, Appel, Dixon & Co.*,¹⁸¹ in which the court squarely addressed the self-defense exception to the privilege in connection with a third-party claim against a lawyer, is a more important case.

The *First Federal* plaintiffs were damaged when Comark, a government securities dealer, collapsed and subsequently sought bankruptcy protection.¹⁸² They consequently sued Comark's former auditor—Oppenheim, Appel, Dixon & Co. (OAD)—on various theories in the U.S. District Court for the Southern District of New York.¹⁸³ In response, OAD impleaded Comark's

175. *Id.*; see, e.g., *Children First Found. v. Martinez*, No. 1:04-CV-0927 (NPM/RFT), 2007 WL 4344915, at *18 (N.D.N.Y. Dec. 10, 2007) (concluding that a state lawyer's interest in defending herself outweighed state agencies' interests in maintaining the attorney-client privilege).

176. *First Fed.*, 110 F.R.D. at 565.

177. See, e.g., *Children First Found.*, 2007 WL 4344915, at *17 ("The self defense exception is not . . . available only when the client sues her attorney. The Discipline Rule encompasses all of those circumstances when an attorney has been accused of misconduct, even when sued by someone other than the client."); *Trepel v. Dippold*, No. 04 Civ. 8310 (DLC), 2005 WL 2206800, at *3 (S.D.N.Y. Sept. 12, 2005) (citing former New York Disciplinary Rule 4-101(C)(4)); *Apex Mun. Fund v. N-Grp. Sec.*, 841 F. Supp. 1423, 1430 (S.D. Tex. 1993) ("[A]n attorney can waive the privilege to defend himself against third-party accusations even though the client does not agree to waive the privilege."); *In re Nat'l Mortg. Equity Corp. Mortg. Pool Certificates Sec. Litig.*, 120 F.R.D. 687, 691-92 (C.D. Cal. 1988) (applying federal common law); *S.E.C. v. Forma*, 117 F.R.D. 517, 524, 526 (S.D.N.Y. 1987) (involving an SEC investigation); *First Fed.*, 110 F.R.D. at 565-66 (applying federal law). *But see* *Dietz v. Meisenheimer & Herron*, 99 Cal. Rptr. 3d 464, 476 (Ct. App. 2009) ("[W]hile the law is not fully settled in this area, we assume for purposes of this decision that there is no exception to the duty to preserve client confidences in a case brought against an attorney by a third party.").

178. 497 F.2d 1190 (2d Cir. 1974).

179. See *id.* at 1193-96.

180. See *id.* at 1193-97.

181. See *First Fed.*, 110 F.R.D. at 561-62.

182. *Id.* at 558-59.

183. *Id.*

former general counsel, Daniel Harkins.¹⁸⁴ Harkins planned to defend himself by producing documents and giving deposition testimony that were within Comark's attorney–client privilege “on the theory that, as a named third-party defendant, he [was] entitled to use in his defense any helpful information even if it would otherwise be protected from disclosure by his client's privilege.”¹⁸⁵ The other parties and Comark's bankruptcy trustee acknowledged that the Second Circuit recognized a self-defense exception to the attorney–client privilege; however, they disputed the showing, if any, that Harkins had to make to invoke the exception, as well as the scope of any disclosure.¹⁸⁶

The court observed that, while a lawyer may disregard a current or former client's privilege in “appropriate circumstances,” just what those circumstances might be is debatable.¹⁸⁷ In prior self-defense exception cases, the lawyer had sued the client to collect a fee, the client had sued the lawyer for malpractice, or the client had attacked the lawyer's competence or integrity without dragging the lawyer into litigation.¹⁸⁸ In those situations, the clients could be said to have waived the privilege by placing their communications with the lawyers at issue.¹⁸⁹ None of those courts had contemplated a situation where the lawyer's interest in disclosing confidential client communications was tied to claims by anyone other than a client.¹⁹⁰ In fact, based on existing case law, Harkins likely lacked the right to make his planned disclosures because Comark had not complained about his performance or conduct.¹⁹¹ Harkins, however, argued that he was entitled to make the disclosures under a New York ethics rule, DR 4–101(C)(4), which permitted a lawyer to disclose a client's confidences or secrets “necessary to establish or collect his fee or to defend himself or his employees or associates against an accusation of wrongful conduct.”¹⁹² As the *First Federal* court observed, the rule indeed appeared to permit a lawyer to disclose client confidences and secrets when sued by someone other than a client or even when accused of misconduct outside of litigation.¹⁹³

The court observed that Harkins's argument was supported by the Second Circuit's decision in *Meyerhofer*—which, as noted previously, is considered the leading case in this area—although it did not control here because the

184. *See id.* at 559.

185. *Id.*

186. *Id.*

187. *Id.* at 560.

188. *Id.* at 560–61.

189. *Id.* at 561.

190. *Id.*

191. *See id.*

192. *Id.* at 561–62 (quoting DR 4-101(C)(4)).

193. *Id.* at 562.

Meyerhofer court “did not purport to adjudicate an attorney–client privilege claim or an attempt by an attorney to overcome his client’s assertion of the privilege.”¹⁹⁴ Rather, in reversing the disqualification of the plaintiffs’ law firm in that case, the *Meyerhofer* court had explained that the lawyer who fed the law firm the confidential information that led to its erroneous disqualification was entitled to reveal that information under DR 4-101(C)(4).¹⁹⁵ But even though *Meyerhofer* was not quite on point, the *First Federal* court saw merit in recognizing a self-defense exception to the attorney–client privilege:

First, if an attorney is sued for alleged misconduct in representing a client, it is self-evident that he has a compelling interest in being able to defend himself. Second, that interest may well outweigh the interest of the client in maintaining the confidentiality of his communications, particularly if disclosure of those communications will not imperil the legal interests of the client Third, such disclosure will serve the truth-finding function of the litigation process, and is thus consistent with the general principle of narrowly construing evidentiary privileges.¹⁹⁶

Furthermore, the principle that lawyers should be able to reveal privileged information to defend against civil or criminal charges appeared to have broad case law support.¹⁹⁷

The *First Federal* court thus embraced the self-defense exception to the attorney–client privilege with respect to Harkins’s planned disclosures.¹⁹⁸ That left two questions: (1) the showing, if any, Harkins had to make to permissibly disclose Comark’s otherwise privileged information; and (2) the scope of any disclosure.¹⁹⁹

The court did not need to answer the first question because OAD’s claim against Harkins was legally sufficient and plainly not pretextual.²⁰⁰ As for the second question, because discovery was still underway, the court had time to “limit the scope of the disclosure in order to reconcile, to the extent possible,

194. *Id.* at 563.

195. *Meyerhofer v. Empire Fire & Marine Ins. Co.*, 497 F.2d 1190, 1194–95 (2d Cir. 1974).

196. *First Fed.*, 110 F.R.D. at 565 (citations omitted).

197. *Id.* at 566.

198. *See id.* (“In sum, the exception for attorney self-defense is recognized and accepted by the courts, albeit with varying degrees of warmth. The key issue, then, involves what limitations—both procedural and substantive—must be placed on its invocation.”).

