COMMENT

Clement J. Hayes

The Qualified Privilege of Texas Lawyers to Defend Their Reputations

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I. INTRODUCTION TO THE PROBLEM

The technology-based society of the twenty-first century offers vast Internet resources that afford individuals easy access to information and means of communication.[1] As a result, people spend substantial time online.[2] Some Internet sites, such as Facebook, Twitter, Yelp, Angie's List and Google, provide consumers an online forum for sharing experiences and opinions.[3] This development, while in many respects beneficial, is not without its drawbacks.[4]

1. *See* Robert Ambrogi, *Lawyers' Social Media Use Grows Modestly, ABA Annual Tech Survey Shows*, LAWSITES (Aug. 5, 2013), http://www.lawsitesblog.com/2013/08/lawyers-social-media-use-continues-to-grow-aba-annual-tech-survey-shows.html (explaining that firms and attorneys have an increasing online presence); Myles Anderson, *Study: 72% of Consumers Trust Online Reviews As Much As Personal Recommendations*, SEARCH ENGINE LAND (Mar. 12, 2012, 10:00 AM), http://searchengineland.com/study-72-of-consumers-trust-online-reviews-as-much-as-personal-recommendations-114152 (implicating the frequency in which individuals turn to online resources); *What Americans Do Online: Social Media and Games Dominate Activity*, NIELSEN WIRE (Aug. 2, 2010), http://www.nielsen.com/us/en/insights/news/2010/what-americans-do-online-social-media-and-games-dominate-activity.html (discussing the large amount of time that Americans spend online).

2. *See* Robert Ambrogi, *Lawyers' Social Media Use Grows Modestly, ABA Annual Tech Survey Shows*, LAWSITES (Aug. 5, 2013), http://www.lawsitesblog.com/2013/08/lawyers-social-media-use-continues-to-grow-aba-annual-tech-survey-shows.html (noting that according to the ABA Legal Technology Survey 56% of private practice attorneys have a presence on social media sites); *cf.* Jolie O'Dell, *The History of Social Media*, MASHABLE (Jan. 24, 2011), http://mashable.com/2011/01/24/the-history-of-social-media-infographic/ (designating 1971 as the date of the first email); *What Americans Do Online: Social Media and Games Dominate Activity*, NIELSEN WIRE (Aug. 2, 2010), http://www.nielsen.com/us/en/insights/news/2010/what-americans-do-online-social-media-and-games-dominate-activity.html (stating that 20% of the average American's time is spent on social network sites like Facebook where they have access to recent information).

3. *See* Debra L. Bruce, *Social Media 101 for Lawyers,* 73 TEX. B.J. 186, 189 (2010) (detailing the differences among various types of social media).

4. *See* Steven C. Bennett, *Ethics of Lawyer Social Networking*, 73 ALB. L. REV. 113, 122 (2009) ("The speed of social networking . . . may facilitate referrals, advice, and the formation of apparent attorney–client relationships, all with a few clicks of a mouse . . . [and i]n social networking, casual interactions sometimes cannot be distinguished from more formal relationships."); Hope A. Comisky & William M. Taylor, *Don't Be a Twit: Avoiding the Ethical Pitfalls Facing Lawyers Utilizing Social Media in Three Important Arenas—Discovery, Communications with Judges and Jurors, and Marketing*, 20 TEMP. POL. & CIV. RTS. L. REV. 297, 311 (2011) (explaining the obstacles for lawyers when using social media); Anna P. Hemingway, *Keeping It Real: Using Facebook Posts to Teach Professional Responsibility and Professionalism*, 43 N.M. L. REV. 43, 44 (2013) (explaining how legal professionals often post inappropriate content because they fail to make the connection between online postings and the rules of professional responsibility); Nathan M. Crystal, *Ethics Watch: Ethical Issues in Using Social Networking Sites*, S.C. LAW., Nov. 17, 2009, at 10, 10 (noting that social media "radically increase[s] the number of people with whom such communications are made"); Margaret DiBianca, *Social Media Woes for School District*, LEXISNEXIS LEGAL NEWSROOM (Jan. 03, 2012, 2:16 PM), http://www.lexisnexis.com/legalnewsroom/labor-employment/b/labor-employment-top-blogs/archive/2012/01/03/social-media-woes-for-school-districts.aspx (reporting how a school teacher

Many consumers have weaponized reviews, particularly those published online.[5] It is extremely simple to make a statement—whether positive or negative—that can have a measurable impact on a business.[6] Recent data show that consumers are utilizing online reviews more frequently when making decisions regarding how and where to spend their money.[7] This aspect of the rapid free flow of information can be especially challenging for attorneys who may be put in a negative light,[8] given that reputation can have a substantial impact on their ability to generate casework and, in turn, income.[9] In light of a national history replete with acknowledgments of freedom of speech in both the public and private sectors, many people mistakenly believe that the publication of online reviews is unfettered and without consequence or rebuttal.[10] As an initial

was professionally disciplined for posting negative information about her employer); *What Americans Do Online: Social Media and Games Dominate Activity,* NIELSEN WIRE (Aug. 2, 2010), http://www.nielsen.com/us/en/insights/news/2010/what-americans-do-online-social-media-and-games-dominate-activity.html (explaining that Americans spend a lot of time on social network sites like Facebook where they have access to current information).

5. *See* Whitney Gibson, *False Online Reviews Hurt Businesses*, E. HILLS J., Oct. 2, 2013, at A8, *available at* http://issuu.com/cincinnati/docs/eastern-hills-journal-100213?viewMode=magazine&mode=embed ("Someone committed to significantly damaging a business will find ways to substantially harm it online, including through false reviews.").

6. *See* Myles Anderson, *Study: 72% of Consumers Trust Online Reviews As Much As Personal Recommendations*, SEARCH ENGINE LAND (Mar. 12, 2012, 10:00 AM), http://searchengineland.com/study-72-of-consumers-trust-online-reviews-as-much-as-personal-recommendations-114152 ("Approximately 72% of consumers surveyed said that they trust online reviews as much as personal recommendations . . . .").

7. *See id.* ("Only 15% of consumers said they *had not* used the Internet t[o] find a local business.").

8. *Compare* Fla. Jud. Ethics Advisory Comm., Formal Op. 2009-20 (2009) ("The Committee believes that listing lawyers who may appear before the judge as 'friends' on a judge's social networking page reasonably conveys to others the impression that these lawyer 'friends' are in a special position to influence the judge."), *with* Ohio Bd. of Comm'rs on Grievances and Discipline, Formal Op. 2010-7 (2010) ("A judge may be a 'friend' on a social networking site with a lawyer who appears as counsel in a case before the judge."), *and* Ky. Jud. Ethics Comm., Formal Op. JE-119 (2010) ("While the nomenclature of a social networking site may designate certain participants as 'friends,' the view of the Committee is that such a listing, by itself, does not reasonably convey to others an impression that such persons are in a special position to influence the judge."), *and* N.Y. Jud. Ethics Comm., Informal Op. 08-176 (2009) ("The Committee cannot discern anything inherently inappropriate about a judge joining and making use of a social network."), *and* Kendall Kelly Hayden, *The Proof Is in the Posting: How Social Media Is Changing the Law*, 73 TEX. B.J. 188, 189 (2010) (arguing that social media is changing the law).

9. *See* Myles Anderson, *Study: 72% of Consumers Trust Online Reviews As Much As Personal Recommendations*, SEARCH ENGINE LAND (Mar. 12, 2012, 10:00 AM), http://searchengineland.com/study-72-of-consumers-trust-online-reviews-as-much-as-personal-recommendations-114152 (implying that negative reviews can have an impact on a business).

10. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 369 (1974) (describing how published false statements may warrant liability for defamation); Messina v. Tri-Gas Inc., 816 F. Supp. 1163, 1167

matter, the Freedom of Speech Clause does not create a per se privilege to speak as one wishes.[11] Second, the First Amendment to the United States Constitution, as well as the Texas State Constitution, protects personal rights to respond to the published opinions of others.[12]

Below is a hypothetical negative review of a family law firm with a response from the attorney about whom it was written that will be used as a basis for discussion throughout this comment. Both the review and the reply are based on actual statements published in an online forum.

> *Client review*: "Working with John Doe was a nightmare for our family on all levels. John treated us with callousness and was not fully honest with us at various points. The worst part about it was our child was suffering and John did absolutely nothing to help him. Thankfully, we changed attorneys (almost too late) and they fought tooth and nail to help us show the court what our child needed. It cost a lot of money and enormous stress to undo all the damage John did during his time as our attorney. You do not want to work with an attorney you do not trust and who does not seem to care one bit about you or your child's welfare. John was far more concerned with how much money he could make from my case than how to help me survive the divorce process."[13]

> *Attorney response*: "The statements made in this review are untrue. I always represent clients to the best of my ability, as economically as possible, and with care and concern for them and any involved children. That was hampered here because this client did not reveal all of the facts of her situation up front in our initial meetings. The facts that later came to light required a great deal of time and effort to sort out and deal with. Nevertheless, this firm did no 'damage,' let alone create any problem that another attorney had to 'undo.' The client claims that her child suffered, but fails to mention that the child is mentally handicapped and was abused by her father, and that the child's difficulties were exacerbated by the

(S.D. Tex. 1993) (defining libel and slander in Texas); Cullum v. White, 399 S.W.3d 173, 179 (Tex. App.—San Antonio 2011, pet. denied) (ruling that false statements made online warranted damages); Lauren Gelman, *Privacy, Free Speech, and "Blurry-Edged" Social Networks*, 50 B.C. L. REV. 1315, 1317 (2009) (explaining that consumers have a right to post online reviews but must be honest).

