

# Defending Yourself Against Charges By Third Parties

BY JOHN B. HARRIS

You're retained by general counsel to XYZ Corporation to negotiate the sale of one of its divisions. The sale goes through, but six months later you get a letter from the buyer's lawyer claiming that you assisted XYZ in misrepresenting the division's financial picture. You call XYZ's general counsel, who insists that XYZ has done nothing wrong and urges you to fulfill your duty to protect the confidences of your client.

If you weren't a lawyer, you could go to the buyer and explain your limited role in the transaction and that XYZ ignored your sound advice in valuing the company. You might even persuade plaintiff's counsel to exclude you from the litigation. But you are a lawyer, and you ask the unavoidable questions: How can my selfish desire to avoid a sullied reputation or dodge unwelcome professional inquiries possibly justify the unilateral disclosure of my client's confidences? And if the Code of Professional Responsibility prohibits me from disclosing confidential information even when I want to help the victims of a client's fraud, how can I be permitted to disclose confidences merely to protect myself?

## Lawyers May Disclose In Self-Defense

Though these questions yield no easy answers, the fact is that New York lawyers do have the right, as do lawyers in many other states and under the recently re-drafted Restatement of the Law Governing Lawyers, to disclose client confidences and even waive the attorney-client privilege in the interest of defending themselves and their firms. This is a doctrine that would shock most clients (if they had any inkling that it existed) because it runs counter to traditional notions of zealous representation and client loyalty, and because it is fraught with the potential for abuse by parties who manufacture charges against an attorney in order to obtain client confidences. At the same time, it also provides a much-needed avenue for an accused lawyer to clear the air, protect a good name and avoid becoming needlessly embroiled in costly and time-consuming legal and disciplinary proceedings.

This article explores the "self-defense" exception, particularly as applied to accusations of wrongdoing made by non-clients. I consider what kinds of accusations may prompt its invocation; how and when the exception can be invoked; and the scope of permissible disclosures in defense. I conclude with a caution: given the degree to which the self-defense exception is contrary to core professional values, a lawyer confronting a charge against him should think seriously before placing his own personal interest ahead of the client's reliance on his confidentiality.

The self-defense exception stems from the long-established right of an attorney to disclose client confidences when the client has acted in a way that implicitly waives confidentiality. For example, the obligation to protect relevant confidences is effectively waived when the client charges the lawyer with malpractice or breach of fiduciary duty, or when the lawyer sues to recover a fee the client has failed to pay. The rationale behind these rules is that the lawyer should not be hamstrung when relations with the client have become adversarial. Similarly, the attorney-client privilege does not protect communications when the client has waived its protection or where there is prima facie evidence that the client has used the lawyer's services to further a crime or fraud.

### **Exception Available Against Third Parties**

While this implicit waiver amply justifies self-defense disclosure when the client is the accuser, the rationale is less clear when third parties — prosecutors, regulators, private litigants — make charges, because then there is no waiver, illegal action or other conduct by the client. See *First Federal Savings & Loan Ass'n. of Pittsburgh v. Oppenheim, Appel, Dixon & Co.*, 110 F.R.D. 557, 561 (S.D.N.Y. 1986) (“[T]he traditional rule did not contemplate an exception to the privilege merely because it was in an attorney’s pecuniary or legal interest to make the disclosure, such as when he was sued by someone other than the client”).

Nevertheless, despite the absence of any strong historical or logical underpinning for permitting the self-defense exception when accusations are raised by third parties, the ABA included DR 4-101(C)(4) when it enacted its Code of Professional Responsibility in 1969. This rule permits a lawyer to reveal confidences or secrets necessary to establish or collect a fee or “to defend the lawyer or his or her employees or associates against an accusation of wrongful conduct.” Although the notes explaining the Rule relate exclusively to claims raised by or against clients, the Rule on its face does not depend on the accuser’s identity. (The plain language of the Rule is broad enough to permit disclosure of client confidences whenever anyone criticizes the performance of a lawyer or the lawyer’s firm.)

The inclusion of disclosure in response to third-party accusations was cemented by the Second Circuit’s opinion in *Meyerhofer v. Empire Fire & Marine Ins. Co.*, 497 F.2d 1190, 1194-96 (2d Cir.), cert. denied, 419 U.S. 998 (1974). In *Meyerhofer*, Goldberg, a law firm associate, was under investigation by the SEC and was named as a defendant in a securities fraud lawsuit accusing him of knowing about a finder’s fee paid by the client to Goldberg’s firm — a fee which wasn’t disclosed in offering documents. Noting the seriousness of the charges, the potentially high cost to Goldberg of defending himself, and the damage to his professional reputation “which might be occasioned by the mere pendency” of a securities fraud charge, the court recognized Goldberg’s right under DR 4-101(C)(4) to make the disclosures necessary to prove that he was not involved in omitting the finder’s fee.

