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### How Do You Rate Your Lawyer? Lawyers' Responses to Online Reviews of Their Services

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# ARTICLE

*Laurel A. Rigertas*

## How Do You Rate Your Lawyer? Lawyers' Responses to Online Reviews of Their Services

**Abstract.** With the proliferation of opportunities for consumers to review a variety of services on the Internet, it is only a matter of time until more clients review their attorneys' services on the Internet. This raises a variety of potential ethical and public policy issues. First, what can attorneys do to try to control their online reputations? Second, if a client posts negative comments about an attorney's services on a public Internet forum, can the attorney respond on that forum without breaching the duty of confidentiality and, if so, how? Finally, when settling a dispute with a client, may an attorney put a provision in a settlement agreement that prohibits a client from posting any reviews of the lawyer's services on the Internet? This Article will address each of these questions in light of normative considerations, the rules governing lawyers' conduct, clients' interest in confidentiality and loyalty, lawyers' reputational interests, and public policy concerns about consumers' access to accurate information about legal services.

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## INTRODUCTION

With the proliferation of opportunities for consumers to review a variety of services on the Internet, clients are increasingly reviewing their attorneys' services on various online sites. The best ways for lawyers to minimize negative online reviews are to: (1) be careful to screen potential clients who may have unrealistic expectations, (2) to maintain good communication with clients, and (3) try to resolve any conflicts with clients early and amicably. However, prevention will not result in a 100% satisfaction rate and, at some point, most lawyers will probably be the subject of one or more negative online reviews that could affect their reputation. The reputation of lawyers is not only important to any individual lawyer, but it is also important to the profession as a whole.

As lawyers seek to defend their reputations, some of the possible means of controlling negative reviews raise potential ethical and public policy issues that will be discussed in this Article. Part I will briefly outline the various interests at stake when consumers review, or are restrained from reviewing, legal services. Part II will look at some efforts by doctors to prevent negative reviews by limiting their patients' conduct through contract law at the outset of the physician-patient relationship. This section will assess whether those efforts could be emulated by lawyers during the creation of the lawyer-client relationship, particularly in light of the unique ethical constraints on lawyers. Part III will assess options available to a lawyer if a client or former client posts negative comments about an attorney's services on a public online forum. Specifically, this section will address whether the attorney can post a public response to the negative review without breaching the duty of confidentiality and, if so, how. This section will also look briefly at defamation suits as a possible remedy. Finally, Part IV will examine whether, when settling a dispute with a client, an attorney can put a provision in a settlement agreement that prohibits a client from making any public statements or reviews about the lawyer's services.

### I. THE INTERESTS AT STAKE

This Article examines the review of lawyers' services primarily from the perspective of lawyers who may be motivated to act in order to protect their professional reputations. However, the appropriateness of lawyers' actions in this regard cannot be assessed without considering the variety of

interests at stake and how those interests should inform the decision-making of both lawyers who act to protect their online professional reputations and courts who then have to rule on the measures. Other interests that are relevant include the clients' interests in both confidentiality and in voicing their opinions about legal services they have received, consumers' interest in learning about lawyers who they are thinking about hiring, and the legal profession's interest in both its collective reputation and in providing information to the public in a manner that will help increase its ability to access suitable legal services.

Clients have an interest in the ability to share information with others about their experiences with their lawyers. Whether happy or dissatisfied, the ability to voice one's opinion about the quality of services is important to consumers as evidenced by the explosion of online reviews. Clients of legal services, however, also have a stake in having their lawyers maintain the confidentiality of the information learned during the course of legal representation. This raises issues unique to lawyers and physicians—unlike other service providers, their ability to respond to online criticism is constrained by confidentiality and privacy obligations.

The public has an interest in learning information about lawyers whom they are considering hiring. In the absence of a word of mouth referral, it is quite difficult for the general public to learn information about lawyers whom they may want to hire, such as their ability to demonstrate responsiveness, empathy, competence, etc. "Traditionally, law firms and what their client interactions are like have been cloaked in mystery, and nobody really knows how good their service is . . . . That's obviously disadvantageous to clients."<sup>1</sup> But an increase in access to information online may help empower clients to feel more in control of their decisions, such as when they need a lawyer and who they will hire.<sup>2</sup> Such information, however, is not useful to consumers if it is false.<sup>3</sup>

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1. Stephanie Francis Ward, *Grade Anxiety*, A.B.A. J., Feb. 2010, at 48, 53; see Tobias J. Butler, *The Realities of Relying on Doctor-Patient Non-Disclosure Agreements for Reputational Protection*, HEALTH LAW., June 2010, at 23, 23 (outlining similar concerns in the area of consumers finding information about health care providers).

2. See, e.g., Steve Seidenberg, *Firm Opinions*, A.B.A. J. E-Report, May 2005, at 6 (discussing how client recommendations have changed due to the Internet). See generally Ann Marie Marciarille, "How's My Doctoring?" *Patient Feedback's Role in Assessing Physician Quality*, 14 DEPAUL J. HEALTH CARE L. 361, 365–67 (2012) (addressing similarities raised by the simultaneous "democratization of medical knowledge" and rise in patients seeking more information about medical professionals).

3. See Stephanie Francis Ward, *Grade Anxiety*, A.B.A. J., Feb. 2010, at 48, 53 (balancing the value of credible online ratings of lawyers and the dangers of ones that are subject to manipulation); see also Ann Marie Marciarille, "How's My Doctoring?" *Patient Feedback's Role in Assessing Physician Quality*, 14 DEPAUL J. HEALTH CARE L. 361, 393–94 (2012) (noting that, with respect to

The legal profession has an interest in its reputation as a whole because its legitimacy and its status as a self-regulated profession rely heavily on the reputation and integrity of the profession.<sup>4</sup> Disparaging remarks about lawyers could undermine the profession's reputation and, if the remarks are unfounded, could create false perceptions among the public. However, the profession as a whole also has an interest in assisting the public in obtaining meaningful information about lawyers who they want to hire. Consumer reviews of services are of increasing importance to consumer purchasing decisions and the legal profession should be mindful of unnecessarily impeding this trend.<sup>5</sup> Lastly, online reviews of lawyers' services may aid the regulators of the legal profession in becoming aware of possible misconduct by individual lawyers as well as trends in clients' perception of lawyers' services that could inform the training of lawyers and/or drafting of disciplinary rules.

## II. PROTECTING REPUTATIONAL INTERESTS AT THE FORMATION OF THE ATTORNEY-CLIENT RELATIONSHIP

Attorneys interested in controlling their online reputations may consider trying to control their clients' online activities as part of the contractual ordering of affairs between the lawyer and the client at the outset of the relationship. Because doctors have been at the forefront of these efforts, this Article will first explain how doctors have tried to use non-disclosure agreements and mutual privacy agreements to constrain their patients' online activity and then will assess whether similar efforts would be viable in the attorney-client context.

### A. *Comparative Perspective: Physicians' Attempts to Control the Patients' Online Reviews of Health Care Services*

Physicians were confronted with the issue of online reviews earlier than lawyers, so it is instructive to look at some of their efforts to control their online reputations.<sup>6</sup> Like lawyers, physicians have constraints on their ability to respond to negative reviews because of privacy and

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physicians, limited data suggests that negative reviews are more inaccurate than positive ones).

4. See MODEL RULES OF PROF'L CONDUCT, Preamble, § 12 (2013) (stating that the legal profession has a responsibility toward self-governance).

5. See *infra* notes 49-57 and accompanying text.

6. See Ann Marie Marciarille, "How's My Doctoring?" *Patient Feedback's Role in Assessing Physician Quality*, 14 DEPAUL J. HEALTH CARE L. 361, 376 (2012) ("The online information market place has been particularly responsive to consumer-driven demand for physician-specific service reviews"). For example, in July 2010, Angie's List created a category for online reviews of health care professionals. ANGIE'S LIST, <http://www.angieslist.com/> (last visited Mar. 23, 2014).

confidentiality obligations.<sup>7</sup> This has caused some physicians to try to control their online reputation by controlling the content of what their patients post online.

A new industry was created to aid physicians in the defense of their online reputations.<sup>8</sup> One of these companies, Medical Justice Corporation, offers physicians a variety of services to help manage their online reputations.<sup>9</sup> Medical Justice initially provided its physician members with contractual non-disclosure agreements to use at the inception of the physician–patient relationship, but those raised a variety of public policy and enforcement issues under general contract principles, such as unconscionability.<sup>10</sup> They also raised practical issues regarding enforcement because many online reviews are posted anonymously and establishing damages for the breach of these contracts could be difficult.<sup>11</sup>

Due to these problems, Medical Justice shifted its strategy to a creative use of intellectual property law.<sup>12</sup> Medical Justice next provided its physician members with a form contract to use with their patients titled “Mutual Agreement to Maintain Privacy” (“Mutual Agreement”).<sup>13</sup> The

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7. See Nicolas P. Terry, *Fear of Facebook: Private Ordering of Social Media Risks Incurred by Healthcare Providers*, 90 NEB. L. REV. 703, 746 (2012) (pointing out that HIPPA law creates problems for doctors in responding to online criticism).

8. See Ann Marie Marciarille, “How’s My Doctoring?” *Patient Feedback’s Role in Assessing Physician Quality*, 14 DEPAUL J. HEALTH CARE L. 361, 362–63 (2012) (providing examples of new websites that help to protect physicians’ reputations); see also Nicolas P. Terry, *Fear of Facebook: Private Ordering of Social Media Risks Incurred by Healthcare Providers*, 90 NEB. L. REV. 703, 745 (2012) (explaining how eMerit provides “medical and dental reputational management”).

9. See Ann Marie Marciarille, “How’s My Doctoring?” *Patient Feedback’s Role in Assessing Physician Quality*, 14 DEPAUL J. HEALTH CARE L. 361, 362–63 (2012) (detailing how the Medical Justice Corporation operates); see also MEDICAL JUSTICE CORPORATION, <http://www.medicaljustice.com/> (last visited Mar. 23, 2014) (illustrating the use of Medical Justice Corporation to “protect against frivolous lawsuits and damage to your good name”).

10. See Tobias J. Butler, *The Realities of Relying on Doctor-Patient Non-Disclosure Agreements for Reputational Protection*, HEALTH LAW., June 2010, at 23, 23–24 (discussing the enforceability of non-disclosure agreements); see also Ann Marie Marciarille, “How’s My Doctoring?” *Patient Feedback’s Role in Assessing Physician Quality*, 14 DEPAUL J. HEALTH CARE L. 361, 362–63 (2012) (discussing how non-disclosure agreements have created a good amount of controversy); Daniel Simmons, *Company Tries to Stifle Online Reviews with Patient “Gag Orders”*, ANGIE’S LIST, (May 28, 2009), <http://www.angieslist.com/articles/company-tries-stifle-online-reviews-patient-%E2%80%98gag-orders%E2%80%99.htm> (explaining the issues associated with medical gag orders).

11. See Tobias J. Butler, *The Realities of Relying on Doctor-Patient Non-Disclosure Agreements for Reputational Protection*, HEALTH LAW., June 2010, at 23, 24 (2010) (noting the difficulties in enforcing non-disclosure agreements).