11. U.S. CONST. amend. I.

12. *See id.* (granting every U.S. citizen has the right of free speech); TEX. CONST. art. I, § 8 ("Every person shall be at liberty to speak, write or publish his opinions on any subject, being responsible for the abuse of that privilege; and no law shall ever be passed curtailing the liberty of speech or of the press."); Klein & Assocs. Political Relations v. Port Arthur Indep. Sch. Dist., 92 S.W.3d 889, 897 (Tex. App.—Beaumont 2002, pet. denied) (noting the First Amendment right to respond publically to public criticism).

13. *See* William Wernz, *This Month's Topic: Online Ratings of Lawyers*, MINN. LAW. (Oct. 1, 2013) (on file with the *St. Mary's Law Journal*) (providing an example that was actually posted in an online forum that is similar to the hypothetical).

> conduct of the client who was abusing drugs at the time. The client review also does not mention the fact that she had not been paying according to our agreement, probably because of her drug habit. I was as flexible as I could be in obtaining payments when she could afford to make them."[14]

For purposes of analysis, we will assume both the client and the attorney believe their statements to be true, except the client's claim that the attorney was dishonest which was generated by emotion rather than reality. After the attorney's response to the review is published, the client reports the attorney to the Texas Bar. The Bar in turn investigates the attorney for a possible violation of Rule 1.05 of the Texas Disciplinary Rules of Professional Conduct, which, in part, prohibits a lawyer from knowingly revealing confidential information of a client or a former client to others absent the client's permission.[15] The client told the lawyer about her drug habit in confidence. If a disciplinary proceeding ensues, what options should be available to the attorney?

This comment suggests that—given the realities of today's online world, its reach, and the substantial community reliance upon it—the qualified privilege ought govern analysis of an attorney's clarifying response to a negative review posted on the Internet.

II. INTRODUCTION TO QUALIFIED PRIVILEGE AS A SOLUTION

Attorneys, like other citizens, enjoy important protections under the First Amendment.[16] Thus, they are able to respond to a negative online review. Attorneys in Texas must, however, consider the Texas Disciplinary Rules of Professional Conduct in doing so in situations like that described above, particularly with respect to their clear obligations regarding client confidentiality under Rule 1.05.[17] The Rules do not specifically address

14. *See id.* (offering a similar attorney response to the one used in the example).

15. *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.05(b) (stating that an attorney may not reveal client confidential information except under a limited set of circumstances), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. A (West 2005) (TEX. STATE BAR R. art. X, § 9).

16. *See* U.S. CONST. amend. I (emphasizing that all United States citizens enjoy the right of free speech).

17. *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.05(b) (detailing what constitutes confidential information and when an attorney may breach confidentiality); MODEL RULES OF PROF'L CONDUCT R. 1.6 (2013) (listing the rules that govern confidentiality in an attorney–client relationship); *id.* R. 1.6 cmt. 16 (2013) (explaining that an attorney "must act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure"); Hope A. Comisky & William M. Taylor, *Don't Be a Twit: Avoiding the Ethical Pitfalls Facing Lawyers Utilizing Social Media in Three Important Arenas—Discovery, Communications with Judges and Jurors, and Marketing*, 20 TEMP. POL. & CIV. RTS. L. REV. 297, 311 (2011) (discussing some of the common issues lawyers face when using social media); Linda D. Schwartz, *Social*

online conduct.[18] Despite this lack of detail, caution must be exercised given that violations of the Rules may result in stiff consequences, up to and including disbarment.[19] A client who writes a negative review has a serious advantage because the confidentiality Rule limits what a lawyer may say in response. Yet, an attorney's reputation is so crucial to their business and earning potential that avenues to protect those interests should be fully understood.[20]

Qualified privilege is an important avenue for exploration. Traditionally, qualified is a defense that arises in cases focused on civil liability for defamation.[21] However, it is broader than that.[22] Qualified

Media—Friend or Foe?, 44 MD. B.J. 12, 14 (2011) (discussing the applicability of Rule 1.6 to online posting); Kathleen Elliott Vinson, *The Blurred Boundaries of Social Networking in the Legal Field: Just "Face" It*, 41 U. MEM. L. REV. 355, 357 (2010) (discussing ABA Model Rule 7.1 and its applicability to attorneys online postings); *cf.* MODEL RULES OF PROF'L CONDUCT R. 7.1 (2013) ("A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.").

18. *See* Michael E. Lackey Jr. & Joseph P. Minta, *Lawyers and Social Media: The Legal Ethics of Tweeting, Facebooking and Blogging*, 28 TOURO L. REV. 149, 150 (2012) (explaining how the ABA Model Rules were written in a time when the Internet as we know it was in its infancy and implying that the Rules are ill equipped for online issues).

19. *See* Anna P. Hemingway, *Keeping It Real: Using Facebook Posts to Teach Professional Responsibility and Professionalism*, 43 N.M. L. REV. 43, 44 (2013) (explaining how attorneys often do not realize that posting online puts them at risk for violating the Rules of Professional Responsibility and in turn subjecting them to discipline by the state bar); Steven Seidenberg, *Seduced: For Lawyers, the Appeal of Social Media Is Obvious. It's Also Dangerous*, 97 A.B.A. J. 49, 53 (2011) (discussing how a lawyer in Illinois lost her license because she was blogging about her case); Kathleen Elliott Vinson, *The Blurred Boundaries of Social Networking in the Legal Field: Just "Face" It*, 41 U. MEM. L. REV. 355, 377 (2010) (discussing the difficulty of attorneys posting online).

20. *See* Myles Anderson, *Study: 72% of Consumers Trust Online Reviews As Much As Personal Recommendations*, SEARCH ENGINE LAND (Mar. 12, 2012, 10:00 AM), http://searchengineland.com/study-72-of-consumers-trust-online-reviews-as-much-as-personal-recommendations-114152 (implying that negative reviews can reduce earnings).

21. *See* Clark v. Jenkins, 248 S.W.3d 418, 432 (Tex. App.—Amarillo 2008, pet. denied) (explaining that qualified privilege can act as a defense to defamation); Grant v. Stop-N-Go Mkt. of Tex., Inc., 994 S.W.2d 867, 874 (Tex. App.—Houston [1st Dist.] 1999, no pet.) (explaining that in certain instances a qualified privilege may be granted in a defamation case); Wal-Mart Stores, Inc. v. Odem, 929 S.W.2d 513, 525 (Tex. App.—San Antonio 1996, writ denied) (providing an example of defamation case in which a qualified privilege was granted); Holloway v. Tex. Med. Ass'n, 757 S.W.2d 810, 814 (Tex. App.—Houston [1st Dist.] 1988, writ denied) (granting a qualified privilege to a Texas attorney); Maynard v. Caballero, 752 S.W.2d 719, 722 (Tex. App.—El Paso 1988, writ denied) (granting a qualified privilege to a Texas attorney in a tortious interference action); VINCENT R. JOHNSON & ALAN GUNN, STUDIES IN AMERICAN TORT LAW 996 (4th ed. 2009) (noting the criteria for when a qualified privilege may be granted); A.G. Harmon, *Defamation in Good Faith: An Argument for Restating the Defense of Qualified Privilege*, 16 BARRY L. REV. 27, 29 (2011) (explaining that qualified privilege most often arises in defamation cases).

22. *See Maynard*, 752 S.W.2d at 722 (granting a qualified privilege in a tortious interference case).

privilege covers statements made fairly in situations in which there is an obligation to give the information and the person to whom it is given has a corresponding duty or interest to receive it.[23] It also applies when someone is acting in defense of their reputation.[24] The privilege attaching to professional communications between lawyer and client is also qualified, rather than absolute (as made clear, for example, by Rule 1.05(c)(7) of the Texas Disciplinary Rules of Professional Conduct relating to the prevention of criminal activity by a client).[25]

In general, the qualified privilege permits certain persons to make statements, or relay or report statements, that would be considered slander and libel if made by anyone else. Examples of qualified privilege include immunity from defamation for statements made in the course of an employer's duties, such as performance reviews.[26] Communications between teachers and parents, and vendors and credit agencies, are also relationships protected by qualified privilege.[27] Another example is immunity of the press from defamation charges for statements made about a private figure in good faith, unless it can be proven that they were made with malice.[28] The qualified privilege is intended to permit open and honest communication, and in certain situations may be applied to comments that may otherwise be seen as defamatory.[29] It is viewed as a

23. *Wal-Mart Stores*, 929 S.W.2d at 525 (granting a qualified privilege to a former employer for disclosing information to a potential employer).

24. *See* Kaplan v. Goodfried, 497 S.W.2d 101, 105 (Tex. Civ. App.—Dallas 1973, no writ) ("A conditional privilege is recognized whenever a public or private interest in the availability of correct information is of sufficient importance to require protection of honest communication of misinformation.").

25. *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.05(c)(7) (stating that a lawyer may reveal client confidential information "[w]hen the lawyer has reason to believe it is necessary to do so in order to prevent the client from committing a criminal or fraudulent act").

26. *See* Pioneer Concrete of Tex., Inc. v. Allen, 858 S.W.2d 47, 51 (Tex. App.—Houston [14th Dist.] 1993, writ denied) (ruling that a communication between a former and potential employer regarding an employee was privileged).

27. *Cf. Kaplan*, 497 S.W.2d at 105 (implying the many instances under which qualified privilege may apply).

28. *See* WFAA-TV, Inc. v. McLemore, 978 S.W.2d 568, 571 (Tex. 1998) (noting that in cases involving the media and a public figure, a showing of actual malice is necessary in order to bring a cause of action for defamation).