199. *See id.* (discussing potential limitations on Harkins’s deployment of the self-defense exception).

200. *Id.*

the competing interests of Harkins in disproving OAD's allegations of wrongdoing by him and of his client Comark in protecting the confidentiality of its communications with its attorneys."²⁰¹ In fact, the court had already ordered Harkins to furnish for *in camera* review the documents he wanted to disclose, along with an affidavit explaining the necessity for all his proposed disclosures, both documentary and testimonial.²⁰² Based on that review, the court authorized Harkins to disclose those communications and documents that seemed likely to significantly assist in his defense.²⁰³ In making that determination, the *First Federal* court applied a "reasonable necessity" standard derived from Model Rule 1.6.²⁰⁴

E. Capsulizing the Self-Defense Exception to the Attorney–Client Privilege

Lawyers enjoy a self-defense exception to the attorney–client privilege in litigation brought against them by clients and by third parties.²⁰⁵ In some jurisdictions, the self-defense exception may be statutory, while in others it may reside in the common law. Lawyers also enjoy a self-defense exception to the privilege where they face sanctions,²⁰⁶ as well as when they face criminal charges.²⁰⁷ In criminal and regulatory investigations and proceedings, a lawyer may disclose otherwise-privileged client communications before an indictment is issued, charges are filed, an administrative action is initiated, or violations are announced to try and head off such events.²⁰⁸ A lawyer who invokes the self-defense exception must

201. *Id.* at 567.

202. *Id.*

203. *Id.*

204. *Id.*

205. RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS. § 83(2) cmt. d (AM. L. INST. 2000).

206. *See, e.g.,* Qualcomm Inc. v. Broadcom Corp., No. 05CV1958-RMB (BLM), 2008 WL 638108, at *3 (S.D. Cal. Mar. 5, 2008) (holding that the lawyers had a due process right to defend themselves in a sanctions hearing on alleged discovery misconduct where the client, which was also targeted in the defendant's sanctions motion, was "critical of the services and advice" that the lawyers provided during discovery); *Brandt v. Schal Assocs., Inc.*, 121 F.R.D. 368, 385 n.48 (N.D. Ill. 1988) (stating that a Rule 11 motion triggers the self-defense exception to the attorney–client privilege).

207. *United States v. Schussel*, 291 F. App'x 336, 346 (1st Cir. 2008); *United States v. Weger*, 709 F.2d 1151, 1156 (7th Cir. 1983).

208. *See, e.g., Schussel*, 291 F. App'x at 346 (explaining that a lawyer need not wait to be indicted before making a self-defensive disclosure); *S.E.C. v. Forma*, 117 F.R.D. 516, 524–25 (S.D.N.Y. 1987) ("Here, [the lawyer] was entitled to invoke the self-defense doctrine during the SEC investigation. Requiring him to wait until he was named as a defendant would have required

limit the disclosure to communications with the client that are relevant to the subject of the lawsuit or other proceeding.²⁰⁹ Courts should not expand the exception “to communications that are of dubious relevance or merely cumulative of other evidence.”²¹⁰ The self-defense exception additionally extends to a client’s communications with other lawyers who concurrently represented the client in the same matter with the defending lawyer—that is, with the defending lawyer’s co-counsel—but it generally does not encompass the client’s communications with successor counsel.²¹¹ Of course, regardless of whether the self-defense exception applies in a given case, other exceptions to the attorney–client privilege may permit the lawyer to reveal confidential client communications, or the client may otherwise waive the privilege.

IV. THE SELF-DEFENSE EXCEPTION TO THE DUTY OF CONFIDENTIALITY

In addition to protecting confidential client communications under the attorney–client privilege, a lawyer generally must maintain the confidentiality of all information related to a client’s representation.²¹² As Model Rule 1.6(a) provides: “A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b)” of the rule.²¹³ Fortunately for lawyers, paragraph (b) includes a self-defense exception to the duty of confidentiality.²¹⁴ Model Rule 1.6(b)(5) states:

A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary: . . . to [1] establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to [2] establish a defense to a criminal charge or civil claim against the lawyer based

him to expend substantial resources in his defense, tarnished his professional reputation, and threatened his livelihood as a securities lawyer.”); *In re Friend*, 411 F. Supp. 776, 776 (S.D.N.Y. 1975) (involving a grand jury investigation).

209. *MCC Mgmt. of Naples, Inc. v. Arnold & Porter LLP*, Nos. 2:07-cv-387-FtM-29SPC, 2:07-cv-420-FtM-29DNF, 2010 WL 1817585, at *3 (M.D. Fla. May 5, 2010) (applying Florida law); *Fraidin v. Weitzman*, 611 A.2d 1046, 1076 (Md. Ct. Spec. App. 1992); *Longo v. Premo*, 326 P.3d 1152, 1158 (Or. 2014); RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS. § 83 cmt. e (AM. L. INST. 2000).

210. RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS. § 83 cmt. e (AM. L. INST. 2000).

211. See *supra* notes 135–137 and accompanying text.

212. MODEL RULES OF PRO. CONDUCT r. 1.6(a) (AM. BAR ASS’N 2021).

213. *Id.*

214. *Id.* r. 1.6(b)(5).

upon conduct in which the client was involved, or [3] to respond to allegations in any proceeding concerning the lawyer's representation of the client²¹⁵

As the use of the term “may” signals, lawyers' disclosure of client information in any of the situations identified in Model Rule 1.6(b)(5) is permissive, not mandatory.²¹⁶

A. Reasonable Belief and Necessary Disclosure

Regardless of the circumstances in which lawyers decide to defensively reveal information related to clients' representations, they must limit any disclosure to that information which they reasonably believe is necessary to establish their defenses or to respond to allegations of wrongdoing.²¹⁷ Furthermore, the lawyer must restrict any disclosure of client information to those with whom the lawyer must deal in preparing and presenting a defense or response.²¹⁸ In some cases, a lawyer may need to seek permission from a tribunal or agency to file materials under seal, ask a court to review documents *in camera*, or move for a protective order concerning certain disclosures to prevent dissemination of the information.²¹⁹ Even when such protections are available, however, the lawyer still must confine any disclosures to those she reasonably believes are necessary to defend or justify her conduct or decisions.²²⁰ The reasonableness of a lawyer's belief is measured according to an objective standard.²²¹

A recurring scenario involves a lawyer's overbroad response to a negative online review by a former client.²²² Courts have disciplined lawyers for

215. *Id.*

216. *State v. Montgomery*, 997 N.E.2d 579, 590 (Ohio Ct. App. 2013); Todd D. Erb, *Take a Methodical Approach: Resolving Ethical Dilemmas When a Lawyer is Sued by a Non-Client*, FOR DEF., Apr. 2017, at 20, 21.

217. *Iowa Sup. Ct. Att'y Disciplinary Bd. v. Willey*, 965 N.W.2d 599, 606 (Iowa 2021); MODEL RULES OF PRO. CONDUCT r. 1.6(b)(5) (AM. BAR ASS'N 2021).

218. RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS. § 64 cmt. e (AM. L. INST. 2000).

219. *Id.*

220. *See Spratley v. State Farm Mut. Auto. Ins. Co.*, 78 P.3d 603, 610 (Utah 2003) (making this point with respect to a lawyer's claim against a client).

221. *In re Conduct of Conry*, 491 P.3d 42, 55 (Or. 2021); *In re Disciplinary Proc. Against Thompson*, 847 N.W.2d 793, 800 (Wis. 2014); ABA Comm. on Ethics & Pro. Resp., Formal Op. 10-456, at 4 (2010).

222. *See, e.g., Bd. of Prof. Resp. of the Sup. Ct. of Tenn., Pub. Censure, In re Jeffrey Dennis Johnson*, File No. 64942-1-ES (Apr. 8, 2021), <https://docs.tbpr.org/johnson-64942-washington-county-lawyer-censured.pdf> [<https://perma.cc/6VDT-GUTP>] (concluding that the

unreasonably disclosing client information in response to clients' criticism of them on social media, with the severity of the discipline usually depending on the information disclosed, the potential harm or prejudice to the client, and the lawyer's violation of other rules of professional conduct.²²³ *In re Conduct of Conry*²²⁴ is an interesting recent case in this vein.

Oregon lawyer Brian Conry practiced immigration and criminal law.²²⁵ He was hired in 2010 by a client (Client) who was facing possible deportation following second degree burglary and second degree theft convictions.²²⁶ Conry represented Client until 2015, when the government ordered Client's deportation.²²⁷ Client then changed lawyers, and his new lawyer, Inna Levin, convinced the government that he could not be deported based on 2013 Supreme Court cases Conry either overlooked or considered inapposite.²²⁸ To be quick about it, Conry had evidently conceded that Client's convictions justified his deportation because they involved crimes of moral turpitude.²²⁹ According to Levin, however, the Supreme Court clarified in its 2013 decisions that second degree burglary and second degree theft were no longer treated as crimes involving moral turpitude.²³⁰ As noted above, the government accepted Levin's argument.²³¹ Had the government not folded, Levin was prepared to assert that Conry had provided Client with ineffective assistance of counsel.²³²

lawyer violated Rule 1.9(c) by posting an online response to a former client's Google review in which the lawyer detailed the former client's health and medical conditions, described the type of case in which he represented the former client, and stated that the former client asked him to lie to the court, and publicly censuring the lawyer for the rule violation).

223. Compare *In re Skinner*, 758 S.E.2d 788, 790 (Ga. 2014) (reprimanding the lawyer publicly and ordering her to obtain practice management assistance where the disclosure of confidential information was isolated and involved a single client, the disclosure did not actually nor potentially harm the client, and there were significant mitigating circumstances), with *People v. Isaac*, 470 P.3d 837, 847 (Colo. 2016) (suspending for six months a lawyer who posted online responses to two negative client reviews that contained client information, failed to acknowledge his misconduct or express remorse, and had an extensive disciplinary history), and *In re Steele*, 45 N.E.2d 777, 780–81 (Ind. 2015) (disbarring a lawyer who knowingly made false statements in response to negative Avvo reviews, once revealed the wrong client's confidential information in response to another client's negative Avvo review, violated clients' confidentiality in other ways, misappropriated client funds, and repeatedly lied to disciplinary authorities).

224. 491 P.3d 42 (Or. 2021).

225. *Id.* at 46.

226. *Id.*

227. *Id.*

228. *Id.* at 46–47.

229. *Id.* at 46.

230. *Id.*

231. *See id.* at 46–47.

232. *See id.* at 46.

In December 2015, Client filed a disciplinary complaint against Conry, which was eventually dismissed with no action taken.²³³ While that complaint was pending, Client, posting pseudonymously as Yarik P., harshly reviewed Conry's work on Yelp.²³⁴ Client characterized Conry's representation of him as horrible, claimed that Conry had charged him \$20,000 in losing, and strongly recommended that readers not hire Conry.²³⁵

In February 2016, with his disciplinary complaint against Conry still pending, Client, once more posting as Yarik P., reviewed Conry on Google.²³⁶ He called Conry "crooked," urged readers not to hire him, insinuated that Conry had overbilled him, and accused Conry of multiple mistakes—most notably overlooking the dispositive Supreme Court cases.²³⁷ He also reported that he won his case soon after changing counsel.²³⁸

In March 2016, Client, this time identifying himself as Yarik, disparaged Conry's performance on Avvo.²³⁹ He again wrote that Conry was a horrible lawyer, implored readers not to hire him, blasted his fees, and accused him of multiple mistakes.²⁴⁰ By now Client's disciplinary complaint had been dismissed.²⁴¹

Conry responded to all of Client's negative reviews in June 2016.²⁴² In his response on Yelp, Conry disclosed the crimes of which Client had been convicted and how they related to deportation, argued that his tactics had enabled Client to avoid deportation, defended his fees, and directed readers to his website to get an accurate portrayal of his practice.²⁴³ In his response on Google, Conry again specifically recited Client's criminal convictions.²⁴⁴ Finally, in his response on Avvo, Conry identified Client by his full name and spelled out the two crimes of which he was convicted.²⁴⁵ Conry explained in detail the immigration law consequences of Client's crimes and their characterization for immigration law purposes as crimes of moral turpitude.²⁴⁶ He also speculated that if the government appealed, Client still might be

233. *Id.* at 47.

234. *Id.*

235. *Id.*

236. *Id.*

237. *Id.* at 47–48.

238. *Id.* at 48.

239. *Id.*

240. *Id.*

241. *Id.* at 47.

242. *Id.*

243. *Id.*

244. *Id.* at 48.

245. *Id.*

246. *Id.*

deported.²⁴⁷ He concluded by inviting readers to visit his website to obtain a true picture of his legal skills.²⁴⁸

Client learned of Conry's responses soon after they were posted and, in July 2016, filed a disciplinary complaint against Conry regarding Conry's Avvo post.²⁴⁹ Also in July 2016, Conry deleted Client's full name from the Avvo response apparently based on the advice of counsel.²⁵⁰ Conry deleted all three of his posts in October 2016 after attending a seminar in which he learned that his online responses to Client's posts might violate rules of professional conduct.²⁵¹

The Oregon State Bar charged Conry with violating Oregon's version of Rule 1.6(a).²⁵² A disciplinary panel found that Conry violated Rule 1.6(a) through his posts and that the self-defense exception contained in Oregon Rule 1.6(b)(4) did not spare him.²⁵³ The disciplinary panel wrote: "We find that disclosing the client's full name and criminal convictions do not fit within this limitation. No reasonable argument supports the conclusion that these facts were necessary to defend [Conry's] work or reputation."²⁵⁴ The disciplinary panel recommended that Conry be suspended from practice for thirty days, but that recommendation was tabled when Conry sought review by the Oregon Supreme Court.²⁵⁵

The first question for the court was whether Conry's responses to Client's online reviews "fell within the scope of the general prohibition against revealing information relating to the representation of a client."²⁵⁶ Oregon Rule of Professional Conduct 1.0(f) defined "information relating to the representation of a client" to include "information gained in a current or former professional relationship" which, if disclosed, "would be embarrassing or would be likely to be detrimental to the client."²⁵⁷

Although "Yarik P." had let his audience—readers of online reviews of lawyers—know that he had faced criminal charges, he did not reveal his real name or criminal history, nor did he disclose that he had been convicted of any crimes.²⁵⁸ Then along came Conry, who specifically disclosed Client's two criminal convictions, and, in his Avvo response, revealed Client's

247. *Id.*

248. *Id.*

249. *Id.* at 48–49.