12. See Ann Marie Marciarille, “How’s My Doctoring?” *Patient Feedback’s Role in Assessing Physician Quality*, 14 DEPAUL J. HEALTH CARE L. 361, 394–95 (2012) (discussing the shift of enforcement from libel and defamation law to copyright rights).

13. Ann Marie Marciarille, “How’s My Doctoring?” *Patient Feedback’s Role in Assessing Physician Quality*, 14 DEPAUL J. HEALTH CARE L. 361, 362 (2012); see, e.g., Timothy B. Lee, *Patient Sues*

terms of this contract required the patient to assign to the treating physician “all intellectual property rights, including copyrights,” in the patient’s online reviews of the physician.<sup>14</sup> The purported consideration for this agreement was the doctor’s promise to maintain the confidentiality of the patient’s medical information.<sup>15</sup>

The Mutual Agreement was designed to circumvent section 230 of the Communications Decency Act,<sup>16</sup> which protects Internet service providers from a variety of claims based on content posted by third parties, such as defamation claims, but which does not protect Internet service providers from violations of intellectual property law.<sup>17</sup> Instead, the Digital Millennium Copyright Act (“DMCA”)<sup>18</sup> shields Internet service providers from liability for copyright violations only if they promptly comply with takedown requests.<sup>19</sup> As a practical matter, if a physician owns the copyright to the online reviews of its services, and the physician does not like an online review, then the physician can send a takedown notice to the Internet service provider on whose site the review appears and the site is likely to immediately honor the takedown notice.<sup>20</sup>

There are many questions about the validity of these agreements that range from the validity of the consideration—physicians already have a pre-existing duty to maintain the confidentiality of their patients’ medical information—to whether they violate physicians’ ethical rules.<sup>21</sup> There have been several legal challenges to these Mutual Agreements, but no

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*Dentist Over Gag Order, Gets Medical Justice to Backtrack*, ARS TECHNICA (Nov. 30, 2011), <http://arstechnica.com/tech-policy/2011/11/patient-sues-dentist-over-gag-order-causing-medical-justice-to-drop-it/> (providing an example of a “Mutual Agreement to Maintain Privacy”).

14. Ann Marie Marciarille, “*How’s My Doctoring?*” *Patient Feedback’s Role in Assessing Physician Quality*, 14 DEPAUL J. HEALTH CARE L. 361, 395 (2012).

15. *See id.* (explaining that the consideration given in this type of agreement is the confidentiality of the patient’s information).

16. Communications Decency Act of 1996, 47 U.S.C. § 230 (2006).

17. *See* Ann Marie Marciarille, “*How’s My Doctoring?*” *Patient Feedback’s Role in Assessing Physician Quality*, 14 DEPAUL J. HEALTH CARE L. 361, 395 (2012) (detailing how the Medical Justice contract circumvents current law); *see also* Communications Decency Act of 1996, 47 U.S.C. § 230 (1996) (offering “protection for private blocking and screening of offensive material”); Leslie A. Gordon, *A Prescription for Silence*, A.B.A. J., June 2009, at 14, 14 (June 2009) (describing the agreement as “[w]iggling through loopholes in the Communications Decency Act”).

18. Digital Millennium Copyright Act, 17 U.S.C. §§ 1301–1332 (2012).

19. *See* Ann Marie Marciarille, “*How’s My Doctoring?*” *Patient Feedback’s Role in Assessing Physician Quality*, 14 DEPAUL J. HEALTH CARE L. 361, 395–96 (2012) (explaining that websites may avoid liability by quickly removing questionable posts).

20. *See id.* at 396 (illustrating that a valid copyright owner can send a takedown notice to a website in order to have an unfavorable review removed).

21. *See id.* at 398–403 (explaining what the physician offers in consideration of the contract to obtain “the patient’s anticipatory copyright assignment”).



rulings regarding their validity. In 2011, the Center for Democracy & Technology filed a complaint with the Federal Trade Commission that alleged that the Mutual Agreements are a deceptive and unfair business practice under the Sherman Act.<sup>22</sup> In response to that complaint, Medical Justice appears to have “retired” the Mutual Agreement contracts from the services that it provides its physician members.<sup>23</sup> As a *Forbes* blog post has reported: “Indeed, Medical Justice has done a complete reversal on its customers. Having persuaded its customers that patient reviews should be suppressed, Medical Justice (under a new brand, eMerit) is now selling doctors and dentists a service to help them *increase* the number of online reviews from patients.”<sup>24</sup>

Some physicians and dentists, however, are reportedly still using the Mutual Agreement.<sup>25</sup> One dentist’s patients have filed a class action lawsuit challenging the validity of the Mutual Agreement after the dentist attempted to enforce the agreement by claiming copyright to a negative review that the patient posted on Yelp.<sup>26</sup> The district court has denied the dentist’s motion to dismiss the complaint, but there is no ruling yet on the merits of the case.<sup>27</sup>

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22. See *id.* at 400 (noting that in “November of 2011, the Center for Democracy & Technology filed a complaint with the Federal Trade Commission targeting Medical Justice’s sale of MAMPs as a deceptive and unfair business”).

23. See Eric Goldman, *You Shouldn’t Need a Copyright Lawyer to Pick a Dentist*, *FORBES* (Apr. 17, 2013, 1:14 PM), <http://www.forbes.com/sites/ericgoldman/2013/04/17/you-shouldnt-need-a-copyright-lawyer-to-pick-a-dentist/> (opining that copyright agreements have no place in medical practice).

24. *Id.*

25. See *id.* (noting that “Medical Justice was so effective at persuading doctors/dentists to fear patient reviews that some doctors and dentists are still using the form agreement”).

26. See Class Action Complaint for Declaratory and Injunctive Relief and Individual Action for Declaratory Relief and Damages, *Lee v. Makhnevich*, No. 11-civ-8665 (S.D.N.Y. Nov. 29, 2011), available at [www.citizen.org/documents/Lee-v-Makhnevich-complaint.pdf](http://www.citizen.org/documents/Lee-v-Makhnevich-complaint.pdf) (describing the case as “a class action for declaratory and injunctive relief . . . to recover damages caused by defendants’ wrongful conduct”); see also Eric Goldman, *You Shouldn’t Need a Copyright Lawyer to Pick a Dentist*, *FORBES* (Apr. 17, 2013, 1:14 PM), <http://www.forbes.com/sites/ericgoldman/2013/04/17/you-shouldnt-need-a-copyright-lawyer-to-pick-a-dentist/> (providing background and context for the class action lawsuit filed regarding the validity of the Mutual Agreement used by Medical Justice).

27. See Class Action Court Order Denying Motion to Dismiss, *Lee v. Makhnevich*, No. 11-civ-8665 (S.D.N.Y. Nov. 29, 2011), available at <http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1347&context=historical> (proclaiming that the ultimate result of the case was still pending); see also Eric Goldman, *You Shouldn’t Need a Copyright Lawyer to Pick a Dentist*, *FORBES* (Apr. 17, 2013, 1:14 PM), <http://www.forbes.com/sites/ericgoldman/2013/04/17/you-shouldnt-need-a-copyright-lawyer-to-pick-a-dentist/> (detailing the procedural history of the class action lawsuit regarding the Mutual Agreement used by a dentist).

B. *Controlling Client Conduct at the Onset of the Attorney–Client Relationship*

Lawyers who are interested in exercising control over their professional reputation may also be inclined to think about addressing this issue at the inception of the attorney–client relationship. Within the constraints set out in the rules of professional conduct, attorneys and clients have some latitude to contractually define the terms of their relationship.<sup>28</sup> Accordingly, like physicians, lawyers might consider including a provision in the lawyer's engagement letter that would prohibit the client from publically commenting on the lawyers' services during or after the conclusion of the representation or that would assign the copyright of reviews to the lawyer.

1. Non-Disclosure Agreements

As a practical matter, a broad contractual prohibition on publicly commenting about a lawyer's services would prohibit clients who are pleased with their lawyers' services from posting positive reviews just as much as it would prohibit disgruntled clients from posting negative comments. In the growing world of information on the Internet, from a marketing and business perspective, it may be unwise for a lawyer or law firm to constrain the development of any online reputation.<sup>29</sup> Also, as a practical matter, the enforcement of such an agreement could pose significant challenges as many reviews are posted anonymously.<sup>30</sup> It is also not difficult to imagine a variety of enforcement issues such as determining what qualifies as an online review of a lawyer's services. Would this

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28. See MODEL RULES OF PROF'L CONDUCT R. 1.2 cmt. 6 (2013) ("The scope of services provided by a lawyer may be limited by agreement with the client or by terms under which the lawyer's services are made available to the client.").

29. See Josh King, *Your Business: Someone Online Hates You*, THE RECORDER (Aug. 16, 2013, 4:40 PM) (reporting that "[a]ccording to the latest Nielsen survey data, consumer reviews posted online are now the second most trusted source of marketing information for consumers"); see also Maria Kantzavelos, *Riding the DIY Wave*, ILL. B.J., Mar. 2013, at 128, 129 (Mar. 2013) (declaring the need for online marketing). Of course, lawyers can form online reputations in ways other than consumer reviews, such as creating their own content on websites, blogs, etc. See, e.g., Alfredo Sciascia, *Would-Be Clients Watching, Weighing Online Evaluations*, L. OFF. MGMT. & ADMIN. REP., June 2009, at 1, 15 (discussing how websites continue "to serve as an effective online platform for lawyers to showcase their credentials").

30. See Robert D. Richards, *Compulsory Process in Cyberspace*, 36 HARV. J.L. & PUB. POL'Y 519, 535 (2013) (noting how anonymous posting has created significant challenges in the legal world); see also Jeffrey Segal, Michael J. Sacopulos & Domingo Rivera, *Legal Remedies for Online Defamation of Physicians*, 30 J. LEGAL MED. 349, 349 (2009) (recognizing that "[p]hysicians and other health care providers are often criticized on the Internet"—often times anonymously—and at essentially no cost to the individual making the harsh review).

include an e-mail to three friends? A post on Facebook? A post on a blog? Or, only posts on formats that potential consumers of legal services are likely to review, such as Avvo? Furthermore, many lawyers would welcome the positive feedback and are really just concerned about negative comments, particularly when considerations, such as the duty of confidentiality, may impair lawyers' ability to respond to negative comments.<sup>31</sup> A prohibition on any commentary about a lawyer's services would encompass all types of reviews.

Setting aside the question of practical limitations arising from a contractual agreement, a more important inquiry is whether a contractual prohibition on the public dissemination of statements or opinions about a lawyer's services would be permitted under ethical rules. As a matter of public policy, any prohibition on publicly communicating about a lawyer's services would need to exclude any constraints on reporting misconduct to disciplinary authorities.<sup>32</sup> There are also ethical constraints if this provision was construed to release the lawyer prospectively from liability for malpractice.<sup>33</sup> Therefore, this Article is focusing on the enforceability of a provision that would prohibit comments about the lawyers' services in non-adjudicative public forums such as the media and the Internet. Because the analysis of this question could vary depending on the rules in each state, this Article will focus on the American Bar Association ("ABA") Model Rules of Professional Conduct to evaluate such an agreement.