Twelve years later, in *First Federal*, supra, Magistrate-Judge Dolinger held that there was a corresponding self-defense exception to the evidentiary attorney-client privilege, when a non-client accuses an attorney of misconduct.

## **Model Rule Recognizes Exception**

Following Meyerhofer, the ABA enacted Model Rule 1.6(b)(2), which again recognized the self-defense exception when either clients or non-clients accuse the lawyer. Rule 1.6(b)(2) somewhat narrowed the broad language of the New York Code, permitting the exception in “a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or in response to allegations in any proceeding concerning the lawyer’s representation of the client.” (Emphasis added.) None of the underlined limitations is present in the text of the New York Code. The Model Rule also adds in commentary that the lawyer must make every effort practicable to limit the scope of the disclosure to information which is necessary, and that the lawyer must also seek to “obtain protective orders or make other arrangements minimizing the risk of disclosure.”

The recently revised Restatement of the Law Governing Lawyers views the self-defense exception favorably, asserting that “in the absence of the exception, lawyers accused of wrongdoing would be left defenseless against false charges in a way unlike that confronting any other occupational group.” Section 116, comment b. The Restatement echoes the reasonable-belief standard of Model Rule 1.6(b), and makes clear that the exception arises when necessary to defend the lawyer or the lawyer’s associate or agent against “a charge or threatened charge by any person that the lawyer...acted wrongfully in the course of representing that client.”

There are relatively few reported decisions on the invocation of the self-defense exception nationwide, and it is hard to assess how frequently it arises, because the attorney has the discretion to make self defense disclosures before litigation, without the necessity of the judicial determination that typically precedes the crime-fraud exception to the attorney-client privilege. Indeed, there is no express requirement under DR 4-101(C)(4) that the attorney notify the client of the intention to disclose. The client may have no real opportunity to prevent the disclosure before it occurs. Even if the attorney notifies the client of his intent to make disclosures to forestall litigation, there may be no easily available forum in which the client can obtain a protective order.

## **When The Exception Arises**

DR 4-101(C)(4) does not define what constitutes “an accusation of wrongful conduct” or delineate the procedural setting in which the exception can arise. In deciding what constitutes an “accusation of misconduct”, it is clear that the attorney may act before charges of wrongdoing are actually brought. “The cost and other burdens of defending against a formal charge and the damage it can inflict on a lawyer’s reputation, even if ultimately resisted successfully, argue against such a restrictive interpretation.” New York City Bar Ass’n Op. 1986-7. By the same token, the ethical rules “require more than a whisper or suspicion of wrongdoing” before confidences and secrets may be disclosed. NYCBA Op. 1986-7.

In a 1997 opinion, the New York County Lawyers Association considered whether a client’s statements to neighbors that the attorney was negligent triggered the self-defense exception. NYCLA Ethics Op. 722. The Opinion stated that DR 4-101(C)(4) applies only to “actionable” accusations, not merely “a passing remark or an expression of doubt” about the attorney. Unfavorable or unflattering characterizations of the lawyer’s performance will permit the revelation of client confidences only if they are “directly and specifically” accusatory and would lead a reasonable person to consider the attorney “subject to an impending charge or claim” before a body empowered to adjudicate a claim. *See also Eckhaus v. Alfa Laval, Inc.*, 764 F. Supp. 34, 37-38 (S.D.N.Y. 1991) (“informal charges” of exercising poor judgment and giving

“inappropriate” legal advice do not amount to an accusation of wrongful conduct); *Siedle v. Putnam Investments, Inc.*, 147 F.3d 7 (1st Cir. 1998) (lawyer who “chafed at [employer’s] criticism of his work” cannot use the self-defense exception offensively in an action against employer).

