LOS ANGELES & SAN FRANCISCO
Daily Journal
www.dailyjournal.com
TUESDAY, MARCH 5, 2025

Published In The Top Professional Responsibility Lawyers 2025 Supplement

When can an attorney use a client's confidential information for protection?

Erin M. Joyce

Attorneys are trained to hold client confidences and other private information they learn during the course of a representation as privileged and confidential. California highly prizes the attorney client privilege, and in a significant departure from the Model Rules of Professional Conduct, only allows a very limited carve out for an attorney to breach privilege when a third party's life is in danger. Business and Professions Code section 6068(e)(1) provides that it is the duty of an attorney "to maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client." Under Business and Professions Code section 6068(e)(2) "an attorney may, but is not required to, reveal confidential information relating to the representation of a client to the extent that the attorney reasonably believes the disclosure is necessary to prevent a criminal act that the attorney reasonably believes is likely to result in death of, or substantial bodily harm to, an individual." See also Rule of Professional Conduct 1.6 and LACBA Opinion No. 525 (2012).

But what about when an attorney must use communications with the client, or other confidential information learned during the representation, to defend against false allegations? This depends on the forum where the attorney finds himself, and who makes the complaint. A client has waived the attorney client privilege and confidentiality when the client has filed a State Bar complaint against the attorney, seeks to avoid paying attorney fees or initiates litigation against the attorney. However, attorneys have faced discipline for using confidential information to "defend" against bad online reviews from problem clients. And where a complaint comes from a third party, there is no waiver, and the attorney may not be able to use privileged or confidential information to defend against unwarranted charges without client consent.

Rule of Procedure of the State Bar of California 2406 provides:

A client or former client who complains against an attorney thereby waives the attorney-client privilege and any other applicable privilege, as between the complainant and the attorney, to the extent necessary for the investigation and prosecution of the allegations.

So in the average State Bar complaint, when the complaining witness is the former client, who alleges the attorney did not timely respond to calls, failed to take proper action on the client's case, or failed to disburse funds properly, the attorney can use emails or other interchanges with the client and other privileged information gleaned from the investigation and discovery in the matter handled for the client, to respond to the State Bar. An attorney can likewise use confidential information to defend against malpractice claims or to support a claim for attorney fees that the client has not paid. But this defensive use of confidential information is not available to respond to negative online reviews. As detailed in the Los Angeles County Bar Association Opinion No. 525, an attorney can respond to an online review where the response does not disclose confidential information, does not cause damage to the

Erin M. Joyce *is founder of Erin Joyce Law, PC.*

former client and is "restrained." The key takeaway is that even in response to highly inflammatory reviews, the attorney needs to be professional. The ABA Opinion concerning how to respond to online reviews echoes this sentiment. ABA Formal Op. 21-496. The Committee first suggests that the attorney consider if any response is warranted or advisable. And where the attorney makes the decision to respond, the attorney cannot use confidential information to undermine the client in doing so.

When a complaint is filed against an attorney by a third party, the general confidentiality rules still apply. In those circumstances, the attorney will be foreclosed from using client confidences or other confidential information to respond to the State Bar complaint from a third party - like an opposing counsel or court. The fact that the attorney cannot disclose privileged information when the State Bar complaint was filed by a third party does not absolve the attorney of responding to the State Bar complaint. The attorney must claim the privilege in a written response to the State Bar, pursuant to Rule of Procedure of the State Bar of California 2409(c).

In situations where the attorney can use confidential information - in the event of a Bar complaint or litigation against the client -- the attorney is only allowed to invade privilege to the extent necessary to directly respond to the allegations leveled by the client. *In the Matter of Ellerman* (Review Dept. 2022) 5 Cal. State Bar Ct. Rptr. 899, 907. And attempting to tarnish the client's credibility even with "public" information may be found to violate the duty of confidentiality. In *In the Matter of Johnson*, the State Bar Review Department found that disclosing a client's felony conviction without good cause constituted a breach of his duty to maintain confidentiality, even though the felony conviction was public. In the Matter of Johnson (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179, 189. In In the Matter of Johnson, the disclosure violated the attorney's duty of confidentiality since the attorney only learned about the client's prior conviction because the client confided in the attorney during the representation, and the public record of the conviction was not easily found.

Attorneys should always take care to protect privileged communications and other confidential information of clients, and can only use that information to defend against allegations leveled by clients in litigation or a disciplinary complaint.

Reprinted with permission from the *Daily Journal*. ©2025 Daily Journal Corporation. All rights reserved. Reprinted by ReprintPros 949-702-5390.