Communication is a bedrock principle of the attorney–client relationship. As set out in Model Rule 1.4, "[a] lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."<sup>34</sup> A lawyer, therefore, would, need to explain to the client all of the implications of making an agreement to forego public comments about the lawyer's services to the extent reasonably necessary for the client to make an informed decision about whether or not to agree to such a provision. This raises a few considerations. Initially, a client in need of legal assistance may not feel in a position to negotiate or refuse the inclusion of such a provision, which

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31. See *infra* Section III.

32. See, e.g., ILL. RULES OF PROF'L CONDUCT R. 8.4(h) (2010) ("It is professional misconduct for a lawyer to . . . enter into an agreement with a client or former client limiting or purporting to limit the right of the client or former client to file or pursue any complaint before the Illinois Attorney Registration and Disciplinary Commission.")

33. See MODEL RULES OF PROF'L CONDUCT R. 1.8(h)(1) (2013) ("A lawyer shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement . . .").

34. *Id.* R. 1.4(b).

raises a question of whether the disparate bargaining power would impair the validity of such an agreement.<sup>35</sup> Also, it is fair to question whether a lawyer can objectively explain the pros and cons of such a provision to the client when the provision would exist solely for the benefit of the lawyer. Model Rule 1.7 prohibits a lawyer from representing a client when there is a significant risk that the representation of the client will be materially limited by the lawyer's personal interests.<sup>36</sup>

Furthermore, the inclusion of a self-protecting provision that is of no benefit to clients is in many respects inconsistent with the fiduciary nature of the attorney–client relationship and lawyers' duty of loyalty to their clients.<sup>37</sup> Many of the Model Rules of Professional Conduct underscore the fiduciary nature of the attorney–client relationship and requiring a provision at the outset of the relationship that exists solely for the protection of the lawyer may undermine the spirit of these rules.<sup>38</sup> However, the Model Rules do allow for some actions by lawyers during the formation of the relationship that are primarily motivated by the lawyer's self-interest, so this concern alone is not necessarily dispositive. For example, the Model Rules permit a lawyer to prospectively limit malpractice liability if “the client is independently represented in making the agreement.”<sup>39</sup> The Model Rules also permit a lawyer to seek an advanced conflict waiver in some circumstances.<sup>40</sup>

An agreement that prohibits a client from expressing an opinion about a lawyer's services in a public forum is, however, distinguishable from the

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35. See Tobias J. Butler, *The Realities of Relying on Doctor-Patient Non-Disclosure Agreements for Reputational Protection*, HEALTH LAW., June 2010, at 23, 23–24 (discussing potential problems with the enforceability of non-disclosure agreements in the physician–patient context); Ann Marie Marciarille, “How's My Doctoring?” *Patient Feedback's Role in Assessing Physician Quality*, 14 DEPAUL J. HEALTH CARE L. 361, 398 (2012) (explaining the enforceability of similar agreements in the physician–patient context particularly given the vulnerable position of a patient in need of care).

36. See MODEL RULES OF PROF'L CONDUCT R. 1.7(a) (2013) (encouraging a lawyer to refrain from representing a client when such representation interferes with the lawyer's personal interests).

37. See *id.* R. 1.7 cmt. 1 (explaining that independent judgment and loyalty are essential in an attorney–client relationship and that any conflicts of interest puts this in jeopardy).

38. Many rules and comments underscore the fiduciary nature of the attorney–client relationship. See, e.g., *id.* R. 1.7 (showing evidence that the attorney–client relationship is fiduciary in nature); *id.* R. 1.8 (implying the fiduciary nature of the attorney–client relationship); *id.* R. 1.15 (explaining that a lawyer must keep client funds separate from his own personal funds).

39. *Id.* R. 1.8(h)(1) (declaring that a client must be independently represented when making an agreement to prospectively waive liability of the representing attorney).

40. See *id.* R. 1.7(b) (stating the conditions under which a lawyer may represent a client without being subject to discipline when there is a concurrent conflict of interest); see also *id.* R. 1.7 cmt. 22 (explaining the conditions under which a lawyer may obtain a client waiver to avoid being subject to discipline).

preceding examples. Unlike limitations on malpractice liability, the Model Rules do not require a client who gives up the ability to publicly comment on a lawyer's services to be represented by independent counsel when making that agreement.<sup>41</sup> Thus, there is no advocate who can advise the client about the terms of the relationship without any self-interest in those terms. Also, advanced conflict waivers are predominately, if not exclusively, used with fairly sophisticated consumers of legal services.<sup>42</sup> A prohibition on public commentary about a lawyer's services would not be restricted by its nature to sophisticated purchasers of legal services. While the ABA Model Rules of Professional Conduct have some provisions that may guide the potential inclusion of a term in a retainer agreement that would prohibit public commentary about a lawyer's services, they do not explicitly prohibit it.<sup>43</sup>

Courts should, however, consider whether such agreements would be void as a matter of public policy. There are some strong arguments to support this. First, as discussed, such agreements exist to serve the interest of lawyers, not the interests of clients. Therefore, they are inconsistent with the fiduciary nature of the attorney–client relationship.<sup>44</sup> Furthermore, the public has difficulty finding meaningful information about lawyers whom they may be interested in hiring, and, therefore, consumers would benefit from access to more information about lawyers.<sup>45</sup> From this perspective, as the regulators of legal services, courts

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41. See, e.g., *id.* R. 1.7 cmt. 22 (omitting any mention of the need for a waiver when an attorney contractually limits the clients ability to comment regarding the lawyers services).

42. See Milan Markovic, *The Sophisticates: Conflicted Representation and the Lehman Bankruptcy*, 2012 UTAH L. REV. 903, 918–19 (2012) (discussing the complexity of advanced waiver conflicts and “[t]he rationale for treating sophisticated and unsophisticated clients differently in terms of waiving conflicts of interest”); see also MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 22 (2013) (“[I]f the client agrees to consent to a particular type of conflict with which the client is already familiar, then the consent ordinarily will be effective with regard to the type of conflict.”).

43. But see Lucille M. Ponte, *Mad Med Posing as Ordinary Consumers: The Essential Role of Self-Regulation and Industry Ethics on Decreasing Deceptive Online Consumer Ratings and Reviews*, 12 J. MARSHALL REV. INTELL. PROP. L. 462, 501–02 (2013) (“Professional ethics codes should expressly prohibit these kinds of gag contracts as unethical conduct.”).

44. See Jan L. Jacobowitz & Kelly Rains Jesson, *Fidelity Diluted: Client Confidentiality Gives Way to the First Amendment & Social Media*, in Virginia State Bar, ex rel. Third District Committee v. Horace Frazier Hunter, 36 CAMPBELL L. REV. (forthcoming 2014) (manuscript at 6) (“[T]he relationship between an attorney and client is a fiduciary relationship of the very highest character. All dealings between an attorney and his client that are beneficial to the attorney will be closely scrutinized with the utmost strictness for any unfairness.” (citing *Lee v. State Bar*, 2 Cal. 3d 927, 939 (1970))).

45. See, e.g., Alfredo Sciascia, *Would-be Clients Watching, Weighing Online Evaluations*, LAW. OFF. MGMT. & ADMIN. REP., June 2009, at 1, 13 (discussing the impact of the Internet on the decision-making of purchasers of legal services).

should view non-disclosure as undermining the legal profession's responsibility to assist consumers in their quest for access to information about legal services.<sup>46</sup>

In addition, getting information from consumers should be beneficial to the legal profession's interest in delivering competent legal services to consumers. A vice president of LexisNexis opined that:

[T]he prevalence and growing use of ratings systems should motivate lawyers to deliver better value and client service. The result of this pursuit will be a more informed potential buyer armed with better and more comprehensive information about lawyers under consideration. All of this contributes to better-qualified leads for the law firm and improved service and legal outcomes for the client.<sup>47</sup>

## 2. Copyright Assignments

It is also possible that some lawyers may consider including provisions in their contracts with clients that emulate the copyright assignments that physicians have used, particularly if courts hold that those provisions are enforceable. Such agreements would raise all of the issues discussed above with respect to non-disclosure agreements. Obtaining a legal interest in content created by a client would, however, also trigger a lawyer's obligations under Model Rule 1.8(a), which states that a lawyer "shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client" unless a variety of factors are satisfied, such as ensuring that the terms are fair and reasonable to the client, advising the client of the desirability of seeking the advice of independent counsel for the transaction, and getting informed consent from the client.<sup>48</sup> Therefore, an attorney would need to comply with this provision in order to obtain an ownership interest in the client's online reviews.

There is no evidence showing use of either non-disclosure agreements or assignments of copyright in the practice of law. It is possible that these issues will never arise. If, however, lawyers do try either method, they

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46. See Ann Marie Marciarille, "How's My Doctoring?" *Patient Feedback's Role in Assessing Physician Quality*, 14 DEPAUL J. HEALTH CARE L. 361, 402 (2012) (analyzing similar agreements in the physician-patient context and concluding that "physicians who use medical gag orders to chill or suppress negative online reviews rob their peers of intelligence on patient needs and preferences as much as deprive past patients of a voice and prospective patients of useful patient experience data").

47. Alfredo Sciascia, *Would-be Clients Watching, Weighing Online Evaluations*, LAW. OFF. MGMT. & ADMIN. REP., June 2009, at 1, 15.

48. MODEL RULES OF PROF'L CONDUCT R. 1.8(a) (2013).

should be cognizant of the ethical rules that would govern their conduct. They should also recognize that there is a possibility that a court might find the provision unenforceable as a matter of public policy. From a normative perspective, courts should find them unenforceable. They are inconsistent with the fiduciary nature of the attorney–client relationship and are particularly inappropriate at the formation of that relationship. They also frustrate the public’s interest in finding out meaningful information about lawyers they might want to hire.

### III. RESPONDING TO NEGATIVE PUBLIC REVIEWS OF ATTORNEY SERVICES

With the growth of online services lawyers “must recognize that they are being publicly evaluated by more parties than ever before and not just on their legal ability, but on price, perceived value, their ability to communicate with their clients, and many other factors.”<sup>49</sup> There are a variety of websites that review lawyers and specifically allow consumers to post reviews. These websites include, among others, *martindale.com*, *legalreviewz.com*, and *avvo.com*.<sup>50</sup> Consumer reviews of lawyers’ services can also appear on other sites such as *yelp.com*,<sup>51</sup> *yahoo.com*,<sup>52</sup> and *google.com*.<sup>53</sup>

As online reviews of lawyers’ services become more common, the most pressing question for lawyers will be how, if at all, they can respond to negative reviews. As discussed below, there are fairly generic ways that lawyers can respond that do not raise issues such as client confidentiality. If, however, a lawyer wants to respond to specific criticisms regarding the handling of a matter, then there are two questions that the lawyer will need to answer. First, does the lawyer’s response contain any confidential client

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49. Alfredo Sciascia, *Would-be Clients Watching, Weighing Online Evaluations*, LAW. OFF. MGMT. & ADMIN. REP., June 2009, at 1, 13; see Lucille M. Ponte, *Mad Med Posing as Ordinary Consumers: The Essential Role of Self-Regulation and Industry Ethics on Decreasing Deceptive Online Consumer Ratings and Reviews*, 12 J. MARSHALL REV. INTELL. PROP. L 462, 463–67 (2013) (discussing the decrease in traditional advertising and increase in peer assessment when consumers make purchasing decisions); see also Stephanie Francis Ward, *Grade Anxiety*, A.B.A. J., Feb. 2010 at 48, 53 (predicting that online reviews of lawyers will increase as the under-30 generation enters the workforce).