### **Prospect Of Proceeding Invokes Exception**

Although the text of DR 4-101(C)(4) does not require that the “accusations of wrongful conduct” be made in the context of an actual or imminently threatened proceeding naming the lawyer, the prospect of proceedings is a practical prerequisite for invocation of the exception. Under the Restatement, the charges must “imminently threaten” serious consequences, such as indictment, claims of legal malpractice or complaints in disciplinary proceedings. Section 116, comment c. A criminal prosecutor’s statement to an attorney that corporate employees have made incriminating statements about him is considered a sufficient accusation, even in the absence of the threat of an indictment. NYCBA Op. 1986-7. *See also Meyerhofer* (prospect of SEC regulatory bar may trigger exception); *Brandt v. Schal Associates, Inc.*, 121 F.R.D. 368, 385 n.48 (N.D. Ill. 1988) (Rule 11 claim constitutes “accusation of wrongful conduct”); *Matter of Robeson*, 293 Or. 610, 652 P.2d 336 (1982) (self defense exception is available in attorney discipline proceedings). In assessing the imminence of the claim, the lawyer should consider whether the person threatening the charges is “in an apparent position” to invoke them, *e.g.*, a prosecutor or aggrieved potential litigant. Restatement Section 116 comment c. This limitation, if grafted onto DR 4-101(C)(4), would not permit an attorney to disclose confidences in defense of an accusation of misconduct or incompetence published by a news commentator or author. *See, e.g., Armstrong v. Simon & Schuster, Inc.*, 85 N.Y.2d 373, 625 N.Y.S.2d 477 (1995).

### **Charge Cannot Be Ambiguous**

Courts have hesitated to apply the self-defense exception when the charge of misconduct is uncertain or ambiguous. In *General Realty Associates v. Walters*, 136 Misc.2d 1027, 519 N.Y.S.2d 530 (Civ. Ct. N.Y. Co. 1987), a tenant asserted as a defense in a foreclosure action that her lawyer had failed to notify her that a judgment requiring payment had been entered. While such an allegation “obviously raises the possibility that [the attorney] neglected to carry out a professional responsibility,” if the attorney were to state that he sent the notification by mail “her claim of non-receipt would not necessarily point the finger of blame at him.” Accordingly, the court permitted the lawyer to “part the curtain” of confidentiality to the extent necessary to ascertain whether his version of notification squarely conflicted with the client’s — in which case he would be inferentially “accused.” *Id.*; see also NYCLA Op. 722 (disclosure not available when lawyer merely suspects that he or she has been accused of wrongdoing, but is uncertain as to the nature or degree). Similarly, the bare service of a grand jury or regulatory subpoena for testimony is probably not sufficient by itself to constitute an “accusation”. *United States v. Edgar*, 82 F.3d 499, 509 n.11 (1st Cir. 1996); *George v. LeBlanc*, 78 F.R.D. 281, 289 n.4 (N.D. Tx. 1977) (questioning whether a subpoena to testify before the SEC is enough to constitute an “accusatory finger”).

Interestingly, the ability to disclose does not appear to hinge on the lawyer’s own view of the truth or falsity of the charges. The Restatement suggests that a lawyer must minimize the risk of unfounded charges before disclosing by objecting to the threatener’s “abusive tactics”. If his objection fails, the lawyer may disclose if it reasonably appears to him “that the charge, although false, will in fact be pressed.” Section 116 comment c. There appears to be no authority requiring the lawyer to ascertain whether grounds would exist to dismiss the allegations on an early motion. The Restatement’s focus on the tenacity of the threatener — instead of the credibility of the accuser, the strength of the claim, or the

likely degree of damage to the lawyer — is questionable. For example, should an attorney be permitted to disclose confidential information to defend himself against claims — though pressed fervently — that appear on their face to be time-barred or otherwise invalid?

### **Invoking The Exception**

Courts have held that disclosure of confidences under the self-defense exception should ordinarily be made only after the client has been informed of the lawyer's intention to reveal. This notice would provide the client with the opportunity to consent to the disclosure, or, indeed, to obtain a protective order against the disclosure. Some authorities have asserted that notice to the client can be dispensed with if the lawyer reasonably believes that the client might, if notified, take steps to conceal the wrongdoing, or if the lawyer reasonably fears that disclosure might result in "bodily or other harm" to the lawyer or his family. NYCBA 1986-7.

### **Weighing The Client's Interests**

In determining when to invoke the self-defense exception, the attorney will be pushed by countervailing interests. He may not actually know what he must defend against until the charges are actually filed, and a pre-filing self-defense disclosure might turn out to be broader than necessary to defend against the charges that are ultimately disclosed. (Pre-litigation threats are not subject to Fed. R. Civ. P. 11 or its state counterparts, and a plaintiff might ultimately choose not to risk sanctions by filing charges which are problematic.) In assessing the scope of attorney disclosures, authorities have focused on whether the disclosures would or did influence the filing of serious charges against the client or, instead, whether the disclosures merely confirm information already possessed by the plaintiffs. First Federal, 110 F.R.D. at 567 n.16 (in permitting self-defense exception disclosures by attorney, court notes that the client had already been sued for fraud and the disclosures would not have induced the filing of a suit).