29. *See* VINCENT R. JOHNSON & ALAN GUNN, STUDIES IN AMERICAN TORT LAW 996 (4th ed. 2009) ("A 'qualified privilege' entitles the speaker to some degree of immunity from liability for making false statements . . . ."); A.G. Harmon, *Defamation in Good Faith: An Argument for Restating the Defense of Qualified Privilege*, 16 BARRY L. REV. 27, 28–29 (2011) (noting that a qualified privilege attaches to statements made 1) in good faith; 2) about a subject in which the speaker has an interest or duty; 3) within a scope limited to that interest; 4) in a proper manner; and 5) between the proper parties. This iteration is common to nearly every state in the union).

useful tool for individuals who have a "good reason for the law to encourage or permit" making a statement.[30] This comment submits that defense of an attorney's reputation is an example of a "good reason for the law to encourage or permit" an otherwise impermissible statement, and that qualified privilege should be available as a defense to disciplinary action for violating Rule 1.05 of the Texas Disciplinary Rules of Professional Conduct, just as it would be in a civil action by the client for alleged defamation where, additionally, truth is an absolute bar to recovery.

This comment advocates adoption of the qualified privilege as a defense against disciplinary action in Texas for attorneys seeking to defend their reputations online, or otherwise. First, it examines both the client's and the attorney's rights under the First Amendment and the elements of a cause of action for defamation in Texas. Second, it examines Model Rule 1.05 of the Texas Disciplinary Rules of Professional Conduct. Third, it discusses the circumstances under which the defense of qualified privilege traditionally arises, and also when it is lost. Finally, it suggests why qualified privilege should be available as a defense to disciplinary actions resulting from violations of Rule 1.05 of the Texas Disciplinary Rules of Professional Conduct.

III. FIRST AMENDMENT, DEFAMATION, AND THE APPLICATION OF QUALIFIED PRIVILEGE

Before examining the additional limitations placed upon attorneys in Texas by the Texas Disciplinary Rules of Professional Conduct, it is important to understand the First Amendment and how defamation arises. This provides the starting point in examining what a lawyer may say in defense of their reputation.[31] The First Amendment itself only applies to Congress, and states that "Congress shall make no law . . . abridging the freedom of speech, or of the press."[32] However, it is made applicable to state governments through the due process clause of the Fourteenth

30. *See* VINCENT R. JOHNSON & ALAN GUNN, STUDIES IN AMERICAN TORT LAW 996 (4th ed. 2009) ("In theory, a qualified privilege will arise in any situation in which there is a good reason for the law to encourage or permit a person to speak or write about someone, even though the speaker is not certain about the accuracy of the information relayed.").

31. *See* U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.").

32. *Id.*

Amendment.[33]

The First Amendment protects a wide range of speech with only narrow exceptions.[34] For example, under certain circumstances, "publishing" a false statement about an individual will result in liability for defamation in the form of libel (written defamation) or slander (oral defamation).[35] This is usually true even if the publication does not mention the individual by name, referring to them instead in some other identifiable manner,[36] and even if the false statement is prefaced as an opinion.[37]

In Texas, a libelous or slanderous remark is considered to be published if it is communicated "to a third person who is capable of understanding its defamatory meaning and in such a way that the person did understand its defamatory meaning."[38] Under Texas state law libel is:

33. *See id.* amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any [s]tate deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").

34. *Id.* amend. I; *see* Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 57–58 (1988) (ruling that publications of false statements are not protected by the First Amendment); New York v. Ferber, 458 U.S. 747, 774 (1982) (ruling that obscene speech is unprotected by the Constitution); Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 557–59 (1980) (outlining the test for when commercial speech abridges the First Amendment); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 286 (1964) (articulating the rules for maintaining a defamation case); Feiner v. New York, 340 U.S. 315, 321 (1951) (ruling that "fighting words" are an unprotected class of speech); MODEL RULES OF PROF'L CONDUCT R. 7.1 (2013) (explaining that an attorney may not make misleading or false communications to a client and that "[a] communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading").

35. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 369 (1974) (discussing liability for defamation for false statements); Messina v. Tri-Gas Inc., 816 F. Supp. 1163, 1167 (S.D. Tex. 1993) (defining libel and slander under Texas law); Cullum v. White, 399 S.W.3d 173, 179 (Tex. App.—San Antonio 2011, pet. denied) (ruling that false statements made alleging a ranch owner committed various crimes against former customers were defamatory and warranted damages); Lauren Gelman, *Privacy, Free Speech, and "Blurry-Edged" Social Networks*, 50 B.C. L. REV. 1315, 317 (2009) (explaining that while consumers have a first amendment right of free speech they also have a responsibility to be honest).

36. *See* Galveston Cnty. Fair & Rodeo, Inc. v. Glover, 880 S.W.2d 112, 119 (Tex. App.—Texarkana 1994), *writ denied*, 940 S.W.2d 585 (Tex. 1996) (per curiam) ("[A]lthough the plaintiffs in a libel or slander action must be the particular persons about whom the allegedly defamatory statements are made . . . publication does not require that the plaintiff be named, if those who know the plaintiff and are acquainted with him understand that the defamatory publication referred to him.").

37. *See* Milkovich v. Lorain Journal Co., 497 U.S. 1, 22–23 (1990) (ruling that statements in the form of opinions may still be treated as statements and their publication may result in liability for defamation).

38. *See* Thomas-Smith v. Mackin, 238 S.W.3d 503, 507 (Tex. App.—Houston [14th Dist.] 2007, no pet.) (explaining when a slanderous remark is considered to be published, therefore incurring liability).

> [A] defamation expressed in written or other graphic form that tends to . . . injure a living person's reputation and thereby expose the person to public hatred, contempt or ridicule, or financial injury or to impeach any person's honesty, integrity, virtue, or reputation or to publish the natural defects of anyone and thereby expose the person to public hatred, ridicule, or financial injury.[39]

Thus, a defamation claim offers the first option for recourse to an attorney who is the victim of a false or misleading online review.[40] The elements for proving a defamation case and remedies available, however, vary depending on whether the statements were made about a public or private individual.[41] Thus, it is important initially for an attorney wishing to respond to an online review to understand whether the attorney or her client would be treated under the law as private or public figures.[42]

When a statement is made in the media about a public figure,[43] both Texas and United States Supreme Court cases provide ample and clear precedent.[44] The plaintiff must prove the source made the statement with actual malice, meaning "with knowledge that it was false or with reckless disregard of whether it was false or not."[45] Additionally, in Texas, there

39. TEX. CIV. PRAC. & REM. CODE ANN. § 73.001 (West 2001); *see* Cain v. Hearst Corp., 878 S.W.2d 577, 580 (Tex. 1994) (applying the definition of libel in Texas.); *see also* Brown v. Petrolite Corp., 965 F.2d 38, 46 (5th Cir. 1992) (explaining that in a defamation case, plaintiff must prove that the statement by defendant was false and show that the publication of the false speech was the proximate cause of their damages).

40. *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 280 (1964) (offering an example of a precedential defamation case); WFAA-TV, Inc. v. McLemore, 978 S.W.2d 568, 571 (Tex. 1998) (exploring defamation in Texas).

41. *Compare* Gertz v. Robert Welch, Inc., 418 U.S. 323, 369 (1974) (ruling that strict liability is not proper for a defamation case if the defendant is a member of the media), *with* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 763 (1985) (permitting "recovery of presumed and punitive damages in defamation cases absent a showing of 'actual malice' . . . when the defamatory statements do not involve matters of public concern").

42. *See Gertz*, 418 U.S. at 342 (noting that the elements of defamation vary when dealing with private and public individuals); Foster v. Laredo Newspapers, Inc., 541 S.W.2d 809, 816 (Tex. 1976) (illustrating the difference between public and private individuals in Texas and the application to defamation law).

43. *See Gertz*, 418 U.S. at 342 (noting the distinction between private and public individuals and that there are different rules that apply); Foster, 541 S.W.2d at 816 (explaining the different standards used in Texas defamation cases dealing with public and private individuals).

44. *See Gertz*, 418 U.S. at 342 (defining public figure); *Foster*, 541 S.W.2d at 816 (using the Supreme Court standard set forth in *Gertz* for determining when a figure is a public figure).

45. *See N.Y. Times*, 376 U.S. at 279–80 ("The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamat[ion] . . . unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not."); *WFAA-TV*, 978 S.W.2d at 571 (explaining that in order for a plaintiff to maintain a cause of action for defamation, "the plaintiff must prove

are two types of public figures.[46] General-purpose public figures are individuals who have achieved "such pervasive fame or notoriety that they become public figures for all purposes and in all contexts."[47] "Limited-purpose public figures, on the other hand, are only public figures for a limited range of issues surrounding a particular public controversy."[48] Plainly, in nearly all cases involving an attorney and a client in a defamation action, neither will rise to the level of a public or limited-purpose figure and will thus be viewed as private figures under applicable precedent.[49]

Each state determines its own legal standards for defamation cases involving private figures.[50] Texas has adopted a negligence standard for private figure defamation claims.[51] Thus, a private plaintiff "must prove that the defendant was at least negligent" as to the falsity of the published

that the defendant: (1) published a statement; (2) that was defamatory concerning the plaintiff; (3) while acting with . . . negligence, if the plaintiff was a private individual, regarding the truth of the statement").

46. *See WFAA-TV*, 978 S.W.2d at 571 ("General-purpose public figures are those individuals who have achieved such pervasive fame or notoriety that they become public figures for all purposes and in all contexts. Limited-purpose public figures, on the other hand, are only public figures for a limited range of issues surrounding a particular public controversy.").