250. *Id.* at 49.

251. *Id.*

252. *Id.*

253. *Id.*

254. *Id.* (quoting the disciplinary panel's opinion).

255. *Id.*

256. *Id.* at 52.

257. *Id.* (quoting Oregon Rule of Professional Conduct 1.0(f)).

258. *Id.*

name.²⁵⁹ The court deemed those pieces of information to be embarrassing.²⁶⁰ Moreover, Client testified before the disciplinary panel that he was, in fact, embarrassed by Conry's online disclosures.²⁶¹ He fretted about losing his job if his employer came across them.²⁶² He also worried about what might happen if his wife's very religious family, which knew nothing of his convictions, read Conry's posts.²⁶³

Conry countered that the information he disclosed was not embarrassing to Client as a matter of law because Client's name and criminal convictions were matters of public record, and a public records request to the Oregon State Bar for Client's first ethics complaint would have revealed the same information.²⁶⁴ The court disagreed.²⁶⁵ Client did not identify himself in his reviews, nor did he reveal his convictions or his underlying crimes.²⁶⁶ While readers of Conry's posts might have been able to collect that information themselves, that chance was remote and would have required herculean effort.²⁶⁷ Readers of Conry's responses were equally unlikely to submit a public records request to the Bar for complaints against him, thereby exposing Client and his criminal convictions, because neither Client's nor Conry's posts indicated that Client had filed a Bar complaint.²⁶⁸ Even if readers of Client's reviews might have guessed that he had done so, there was no basis to conclude that they would know to make a public records request to the Bar, or if they did, that they would spend the time to investigate the details of Client's reviews.²⁶⁹

With the court having determined that Conry had revealed information relating to Client's representation, the question became whether his disclosures fell under the self-defense exception in Oregon Rule 1.6(b)(4).²⁷⁰ That exception provided in pertinent part: "A lawyer 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[.]"²⁷¹ The court assumed the existence of a "controversy" to focus on whether Conry reasonably

259. *Id.*

260. *Id.*

261. *Id.*

262. *Id.*

263. *Id.* at 52–53

264. *Id.* at 53.

265. *Id.*

266. *Id.*

267. *Id.*

268. *Id.*

269. *Id.*

270. *Id.*

271. *Id.* at 53–54 (quoting the self-defense exception in Rule 1.6(b)(4)).

believed that his disclosures were necessary to his defense.²⁷² Phrased as a question, was it “objectively reasonable for [Conry] to believe that disclosing [C]lient’s full name and specific criminal convictions was necessary (*e.g.*, essential or indispensable)” for him to defend against Client’s allegations?²⁷³

The court first evaluated Conry’s specific disclosures of Client’s crimes.²⁷⁴ This was a close question, at least concerning Conry’s Yelp and Google posts where he did not identify Client.²⁷⁵ Close though it may have been, the court sided with Conry.²⁷⁶ By asserting that his crimes were not deportable offenses, Client arguably opened the door for Conry to explain to the Yelp and Google audiences the government’s grounds for seeking deportation—conviction of crimes involving moral turpitude—and whether Client’s crimes could be so categorized.²⁷⁷ The court thus acknowledged that Conry could have reasonably believed it necessary to detail Client’s crimes in his responses.²⁷⁸

Conry’s Avvo response was a different story.²⁷⁹ There he disclosed Client’s full name in addition to his specific criminal convictions.²⁸⁰ In doing so, he revealed Client’s name and criminal history not just to readers of online reviews of lawyers, but also to the public at large.²⁸¹ Internet search engines would circulate Client’s identity globally.²⁸² Anyone who searched Client’s name online for any reason could read about the nuts and bolts of his criminal convictions.²⁸³

The court concluded that Conry could not have reasonably believed that it was necessary for him to name Client in his Avvo response.²⁸⁴ As a result, he could not invoke the self-defense exception in Oregon Rule 1.6(b)(4) to avoid discipline for breaching his duty of confidentiality.²⁸⁵ That ultimately brought the court to the issue of an appropriate penalty for his misconduct.²⁸⁶

The court considered the nature of the duty Conry breached, evaluated his mental state, considered Client’s injury, weighed the aggravating and

272. *Id.* at 54–55.

273. *Id.* at 55.

274. *See id.* at 55–56.

275. *Id.* at 56.

276. *Id.*

277. *Id.*

278. *Id.*

279. *Id.*

280. *Id.*

281. *Id.*

282. *See id.*

283. *Id.*

284. *Id.*

285. *Id.*

286. *Id.* at 57.

mitigating circumstances, and reviewed case law.²⁸⁷ In the end, the court publicly reprimanded Conry.²⁸⁸

B. A “Controversy” Between a Lawyer and a Client

Again, Model Rule 1.6(b)(5) provides that a lawyer may reveal information related to a client’s representation that she reasonably believes is necessary to defend herself in a “controversy” with the client.²⁸⁹ The *In re Conduct of Conry* court did not decide whether Client’s negative online reviews of Conry created a “controversy” under the analogous Oregon rule because it did not need to do so given its disapproval of Conry’s Avvo post.²⁹⁰ Ethics committees that have considered the issue, however, have generally found that a client’s negative online review of a lawyer is not a “controversy” for purposes of the self-defense exception to the duty of confidentiality.²⁹¹ Support for this position may be implied from the text of Model Rule 1.6(b)(5), which permits disclosure by a lawyer “to establish a claim or defense” in a controversy with a client.²⁹² It may further be implied from comment 10 to Model Rule 1.6, which states that “[w]here a *legal claim or disciplinary charge* alleges complicity of the lawyer in a client’s conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to

287. *See id.* at 57–60.

288. *Id.* at 60.

289. MODEL RULES OF PRO. CONDUCT r. 1.6(b)(5) (AM. BAR ASS’N 2021).

290. *In re Conduct of Conry*, 491 P.3d at 54–55.