50. See, e.g., AVVO, [http://www.avvo.com/about\\_avvo/overview](http://www.avvo.com/about_avvo/overview) (last visited Mar. 10, 2014) (discussing the policies for posting online reviews of lawyers).

51. YELP, <http://www.yelp.com> (last visited Mar. 23, 2014).

52. YAHOO, <http://www.yahoo.com> (last visited Mar. 23, 2014).

53. See *Lawyer Ratings Stir New Controversy*, ABA to Investigate, 10-5 PARTNER’S REPORT 2 (May 2010) (identifying various sites that permit online reviews of lawyers). See generally GOOGLE, <http://www.google.com> (last visited Mar. 23, 2014).

information and, second, if it does, are there any exceptions to the duty of confidentiality that would permit the lawyer to disclose that information?<sup>54</sup>

A. *Responding to Negative Reviews Without Revealing Client Specific Information*

The General Counsel of Avvo, a web site that profiles and rates lawyers, has given the following advice to lawyers who receive negative reviews:

Negative commentary can be a golden marketing opportunity. By posting a professional, meaningful response to negative commentary, an attorney sends a powerful message to any readers of that review. Done correctly, such a message communicates responsiveness, attention to feedback and strength of character. The trick is to not get defensive, petty, or feel the need to directly refute what you perceive is wrong with the review. . . . [A] poorly-handled response to a negative review is much worse than no response at all. It makes you look thin-skinned and defensive. Worse yet, if you argue and reveal client confidences (or even potential harmful non-confidences), you may be subject to discipline.<sup>55</sup>

This is good advice.<sup>56</sup> Many service providers in a variety of industries respond to negative consumer reviews in a generic way that communicates that the provider cares about satisfying customers and wants to make things right. For example, responses to online reviews in a variety of service industries frequently say things like “We are sorry that you were not happy with our service. Customer satisfaction is very important to us.” Some attorneys on Avvo and other similar sites are following this type of

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54. See MODEL RULES OF PROF'L CONDUCT R. 1.6 (b) (2013) (describing when an attorney is permitted to disclose confidential client information).

55. Josh King, *Your Business: Someone Online Hates You*, THE RECORDER (Aug. 16, 2013, 4:40 PM) <http://www.therecorder.com/id=1202614786352/Your-Business:-Someone-Online-Hates-You?slreturn=20140026162748>; see Sandra Napoli-D'Arco, *What to Do with a Bad Online Review*, CHI. DAILY L. BULL. (Oct. 9, 2013), <http://www.chicagolawbulletin.com/Archives/2013/10/09/snap-d-10-9-13.aspx> (explaining that a simple, to the point, professional response to a negative online review has a positive impact on readers); see also Frank J. Cavaliere, *Web-Wise Lawyer*, PRAC. LAW., Apr. 2012, at 11, 12 (discussing Avvo.com and lawyerratingz.com); *Frequently Asked Questions*, LAWYERRATINGZ, <http://www.lawyerratingz.com/faq.jsp#3> (last visited Mar. 23, 2014) (allowing lawyers to post responses to online review but offering no ethical guidance in doing so).

56. See, e.g., Martha Chan, *Have You Googled Your Name Lately*, FAM. ADVOC., Winter 2013, at 38, 39–40 (recommending a variety of ways to soften the impact of negative online reviews); accord Debra Bruce, *How Lawyers Can Handle Bad Reviews and Complaints on Social Media*, TEX. B.J., MAY 2012, at 402, 403 (supporting the notion of trying to generate as much positive content as possible to negate bad reviews).



advice.<sup>57</sup>

There are, however, starting to be some cases where lawyers have found themselves subject to potential discipline by responding in a manner that reveals client confidences. In August 2013 the Illinois Attorney Registration and Disciplinary Commission (“ARDC”) filed a disciplinary complaint against an attorney who posted a response to a former client’s negative online review on Avvo.<sup>58</sup> The complaint alleged that a former client wrote: “She only wants your money, claims ‘always on your side’ is a huge lie. Paid her to help me secure unemployment, she took my money knowing full well a certain law in Illinois would not let me collect unemployment. [N]ow is billing me for an additional \$1500 for her time.”<sup>59</sup> Avvo removed the post sometime later, but then the client posted another similar review.<sup>60</sup> In response to this second negative review, the complaint alleged that the lawyer posted the following reply:

This is simply false. The person did not reveal all the facts of his situation up front in our first and second meeting. . . . When I received his personnel file, I discussed the contents of it with him and informed him that he would likely lose unless the employer chose not to contest the unemployment (employers sometimes do . . .). Despite knowing that he would likely lose, he chose to go forward with a hearing to try to obtain benefits. I dislike it very much when my clients lose but I cannot invent positive facts for clients when they are not there. I feel badly for him but his own actions in beating up a female coworker are what caused the consequences he is now so upset about.<sup>61</sup>

Paragraph 22 of the ARDC’s complaint states:

By stating in her April 11, 2013 AVVO posting that Rinehart beat up a female coworker, Respondent revealed information that she had obtained from Rinehart about the termination of his employment. Respondent’s statements in the posting were designed to intimidate and embarrass

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57. See, e.g., AVVO, <http://www.avvo.com/attorneys/60601-il-stephen-phillips-1126711/reviews.html> (last visited Mar. 23, 2014) (showing an example of a statement made by a lawyer responding to a negative online review which stated, “We strive for the utmost in client satisfaction, and we’re sorry to hear that you had this experience. Please contact us directly so we can address your specific concerns”).

58. See, e.g., *In the Matter of Tsamis*, Ill. Att’y Registration and Disciplinary Comm’n, Comm. No. 2013PR00095 (2013), available at <http://www.iardc.org/13PR0095CM.html> (providing an example of a disciplinary complaint hearing after an attorney responded to a negative online review in Avvo).

59. *Id.* at 4.

60. See *id.* (alleging that although Avvo removed the post, the client posted a similar review sometime later).

61. *Id.* at 5.

Rinehart and to keep him from posting additional information about her on the AVVO website.<sup>62</sup>

Paragraph 23 of the complaint concluded that the conduct constituted misconduct in three separate ways: it revealed confidential information in violation of Illinois Rule of Professional Conduct 1.6(a), it used means intended to embarrass, delay or burden a third person in violation of Illinois Rule of Professional Conduct 4.4, and it was prejudicial to the administration of justice.<sup>63</sup>

Based on the wording of the first sentence in Paragraph 22 of the complaint, it is possible the ARDC was seeking to discipline the attorney based on the last sentence in the post and that the ARDC found the rest of the post permissible under Illinois Rule 1.6(b).<sup>64</sup> It is somewhat ambiguous as to whether the complaint was only focused on the statement about the coworker or whether the ARDC found other parts of the post problematic because they were intended to embarrass or were prejudicial to the administration of justice. In a subsequent joint stipulation of the facts, the parties simply stipulated that this post “exceeded what was necessary to respond to Rinehart’s accusations.”<sup>65</sup> The attorney was reprimanded.<sup>66</sup>

Another lawyer faced similar disciplinary charges in Georgia.<sup>67</sup> While fewer details are available about the exact comments posted, the decision rejecting the attorney’s petition for voluntary discipline stated:

Ms. Skinner admitted that, after the client had notified Ms. Skinner that the client had discharged Ms. Skinner and had obtained new counsel, Ms. Skinner posted on the [I]nternet personal and confidential information about the client that Ms. Skinner had gained in her professional relationship with the client. Ms. Skinner posted the information in response to negative

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62. *Id.*

63. *See id.* at 6 (alleging that the attorney should be subject to discipline).

64. *See also* William Wernz, *This Month’s Topic: Online Ratings of Lawyers*, MINN. LAWYERING (Oct. 1, 2013), <http://minnesotalawyer.com/2013/10/october-2013-minnesota-ethics-update/> (noting that disclosure of the specifics of the case was what likely subjected the attorney to disciplinary action).

65. *In the Matter of Tsamis*, Joint Stipulation and Recommendation for a Reprimand by the Hearing Board, Ill. Att’y Registration and Disciplinary Comm’n, Comm. No. 2013PR00095 (2013), *available at* [https://www.iardc.org/rd\\_database/rulesdecisions.html](https://www.iardc.org/rd_database/rulesdecisions.html) (search under “Exact Match”; enter in “Tsamis”; then follow “Tsamis, Betty” hyperlink).

66. *In the Matter of Tsamis*, Reprimand, Ill. Att’y Registration and Disciplinary Comm’n, Comm. No. 2013PR00095 (2013), *available at* [https://www.iardc.org/rd\\_database/rulesdecisions.html](https://www.iardc.org/rd_database/rulesdecisions.html) (search under “Exact Match”; enter in “Tsamis”; then follow “Tsamis, Betty” hyperlink).

67. *See In re Skinner*, 740 S.E.2d 171, 173 (Ga. 2013) (ruling that the attorney was required not to disclose confidential client information).

reviews of Ms. Skinner the client had posted on consumer websites.<sup>68</sup>

The court specifically noted that “the record does not reflect the nature of the disclosures (except that they concern personal and confidential information) or the actual or potential harm to the client as a result of the disclosures.”<sup>69</sup>

### 1. Analyzing Confidentiality

These disciplinary complaints raise the basic confidentiality analysis that any lawyer must undertake before responding to an online review in a manner that contains specific information. First, does the response contain confidential information and second, if so, is the lawyer permitted to reveal it under any exceptions? For example, a client could give informed consent to a disclosure or the client could waive the right to confidentiality.<sup>70</sup> However, the exception most likely to be considered in this situation is the self-defense provision of ABA Model Rule 1.6(b)(5).<sup>71</sup> Model Rule 1.6(a) states, “[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).”<sup>72</sup> The comments provide that the rule “applies not only to matters communicated in confidence by the client, but also to all information relating to the representation, whatever its source.”<sup>73</sup> One of the exceptions in subsection (b) permits a lawyer to reveal confidential information “to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client . . . or to respond to allegations in any proceeding concerning the lawyer’s representation of the

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68. *Id.* at 172.

69. *Id.* at 173 n.6.

70. For example, if the client’s review of the attorney’s services contains previously confidential information, that information may become generally known and no longer be considered confidential. *See, e.g.*, RESTATEMENT OF THE LAW GOVERNING LAWYERS § 59 (2007) (“Confidential client information consists of information relating to representation of a client, other than information that is generally known.”).

71. *See, e.g.*, Ill. Att’y Registration & Disciplinary Comm’n, Comm. No. 2013PR00095 (2013), available at <http://www.iardc.org/13PR0095CM.html> (illustrating an example of additional rules that constrain a lawyer’s conduct).