47. *See id.* (stating the definition of a general-purpose public figure).

48. *See id.* (defining limited-purpose public figure).

49. *See id.* (explaining that the test for determining a limited public figure as: "(1) [T]he controversy at issue must be public both in the sense that people are discussing it and people other than the immediate participants in the controversy are likely to feel the impact of its resolution; (2) the plaintiff must have more than a trivial or tangential role in the controversy; and (3) the alleged defamation must be germane to the plaintiff's participation in the controversy"); *Gertz*, 418 U.S. at 342 (defining public figure as "[t]hose who, by reason of the notoriety of their achievements or the vigor and success with which they seek the public's attention, are properly classed as public figures and those who hold governmental office").

50. *See Gertz*, 418 U.S. at 347 (ruling that as long as states do not impose strict liability, "[they] may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual"); Foster v. Laredo Newspapers, Inc., 541 S.W.2d 809, 818 (Tex. 1976) (noting that the Supreme Court has designated negligence as the baseline for states when dealing with a defamation case involving a private individual and "that states may define for themselves the appropriate standard of liability for a publisher or broadcaster of a defamatory falsehood injurious to a private individual so long as they do not impose liability without fault").

51. *See WFAA-TV*, 978 S.W.2d at 571 (explaining that if the plaintiff is a private individual, they only must prove that the defendant was negligent as to the falsity of their statements); *Gertz*, 418 U.S. at 347 ("We hold that, so long as they do not impose liability without fault, the [s]tates may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual."); *id.* at 353 (Blackmun, J., concurring) ("[T]he Court now conditions a libel action by a private person upon a showing of negligence, as contrasted with a showing of willful or reckless disregard."); McClendon v. Springfield, 505 B.R. 786, 790 (Bankr. E.D. Tex. Sept. 16, 2013) ("Under Texas law, liability for defamation may arise from a negligent or intentional act that communicates defamatory matter to a person other than the person defamed.").

statement.[52] In addition, Texas case law provides that "the truth of the statement is an affirmative defense that must be proved by the defendant."[53] "[A] private individual may recover damages from a publisher or broadcaster of a defamatory falsehood as compensation for actual injury upon a showing that the publisher or broadcaster knew or should have known that the defamatory statement was false."[54]

Applying these considerations to the example set forth in Part I, there is no indication that either the attorney or client are public figures.[55] Accordingly, in a defamation case brought by either party in Texas, the statements will be presumed to be defamatory and the defendant must prove that they were either true, or that they did not know or should not have known that the published statements were false.[56] In the example, both sides made harsh criticisms of the other. However, assuming the client's statement about the attorney's honesty is deliberately false, the attorney could likely prevail in a suit against the client for defamation.[57] This, however, may be little consolation for the attorney because as will be seen, the attorney is still subject to possible discipline under Rule 1.05 of the Texas Disciplinary Rules of Professional Conduct for revealing facts learned about the client in the course of the representation that are not generally available to the public.[58]

52. *See WFAA-TV*, 978 S.W.2d at 571 (setting negligence as the baseline for proving a defamation case involving private individuals); *Foster*, 541 S.W.2d at 819 (holding that "a private individual may recover damages from a publisher or broadcaster of a defamatory falsehood as compensation for actual injury upon a showing that the publisher or broadcaster knew or should have known that the defamatory statement was false"); *McClendon*, 505 B.R. at 790 (setting negligence as the baseline in a defamation case).

53. *See* Thomas-Smith v. Mackin, 238 S.W.3d 503, 509 (Tex. App.—Houston [14th Dist.] 2007, no pet.) (stating that the falsity of a defamatory statement is generally presumed, and proving the statements truthfulness is an affirmative defense for the defendant).

54. *Foster*, 541 S.W.2d at 819.

55. *See WFAA-TV*, 978 S.W.2d at 571 (noting the test for determining when a figure is public); *Gertz*, 418 U.S. at 342 (defining public figure and the test used for determining when one exists).

56. *See Foster*, 541 S.W.2d at 819 ("[A] private individual may recover damages from a publisher or broadcaster of a defamatory falsehood as compensation for actual injury upon a showing that the publisher or broadcaster knew or should have known that the defamatory statement was false.").

57. *See id.* (implying that true statements are not subject to a cause of action for defamation).

58. *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.05 (describing the rules that govern attorneys when disclosing confidential client information).

IV. THE ABA MODEL RULES OF PROFESSIONAL RESPONSIBILITY AND THE TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT

Even if an attorney concludes that a response to a negative review is permissible under the First Amendment, they must additionally consider the relevant rules of professional responsibility before responding.[59] Though not binding, the ABA Model Rules of Professional Responsibility are a template for governance of attorneys in ethical matters.[60] The vast majority of states, including Texas, have adopted a version of these Rules.[61] Texas's rules are referred to as the Texas Disciplinary Rules of Professional Conduct.[62]

In considering application of the Rules to a possible attorney response to an online review, the first step is to examine whether the individual was, or is, a client.[63] If the attorney–client relationship is never formed, only First Amendment restrictions will apply.[64] Next, the attorney must determine what information may be considered confidential to the client, as defined

59. *See id.* R. 1.05(b) (detailing the rules that govern Texas attorneys in ethical matters regarding client confidentiality); MODEL RULES OF PROF'L CONDUCT R. 1.6 (2013) (detailing the rules governing lawyers regarding disclosure of confidential client information); Ingrid A. Minott, *The Attorney–Client Relationship: Exploring the Unintended Consequences of Inadvertent Formation*, 86 U. DET. MERCY L. REV. 269, 273 (2009) ("Understanding how attorney–client relationships are created is an important issue because the answer determines the applicability of the large body of substantive and professional rules governing an attorney's ethical duties owed to his client.").

60. *See* MODEL RULES OF PROF'L CONDUCT (2013) (detailing the rules of professional conduct governing lawyers in ethical matters).

61. *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT (stating the Texas interpretation of the Model Rules of Professional Responsibility); Samuel J. Levine, *Taking Ethics Codes Seriously: Broad Ethics Provisions and Unenumerated Ethical Obligations in a Comparative Hermeneutic Framework*, 77 TUL. L. REV. 527, 531 (2003) (stating that the majority of states have adopted a form of the Model Rules)

62. *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT (describing the rules that govern attorneys in Texas).

63. *See* Vinson & Elkins v. Moran, 946 S.W.2d 381, 405 (Tex. App.—Houston [14th Dist.] 1997, writ dism'd by agr.) ("To establish the [attorney–client] relationship, the parties must explicitly or by their conduct manifest an intention to create it."); Ingrid A. Minott, *The Attorney–client Relationship: Exploring the Unintended Consequences of Inadvertent Formation*, 86 U. DET. MERCY L. REV. 269, 273 (2009) ("Not every interaction between an attorney and an individual results in the creation of an attorney–client relationship. Nonetheless, it is important to recognize that even brief consultations between an attorney and a prospective client can result in the formation of this relationship."); *cf.* Steven C. Bennett, *Ethics of Lawyer Social Networking*, 73 ALB. L. REV. 113, 122 (2009) ("The speed of social networking . . . may facilitate referrals, advice, and the formation of apparent attorney–client relationships, all with a few clicks of a mouse.").

64. *See* Sotelo v. Stewart, 281 S.W.3d 76, 80 (Tex. App.—El Paso 2008, pet. denied) (advancing that an attorney owes a duty only to a client); Greene's Pressure Treating & Rentals, Inc. v. Fulbright & Jaworski, LLP, 178 S.W.3d 40, 43 (Tex. App.—Houston [1st Dist.] 2005, no pet.) (implying that if no attorney–client relationship is formed the attorney does not owe a fiduciary duty).

in Texas.[65] Finally, the attorney should examine Rule 1.05 of the Texas Disciplinary Rules of Professional Conduct to determine whether their response could lead to investigation by the State Bar and result in disciplinary action.[66]

The Texas Rules of Evidence define a client as "a person, public officer, or corporation, association, or other organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from that lawyer."[67] This definition fails to explain precisely when the attorney–client relationship is formed and neither the Model Rules nor the Texas Disciplinary Rules offer any direct insight.[68] Rather, it has been left to other bodies to determine what circumstances create the relationship.[69] Texas case law makes clear that the attorney–client relationship may be created expressly through contract, or impliedly through the parties' actions and requires a meeting of the minds.[70] More specifically, the "attorney's gratuitous rendition of professional services" will imply the

65. *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.05(a) (defining confidential information in Texas).

66. *See id.* R. 1.05 (explaining when an attorney is permitted to reveal client confidential information).

67. TEX. R. EVID. 503(a)(1).

68. *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT (explaining the attorney–client relationship but never stating when one is formed); MODEL RULES OF PROF'L CONDUCT (2013) (detailing the ethical considerations for an attorney but not stating when the attorney–client relationship is formed).

69. *See* 1 TEX. PRAC. GUIDE WILLS, TRUSTS AND EST. PLAN. § 2:72 (2013) ("Whether an attorney–client relationship has been formed depends upon the reasonable expectation[s] of the client in light of all the surrounding circumstances; it does not depend upon the execution of a representation agreement, the payment of a fee, or an offer of payment."); *Greene's Pressure Treating & Rentals*, 178 S.W.3d at 43 (noting that the attorney–client relationship may be created through contract, or implied by the actions of the parties); Mellon Serv. Co. v. Touche Ross & Co., 17 S.W.3d 432, 437 (Tex. App.—Houston [1st Dist.] 2000, no pet.) ("The attorney–client relationship is a contractual relationship whereby an attorney agrees to render professional services for a client."); Vinson & Elkins, v. Moran, 946 S.W.2d 381, 405 (Tex. App.—Houston [14th Dist.] 1997, writ dism'd by agr.) ("The attorney–client relationship is a contractual relationship in which an attorney 'agrees' to render professional services . . . To establish the relationship, the parties must explicitly or by their conduct manifest an intention to create it."); Terrell v. State, 891 S.W.2d 307, 313 (Tex. App.—El Paso 1994, writ ref'd) (noting that the attorney–client relationship may be formed either expressly or implied through the actions of the attorney and client).