291. ABA Comm. on Ethics & Pro. Resp., Formal Op. 496, at 3 (2021) [hereinafter ABA Formal Op. 496]; Mo. Bar Informal Advisory Op. 2018-08 (2018), <https://mobar.org/public/ethics/InformalOpinionsSearch.aspx> [<https://perma.cc/W3UJ-ATZ8>]; NJ Eth. Op. 738, 2020 WL 7356382, at *1 (N.J. Sup. Ct., Advisory Comm. on Pro. Ethics 2020); PA Eth. Op. 2014-200, 2014 WL 10383868, at *2 (Pa. Bar Ass’n, Comm. on Legal Ethics & Pro. Resp. 2014) [hereinafter Pa. Eth. Op. 2014-200]; TX Eth. Op. 662, 2016 WL 4764929, at *2 (Sup. Ct. of Tex., Pro. Ethics Comm. 2016). *But see* Colo. Bar Ass’n Ethics Comm., Formal Op. 136, at 7 (2019) (acknowledging that a client’s online criticisms sometimes can create a controversy between the lawyer and the client); State Bar of Ariz., Formal Ethics Op. 93-02 (1993) [hereinafter Ariz. Formal Op. 93-02] (reasoning that a former client’s statements created a controversy that entitled the lawyer to divulge the substance of confidential conversations with the former client). Other ethics committees have concluded that a client’s or former client’s negative online review of a lawyer does not entitle the lawyer to defensively reveal information related to the client’s or former client’s representation without specifically linking the prohibition to the lack of a “controversy.” *See, e.g.*, L.A. Cnty. Bar Ass’n, Pro. Resp. & Ethics Comm., Op. No. 525, at 4 (2012); FL Eth. Op. 20-01, 2020 WL 9813200, at *2 (Fla. State Bar Ass’n, Comm. on Pro. Ethics 2020); MN Eth. Op. 24, 2016 WL 7744853, at *1 (Minn. Law. Pro. Resp. Bd. 2016); N.Y. State Bar Ass’n, Comm. on Pro. Ethics, Op. 1032, at 3–4 (2014).

292. MODEL RULES OF PRO. CONDUCT r. 1.6(b)(5) (AM. BAR ASS’N 2021).

establish a defense.”²⁹³ In other words, a “controversy” between a client and a lawyer within the meaning of Model Rule 1.6(b)(5) requires some sort of formal proceeding, and a negative online review does not qualify.²⁹⁴ Although a lawyer generally has a right to preemptively or proactively defend against a threatened legal claim or disciplinary charge rather than waiting for the initiation of a proceeding,²⁹⁵ the majority of ethics committees to have analyzed the issue would find no such right here because a negative online review is neither a legal claim nor a disciplinary action. Even if a client’s online smear job was a precursor to either of those events, the lawyer’s right to discuss client information in self-defense would be limited to responding to the client rather than posting a rebuttal online.²⁹⁶

But wait. A “controversy” includes “[a] dispute, especially a public one, between sides holding opposing views.”²⁹⁷ A client’s or former client’s online criticism of a lawyer’s competence or honesty—which will spread globally via the internet—meets that definition. Although the lawyer’s attacker may never file a disciplinary complaint or sue the lawyer, that is immaterial because lawyers generally may respond to accusations of wrongdoing before the commencement of an action or proceeding (which may or may not ever come).²⁹⁸ The “claim or defense” language in Model Rule 1.6(b)(5) is certainly no basis to prohibit lawyers from disclosing client information in response to clients’ online criticism when they reasonably believe it necessary because that interpretation would render the trailing “in a controversy between the lawyer and a client” language in the rule superfluous.²⁹⁹ That result cannot stand because courts interpret rules of professional conduct according to the principles that govern statutory interpretation,³⁰⁰ and courts generally construe statutes so that no provision is rendered superfluous.³⁰¹ And reliance on the comment to Model Rule 1.6 is no substitute; the language there is

293. *Id.* r. 1.6 cmt. 10 (emphasis added).

294. See ABA Formal Op. 496, *supra* note 291, at 3.

295. MODEL RULES OF PRO. CONDUCT r. 1.6 cmt. 10 (AM. BAR ASS’N 2021).

296. ABA Formal Op. 496, *supra* note 291, at 3.

297. AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 400 (4th ed. 2009).

298. MODEL RULES OF PRO. CONDUCT r. 1.6 cmt. 10 (AM. BAR ASS’N 2021); see *Hélie v. McDermott, Will & Emery*, 869 N.Y.S.2d 27, 28 (App. Div. 2008) (allowing the defendants to disclose client information in their defense without the plaintiff first establishing a prima facie case of the defendants’ liability).

299. See *Ariz. Formal Op. 93-02*, *supra* note 291.

300. See, e.g., *Ferris, Thompson & Zweig, Ltd. v. Esposito*, 90 N.E.3d 400, 405 (Ill. 2017); *Law Offs. of Jeffrey Sherbow, PC v. Fieger & Fieger, PC*, 930 N.W.2d 416, 424 (Mich. Ct. App. 2019) (quoting *Morris & Doherty, P.C. v. Lockwood*, 672 N.W.2d 884, 888 (Mich. Ct. App. 2003)); *Comm’n for Law. Discipline v. Hanna*, 513 S.W.3d 175, 178 (Tex. App. 2016).

301. See, e.g., *Rogers v. Ark. Dep’t of Corr.*, 638 S.W.3d 265, 269 (Ark. 2022); *Arapahoe Cnty. Dep’t of Hum. Servs. v. Velarde*, 507 P.3d 518, 521 (Colo. 2022); *Little v. Davis*, 974 N.W.2d 70, 75 (Iowa 2022); *State v. Pauly*, 972 N.W.2d 907, 918 (Neb. 2022).

merely giving an example of when a lawyer may defensively reveal client information.³⁰²

Here is the core of the issue: to date, most ethics committees have simply adopted a different approach to lawyers' preemptive defense where the "controversy" involves online criticism. The two principal reasons for this divergent approach appear to be: (1) holding otherwise "would mean that any time a lawyer and a client disagree about the quality of the [lawyer's] representation, the lawyer [could] publicly divulge confidential information";³⁰³ and (2) even if a client's online criticism creates a controversy with the lawyer, a public response by the lawyer "is not reasonably necessary or contemplated by Rule 1.6(b) for the lawyer to establish a claim or defense" in that controversy.³⁰⁴ Neither rationale is compelling.

First, lawyers obviously cannot publicly divulge client information any time they disagree with clients because Rule 1.6(b)(5) permits lawyers to disclose client information only when they reasonably believe it is necessary.³⁰⁵ A lawyer's public disclosure of client information during a *private* disagreement with a client is unnecessary and thus would violate Rule 1.6(a).³⁰⁶

Second, the rationale that a lawyer's public response "is not reasonably necessary or contemplated by Rule 1.6(b) for the lawyer to establish a claim or defense" comes from Formal Opinion 496, issued by the ABA's Standing Committee on Ethics and Professional Responsibility in 2021.³⁰⁷ But the Committee rested its reasoning on the following passage from comment 16 to Model Rule 1.6: "Paragraph (b) permits disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes stated [sic]."³⁰⁸ By any reading, the quoted language does not support the view that lawyers' public responses to online criticism are never reasonably necessary or are not contemplated by Model Rule 1.6(b)(5); rather, it counsels restraint if and when a lawyer responds publicly.