Although many courts have recognized the self-defense exception, relatively few have allowed the attorney to waive the client's privilege by unilaterally disclosing communications. The Restatement nevertheless endorses this approach. Given that the purpose of the exception is to allow attorneys to exonerate themselves (not to provide plaintiffs' counsel with ammunition against the client), it is difficult to understand why self-defense disclosures should then be freely used by a prosecutor or plaintiffs' counsel against the client on the theory of waiver. It would make more sense to force plaintiffs' counsel to consider the self-defense disclosures solely in evaluating whether to proceed against the attorney, and not to permit their use against the client except upon a showing of actual client waiver or in application of the crime-fraud exception. This more limited use would seem to strike a fairer balance than to allow a lawyer who is desperate to keep his name off the complaint to waive the privilege held by a potentially innocent client.

### **Scope Of Disclosure**

The law is clear that the disclosure by the attorney should be only that reasonably necessary to accomplish the purpose of self-defense. Accordingly, it is improper for an attorney to enter into a blanket "cooperation" agreement with a prosecutor or other litigant. *Morin v. Trupin*, 728 F. Supp. 952 (S.D.N.Y. 1989). For example, an attorney accused of misconduct with respect to a single transaction should not ordinarily disclose confidential information regarding a separate transaction. See *Meyerhofer*, 497 F.2d 1190, 1995 (attorney extensively details steps to correct misstatements in unrelated, but parallel

transaction to one in which he was accused); Trupin, 728 F. Supp. at 956 (attorney faulted for providing information beyond that dealing with the “propriety or legality” of his own actions).

But what is “necessary” for defense may be elusive. For example, in First Federal, Judge Dolinger found that the proper standard was disclosure of information that “as a practical matter {would} seem likely to provide significant assistance” to the attorney’s defense. 110 F.R.D. at 567. The Court further found that fairness dictated that the disclosure include not only those documents that the attorney would use in his defense, but also “relevant unfavorable information” on the same subject that the attorney would not volunteer. *Id.* See Trupin, 728 F. Supp. at 957 n.2 (“necessary” information should not include information ‘wholly apart from its bearing on the [attorney’s] own involvement’); Restatement Section 116 Exs. 2 and 3 (when attorney is accused of converting client funds, he may disclose to accuser confidential communications with client, but cannot disclose that the law firm has engaged in a pattern of similar practice with other clients).

Many courts will be willing to do an in camera review of the attorney’s proposed disclosure. This practice will avoid issues of disqualification and sanctions that might otherwise arise. Indeed, the accuser, too, may wish to have judicial approval of the attorney’s self defense disclosure, particularly given that counsel who receive information beyond that permissible under the self-defense exception could find themselves subject to a motion to disqualify on the ground that they have been poisoned by the receipt of impermissible information.

### **Practical Considerations**

In theory, New York gives broad latitude to claim the self- defense exception. But as a practical matter, the doctrine is so easily abused by unscrupulous adversaries (or by the attorneys themselves) that it should be used sparingly, subject to many ground rules. Not all of the following are mandated by case law but they will serve to protect the attorney and the client, and preserve the sanctity of confidential communications between them:

1. Before invoking the exception, the attorney should be faced with actual charges of wrongdoing or, at a minimum, a documented and specific accusation accompanied by some manifestation of intent to pursue it. Accusations made by a prosecutor or government regulator may justify pre-litigation disclosure more readily than threats by others.
2. There are few, if any, situations where the client should not be notified of the lawyer’s intention to make disclosure.
3. A lawyer should not invoke the exception pre-filing if the claims appear dubious on their face, e.g., because they are time-barred or fail to state a claim. In these cases, the attorney should seek dismissal of the claims before disclosing.
4. If the lawyer believes the claims to be baseless, the attorney should object and make every effort to discourage the filing without disclosing confidential information. If this is not possible, the attorney should attempt to balance the likely harm to the client from disclosure (e.g., will disclosure tend to incriminate the client?) against the likely harm to the attorney. Toss-ups should be resolved in favor of non-disclosure.

5. Where possible, the attorney should attempt to obtain guidance from another attorney, request guidance from an ethics panel or, ideally, request the court to make a ruling on the propriety and scope of the disclosure.
6. Disclosure should be narrowly limited to information necessary to establish the lawyer's own defense to the charges. An attorney should avoid attempting to ingratiate himself with the adversary by providing a free flow of information to induce the adversary to drop him from the case.

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