70. *See Greene's Pressure Treating & Rentals*, 178 S.W.3d at 43 (stating that the attorney–client relationship is not necessarily expressed and may be created through contract, or implied by the actions of the parties); *Mellon Serv. Co.*, 17 S.W.3d at 437 (noting that the attorney–client relationship is contractual in nature where the attorney agrees to represent the client); *Vinson & Elkins*, 946 S.W.2d at 405 (mentioning that in order to establish the attorney–client relationship, the parties must either explicitly or impliedly manifest an intent to create it).

formation of the attorney–client relationship.[71]

Once an attorney–client relationship is formed, the attorney must comply with the Texas Disciplinary Rules of Professional Conduct.[72] The Rules are strict with respect to attorney–client confidentiality,[73] and an attorney should carefully consider Rule 1.05 before publically responding to a review by a client or former client.[74]

Texas Rule 1.05 dictates that only under a very narrow set of circumstances may an attorney reveal confidential client information that is not "generally known" to the public.[75] Whether information is generally known is a question of fact.[76] Information that is readily available to the public is not necessarily generally known information.[77] Rather, the State Bar instructs that "[i]nformation that has become generally known is information that is actually known to some members of the general public and is not merely available to be known if members of

71. *See* Sotelo v. Stewart, 281 S.W.3d 76, 81 (Tex. App.—El Paso 2008, pet. denied) (indicating that the attorney–client relationship may be implied from the "attorney's gratuitous rendition of professional services").

72. *See Vinson & Elkins*, 946 S.W.2d at 403 (explaining that once the attorney–client relationship is formed the attorney has a fiduciary duty to the client and is bound by the Texas Disciplinary Rules of Professional Conduct); *cf.* Ingrid A. Minott, *The Attorney–Client Relationship: Exploring the Unintended Consequences of Inadvertent Formation*, 86 U. DET. MERCY L. REV. 269, 292 (2009) (stating that the failure of an attorney to realize that the attorney–client relationship has been formed "may lead to the violation of ethical duties and subsequent disciplinary proceedings, resulting in the imposition of sanctions against the lawyer").

73. *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.05(b) (detailing the limited set of circumstances under which an attorney may breach client confidentiality); MODEL RULES OF PROF'L CONDUCT R. 1.6(a) (2013) (preventing lawyers from disclosing 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").

74. *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.05 (stating that the duty of confidentiality is to both current and former clients); MODEL RULES OF PROF'L CONDUCT R. 1.6 (2013) (discussing attorney obligations to client confidentiality under the ABA Model Rules); Linda D. Schwartz, *Social Media—Friend or Foe?*, 44 MD. B. J. 12, 14 (2011) (discussing the applicability of Rule 1.6 to social media).

75. *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.05(b)(3) (stating that an attorney is prohibited from disclosing confidential client information "to the disadvantage of the former client after the representation is concluded unless the former client consents after consultation or the confidential information has become generally known"); Tex. Comm. on Prof'l Ethics, Op. 595 (2010) (explaining that whether information is "generally known" is a question of fact).

76. *See* Tex. Comm. on Prof'l Ethics, Op. 595 (2010) ("Information that 'has become generally known' is information that is actually known to some members of the general public and is not merely available to be known if members of the general public choose to look where the information is to be found. Whether information is 'generally known' within the meaning of Rule 1.05(b)(3) is a question of fact.").

77. *See id.* (explaining that simply because the public has access to the information, does not make it generally known information).

the general public choose to look where the information is to be found."[78]

Pursuant to Rule 1.05, confidential information includes both privileged and unprivileged client information.[79] Client information is privileged "if [it is] not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication."[80] Unprivileged client information refers to "all information relating to a client or furnished by the client, other than privileged information, acquired by the lawyer during the course of or by reason of the representation of the client."[81] The restrictions of Rule 1.05 seriously limit an attorney's response to a negative online review, as will be seen when applied to the example.[82]

However, there are a few situations under the Texas Disciplinary Rules of Professional Conduct that are relevant to this comment where an attorney is permitted to disclose confidential information without the consent of the client.[83] The first is Rule 1.05(c)(5), which states an attorney may reveal confidential information "[t]o the extent reasonably necessary to enforce a claim or establish a defense on behalf of the lawyer in a controversy between the lawyer and the client," and then only "to the extent that such use is reasonably necessary to enforce a claim or establish a defense for the lawyer in the controversy with the former client."[84] In the main, however, "controversy" is only relevant to legal proceedings.[85] The

78. *Id.*

79. *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.05(a) (noting that confidential information includes both privileged and unprivileged client information); Tex. Comm. on Prof'l Ethics, Op. 495 (1994) (stating that privileged and unprivileged information are both confidential client information and can only be disclosed under a narrow set of circumstances).

80. TEX. R. EVID. 503(a)(5); *see* Tex. Comm. on Prof'l Ethics, Op. 495 (1994) (acknowledging that both privileged and unprivileged client information is confidential and may only be revealed with the clients consent or under a narrow set of exceptions).

81. *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.05(a) (defining unprivileged client information); Tex. Comm. on Prof'l Ethics, Op. 495 (1994) (stating that unprivileged client information is confidential).

82. *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.05(a) (defining confidential information as both privileged and unprivileged client information and stating that neither may be revealed without the client's consent).

83. *See id.* R. 1.05(c) (defining situations under which an attorney may reveal confidential client information); *id.* R. 1.05(d) (defining a set of circumstances where an attorney is permitted to reveal client confidential information); *id.* R. 1.05(e) (providing a situation under which an attorney may reveal confidential client information).

84. *Id.* R. 1.05(c)(5); Tex. Comm. on Prof'l Ethics, Op. 595 (2010).

85. *See* Tex. Comm. on Prof'l Ethics, Op. 595 (2010) (divulging that not every situation where an attorney and client are in conflict rises to a controversy); *cf.* MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 16 (2013) (stating that Rule 1.6 "permits disclosure only to the extent the lawyer

second is Rule 1.05(c)(6). It allows an attorney to reveal client confidential information in establishing a defense in a disciplinary proceeding, but it is implied that "any disclosure by the lawyer should be as protective of the client's interests as possible."[86] Neither of these Rules would specifically permit an attorney to reveal client confidential information in a public response to a review.

With respect to the hypothetical response, on its face the attorney is in plain violation in Rule 1.05 of the Texas Disciplinary Rules of Professional Conduct for revealing client confidential information.[87] The statements made about the client's drug habit, the child being abused, the client's financial status and failure to reveal all of the facts of the case involve information that the client did not consent to having revealed and is therefore privileged confidential information.[88] In addition, the attorney will not qualify for the exceptions under Rule 1.05(c)(5) or Rule 1.05 (c)(6) because the controversy is not in a legal or disciplinary proceeding.[89] Assuming that the child's handicap is obvious, it would likely be considered generally known and not confidential information.[90] Thus, it appears that the only permissible statements under the Texas Disciplinary Rules of Professional Conduct are the ones in which the attorney is making general comments about the client's claims being untrue, the child being handicapped and his level of care when representing clients.[91]

The lack of information that the attorney is allowed to provide in defense of his reputation leads to the conclusion that both the Texas

reasonably believes the disclosure is necessary to accomplish one of the purposes specified").

86. *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.05(c)(6) (permitting an attorney to reveal confidential client information "[t]o establish a defense to a criminal charge, civil claim or disciplinary complaint against the lawyer or the lawyer's associates based upon conduct involving the client or the representation of the client"); Tex. Comm. on Prof'l Ethics, Op. 495 (1994) (explaining that any disclosure of confidential client information in a legal or disciplinary proceeding should be as protective of the client as possible).

87. *See id.* R. 1.05(b) (stating that an attorney may only reveal confidential client information under a narrow set of circumstances).

88. *See id.* R. 1.05(a) (stating that privileged and non-privileged information are both considered confidential information).

89. *See* Tex. Comm. on Prof'l Ethics, Op. 595 (2010) (implying that "controversy" means legal or disciplinary proceeding).

90. *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.05(b)(3) (explaining that generally known information is not confidential); Tex. Comm. on Prof'l Ethics, Op. 595 (2010) (noting that generally known information is not confidential and may be revealed by an attorney).

91. *See* Tex. Comm. on Prof'l Ethics, Op. 595 (2010) (noting that confidential client information may only be revealed in a "controversy" which is a legal proceeding); TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.05(a) (defining privileged and non-privileged information).

Disciplinary Rules of Professional Conduct and The Model Rules of Professional Responsibility are ill-suited to protecting an attorney's interests in issues dealing with online posting.[92] In fact, the Rules were written in a time when online reviews, and their impact on an attorney's reputation, had not yet been contemplated.[93] The ABA is aware that the Rules are antiquated regarding online issues and recently updated a small portion of them.[94] In addition, the ABA released the *ABA Best Practice Guidelines for Legal Information Web Site Providers*.[95] However, the changes to the Model Rules are minimal and the guidelines are primarily for website providers offering nothing regarding an attorney's ability to respond to an online review.[96] Thus, if the Model Rules are to act as a template in governing attorneys fairly in responding to an online review, further rapid reform is needed.[97]

92. *See* Michael E. Lackey Jr. & Joseph P. Minta, *Lawyers and Social Media: The Legal Ethics of Tweeting, Facebooking and Blogging*, 28 TOURO L. REV. 149, 150 (2012) (noting that the rules do not specifically address online conduct and, as such, appear to be outdated).