Furthermore, a responsive post by a lawyer that contains client information arguably is necessary to the lawyer's defense because online readers are the lawyer's judge and jury. They are the audience lawyers must reach to defend themselves. Now, maybe a lawyer's overtures to an aggrieved client will persuade the client to delete an offending post, but what if it does

302. See MODEL RULES OF PRO. CONDUCT r. 1.6 cmt. 10 (AM. BAR ASS'N 2021).

303. Pa. Eth. Op. 2014-200, *supra* note 291, at *2.

304. ABA Formal Op. 496, *supra* note 292, at 3.

305. MODEL RULES OF PRO. CONDUCT r. 1.6(b)(5) (AM. BAR ASS'N 2021).

306. See ABA Formal Op. 496, *supra* note 291, at 3.

307. *Id.*

308. *Id.* (misquoting the comment, which uses "specified" instead of "stated").

not? The lawyer might ask the host of the website or search engine to remove the post,³⁰⁹ but there is no guarantee that the host will do so. The advice that a lawyer faced with online criticism offer an anodyne response such as “[p]rofessional obligations do not allow me to respond as I would wish,”³¹⁰ is at best of limited utility because it does not, in fact, establish a defense on the lawyer’s behalf.

To be sure, it may be undignified or unwise for lawyers to spar online with critics, but those concerns do not alone render lawyers’ public refutations of online criticism unethical.

Setting aside the issue of online criticism by disgruntled clients or former clients, what disagreements or disputes unquestionably *do* count as lawyer–client controversies? Threatened, impending, and pending lawsuits, arbitrations, administrative actions and other quasi-judicial proceedings, and disciplinary complaints certainly all qualify.³¹¹ So do disqualification motions, whether threatened, imminent, or filed.³¹² Whether other events or actions create lawyer–client controversies for purposes of the self-defense exception to the duty of confidentiality will depend on the facts and the jurisdiction.³¹³

C. *The Self-Defense Exception in Other Proceedings*

Lawyers’ ability to disclose client information to the extent they reasonably believe necessary to defend themselves is not limited to controversies with clients.³¹⁴ Under Model Rule 1.6(b)(5), lawyers may also reveal client information “to establish a defense to a criminal charge or civil

309. See ABA Formal Op. 496, *supra* note 291, at 5 (suggesting this alternative).

310. *Id.* at 6; see also Fla. Bar Pro. Ethics Comm., Formal Op. 21-1, at 2 (2021) (opining that a Florida lawyer could state: “‘As a lawyer, I am constrained by the Rules Regulating The Florida Bar in responding, but I will simply state that it is my belief that the comments are not accurate’”).

311. See MODEL RULES OF PRO. CONDUCT r. 1.6 cmt. 10 (AM. BAR ASS’N 2021) (referring to civil, criminal, disciplinary, and other proceedings); Or. Bar Ass’n Bd. of Governors, Formal Op. 2005-104 (2005) (explaining that the self-defense exception applies to lawyer disciplinary complaints); S.C. Bar Ethics Advisory Comm., Formal Op. 94-24 (1994) (involving an appeal to an agency board).

312. RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS. § 64 cmt. c (AM. L. INST. 2000).

313. Although beyond the scope of this Article, lawyers may also disclose client information in actions to collect unpaid fees. See MODEL RULES OF PRO. CONDUCT r. 1.6 cmt. 11 (AM. BAR ASS’N 2021).

314. See, e.g., *Stirum v. Whalen*, 811 F. Supp. 78, 83–84 (N.D.N.Y. 1993) (allowing the lawyers to reveal their communications with their clients in a lawsuit between their clients and numerous third parties in which the plaintiffs alleged that the lawyers were complicit in connection with their clients’ securities fraud without naming them as defendants).

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[.]”³¹⁵ These two exceptions plainly are not restricted to controversies between lawyers and clients.³¹⁶ They do not require an allegation of misconduct by a client, nor do they require that a client have a hand in initiating the charge, claim, or proceeding.³¹⁷ Rather, these exceptions allow lawyers to disclose client information in a range of matters in which they are accused of wrongdoing by third parties.³¹⁸ The final exception also permits a lawyer to disclose client information where a client accuses the lawyer of malfeasance in a dispute between the client and a third party.³¹⁹

*Iowa Supreme Court Attorney Disciplinary Board v. Willey*³²⁰ animates some of these principles. The lawyer there, Bruce Willey, was also an entrepreneur who entered into a number of business deals with one of his clients, David Wild.³²¹ In one of those deals, Willey arranged for one of his other clients, Midwest S.N. Investors, LLC (Midwest), to loan \$200,000 to an entity known as Catalyst in which other companies controlled by Wild and Willey had interests.³²² After Catalyst was sued for defaulting on a separate loan that Willey arranged, Wild's and Willey's relationship soured.³²³ Wild eventually filed a complaint against Willey with the Iowa Supreme Court Attorney Disciplinary Board (Board).³²⁴ The Iowa Supreme Court Grievance Commission (Commission) concluded that the Board failed to establish that

315. MODEL RULES OF PRO. CONDUCT r. 1.6(b)(5) (AM. BAR ASS'N 2021).

316. *Iowa Sup. Ct. Att'y Disciplinary Bd. v. Willey*, 965 N.W.2d 599, 607 (Iowa 2021); *Burkhart v. Semitool, Inc.*, 5 P.3d 1031, 1040 (Mont. 2000).

317. *People v. Robnett*, 859 P.2d 872, 879 (Colo. 1993); *Willey*, 965 N.W.2d at 607.

318. *See, e.g., In re Disciplinary Action Against Dyer*, 817 N.W.2d 351, 358–59 (N.D. 2012) (explaining that the lawyers could produce trust account statements and bills sent to clients in a disciplinary proceeding); S.C. Bar Ethics Advisory Comm. Op. 94-23 (1994) (opining that the lawyer could disclose confidential client communications to defend himself in a Social Security Administration investigation).

319. *See, e.g., Hartman v. Cunningham*, 217 S.W.3d 408, 410–14 (Tenn. Ct. App. 2007) (concluding that the lawyer was entitled to provide an affidavit defending his representation of a former client in the former client's lawsuit against other lawyers in which the former client alleged that the lawyer had been negligent in a prior representation); Pa. Bar Ass'n Comm. on Legal Ethics & Pro. Resp., Formal Op. 96-48 (1996) (advising the inquiring lawyer “that since his former clients in their defense in their SEC suit [had] charged him with malpractice, he [was] permitted to reveal such information concerning the representation as he reasonably believe[d] necessary to respond to the allegations”).

320. 965 N.W.2d 599 (Iowa 2021).

321. *Id.* at 602.

322. *Id.* at 603–04.

323. *Id.* at 604.

