

The self-defense exception to client confidentiality

by
Martin Cole, Senior Assistant Director
Minnesota Office of Lawyers Professional Responsibility

Reprinted from *Minnesota Lawyer* (April 1, 2002)

A unique situation involving confidentiality and former clients occurs when a client discharges an attorney and then blames the attorney for some action or advice that has not turned out well. (I.e. "My answer was false, your honor, because my former attorney advised me to lie.") Opposing counsel then contacts the attorney to request an affidavit or testimony about whether the client is telling the truth. Rather than wanting to protect the client's confidential information, it is likely the lawyer wants (perhaps desperately) to tell the real story, motivated in part by a desire to clear the attorney's own name and reputation.

Such situations sometimes arise in criminal post-conviction or habeas corpus proceedings where the former client raises ineffective assistance of counsel claims. But they arise in civil matters as well. Thus, the question presented is whether, if done in self-defense, a lawyer may voluntarily disclose information about the prior representation without the client's consent. Generally, the answer is yes.

Rule 1.6(b)(5) of the Minnesota Rules of Professional Conduct (MRPC) provides that an attorney may reveal a client's confidences and secrets "necessary to . . . defend the lawyers or employees or associates against an accusation of wrongful conduct."

The ABA Model Rule of Professional Conduct 1.6(b)(2)[Ftn 1](#) sets out the so-called "self-defense exception" more fully: "A lawyer may reveal such information [relating to the representation of a client] to the extent the lawyer reasonably believes necessary to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client."[Ftn 2](#)

Sound policy reasons support such a rule. An accusation by a current or former client against a lawyer effectively acts as a waiver of the attorney-client privilege and the ethics rule. Thus, responding to a malpractice suit or a disciplinary complaint is obviously permitted. Further, a client should not be able to hide behind confidentiality rules to falsely accuse someone of wrongdoing in a subsequent matter to which

the lawyer is not a party.

To trigger this exception the accusation need not be made in a formal proceeding. Even the clear threat of such a claim is sufficient to allow the lawyer to use the self-defense exception. [Ftn 3](#) Bear in mind, however, that the rule only allows disclosures of client information relevant to the accusation and only to the limited extent necessary.

Therefore, in the scenario set out at the beginning of this article, the lawyer may disclose otherwise confidential information of the former client or about the prior representation without client consent or an order from a court. If asked, the lawyer may provide an affidavit or testify without violating any rule of professional conduct.

Less clear are situations where a client has not directly accused the lawyer of wrongdoing. For example, a client discharges a lawyer and seeks to repudiate a settlement agreement negotiated by the lawyer. Does the client have to specifically state that the lawyer settled without the client's knowledge and consent to trigger the self-defense exception?

The better view would seem to be that under the exception the lawyer may respond to opposing counsel's inquiries about the settlement process without client consent. If the client acknowledges that the settlement was authorized or the inquiry is strictly about the intended meaning of the agreement, however, then attorney wrongdoing is not necessarily involved and the attorney may not disclose client confidences and secrets.

The self-defense exception does not require a lawyer to disclose client information; it only provides the discretion to do so. Although it may result in additional time and expense to the parties, a lawyer may take the cautious approach and decline to disclose any information. If subpoenaed to a deposition or a hearing, the attorney could assert the attorney-client privilege or the ethical obligation in response to all questions seeking such information (and recall that the professional responsibility obligation of confidentiality is more extensive than the privilege).

Hopefully the former client and current counsel are present and can assert or waive the privilege and the ethics rule protection. Waiver, of course, provides the consent necessary for disclosure. If the client will not waive the privilege, then the lawyer could require that the court resolve the question. If then ordered to disclose, the attorney may tell what she knows with protection.

¹ When Minnesota adopted the model rules in 1985, the Supreme Court did not adopt the ABA's model rule, but rather retained the language contained in former DR4-101 of the Minnesota Code of Professional Responsibility. This is just one of several rules where Minnesota and the ABA Model Rules differ. Nevertheless, the scope of the self-defense exception to client confidentiality appears to be similar, if not identical.

² See also, The Restatement (Third) of the Law Governing Lawyers (ALI 2000) sec. 64: "A lawyer may use or disclose confidential client information when and to the extent that the lawyer reasonably believes necessary to defend the lawyer or the lawyer's associate or agent against a charge or threatened charge by any person that the lawyer or such associate or agent acted wrongfully in the course of representing a client."

³ The ABA Model Rule Comment states that the rule "does not require the lawyer to await the commencement of an action or proceeding."