93. *See id.* (stating that the existing ethics rules were created for offline use and thus are often antiquated when regulating online use); Kendall Kelly Hayden, *The Proof Is in the Posting: How Social Media Is Changing the Law*, 73 TEX. B.J. 188, 189 (2010); *cf.* Cal. Ethics Comm., Op. 2012-186 (2012) (noting that, like most states, the California Code of Professional Responsibility does not have any special language that implies it is applicable to social media); Adam C. Losey, *Clicking Away Confidentiality: Workplace Waiver of Attorney–Client Privilege*, 60 FLA. L. REV. 1179, 1182 (2008) ("[E]mployees who e-mail an attorney from the workplace, or from a workplace e-mail account, often lose the evidentiary protections of attorney–client privilege.").

94. *See* ABA Comm. on Ethics 20/20, Resolution 105B (Aug. 6, 2012), *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/2012_hod_annual_meeting_105b_filed_may_2012.authcheckdam.pdf (making changes to the ABA Model Rules due to their inadequacy in dealing with Internet related issues).

95. *See Best Practice Guidelines for Legal Information Web Site Providers*, AM. BAR ASS'N (Feb. 10, 2003), http://www.americanbar.org/groups/law_practice/committees/elawyering-best-practices.html (discussing the ABA guidelines for legal website providers); *see also* Steven W. Kasten, *Professional Ethics and Social Media*, BOSTON B.J., Summer 2011, at 40, 41 ("The American Bar Association Ethics 20/20 Commission is now in the process of examining whether to provide formal guidance and/or to recommend changes to the ABA Model Rules of Professional Conduct to address lawyers' use of social media as client development.").

96. *See Best Practice Guidelines for Legal Information Web Site Providers*, AM. BAR ASS'N (Feb. 10, 2003), http://www.americanbar.org/groups/law_practice/committees/elawyering-best-practices.html (noting the ABA guidelines for legal website providers). *Compare* MODEL RULES OF PROF'L CONDUCT R. 1.6 (2013) (stating the existing confidentiality rules), *and* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.05(a) (detailing the rules regarding confidentiality in Texas), *with* ABA Comm. on Ethics 20/20, Resolution 105B (Aug. 6, 2012), *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/2012_hod_annual_meeting_105b_filed_may_2012.authcheckdam.pdf (making changes to Rule 1.18 but not 1.6, indicating that the model rules are slow to catch up to technology).

97. *See* Kendall Kelly Hayden, *The Proof Is in the Posting: How Social Media Is Changing the Law*, 73 TEX. B.J. 188, 189 (2010) (stating that social media is changing the law).

V. QUALIFIED PRIVILEGE AS TRADITIONALLY APPLIED, AND HOW IT CAN BE LOST

Setting the Texas Disciplinary Rules of Professional Conduct aside, an examination of qualified privilege as it is traditionally applied is necessary. Qualified privilege most often occurs in litigated defamation cases and arises out "of the occasion upon which the defamatory is published . . . and based upon a public policy which recognizes that it is desirable that true information be given whenever it is reasonably necessary for the protection of one's own interests, the interests of a third person, or certain interests of the public."[98] Whether a qualified privilege is granted is a question for the court.[99] If a qualified privilege is granted, Texas law "generally presumes good faith and want of malice."[100]

In Texas, whether a statement has been published with malice is clearly defined.[101] Malice is described as "a specific intent by the defendant to cause substantial injury or harm to the claimant."[102] Thus, if information is published simply to harm a client, an attorney should not expect the grant of qualified privilege. On the other hand, the definition of "good faith" is less precise.[103] Although Texas courts define "good faith" inconsistently, all interpretations require the actor at least believe the information to be true and most require a lack of ill will towards the recipient.[104]

Generally, a statement may enjoy a qualified privilege if it is made in

98. RESTATEMENT (FIRST) OF TORTS ch. 25, tit. B, intro. n. (1938); *see* Holloway v. Tex. Med. Ass'n, 757 S.W.2d 810, 813 (Tex. App.—Houston [1st Dist.] 1988, writ denied) (explaining qualified privilege as applied to defamation). *But see* Maynard v. Caballero, 752 S.W.2d 719, 721 (Tex. App.—El Paso 1988, writ denied) (providing an example of a qualified privilege being granted in a tortious interference case); Kaplan v. Goodfried, 497 S.W.2d 101, 104 (Tex. Civ. App.—Dallas 1973, no writ) (noting qualified privilege in a defamation case).

99. *See* Writt v. Shell Oil Co., 409 S.W.3d 59, 66 (Tex. App.—Houston [1st Dist.] 2013, no pet.) (contending that the decision to grant a qualified privilege is a question for the court).

100. McClendon v. Springfield, 505 B.R. 786, 787 (Bankr. E.D. Tex. Sept. 16, 2013).

101. TEX. CIV. PRAC. & REM. CODE ANN. § 41.001 (West 2001).

102. *Id.*

103. *See* Duvall v. Tex. Dep't of Human Servs., 82 S.W.3d 474, 479 (Tex. App.—Austin 2002, no pet.) (stating that good faith "is a distinctly legal term that has been construed differently by the courts").

104. *See Writt*, 409 S.W.3d at 67 (implying that good faith means that the actor believed the information to be true); *Duvall*, 82 S.W.3d at 479 (noting that the definition of "good faith" varies from case to case); Holloway v. Tex. Med. Ass'n, 757 S.W.2d 810, 814 (Tex. App.—Houston [1st Dist.] 1988, writ denied) ("The defense of qualified privilege is available only if the evidence shows that the communication was made in good faith and without malice. Malice has been defined as 'a want of good faith,' which may be proved by showing that the defendant entertained ill-will toward the complaining party." (citations omitted)).

good faith and both parties have an interest in the statement.[105] This does not mean that the statement must be true, only that the publisher believed it to be true.[106] Additionally, the statement must be "fairly warranted by the occasion."[107] In determining whether a qualified privilege exists, courts consistently weigh: (1) the relationship of the publisher with the recipient; (2) the risks related to the interests of the recipient, publisher and others; (3) whether the information was obtained voluntarily or solicited; (4) "the relevance of the information to self-protective action by the publisher or the recipient; and" (5) if the plaintiff's conduct was carried out in a lawful manner.[108] In addition, courts often look at proportionality as an important element in determining whether to grant a qualified privilege.[109] In this respect, qualified privilege is similar to the necessity defense (often thought of as a privilege).[110] In both

105. *See* Clark v. Jenkins, 248 S.W.3d 418, 432 (Tex. App.—Amarillo 2008, pet. denied) (finding that there is a good faith requirement when granting a qualified privilege); Kaplan v. Goodfried, 497 S.W.2d 101, 105 (Tex. Civ. App.—Dallas 1973, no writ) ("A conditional privilege is recognized whenever a public or private interest in the availability of correct information is of sufficient importance to require protection of honest communication of misinformation.").

106. *See Clark*, 248 S.W.3d at 432 (implying that statements that are false, but made in good faith, may be awarded a qualified privilege); Martin v. Sw. Elec. Power Co., 860 S.W.2d 197, 199 (Tex. App.—Texarkana 1993, writ denied) (explaining that a statement made in good faith and without malice may enjoy a qualified privilege).

107. *See Clark*, 248 S.W.3d at 432 (indicating that when determining whether to grant "a qualified privilege courts must examine the occasion of the communication"); *Kaplan*, 497 S.W.2d at 105 (noting that the courts recognize a conditional privilege when the interests of the public or a private entity warrant protection of honestly communicated misinformation).

108. *See Clark*, 248 S.W.3d at 432 ("In making a determination whether statements are subject to a qualified privilege, courts must examine the occasion of the communication, i.e., the totality of the circumstances including the communication itself, its communicator, its recipient and the relief sought."); Grant v. Stop-N-Go Mkt. of Tex., Inc., 994 S.W.2d 867, 874 (Tex. App.—Houston [1st Dist.] 1999, no pet.) ("To be entitled to the qualified privilege, the person making the statement must make it in good faith on a subject matter in which the speaker has a common interest with the other person, or with reference to which the speaker has a duty to communicate to the other."); Wal-Mart Stores, Inc. v. Odem, 929 S.W.2d 513, 525 (Tex. App.—San Antonio 1996, writ denied) ("A qualified privilege comprehends communications made in good faith on a subject matter in which the author has an interest . . . . Such privilege is termed conditional or qualified because a person availing himself of it must use it in a lawful manner and for a lawful purpose . . . . Even a slanderous per se communication on a privileged occasion is qualifiedly or conditionally privileged, and not actionable, unless the defendant was actuated by malice."); VINCENT R. JOHNSON & ALAN GUNN, STUDIES IN AMERICAN TORT LAW 996 (4th ed. 2009) (explaining what courts look for when determining whether a qualified privilege exists).

109. *See Clark*, 248 S.W.3d at 432 (implying that stating more than is necessary results in the statement being unprivileged); A.G. Harmon, *Defamation in Good Faith: An Argument for Restating the Defense of Qualified Privilege*, 16 BARRY L. REV. 27, 29 (2011) (explaining that a statement must be limited in scope and not state more than is necessary to protect the interest of the party making the statement).