324. *Id.*

Willey committed any ethics violations in his representation of Wild.³²⁵ The Commission did find, however, that Willey had violated three rules of professional conduct in his representation of Midwest regarding its loan to Catalyst and recommended that he be suspended from practice for thirty days.³²⁶

Upon review of the Commission's recommendation by the Iowa Supreme Court, Willey argued that the disciplinary charges against him failed because Midwest never complained about his alleged misconduct and no one from Midwest testified against him in the proceedings below.³²⁷ He further argued that he could not fairly defend against the Board's charges because Midwest had not waived its attorney-client privilege and, consequently, he could not reveal his exculpatory conversations with Midwest.³²⁸

The Iowa Supreme Court rejected Willey's claim that he could not effectively defend himself below because Midwest was not a complainant and thus had not waived its attorney-client privilege.³²⁹ In doing so, the court relied on Iowa Rule of Professional Conduct 32:1.6(b)(5), which tracks Model Rule 1.6(b)(5).³³⁰ The court reasoned that the rule plainly permitted Willey to disclose otherwise-privileged communications with Midwest to defend himself in the disciplinary action regardless of whether Midwest consented to those disclosures.³³¹ As the court explained, the rule disjunctively lists three situations in which lawyers may reveal client information.³³² Only the first scenario contemplates a client's involvement in the proceedings.³³³ In contrast, neither of the latter two scenarios require the client to participate in the proceedings for the rule to apply.³³⁴ For that matter, if the court were to confine the Rule 32:1.6(b)(5) self-defense exception to disciplinary actions initiated by clients, it would materially restrict its ability to regulate the

325. *Id.* at 604-05.

326. *Id.* at 605.

327. *Id.*

328. *Id.* Two of the violations with which Willey was charged involved conflicts of interest. Willey asserted that, absent Midwest's waiver of its attorney-client privilege, he could not testify about his conversations with Midwest about its consent to those conflicts. *Id.*

329. *Id.* at 606. In so arguing, Willey relied on a 2005 Iowa State Bar Association (ISBA) ethics opinion. *Id.* As the *Willey* court pointed out, however, the Iowa Supreme Court is solely responsible for regulating the practice of law in Iowa, and ISBA ethics opinions neither bind the court nor have the force of law. *Id.* (citing GREGORY C. SISK & MARK S. CADY, IOWA PRACTICE SERIES LAWYER & JUDICIAL ETHICS § 2.12 (2015)).

330. *Id.* (quoting IOWA RULES OF PRO. CONDUCT r. 32:1.6(b)(5)).

331. *See id.* at 607.

332. *Id.*

333. *See id.* (quoting IOWA RULES OF PRO. CONDUCT r. 32:1.6(b)(5)).

334. *Id.*

practice of law in Iowa.³³⁵ The court declined to so handcuff itself.³³⁶ As the *Willey* court summarized matters, lawyers must limit any disclosure of client information to materials or communications they reasonably believe necessary to defend themselves, but they cannot raise the attorney–client privilege as a shield to disciplinary charges.³³⁷

The *Willey* court focused on the attorney–client privilege, but its analysis equally covers lawyers' duty of confidentiality.³³⁸ As *Willey* further reflects, while the self-defense exception to lawyers' duty of confidentiality certainly may be raised in lawyer–client disputes, the key to its application is an allegation of misconduct against the lawyer—not the identity of the accuser.³³⁹

Regardless of the circumstances, lawyers may respond to misconduct allegations as soon as they are made; lawyers need not wait for some sort of

335. *Id.*

336. *Id.*

337. *Id.* at 308 (citing 16 GREGORY C. SISK & MARK S. CADY, IOWA PRACTICE SERIES LAWYER & JUDICIAL ETHICS § 5:6(j) (2015)).

338. *See id.* at 606–07 (discussing IOWA RULES OF PRO. CONDUCT r. 32:1.6(b)(5)); *see also* *People v. Robnett*, 859 P.2d 872, 879 (Colo. 1993) (stating that “[b]y its terms,” the Colorado equivalent of Model Rule 1.6(b)(5) “is not restricted to proceedings initiated by allegations from the client”).

339. *See Willey*, 965 N.W.2d at 607–08 (Iowa 2021); *see also In re Disciplinary Action Against Dyer*, 817 N.W.2d 351, 358 (N.D. 2012) (explaining that the self-defense exception to the North Dakota equivalent of Model Rule 1.6(b)(5) applies in a range of proceedings—not simply those initiated by clients).

formal action against them to mount a defense.³⁴⁰ *Hartman v. Cunningham*³⁴¹ is a case in point.

The plaintiff, Leonard Hartman, litigated a bitter and protracted divorce, in which he was successively represented by at least nine lawyers.³⁴² Clarence Cunningham was Hartman's third lawyer and handled his divorce trial.³⁴³ Hartman later sued the fourth, fifth, and sixth lawyers who represented him in his divorce in a case styled *Hartman v. Rogers*.³⁴⁴ In his complaint in *Rogers*, he alleged that Cunningham was not properly prepared to impeach his wife when she testified at trial about a debt that was at issue in the divorce.³⁴⁵ He further alleged that one of the lawyers he sued failed to inform him of the potential causes of action he might have asserted against Cunningham based on the latter's trial work.³⁴⁶

340. See *In re Bryan*, 61 P.3d 641, 654 (Kan. 2003). Unfortunately, comment 10 to Model Rule 1.6 is not a model of clarity on this point. Comment 10 states:

Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense Such a charge can arise in a civil, criminal, disciplinary or other proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person, for example, a person claiming to have been defrauded by the lawyer and client acting together. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (b)(5) 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.

MODEL RULES OF PRO. CONDUCT r. 1.6 cmt. 10 (AM. BAR ASS'N 2021). A reader might be forgiven for thinking based on the last two quoted sentences that a lawyer can respond urgently to a misconduct allegation only where a client is complicit in the lawyer's wrongdoing—in all other situations the lawyer must wait for the filing or presentment of a claim or charge, or the initiation of a proceeding. That is not the law, however. See, e.g., *In re Bryan*, 61 P.3d at 654; see also ELLEN J. BENNETT & HELEN W. GUNNARSSON, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 127 (9th ed. 2019) (“A lawyer accused of wrongful conduct in connection with the representation of a client, or with complicity in a client's wrongful conduct, need not wait until formal charges are filed.”). The reference in the first sentence of the comment to “other misconduct of the lawyer” clarifies that a lawyer's right to respond to an assertion of wrongdoing without having to await the initiation of a related action or proceeding is not tied to the client's complicity in the wrongdoing. The last two sentences of comment 10 are simply part of the example that begins in the prior sentence.

341. 217 S.W.3d 408 (Tenn. Ct. App. 2007).

342. *Id.* at 409.