72. MODEL RULES OF PROF’L CONDUCT R. 1.6(a) (2013).

73. *Id.* R. 1.6(a) cmt. 3; *see* Jan L. Jacobowitz & Kelly Rains Jesson, *Fidelity Diluted: Client Confidentiality Gives Way to the First Amendment & Social Media* in Virginia State Bar, ex rel. Third District Committee v. Horace Frazier Hunter, 36 CAMPBELL L. REV. (forthcoming 2014) (discussing the ABA Model Rules’ very broad definition of confidential information, which has no exception for information that is in the public record).

client.”<sup>74</sup> An issue that may confront lawyers is whether their responses to clients’ online reviews reveal confidential information and, if so, whether such revelations are permissible under Model Rule 1.6(b).

## 2. Is the Information Confidential?

A lawyer contemplating posting a response to an online review that contains information specific to the client’s matter will obviously need to be familiar with the law of the governing jurisdiction regarding confidentiality. It is important to note one of the more controversial recent developments regarding the scope of confidential information—*Hunter v. Virginia State Bar*.<sup>75</sup> In *Hunter*, an attorney was disciplined for maintaining a blog that discussed a variety of legal issues and cases, but was mainly focused on discussing the specifics of favorable outcomes that attorney, Hunter, obtained for his clients.<sup>76</sup> Hunter’s blog specifically identified his clients’ names and some of the facts regarding their cases.<sup>77</sup> The Virginia State Bar (“VSB”) launched an investigation into the blog and charged Hunter with violating the Virginia Rules of Professional Conduct that relate to advertising and confidential information.<sup>78</sup>

During a hearing, one of Hunter’s former clients “testified that he did not consent to information about his cases being posted on Hunter’s blog and believed that the information posted was embarrassing or detrimental to him, despite the fact that all such information had previously been revealed in court.”<sup>79</sup> Hunter contended that he did not need to obtain his client’s consent to discuss their cases on his blog “because all the information that he posted was public information.”<sup>80</sup> He also argued that his blog was political speech, not commercial speech, and that the

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74. MODEL RULES OF PROF’L CONDUCT R. 1.6(b)(5) (2013).

75. *Hunter v. Va. State Bar*, 744 S.E.2d 611 (Va. 2013).

76. *See id.* at 613 (evaluating the nature of Hunter’s blog inasmuch as it was primarily a vehicle to promote his own litigation record).

77. *See id.* at 614 (“[T]he postings of Hunter’s case wins on his webpage advertised cumulative case results.”).

78. *Id.*; VA. RULES PROF’L CONDUCT R. 1.6(a) (2010):

A lawyer shall not reveal information protected by the attorney-client privilege under applicable law or other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation . . . .

*Id.*

79. *Hunter*, 744 S.E.2d at 614.

80. *Id.*

VSB's position on the matter violated his First Amendment rights.<sup>81</sup>

The VSB disagreed that Hunter was free to post public information about his clients and held that Hunter violated Virginia Rule 1.6.<sup>82</sup> The VSB also found that part of the purpose of the blog was to advertise Hunter's law firm and, therefore, it needed to comply with the Virginia Rules of Professional Conduct 7.1 and 7.2 that prohibit advertisements from being misleading and require them to contain certain disclaimers.<sup>83</sup>

Hunter appealed to a three-judge panel of the circuit court, which ruled that the VSB's interpretation of Virginia Rule 1.6 violated the First Amendment, but that its interpretation of Virginia Rules 7.1 and 7.2 did not violate the First Amendment.<sup>84</sup> Hunter then appealed to the Virginia Supreme Court.<sup>85</sup> The Supreme Court of Virginia agreed with the circuit court that the blog was commercial speech even though it was intermingled with some political speech and, accordingly, it analyzed the restrictions and disclaimer requirements in Virginia Rule 7.1 and 7.2 under the *Central Hudson* test<sup>86</sup> that the Supreme Court of the United States has articulated for government restraints on commercial speech.<sup>87</sup> The Supreme Court of Virginia held that the VSB established a substantial government interest in protecting the public from potentially misleading advertising and, therefore, the advertising rules did not violate the First Amendment.<sup>88</sup>

The Supreme Court of Virginia next turned to the question of whether Virginia Rule 1.6 violated Hunter's First Amendment rights. The VSB argued that Hunter violated Virginia Rule 1.6 "by disclosing potentially embarrassing information about his clients on his blog 'in order to advance his personal economic interests.'"<sup>89</sup> Hunter argued that his blog posts

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81. *See id.* at 617 ("Hunter chose to comingle sporadic political statements within his self-promoting blog posts in an attempt to camouflage the true commercial nature of his blog.").

82. *See id.* at 614 ("Specifically, the VSB found that the information in Hunter's blog posts 'would be embarrassing or be likely to be detrimental' to clients and he did not receive consent from his clients to post such information.").

83. *See id.* at 617 (noting that Hunter's blog contained "self-promoting blog posts").

84. *See id.* at 613–14 (appealing to a three-judge panel of the circuit court, where the court subsequently heard Hunter's argument).

85. *See id.* at 615 (deciding to hear the question of whether "[t]he Ruling of the Circuit Court finding a violation of Rules 7.1(a)(4) and 7.2(a)(3) conflicts with the First Amendment to the Constitution of the United States").

86. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 566 (1980).

87. *See Hunter*, 744 S.E.2d at 617–19 (discussing the four-prong analysis set forth in *Central Hudson*).

88. *See id.* at 619 ("These regulations directly advance [the VSB's] interest and are not more restrictive than necessary, unlike outright bans on advertising.").

89. *Id.*

were entitled to First Amendment protection because they only revealed information that had previously been disclosed in public judicial proceedings.<sup>90</sup> The Supreme Court of Virginia framed the issue as “whether the state may prohibit an attorney from discussing information about a client or former client that is not protected by attorney–client privilege without express consent from that client.”<sup>91</sup>

The Supreme Court of Virginia agreed with Hunter and held that, as a general rule, the state may not prohibit a lawyer from discussing information about a client or former client that is not protected by the attorney–client privilege.<sup>92</sup> The court reasoned that attorney speech may be regulated if it poses a substantial likelihood of materially prejudicing a *pending* case, but it may not be regulated regarding public information about criminal cases that have been tried in courts that were open to the public and have reached a conclusion.<sup>93</sup> The court further reasoned that the “VSB concedes that all of the information that was contained within Hunter’s blog was public information and would have been protected speech had the news media or others disseminated it.”<sup>94</sup> As one article concluded, the court’s opinion essentially holds that “it is irrelevant whether an attorney’s blog post is embarrassing or detrimental to his client, as long as the information in the blog is part of the public record.”<sup>95</sup> *Hunter* is not, however, without its critics. Professor Peter Joy has opined:

In effect, the Virginia Supreme Court has created a public records or public knowledge exception to client confidentiality, which erodes the duty of loyalty lawyers owe current and former clients . . . . Now lawyers can embarrass and humiliate former clients with impunity as long as they use confidential information that is in the public records. The court’s ruling is in direct contradiction with the rules of professional conduct.<sup>96</sup>

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90. See *id.* (arguing that the VSB’s interpretation of Rule 1.6 is unconstitutional because the matters discussed in his blogs were public information).

91. *Id.*

92. See *id.* (holding in favor of Hunter’s speech protections).

93. See *id.* at 619–20 (settling the question about whether public information from past cases is protected by the First Amendment).

94. *Id.* at 620.

95. Jan L. Jacobowitz & Kelly Rains Jesson, *Fidelity Diluted: Client Confidentiality Gives Way to the First Amendment & Social Media in Virginia State Bar*, ex rel. Third District Committee v. Horace Frazier Hunter, 36 CAMPBELL L. REV. (forthcoming 2014).

96. David L. Hudson, Jr., *Commercial Ahead: Virginia Supreme Court Holds That Advertising Rules May Be Applied to a Lawyer’s Blog*, A.B.A. J. Nov. 2013, at 20, 21; see also Jan L. Jacobowitz & Kelly Rains Jesson, *Fidelity Diluted: Client Confidentiality Gives Way to the First Amendment & Social Media in Virginia State Bar*, ex rel. Third District Committee v. Horace Frazier Hunter, 36 CAMPBELL L. REV. (forthcoming 2014) (quoting Peter A. Joy, quoted in David L. Hudson, Jr., *Commercial Ahead*, A.B.A. J., Nov. 2013, at 20, 21).

Another article noted that *Hunter* is novel in its creation of an exception to the client confidentiality rule—"public record information when a case has concluded."<sup>97</sup> "In fact, other state courts have expressly held that the rule of confidentiality is not nullified simply because the information has become part of the public record."<sup>98</sup>

The Supreme Court of the United States has denied a petition for a writ of certiorari in *Hunter*, so it is not clear how much impact this decision will have beyond Virginia until the Court is presented with the question of whether ethical rules that constrain lawyers from discussing publicly available information about their clients violate lawyers' First Amendment rights.<sup>99</sup> Until then, if other state courts follow the holding in *Hunter*, that reasoning would impact the analysis of an attorney's response to a negative online review in that an attorney would be able to discuss the specifics of the client's matter in the response to the online review as long as those specifics had become a matter of public record. Many states, however, have a much broader definition of confidential information; thus, any attorney contemplating a response to an online review that contains client specific information would be wise to be familiar with the law in the governing jurisdiction.<sup>100</sup>

### 3. If the Information Is Confidential, Is It Subject to the Self-Defense Exception in Rule 1.6(b)(5)?

If a lawyer wants to include information in a response to a negative online review that could be construed as confidential information, the lawyer should next assess whether the information could still be revealed as an exception to the general confidentiality rule. ABA Model Rule 1.6(5), which is frequently known as the self-defense exception, permits a lawyer

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97. Jan L. Jacobowitz & Kelly Rains Jesson, *Fidelity Diluted: Client Confidentiality Gives Way to the First Amendment & Social Media in Virginia State Bar, ex rel. v. Horace Frazier Hunter*, 36 CAMPBELL L. REV. (forthcoming 2014) (quoting Peter A. Joy, *quoted in* David L. Hudson, Jr., *Commercial Ahead*, A.B.A. J., Nov. 2013, at 20, 21).