110. *See* A.G. Harmon, *Defamation in Good Faith: An Argument for Restating the Defense of*

instances the individual is not permitted to exceed what is proportionate under the circumstances.[111] As a result, an attorney wishing to respond to an online review would lose the privilege if they disclosed more than was necessary in defense of their interests.[112] As described below with respect to the hypothetical online review and response, an attorney must consider each of these criteria carefully.[113]

Texas case law supports both the granting of qualified privilege to attorneys, and its use outside of defamation law.[114] Two Texas cases exemplify this point.[115]

In *Holloway v. Texas Medical Ass'n*,[116] a defendant attorney helped draft a memo sent to individuals with an interest in taking a precedential medical malpractice case to trial.[117] The memo implied that the plaintiff attorney was involved in bringing lawsuits against physicians in Texas

Qualified Privilege, 16 BARRY L. REV. 27, 47 (2011) (comparing qualified privilege and the defense of necessity).

111. *See id.* ("But the exercise of the privilege is not absolute; the policeman is not allowed to exceed what is proportionate under the situation at hand, and will be responsible if the boundaries of propriety are transgressed.").

112. *See Clark*, 248 S.W.3d at 432 (explaining that exceeding what is proportionate will result in the loss of a qualified privilege); VINCENT R. JOHNSON & ALAN GUNN, STUDIES IN AMERICAN TORT LAW 997 (4th ed. 2009) (stating that abuse of a qualified privilege results in its loss).

113. *See Clark*, 248 S.W.3d at 432 (noting that when courts are determining whether to grant a qualified privilege, they "must examine the occasion of the communication, *i.e.*, the totality of the circumstances including the communication itself, its communicator, its recipient and the relief sought"); *Grant*, 994 S.W.2d at 874 (stating that in order for a qualified privilege to be granted, "the person making the statement must make it in good faith on a subject matter in which the speaker has a common interest with the other person, or with reference to which the speaker has a duty to communicate to the other"); *Wal-Mart Stores*, 929 S.W.2d at 525 ("[A statement] made in good faith on a subject matter in which the author has an interest or with reference to which he has a duty to perform to another person having a corresponding interest or duty. Such privilege is termed conditional or qualified because a person availing himself of it must use it in a lawful manner and for a lawful purpose. The effect of the privilege is to justify the communication when it is made without actual malice. Even a slanderous per se communication on a privileged occasion is qualifiedly or conditionally privileged, and not actionable, unless the defendant was actuated by malice." (citations omitted)); VINCENT R. JOHNSON & ALAN GUNN, STUDIES IN AMERICAN TORT LAW 996 (4th ed. 2009) (stating the general considerations for when a qualified privilege is granted).

114. *See* Holloway v. Tex. Med. Ass'n, 757 S.W.2d 810, 814 (Tex. App.—Houston [1st Dist.] 1988, writ denied) (granting an attorney a qualified privilege in a defamation case); Maynard v. Caballero, 752 S.W.2d 719, 721–22 (Tex. App.—El Paso 1988, writ denied) (ruling that a qualified privilege applied in a tortious interference case).

115. *See Holloway*, 757 S.W.2d at 814 (ruling that a qualified privilege attached to a memo drafted by an attorney); *Maynard*, 752 S.W.2d at 721–22 (utilizing qualified privilege in a tortious interference case).

116. Holloway v. Tex. Med. Ass'n, 757 S.W.2d 810 (Tex. App.—Houston [1st Dist.] 1988, writ denied).

117. *See id.* at 814 (noting that the purpose of the memo was to help raise funds to take the case to trial).

without cause.[118] The plaintiff attorney claimed that this accusation was defamatory and damaging to his reputation.[119] The court noted that "[a] qualified privilege attaches to statements made under circumstances in which any one of several persons having a common interest in a particular subject matter may reasonably believe that facts exist that another, sharing that common interest, is entitled to know."[120] Because the recipients of the memorandum were doctors and medical associations, there was strong evidence that they had an interest in the information contained in the memo.[121] The court further explained that a qualified privilege is available if evidence tends to show a good faith communication without malice, which it did.[122] The court concluded that plaintiff attorney could not prove his claim that the communication was made in bad faith and thus granted the qualified privilege.[123]

In *Maynard v. Caballero*,[124] an attorney was granted a privilege outside of the defamation context.[125] In this tortious interference case, the court noted that privilege is not solely reserved for defamation cases.[126] The court held that "[i]nterference with contractual relations is privileged where it results from the exercise of a party's own rights or where the party possessed an equal or superior interest to that of the plaintiff in the subject matter."[127] Because the alleged interference by the defendant attorney was carried out in an effort to protect the right to represent the client the

118. *See id.* at 812 (explaining that there was no question that the attorney took part in drafting the memo containing the allegedly defamatory statements).

119. *See id.* at 813 (noting that plaintiff attorney filed suit for libel and slander as a result of defendant attorney's assistance in drafting the memo).

120. *Id.*

121. *See Holloway*, 757 S.W.2d at 813 ("In the instant case, the circumstances surrounding the publication of the letter and memo were not in dispute. The letter clearly stated that the purpose was to solicit funds to establish a court precedent. Holloway did not offer any contradictory testimony regarding the reason, did not prove an unlawful manner or purpose, and did not dispute the common interest of the recipients.").

122. *See id.* at 814 ("The defense of qualified privilege is available only if the evidence shows that the communication was made in good faith and without malice. Malice has been defined as 'a want of good faith,' which may be proved by showing that the defendant entertained ill-will toward the complaining party. The law presumes good faith and want of malice where the publication is qualifiedly privileged.").

123. *See id.* at 813 (granting a qualified privilege to the defendant attorney).

124. Maynard v. Caballero, 752 S.W.2d 719 (Tex. App.—El Paso 1988, writ denied).

125. *See id.* at 722 (ruling that a qualified privilege was proper for an attorney in a tortious interference case).

126. *See id.* at 721 (explaining that qualified privilege applies in certain tortious interference cases).

127. *Id.*

court granted a qualified privilege to the attorney's actions.[128]

A qualified privilege can, however, easily be lost by abuse.[129] In granting a qualified privilege, the law is concerned with what the publisher knew, who he told, and the reasons behind making the statements.[130] If someone having an interest in the matter does not communicate the information, the privilege is considered abused.[131] Additionally, if a defendant acts with malice or publishes statements in bad faith, the statements will not be subject to a qualified privilege.[132]

Applying the principles set forth in the section to the hypothetical, several of the attorney's statements would arguably enjoy a qualified privilege.[133] The existence of the attorney–client relationship, and potential harm of the client review to the attorney's reputation, are evidence that the attorney has a substantial interest in publishing the response.[134] The statements regarding the client's failure to disclose all of

128. *See id.* ("We find that Caballero's conduct was privileged. As long as our statutes permit the joinder of parties in criminal and civil litigation, there is an ethical and vital need for attorneys, on behalf of their respective clients, to meet, discuss, compromise and plan joint defenses or strategies. This should be done without the fear that if one or more or all of the parties are unsuccessful that the attorneys not in privity with the other litigants should be subject to a tortious interference with contract suit. In such instances, privilege should, as a matter of law, bar recovery as long as the interference is done to protect one's contract right to represent one's own client.").

129. *See* Clark v. Jenkins, 248 S.W.3d 418, 432 (Tex. App.—Amarillo 2008, pet. denied) (noting that the abuse of a qualified privilege results in its loss); Grant v. Stop-N-Go Mkt. of Tex., Inc., 994 S.W.2d 867, 874 (Tex. App.—Houston [1st Dist.] 1999, no pet.) (explaining several ways in which a qualified privilege may be abused resulting in its loss); VINCENT R. JOHNSON & ALAN GUNN, STUDIES IN AMERICAN TORT LAW 997 (4th ed. 2009) (explaining when a qualified privilege is lost due to abuse of the privilege).

130. *See* VINCENT R. JOHNSON & ALAN GUNN, STUDIES IN AMERICAN TORT LAW 997 (4th ed. 2009) ("A qualified privilege is defeasible in the sense that the law does care about what the defendant knew, who the defendant told, and why the defendant made the statement.").

131. *See* Ortiz v. San Antonio City Emps. Fed. Credit Union, 974 S.W.2d 833, 837 (Tex. App.—San Antonio 1998, no pet.) ("A communication will lose its privileged character if it is made to someone outside the interest group."); RESTATEMENT (FIRST) OF TORTS ch. 25, tit. B, intro. n. (1938) (stating a qualified privilege is granted "based upon a public policy which recognizes that it is desirable that true information be given whenever it is reasonably necessary for the protection of one's own interests, the interests of a third person, or certain interests of the public").

132. *See Grant*, 994 S.W.2d at 874 (noting that statements made in good faith may be awarded a qualified privilege); Wal-Mart Stores, Inc. v. Odem, 929 S.W.2d 513, 525 (Tex. App.—San Antonio 1996, writ denied) (concluding that in order for a statement to enjoy a qualified privilege it must be made in good faith and without malice).

133. *See* Holloway v. Tex. Med. Ass'n, 757 S.W.2d 810, 814 (Tex. App.—Houston [1st Dist.] 1988, writ denied) (noting that in order for a qualified privilege to be granted it must not be abused); *Maynard*, 752 S.W.2d at 722 (implying that stating more than is necessary will result in the loss of a qualified privilege).

134. *See* Pioneer Concrete of Tex., Inc. v. Allen, 858 S.W.2d 47, 50 (Tex. App.—Houston [14th Dist.] 1993, writ denied) ("An interest giving rise to a qualified privilege may be that of the publisher of the communication, the recipient, or a third person."); 1 TEX. PRAC. GUIDE WILLS,

the details of the case and failure to pay are entitled to a qualified privilege because the attorney believed them to be true, did not publish them with the intent of harming the client, and did not state more than was necessary.[135] Additionally, assuming the child's handicap is obvious, that statement is also likely permissible because it is both true and probably general knowledge. It is more likely that the statements regarding the abuse and the client's drug habit, however, are not entitled to a qualified privilege.[136] Even though they were made in good faith, they were likely made with malice because of their damaging effect on the client's own reputation. Further the disclosure of this information was arguably not necessary for the attorney to protect his interest.