343. *Id.*

344. *Id.*

345. *Id.*

346. *Id.*

The lawyer for the defendants in *Rogers*, Thomas Kilday, asked Cunningham for an affidavit, which he provided.³⁴⁷ In his affidavit, Cunningham explained the facts surrounding the subject debt, his strategy for dealing with the debt in the divorce trial, and the court's treatment of the debt, which actually favored Hartman.³⁴⁸ Hartman then sued Cunningham for providing the affidavit and Kilday for procuring it.³⁴⁹ Cunningham and Kilday won summary judgment and Hartman appealed to the Tennessee Court of Appeals.³⁵⁰

One of the issues on appeal was whether Cunningham was permitted to submit his affidavit under Tennessee Rule of Professional Conduct 1.6(b)(5), which provided:

A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes disclosure is 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.³⁵¹

Hartman argued that the self-defense exception did not cover Cunningham's affidavit because the relatively few statements about Cunningham in the underlying complaint—he was mentioned in only four of the complaint's twenty-eight paragraphs—were not the subject of the lawsuit, but merely provided a backdrop for the allegations against the defendants in that case.³⁵² According to Hartman, the complaint's references to Cunningham were merely "tangential" to the claims against the named defendants, which notably did not include Cunningham.³⁵³

The *Hartman* court considered this argument meritless.³⁵⁴ The rule did not require that allegations against a lawyer be primary to the proceeding in which they were made to allow a lawyer to respond without violating the duty of confidentiality.³⁵⁵ The simple fact of the matter was that Hartman had

347. *Id.* at 410.

348. *Id.*

349. *Id.*

350. *Id.*

351. *Id.* at 412 (quoting TENN. RULES OF PRO. CONDUCT r. 1.6(b)(5)).

352. *Id.*

353. *Id.* (quoting Hartman's brief).

354. *Id.*

355. *Id.*

asserted in a proceeding that Cunningham committed malpractice, which was all the Tennessee rule required.³⁵⁶ Whether Hartman accused Cunningham of malpractice in one sentence, a few paragraphs, or dozens of paragraphs in his complaint was immaterial.³⁵⁷

It was also immaterial to the court that Hartman did not name Cunningham as a defendant in the *Rogers* case.³⁵⁸ The self-defense exception to the duty of confidentiality established in Tennessee Rule 1.6(b)(5) spelled out “three separate possibilities, which [were] delineated as grammatical clauses joined with the word ‘or,’ not the word ‘and.’”³⁵⁹ For the rule to apply, a lawyer’s disclosure of client information only had to fall within one of three categories or scenarios, the final one of which permitted a lawyer to disclose client information “to respond to allegations *in any proceeding* concerning the lawyer’s representation of the client.”³⁶⁰ Cunningham’s affidavit fit that scenario.³⁶¹

Grasping at straws, Hartman argued that Cunningham could not have reasonably believed that he needed to submit his affidavit in the *Rogers* case because (1) he had not been sued in that case and thus had no stake in its outcome; (2) Hartman had not filed a complaint against him with the Tennessee Board of Professional Responsibility; and (3) the affidavit included unnecessarily prejudicial information.³⁶² The *Hartman* court easily rejected all three arguments.³⁶³

First, Cunningham’s lack of involvement in the *Rogers* case was immaterial as the court had already explained.³⁶⁴ Second, Cunningham did not have to wait around for a disciplinary complaint to defend his tactics in Hartman’s divorce trial.³⁶⁵ The Tennessee rule permitted him “to respond to the serious allegations made against him concerning his professional performance.”³⁶⁶ Any capable and principled lawyer “would respond to allegations made in a proceeding that the lawyer had committed malpractice.”³⁶⁷ Under the circumstances, it was apparent to the court that Cunningham reasonably believed that he needed to respond to Hartman’s

356. *Id.* at 412–13.

357. *Id.* at 412.

358. *Id.* at 413.

359. *Id.*

360. *Id.* (quoting TENN. RULES OF PRO. CONDUCT r. 1.6(b)(5)).

361. *See id.*

362. *Id.*

363. *See id.*

364. *Id.*

365. *Id.*

366. *Id.*

367. *Id.*

accusation of malpractice as he did in his affidavit.³⁶⁸ Third, there was nothing wrong with Cunningham's affidavit; it revealed no privileged communications, and any allegedly unflattering content was a matter of public record by the time he submitted it.³⁶⁹

In conclusion, the *Hartman* court reasoned that it had to rule in Cunningham's favor because to hold otherwise would leave lawyers helpless to defend against serious claims of wrongdoing.³⁷⁰ The court affirmed the trial court judgments for Cunningham and Kilday and assessed the costs of the appeal to Hartman.³⁷¹

Hartman is an illustrative case first because Tennessee's version of Rule 1.6(b)(5) essentially mirrors Model Rule 1.6(b)(5).³⁷² Beyond that, the court nicely outlined how the self-defense exception to the duty of confidentiality applies in a proceeding to which the lawyer is not a party. The court also drove home the point that a lawyer can disclose client information within the bounds of the rule as soon as an accusation of wrongdoing is made rather than waiting for the accusation to evolve into some sort of proceeding to which the lawyer is a party, when the lawyer's defense almost certainly becomes more complex, time-consuming, and costly.³⁷³

At the same time, it is worth asking whether Cunningham reasonably believed that it was necessary to respond to Hartman's allegations given that any legal malpractice claim Hartman might have asserted against him was likely barred by the statute of limitations.³⁷⁴ In fact, any statute of limitations defense was irrelevant to Cunningham's belief that it was necessary for him to respond to Hartman's malpractice allegation. The prong of Rule 1.6(b)(5) that applied to his disclosure required only the existence of "allegations in any proceeding concerning [his] representation of the client"—it did not require a valid cause of action.³⁷⁵ For that matter, even where a lawyer faces a claim by a client or a criminal charge or civil claim based on conduct in which the client was complicit, the charge or claim need not be procedurally or substantively valid for the lawyer to reasonably believe that a defensive disclosure of client information is necessary.³⁷⁶

368. *Id.*

369. *Id.* at 413–14.

370. *Id.* at 414.

371. *Id.*

372. Compare TENN. RULES OF PRO. CONDUCT r. 1.6(b)(5) (2021), with MODEL RULES OF PRO. CONDUCT r. 1.6(b)(5) (AM. BAR ASS'N 2021).

373. See *Hartman v. Rogers*, 174 S.W.3d 170, 173–74 (Tenn. Ct. App. 2005).

374. *Id.* at 171 (holding that Hartman's legal malpractice claims against the lawyers who represented him after Cunningham did were time-barred).

375. MODEL RULES OF PRO. CONDUCT r. 1.6(b)(5) (AM. BAR ASS'N 2021).

376. *Id.* at r. 1.6 cmt. 10.

V. CONCLUSION

The self-defense exceptions to the attorney–client privilege and to lawyers’ duty of confidentiality are essential to lawyers’ ability to defend themselves against baseless allegations of professional wrongdoing. Indeed, to deny lawyers self-defense exceptions to the attorney–client privilege and the duty of confidentiality would leave them uniquely defenseless against false charges of misconduct. At the same time, these exceptions are limited in scope and not necessarily easy to navigate in practice. Lawyers’ reflexive invocation of the self-defense exceptions in response to accusations of wrongdoing may unnecessarily expose them to sanctions or discipline rather than affording them the defense they planned or for which they hoped. In short, the self-defense exceptions to the attorney–client privilege and duty of confidentiality can be essential tools for lawyers who find themselves in professional jeopardy if properly employed. This Article maps their appropriate use.