98. *Id.*

99. See *Hunter v. Va. State Bar*, 133 S. Ct. 2871, 2871 (2013) (denying certiorari).

100. See, e.g., Jan L. Jacobowitz & Kelly Rains Jesson, *Fidelity Diluted: Client Confidentiality Gives Way to the First Amendment & Social Media in Virginia State Bar, ex rel. Third District Committee v. Horace Frazier Hunter*, 36 CAMPBELL L. REV. (forthcoming 2014) (manuscript at 30) (referencing *In re Skinner* and *Hunter* as cases involving the interpretation of when "confidential information" is revealed); Ellen Yankiver Suni, *Ethical Issues for Innocence Projects*, 70 UMKC L. REV. 921, 938-39 (2002) (noting the broad definition of confidential information according to the Restatement as "information relating to representation of a client, other than information that is generally known" and discussing the import of the fact that "[c]onfidentiality duties continue after conclusion of the representation").

to reveal confidential information:

[T]o 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.<sup>101</sup>

The comments to the rule suggest that a lawyer may be able to make some responses prior to the actual commencement of a proceeding. Comment 10 states in part:

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. . . . 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. The right to defend also applies, of course, where a proceeding has been commenced.<sup>102</sup>

Any disclosures permitted under Rule 1.6(b) must be limited to those disclosures that the lawyer "reasonably believes necessary."<sup>103</sup>

As with all of these issues, any lawyer seeking to disclose confidential information in response to a negative online review will need to research the law of the governing jurisdiction regarding the scope of the self-defense exception. For example, there is a split in the authority as to whether a former client's claim of constitutionally ineffective assistance of counsel allows former counsel to reveal confidential information under the self-defense exception.<sup>104</sup> The ABA Standing Committee on Ethics and Professional Responsibility issued an ethics opinion that found that the self-defense exception did not apply in this circumstance.<sup>105</sup> Its reasoning may be informative about the application of the self-defense exception in response to negative online reviews because it limits the exception to circumstances where the lawyer needs to defend against charges that

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101. MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(5) (2013).

102. *Id.* R. 1.6(b) cmt. 10 (emphasis added).

103. *Id.* R. 1.6(b).

104. See generally RONALD ROTUNDA & JOHN DZIENKOWSKI, LEGAL ETHICS: THE LAWYER'S DESKBOOK ON PROFESSIONAL RESPONSIBILITY §§ 1.6-12(a)-(h) (2013-2014 ed.) (recognizing and analyzing exceptions to the revelation of confidential client information).

105. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 10-456 (2010).



imminently threaten the lawyer with serious consequences:

The self-defense exception applies in various contexts, including when and to the extent reasonably necessary to defend against a criminal, civil[,] or disciplinary claim against the lawyer. The rule allows the lawyer, to the extent reasonably necessary, to make disclosures to a third party who credibly threatens to bring such a claim against the lawyer in order to persuade the third party that there is no basis for doing so. For example, the lawyer may disclose information relating to the representation insofar as necessary to dissuade a prosecuting, regulatory[,] or disciplinary authority from initiating proceedings against the lawyer or others in the lawyer's firm, and need not wait until charges or claims are filed before invoking the self-defense exception. Although the scope of the exception has expanded over time, the exception is a limited one, because it is contrary to the fundamental premise that client[-]lawyer confidentiality ensures client trust and encourages the full and frank disclosure necessary to an effective representation. Consequently, it has been said that "[a] lawyer may act in self-defense under [the exception] only to defend against charges that *imminently* threaten the lawyer or the lawyer's associate or agent with *serious* consequences . . . ."<sup>106</sup>

Similarly, the Restatement of the Law Governing Lawyers states that a lawyer may only reveal client confidences "to defend against charges that imminently threaten the lawyer or the lawyer's associate or agent with serious consequences, including criminal charges, claims of legal malpractice, and other civil actions . . . ."<sup>107</sup> The Restatement further opines that the disclosure of confidential information in self-defense is warranted only when it constitutes a "proportionate and restrained response to the charges."<sup>108</sup> Therefore, "[t]he concept of necessity precludes disclosure in responding to casual charges, such as comments not likely to be taken seriously by others."<sup>109</sup> This same comment, however, later states that "[w]hen a client has made a public charge of wrongdoing, a lawyer is warranted in making a proportionate and restrained public response."<sup>110</sup>

The weight of the limited authority suggests that negative comments about a lawyer's services on an online forum would not trigger the self-defense exception under ABA Model Rule 1.6(5), if such comments

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106. *Id.* (discussing the ABA Model Rule that allows for a self-defense exception giving lawyers the ability to reveal confidential client information in certain situations).

107. RESTATEMENT OF THE LAW GOVERNING LAWYERS § 64 cmt. c (2007).

108. *Id.* § 64 cmt. e.

109. *Id.*

110. *Id.*

amount to “mere criticism.”<sup>111</sup> Two recent California ethics opinions have specifically examined the issue of responding to a former client’s adverse public comments.<sup>112</sup> California, however, has not adopted a self-defense provision similar to ABA Model Rule 1.6(5).<sup>113</sup> The Los Angeles County Bar Association Professional Responsibility and Ethics Committee published an ethics opinion concluding that a lawyer may respond, but only if the response “does not disclose confidential or attorney–client privileged information . . . [and is not] in a manner that will injure [the former client] in a matter involving the former representation.”<sup>114</sup> This opinion is qualified by an assumption that the client’s post does not contain any confidential information and there is no litigation or arbitration pending between the attorney and former client.<sup>115</sup>

The Bar Association of San Francisco wrote a similar ethics opinion that concluded:

While the online review could have an impact on the attorney's reputation, absent a consent or waiver, disclosure of otherwise confidential information is not ethically permitted in California unless there is a formal complaint by the client, or an inquiry from a disciplinary authority based on a complaint by the client. Even in situations where disclosure is permitted, disclosure should occur only in the context of the formal proceeding or inquiry, and should be narrowly tailored to the issues raised by the former client. If the matter previously handled for the former client has not concluded, depending on the circumstances, it may be inappropriate for the attorney to provide any substantive response in the online forum, even one that does not disclose confidential information.<sup>116</sup>

The opinion noted that California’s rules of professional conduct do not have a self-defense provision similar to the Model Rules, but that such an

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111. ELLEN J. BENNETT, ET AL., ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT, § 1.6 (2011).

112. See L.A. Cnty. Bar Ass’n, Formal Op. 525 (2012) (examining the ethical duties of lawyers in connection with adverse comments published by a former client).

113. See MODEL RULES OF PROF’L CONDUCT R. 1.6(5) (2013) (discussing the “self-defense” exception to disclosing confidential client information); see also L.A. Cnty. Bar Ass’n, Formal Op. 525 (2012) (examining California’s lack of a self-defense exception similar to ABA Model Rule 1.6(5)).

114. L.A. Cnty. Bar Ass’n, Formal Op. 525 (2012).

115. See *id.* (qualifying the committee’s opinion with the requirements that: (1) any online comments be void of confidential information and (2) that there not be ongoing litigation “between the attorney and former client”).

116. Bar Ass’n of S.F. Opinion 2014-1 (2014).

exception can be found in its statutory and case law.<sup>117</sup> However, the opinion looked at the interpretations of the Model Rules, as well as the Restatement, to conclude that a lawyer could provide a general response to an online review by a former client, but the attorney could not disclose confidential information absent the client's informed consent or a waiver of confidentiality.<sup>118</sup>

There is one ethics opinion by the Los Angeles County Bar Association Professional Responsibility and Ethics Committee that examines the issue of responding to a former client's adverse public comments.<sup>119</sup> California, however, has not adopted a self-defense provision similar to Model Rule 1.6(5).<sup>120</sup> Thus, this ethics opinion concludes that a lawyer may respond but only if the response "does not disclose confidential or attorney-client privileged information . . . [and is not] in a manner that will injure [the former client] in a matter involving the former representation."<sup>121</sup> This opinion is qualified by an assumption that the client's post does not contain any confidential information and there is no litigation or arbitration pending "between the attorney and former client."<sup>122</sup>

The weight of the limited authority suggests that negative comments about a lawyer's services on an online forum would not trigger the self-defense exception under Model Rule 1.6(5), if such comments amount to "mere criticism."<sup>123</sup> For example, there is a formal ethics opinion that the New York County Lawyers' Association Committee on Professional Ethics drafted in 1997 that concludes a lawyer could not reveal confidential information under the self-defense exception after the client complained to a neighbor about the lawyer's services.<sup>124</sup> This opinion reasoned:

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117. *Id.*

118. *Id.*

119. See L.A. Cnty. Bar Ass'n, Formal Op. 525 (2012) (examining the ethical duties of lawyers in connection with adverse comments published by a former client).

120. See MODEL RULES OF PROF'L CONDUCT R. 1.6(5) (2013) (discussing the "self-defense" exception to disclosing confidential client information); see also L.A. Cnty. Bar Ass'n, Formal Op. 525 (2012) (examining California's lack of a self-defense exception similar to ABA Model Rule 1.6(5)).

121. L.A. Cnty. Bar Ass'n, Formal Op. 525 (2012).

122. See *id.* (qualifying the committee's opinion with the requirements that: (1) any online comments be void of confidential information and (2) that there not be ongoing litigation "between the attorney and former client").

123. ELLEN J. BENNETT ET AL., ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT, § 1.6 (2011).

124. See N.Y. Cnty. Law. Ass'n Comm. on Prof'l Ethics, Formal Op. 722 (1997) (discussing confidences and secrets and how they play into defending oneself against public criticism).

[I]t is the opinion of this Committee that [the self-defense exception] applies only to accusations of “wrongful conduct” that are actionable, involving the threat of an imminent proceeding, and not merely to negative references or gossip about the attorney. Thus, a lawyer may not reveal client confidences and secrets only to protect his or her reputation against unfavorable or unflattering characterizations regarding the lawyer or the lawyer’s services unless such characterizations are subject to an impending charge or claim brought before a body empowered to rule on such matters. Indeed, an interpretation of the rule that would allow lawyers to divulge protected information based on disapproving references or depictions, without more, is inconsistent with the solemn duty . . . to preserve client confidences and secrets.<sup>125</sup>

From the standpoint of lawyers and their rules of professional conduct, either refraining from responding to a negative online review or doing so in a way that does not reveal any client confidences is the safest course for lawyers. If a lawyer is going to include any client specific information in the response, the lawyer should consider whether the information would be considered confidential information and, if so, whether the self-defense exception could apply under the law of the governing jurisdiction. It is unlikely, however, that most courts would construe the self-defense exception to apply to responses to negative online reviews. To the extent that there is ambiguity in the rules of the various states about whether or not public criticism of a lawyer gives rise to the self-defense exception, the state supreme courts should consider revising their rules to remove any such ambiguity.

From the perspective of consumers and the reputation of the legal profession, it is probably helpful for consumers to see a non-defensive generic response that indicates that the lawyer takes seriously complaints by former clients, cares about client satisfaction and is professional in dealing with criticism. There is, however, a risk that the public will be deceived by online reviews that contain false information or that are otherwise misleading to which a lawyer may not be able to provide an adequate response due to confidentiality requirements. Because lawyers are constrained from providing their side of the story, however, the public does not benefit from one of the principles of free speech—“sunlight is the most powerful of all disinfectants.”<sup>126</sup> In such instances, a lawyer might consider filing a suit for defamation.

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125. *Id.*

126. *New York Times Co. v. Sullivan*, 376 U.S. 254, 305 (1964) (quoting Justice Brandeis).

#### 4. Defamation Lawsuits

A lawyer who believes that comments in an online review are defamatory false statements of fact could file a lawsuit for defamation against the client.<sup>127</sup> A defamation suit, however, poses substantial hurdles as a remedy for controlling one's online reputation.<sup>128</sup> As an initial matter, a defamation suit only covers false statements of defamatory fact.<sup>129</sup> It does not cover opinions and many negative online reviews may only contain opinions.<sup>130</sup> Satisfying the elements of the cause of action can also be difficult given the First Amendment protections for speech.<sup>131</sup> Furthermore, negative comments will remain online until there is a judgment.<sup>132</sup> Courts will not order allegedly defamatory content to be removed during the pendency of a lawsuit because that is considered a prior restraint on speech that violates the First Amendment.<sup>133</sup> Despite these hurdles, some lawyers have successfully brought defamation claims against prior clients thus making it a possible remedy to a false and defamatory online review of a lawyer's services.<sup>134</sup>

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127. See RESTATEMENT (SECOND) OF TORTS § 581A (1977) ("One who publishes a defamatory statement of fact is not subject to liability for defamation if the statement is true."); *Id.* § 566 (holding that an opinion "is actionable only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion"). See generally *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 (1974) (holding that private individuals may sue for defamation because states can "constitutionally allow private individuals to recover damages for defamation on the basis of any standard of care except liability without fault").

128. See, e.g., *New York Times*, 376 U.S. at 256–65 (examining some of the difficulties posed in order for one to prevail in a defamation suit); see also Carl Franzen, *Critical Yelp Comments Allowed to Stand After Virginia Supreme Court Ruling*, TALKING POINTS MEMO (Jan. 3, 2013, 7:35 PM), <http://talkingpointsmemo.com/idealab/critical-yelp-comments-allowed-to-stand-after-virginia-supreme-court-ruling> (illustrating the difficulties individuals face when the defaming statements are allowed to remain online).

129. See Lauren Guicheteau, *What Is the Media in the Age of the Internet? Defamation Law and the Blogosphere*, 8 WASH. J. L. TECH. & ARTS 573, 577 (2013) (stating that most actions for defamation require several factors, including a false statement published that causes harm to the individual due to the publisher's negligence).

130. See *id.* (explaining that the First Amendment protects opinions from defamation suits (citing *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20 (1990))).

131. See Carl Franzen, *Critical Yelp Comments Allowed to Stand after Virginia Supreme Court Ruling*, TALKING POINTS MEMO (Jan. 3, 2013, 7:35 PM), <http://talkingpointsmemo.com/idealab/critical-yelp-comments-allowed-to-stand-after-virginia-supreme-court-ruling> (noting that an initial win—for keeping defamatory information online through the trial process—was a win for First Amendment rights).

132. See *id.* (stating that the Virginia courts decided that the defamatory material could remain online during the duration of the trial).

133. See, e.g., *id.* (describing how Virginia courts allowed the comments at issue to remain online during a defamation suit).

134. See, e.g., *Afshari v. Barer*, 769 N.Y.S.2d 687, 689 (N.Y. App. Term 2003) (affirming a claim for defamation regarding statements made during correspondence between the opposing

Any lawyer who files a defamation suit should be aware of the risk of being found liable for the defendant's attorneys' fees under state anti-SLAPP laws<sup>135</sup> (SLAPP is an acronym for "Strategic Litigation Against Public Participation"). Anti-SLAPP laws<sup>136</sup> exist in many states and are designed to prevent lawsuits that are filed to silence a voice of criticism.<sup>137</sup> Not every state has an anti-SLAPP law and the states that do have them vary in terms of the scope and strength of the law.<sup>138</sup>

California, for example, has a broad anti-SLAPP law that defines protected activities to include any "written or oral statements [or writing] made in a public forum in connection with an issue of public interest."<sup>139</sup> California courts have interpreted this provision to apply to anonymous comments on a website regarding a company's business practices and

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parties); see also Debra Bruce, *How Lawyers Can Handle Bad Reviews and Complaints on Social Media*, TEX. B.J., May 2012, at 402, 403 (maintaining that a lawyer should avoid lashing out at a complaining client who states one's grievances online (citing *Wong v. Jing*, 189 Cal. App. 4th 1354 (6th Dist. 2010))); Josh King, *Your Business: Someone Online Hates You*, THE RECORDER (Aug. 16, 2013, 4:40 PM), <http://www.therecorder.com/management/id=1202614786352/Your%20Business%20Someone%20Online%20Hates%20You?slreturn=20140015105825#> (illustrating how the lawyer does, however, risk the "Streisand Effect," meaning that bringing attention to the negative review can result in it getting greater attention than it would have if the lawyer had ignored it).

135. See *id.* (stating that one must pay defendant's attorneys' fees due to anti-SLAPP laws if one loses the case); see also Debra Bruce, *How Lawyers Can Handle Bad Reviews and Complaints on Social Media*, TEX. B.J., May 2012, at 402, 403 (noting that a dentist who sued and lost was ordered to pay the opposing side's attorneys' fees).

136. See generally Dena M. Richardson, Comment, *Power Play: An Examination of Texas's Anti-SLAPP Statute and Its Protection of Free Speech Through Accelerated Dismissal*, 45 ST. MARY'S L.J. 245 (2014) (providing background on anti-SLAPP laws).

137. See Marc J. Randazza, *The Need for a Unified and Cohesive National Anti-SLAPP Law*, 91 OR. L. REV. 627, 627-28 (2012) (describing how SLAPP laws protect online speech).

138. See *id.* (illustrating that states have differing laws regarding SLAPP suits).

139. Todd C. Taylor, *Blogger's Liability for Third-Party Comments and Content: A Growing Legal Threat for Bloggers or Plaintiffs' Lingering Ignorance of the Law?*, 30 NO. 13 WESTLAW J. COMPUTER & INTERNET at 1, 4 (Nov. 30, 2012) (citing CAL. CIV. PROC. CODE § 425.16(e)). The legislative intent of the California anti-SLAPP law is as follows:

The Legislature finds and declares that there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances. The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process. To this end, this section shall be construed broadly.

CAL. CIV. PROC. CODE § 425.16(a) (Deering Supp. 2014). But see Robert D. Richards, *A SLAPP in the Facebook: Assessing the Impact of Strategic Lawsuits Against Public Participation on Social Networks, Blogs and Consumer Gripe Sites*, 21 DEPAUL J. ART, TECH. & INTELL. PROP. L. 221, 232 (2011) (discussing anti-SLAPP laws with a far narrower scope such as Pennsylvania, which only provides immunity to someone who "makes an oral or written communication to a government agency relating to enforcement or implementation of an environmental law or regulation").

reasoned “that ‘websites that are accessible free of charge to any member of the public where members of the public may read the views and information posted, and post their own opinions, meet the definition of a public forum . . . .’”<sup>140</sup> If a defendant files a motion to strike a complaint under the anti-SLAPP statute, then the burden shifts to the plaintiff to demonstrate a likelihood of prevailing on the merits.<sup>141</sup> If the court grants the defendant’s motion to strike, the defendant is entitled to attorneys’ fees and costs.<sup>142</sup> Some anti-SLAPP statutes impose additional penalties.<sup>143</sup>

A recent dispute in an unreported decision highlights many of the foregoing issues in the attorney–client context.<sup>144</sup> In *Gwire v. Blumberg*,<sup>145</sup> an unhappy former client anonymously posted negative comments about attorney William Gwire on complaintsboard.com.<sup>146</sup> The comments stated, in part, “Gwire committed a horrific fraud against me that has irreparably damaged every aspect of my life. I hope this partial summary of Gwire’s incredibly unethical history may help other innocent people.”<sup>147</sup> Gwire posted a response on the forum:

In his rebuttal, Gwire called Blumberg “not only unreliable but a proven liar.” The rebuttal referred to Blumberg as “a mentally unbalanced former client . . . who has a history of taking bizarre, and even criminal actions

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140. Todd C. Taylor, *Blogger’s Liability for Third-Party Comments and Content: A Growing Legal Threat for Bloggers or Plaintiffs’ Lingering Ignorance of the Law?*, 30 NO. 13 WESTLAW J. COMPUTER & INTERNET 1, 4 (2012) (citing *Ampex Corp. v. Cargle*, 128 Cal. App. 4th 1569 (Cal. Ct. App. 2005)); see Robert D. Richards, *A SLAPP in the Facebook: Assessing the Impact of Strategic Lawsuits Against Public Participation on Social Networks, Blogs and Consumer Gripe Sites*, 21 DEPAUL J. ART, TECH. & INTELL. PROP. L. 221, 224–30 (2011) (reviewing the “growing trend of businesses and professionals suing consumers who griped about them online” and the role of anti-SLAPP laws).

141. See CAL. CIV. PROC. CODE § 425.16(b) (Deering Supp. 2014) (stating that causes of action that raise free speech rights regarding matters of public interest are “subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim”).

142. See *id.* § 425.16(c) (permitting the court to award attorney’s fees to the defendant if the defendant prevails on a special motion to strike).

143. Marc J. Randazza, *Nevada’s New Anti-SLAPP Law: The Silver State Sets the Gold Standard*, NEV. LAW., OCT. 2013, at 7, 9–10 (discussing amendments to Nevada’s anti-SLAPP law that make it one of the strongest protectors of speech and provides for additional penalties of up to \$10,000 in addition to attorneys’ fees and costs).

144. See, e.g., *Gwire v. Blumberg*, No. CGC11510305, 2013 WL 5493399, at \*1 (Cal. Ct. App. Oct. 3, 2013) (describing issues relating to an attorney’s claim against his former clients, including four causes of action).

145. *Id.*

146. See *id.* at \*1–2 (relating how the plaintiff (Gwire) had filed suit against the defendant (Blumberg), because Blumberg posted negative comments about him on the Internet).

147. *Id.* at \*2.

against people he believes have hurt him.” Gwire claimed Blumberg had a pattern of blaming others “for his failures.” According to Gwire, Blumberg had “completely lost not one, but two fortunes entrusted to him . . . in his attempt to be a hotshot hedge fund manager[.]” Gwire also stated Blumberg’s “wife has divorced him and their divorce file is replete with episodes of unstable behavior by him.” Finally, Gwire accused Blumberg of “lashing out.”<sup>148</sup>

Gwire has sued his former client, Blumberg, for defamation and trade libel.<sup>149</sup> Blumberg moved to dismiss the lawsuit under California’s Anti-SLAPP statute, which the trial court granted in part but denied as to the defamation claims, because the trial court found that Gwire had met his burden of proving that he will probably prevail on his claims.<sup>150</sup> The court of appeals affirmed this holding.<sup>151</sup> The appropriateness of Gwire’s response to the online review, however, was not raised as an issue in the court of appeals’ decision and it is difficult to analyze from the facts in the decision whether any of the statements would be considered confidential information under California law.<sup>152</sup> This case does, however, illustrate how all of the foregoing legal issues can arise in a dispute between a lawyer and a former client.

#### IV. SETTLEMENT OF DISPUTES WITH CLIENTS

As illustrated above, sometimes the relationship between a lawyer and a client ends poorly and may result in a variety of claims including a lawyer’s breach of contract claim against a client who does not pay the lawyer’s legal fees or a client’s malpractice claim against the lawyer. Any disputes arising between a client and a lawyer may end in threatened litigation or the actual commencement of an action. As with most disputes in the legal system, these disputes will probably result in a settlement.<sup>153</sup> This raises the last question that this Article will explore: Can a confidentiality and

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148. *Id.* at \*3 n.3.

149. *See id.* at \*1 (stating that after the defendant posted defamatory statements online, the plaintiff sued his former clients).

150. *See id.* at \*3–4 (noting that the court dismissed as to a portion of the plaintiff’s claim, but holding that he could nonetheless prove defamation as to some of the defendant’s statements (citing CAL. CIV. PROC. CODE § 425.16)).

151. *See id.* at \*13 (agreeing with the previous court to affirm the holding (citing CAL. CIV. PROC. CODE § 425.16)).

152. *See generally id.* at \*3–4 (noting that after the plaintiff threatened to sue the defendant for his online posting, the defendant revised his subsequent online statements).

153. *See* Marc Galanter & Mia Cahill, “Most Cases Settle”: *Judicial Promotion and Regulation of Settlements*, 26 STAN. L. REV. 1339, 1339–40 (1994) (explaining the high rate of settlements of civil cases in the United States).



non-disparagement provision in a settlement agreement between a lawyer and a client be drafted in a manner that would prevent the client from posting negative online reviews about a lawyer as a term of the settlement?

ABA Model Rule 1.8(h)(2) prohibits a lawyer from settling “a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith.”<sup>154</sup> As the comments to Model Rule 1.8 explain, there is a “danger that a lawyer will take unfair advantage of an unrepresented client or former client,” which is why they must be advised of the desirability of seeking the advice of independent counsel.<sup>155</sup> As long as the lawyer complies with this rule, there is nothing that prohibits a lawyer from settling a malpractice or other dispute with a client.<sup>156</sup>

A settlement agreement is, of course, a contract between private parties that will be enforced subject to the defenses available under contract law.<sup>157</sup> If a settlement agreement contained a confidentiality provision that prohibited a former client from posting negative online reviews, a former client subject to such a provision could contend that agreement violates public policy and is unenforceable.<sup>158</sup> The arguments here are similar to those raised in Section II with respect to non-disclosure agreements at the onset of the attorney–client relationship, but there are some differences with a confidentiality provision in a settlement agreement that could warrant a different treatment by the courts.

One key difference that may weigh in favor of enforcing a confidentiality agreement in a settlement agreement is Model Rule 1.8's requirement that the client be advised of obtaining independent counsel and the likelihood that the client will have independent counsel.<sup>159</sup> Unlike the inception of the attorney–client relationship—which is based

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154. MODEL RULES OF PROF'L CONDUCT R. 1.8(h)(2) (2013).

155. *Id.* R. 1.8(h)(2), cmt. 15.

156. *See id.* (“Agreements settling a claim or a potential claim for malpractice are not prohibited by this Rule.”).

157. *See* Sam McGee, *Consequences of the Confidentiality Clause*, 45 TRIAL, Jun. 2009, at 20, 21 (“[A] party who seeks to avoid a confidentiality agreement has to do so based on the principals of contract law by proving fraud, mutual mistake, or other applicable defenses.”).

158. *See* Steven G. Mehta, *Lasting Agreement*, LOS ANGELES LAW., Sept. 2007, at 28, 28 (“A court will not enforce a settlement agreement provision that is illegal, contrary to public policy, or unjust.” (citing Cal. State Auto Ass'n Inter-Ins. Bureau v. Superior Court, 50 Cal. 3d 658, 664 (1990); Timney v. Lin, 106 Cal. App 4th 1121, 1127 (Ct. App. 2003))).

159. *See* MODEL RULES OF PROF'L CONDUCT R. 1.8 (2013) (stating that an attorney must notify the client in writing in order to seek independent counsel for advice).

on establishing trust, loyalty and the creation of a fiduciary relationship—the settlement of a dispute with a lawyer occurs at a time when all of those principles have eroded.<sup>160</sup> The lawyer is no longer in the position of being a fiduciary who must put the client's interests first. Therefore, from a client-centered perspective, enforcing a confidentiality provision that the lawyer and client agreed to after the deterioration of the attorney–client relationship does not raise the same issues as a similar agreement made at the time that the lawyer and client are creating the foundation of their relationship.

Another difference that may favor enforcing a confidentiality clause in a settlement agreement is a general policy favoring the settlement of disputes.

Courts have said that “honoring the parties’ express wish for confidentiality may facilitate settlement, which courts are bound to encourage,” and that “settlement agreements are highly favored in the law and will be upheld whenever possible because they are a means of amicably resolving doubts and uncertainties and preventing lawsuits.”<sup>161</sup>

Courts have cited this policy when enforcing confidentiality agreements even when they restrict a party's right to speak on matters of public concern.<sup>162</sup>

However, another key difference here weighs against enforcing a confidentiality agreement in a settlement agreement. As discussed in Section II regarding non-disclosure agreements at the inception of the attorney–client relationship, a confidentiality agreement that prohibited a client from reporting misconduct to the appropriate disciplinary authority would violate public policy and be unenforceable.<sup>163</sup> The rationale for not enforcing such a restriction is based on the need that disciplinary authorities have in discovering attorney misconduct and imposing the discipline necessary to protect the public from attorneys who have engaged

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160. See Jennifer L. Myers, David Sonenshein & David N. Hofstein, *To Regulate or Not to Regulate Attorney–Client Sex? The Ethical Question*, 69 TEMP. L. REV. 741, 786–87 (1996) (determining that an attorney has a fiduciary duty of loyalty and good faith, a duty of care, and a confidentiality duty when handling the client's information).

161. Sam McGee, *Consequences of the Confidentiality Clause*, 45 TRIAL, Jun. 2009, at 20, 21 (quoting *Gamble v. Deutsche Bank, AG*, 377 F.3d 133, 143 (2d Cir. 2004); *D.H. Overmyer Co. v. Loflin*, 440 F.2d 1213, 1215 (5th Cir. 2005)).

162. See *id.* (describing how courts favor settlements and enforce confidentiality agreements).

163. See, e.g., *In re Himmel*, 533 N.E.2d 790, 794 (Ill. 1988) (holding that an attorney has a duty to protect the client's information unless the client discloses this information to the attorney in the presence of a third party); see also ILL. RULES OF PROF'L CONDUCT R. 8.4(h) (2010) (prohibiting lawyers in Illinois from entering into any contract with a client that limits the client's right to pursue any complaint with the Attorney Registration and Disciplinary Commission).

in professional misconduct.<sup>164</sup>

This public protection rationale could logically extend to a policy that favors the freedom of disgruntled former clients to be able to provide an account of their experience to other consumers who might find that information useful when deciding which lawyer to hire.<sup>165</sup> Some attorney conduct may not warrant discipline, but it can still be relevant to others who are considering hiring a lawyer. The public has a legitimate interest in obtaining information about lawyers who hold the privilege of a law license and who may be handling their important legal matters.<sup>166</sup> This rationale may have more force in agreements that settled a client's claim for malpractice than in agreements that settled other disputes, such as a client's refusal to pay a fee owed.

There are some areas where courts and legislatures have decided that confidentiality agreements should not be enforced as a matter of public policy. For example, The Florida Sunshine in Litigation Act<sup>167</sup> prohibits agreements that conceal public hazards or the resolution of claims against state or municipal entities.<sup>168</sup> Similarly, the California legislature has indicated that it disfavors confidential settlement agreements in civil suits that involve elder abuse.<sup>169</sup> The Eleventh Circuit has also taken this approach with settlements of cases under the Fair Labor Standards Act<sup>170</sup> because confidentiality would contravene Congress's intent and undermine regulatory efforts.<sup>171</sup> These examples reflect the policy concerns about concealing certain information, which has also been described as follows:

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164. See *Himmel*, 533 N.E.2d at 795–96 (discussing how the court decides the proper punishment for the disciplined attorney in light of protecting the public from such conduct).

165. See Ronald L. Burdge, *Bad for Clients, Confidentiality in Settlement Agreements Is Bad for Lawyers, Bad for Justice*, GP SOLO, Nov./Dec. 2012, at 25, 25–26 (arguing that no settlement agreements should be confidential because the legal system belongs to the public and the public has a right to know the resolution of disputes whether that occurs at trial or in a settlement agreement).

166. See *Himmel*, 533 N.E.2d at 795–96 (illustrating how sanctioning an attorney safeguards the public (citing *In re LaPinska*, 72 Ill.2d 461, 473 (1978))).

167. FLA. STAT. ANN. § 69.081 (West 2004).

168. See Jennifer Snyder Heis, *Confidentiality of Settlement Agreements*, FOR THE DEFENSE, Feb. 2007, at 35, 35–36 (explaining how Florida finds settlement contracts unenforceable when they hide public hazards or claims against the state or municipalities because these agreements are against public policy (citing FLA. STAT. § 69.081 (2004))).

169. See Steven G. Mehta, *Lasting Agreement*, LOS ANGELES LAW., Sept. 2007, at 28, 32–33 (noting that the California legislature disfavors confidential settlement agreements involving elder abuse (citing CAL. CODE CIV. PROC. § 2017.310(a))).

170. 29 U.S.C. § 201 (Supp. III 2010).

171. See Ronald L. Burdge, *Confidentiality in Settlement Agreements Is Bad for Clients, Bad for Lawyers, Bad for Justice*, GP SOLO, Nov./Dec. 2012, at 24, 26 (illustrating an example where confidentiality should not be enforced because it violates the intention of the legislature).

Confidentiality prevents the public from knowing about systemic wrongful conduct. It can also prevent regulators and government agencies from performing their duty to enforce the law and protect the public. . . . When violations are hidden by confidentiality, the legal system itself is thwarted from fulfilling one of its fundamental purposes: to protect the citizenry from wrongful conduct.<sup>172</sup>

These concerns may weigh against enforcement of confidentiality or non-disparagement agreements between lawyers and former clients as a matter of public policy.

## V. CONCLUSION

As consumers create and review more online reviews as part of their decision-making process about which lawyer to hire, lawyers will have a variety of issues arise regarding their online professional reputation. Lawyers may consider a variety of ways to control or repair their reputations, but they should be aware of a variety of ethical pitfalls that they may encounter. The upside of the expansion of online reviews is that many consumers may be able to access information about lawyers that was previously elusive—such as communication skills, empathy, diligence, price, etc.—and could inform their decision-making.

There is, however, a risk that consumers will get information that is not helpful because it is false or too one-sided. There is little oversight of consumer reviews and anonymous reviews mean that some reviews might not even be written by actual clients. As the regulators of the legal profession, the state supreme courts may want to consider taking up the role of providing a reliable, non-commercial location for clients to review their experiences with lawyers.<sup>173</sup> Like sites such as Angie's List, the courts could increase the reliability of the ratings by prohibiting anonymous reviews.<sup>174</sup>

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172. *Id.* at 25.

173. See Lucille M. Ponte, *Mad Med Posing as Ordinary Consumers: The Essential Role of Self-Regulation and Industry Ethics on Decreasing Deceptive Online Consumer Ratings and Reviews*, 12 J. MARSHALL REV. INTELL. PROP. L. 462, 502–03 (2013) (suggesting that professions collaborate with “independent third-party review organizations to police their professions and provide easy to understand rankings of fellow professionals”).

174. See ANGIE'S LIST, <http://www.angieslist.com/how-it-works.htm> (last visited Mar. 23, 2014) (describing that the site does not allow anonymous reviews).

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