VI. THE CASE FOR PERMITTING QUALIFIED PRIVILEGE AS A DEFENSE TO DISCIPLINARY ACTION

The argument for utilizing qualified privilege as a defense to disciplinary action begins with an attorney's right to respond to published criticism under the United States and Texas Constitutions.[137] Attorneys now face a market in which clients consistently make decisions based on the experiences and opinions of others.[138] Their ability to respond to

TRUSTS AND EST. PLAN. § 2:72 (2013) (defining the test for when the attorney–client relationship is formed); VINCENT R. JOHNSON & ALAN GUNN, STUDIES IN AMERICAN TORT LAW 996–97 (4th ed. 2009) (expounding that whether a statement is "self protective" will have an impact on a court's decision in granting a qualified privilege).

135. *See* Clark v. Jenkins, 248 S.W.3d 418, 432 (Tex. App.—Amarillo 2008, pet. denied) (noting that when courts are determining whether to grant a qualified privilege, they "must examine the 'occasion' of the communication, i.e., the totality of the circumstances including the communication itself, its communicator, its recipient and the relief sought"); *Grant*, 994 S.W.2d at 874 (stating that in order for a qualified privilege to be granted, "the person making the statement must make it in good faith on a subject matter in which the speaker has a common interest with the other person, or with reference to which the speaker has a duty to communicate to the other"); *Wal-Mart Stores*, 929 S.W.2d at 525 (implying that stating more than is necessary is abuse of the privilege); VINCENT R. JOHNSON & ALAN GUNN, STUDIES IN AMERICAN TORT LAW 996 (4th ed. 2009) (explaining when a qualified privilege is lost).

136. *See Clark*, 248 S.W.3d at 432 (detailing the circumstances under which abuse of a privilege results in its loss); *Grant*, 994 S.W.2d at 874 (explaining when a privilege is abused and lost); VINCENT R. JOHNSON & ALAN GUNN, STUDIES IN AMERICAN TORT LAW 997 (4th ed. 2009) (noting that once a qualified privilege is granted it may be lost due to abuse).

137. *See* U.S. CONST. amend. I (detailing the right of free speech); TEX. CONST. art. I, § 8 (adopting the right of free speech in Texas); Klein & Assocs. Political Relations v. Port Arthur Indep. Sch. Dist., 92 S.W.3d 889, 897 (Tex. App.—Beaumont 2002, pet. denied) (utilizing the First Amendment right to respond to public criticism).

138. *See* Steven C. Bennett, *Ethics of Lawyer Social Networking*, 73 ALB. L. REV. 113, 114 (2009) (promoting that attorneys must be aware of social media and its impact on their practice); Nathan M. Crystal, *Ethics Watch: Ethical Issues in Using Social Networking Sites*, S.C. LAW., Nov. 17, 2009, at 10, 11 (providing that social media is changing how individuals communicate); *What*

criticism is more critical than ever.[139] When a client creates an online review that is false or misleading regarding an attorney, an attorney's services, or both, attorneys should have an avenue permitting a proportionate response. While a defamation claim initially appears to offer some relief, it may take years to litigate and is simply inadequate for protecting the interests of the lawyer.[140] Even if the attorney prevails in the courtroom, the damage done to their reputation may be long lasting or permanent.[141] Further, the attorney may be subject to discipline under the Texas Disciplinary Rules of Professional Conduct.[142] Thus, a qualified privilege would allow a proportional prompt response without subjecting the attorney to discipline.

The ABA Model Rules of Professional Responsibility are admittedly insufficient in this regard.[143] The ABA Commission on Ethics 20/20 is working to modernize the Rules, but progress is slow.[144] As it currently

Americans Do Online: Social Media and Games Dominate Activity, NIELSEN WIRE (Aug. 2, 2010), http://www.nielsen.com/us/en/insights/news/2010/what-americans-do-online-social-media-and-games-dominate-activity.html (addressing how individuals are spending more time online sharing information with one another).

139. *See* Myles Anderson, *Study: 72% of Consumers Trust Online Reviews As Much As Personal Recommendations*, SEARCH ENGINE LAND (Mar. 12, 2012, 10:00 AM), http://searchengineland.com/study-72-of-consumers-trust-online-reviews-as-much-as-personal-recommendations-114152 (noting that consumers utilize social media in various ways including making decisions on where to spend their money).

140. *E.g.*, WFAA-TV, Inc. v. McLemore, 978 S.W.2d 568, 571 (Tex. 1998) (exemplifying how a defamation claim can take years); Foster v. Laredo Newspapers, Inc., 541 S.W.2d 809, 819 (Tex. 1976) (showing litigation in defamation cases can be lengthy); McClendon v. Springfield, 505 B.R. 786, 788–89 (Bankr. E.D. Tex. Sept. 16, 2013) (providing another example of a lengthy defamation case).

141. *See* Myles Anderson, *Study: 72% of Consumers Trust Online Reviews As Much As Personal Recommendations*, SEARCH ENGINE LAND (Mar. 12, 2012, 10:00 AM), http://searchengineland.com/study-72-of-consumers-trust-online-reviews-as-much-as-personal-recommendations-114152 (implying that negative reviews can have an impact on business resulting in lost profits).

142. *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.05 (detailing the rules for when an attorney is subject to discipline for disclosing confidential client information).

143. *See* ABA Comm. on Ethics 20/20, Resolution 105B (Aug. 6, 2012), *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/2012_hod_annual_meeting_105b_filed_may_2012.authcheckdam.pdf (making changes to the model rules regarding the use of technology); *see also* Michael E. Lackey Jr. & Joseph P. Minta, *Lawyers and Social Media: The Legal Ethics of Tweeting, Facebooking and Blogging*, 28 TOURO L. REV. 149, 150 (2012) (explaining how the ABA Model Rules are ill equipped for modern Internet related issues).

144. *Compare* MODEL RULES OF PROF'L CONDUCT R. 1.6 (2013) (stating the ABA Model Rules currently in effect), *and* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.05(a) (detailing the integration of the Model Rules in Texas), *with* ABA Comm. on Ethics 20/20, Resolution 105B (Aug. 6, 2012), *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/ 2012_hod_annual_meeting_105b_filed_may_2012.authcheckdam.pdf (setting new guidelines for the ABA Model Rules).

stands, a client is free to publically criticize an attorney's intentions, quality of service, competence, and any number of other areas they may dislike (or simply wish to say they dislike).[145] Furthermore, in the majority of instances the client need not disclose their identity to do so.[146] On the other hand, an attorney may only respond in generalities being careful not to disclose confidential information.[147] Ultimately, the level of discretion required by the attorney can make it difficult to produce a convincing response.[148]

Although outdated, it is noteworthy that both the Model Rules and Texas Disciplinary Rules of Professional Conduct have provisions that closely resemble a qualified privilege from civil law.[149] Model Rule 1.6 and Texas Disciplinary Rule 1.05 each provide instances under which an attorney may disclose client confidential information.[150] As with a

145. *See* U.S. CONST. amend. I (noting the right of free speech in the United States under the First Amendment); Myles Anderson, *Study: 72% of Consumers Trust Online Reviews As Much As Personal Recommendations*, SEARCH ENGINE LAND (Mar. 12, 2012, 10:00 AM), http://searchengineland.com/study-72-of-consumers-trust-online-reviews-as-much-as-personal-recommendations-114152 (explaining that posters are free to write anything they see fit).

146. *See* Myles Anderson, *Study: 72% of Consumers Trust Online Reviews As Much As Personal Recommendations*, SEARCH ENGINE LAND (Mar. 12, 2012, 10:00 AM), http://searchengineland.com/study-72-of-consumers-trust-online-reviews-as-much-as-personal-recommendations-114152 (noting that many sites do not require posters to disclose their identity).

147. *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.05 (placing restrictions on what client information an attorney may reveal); Tex. Comm. on Prof'l Ethics, Op. 595 (2010), *available at* http://www.legalethicstexas.com/Ethics-Resources/Opinions/Opinion-595.aspx (explaining that attorneys may not reveal confidential information to the disadvantage of the client).

148. *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.05 (restricting when and how an attorney may reveal confidential client information).

149. *Compare id*. R. 1.05(c)(5) (stating that an attorney may disclose confidential client information "[t]o the extent reasonably necessary to enforce a claim or establish a defense on behalf of the lawyer in a controversy between the lawyer and the client"), *and* MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 16 (2013) ("[Rule 1.6] permits disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified . . . . [A] disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose."), *with* Clark v. Jenkins, 248 S.W.3d 418, 432 (Tex. App.—Amarillo 2008, pet. denied) ("In making a determination whether statements are subject to a qualified privilege, courts must examine the occasion of the communication, i.e., the totality of the circumstances including the communication itself, its communicator, its recipient and the relief sought."), *and* Grant v. Stop-N-Go Mkt. of Texas, Inc., 994 S.W.2d 867, 874 (Tex. App.—Houston [1st Dist.] 1999, no pet.) ("To be entitled to the qualified privilege, the person making the statement must make it in good faith on a subject matter in which the speaker has a common interest with the other person, or with reference to which the speaker has a duty to communicate to the other."), *and* Wal-Mart Stores, Inc. v. Odem, 929 S.W.2d 513, 525 (Tex. App.—San Antonio 1996, writ denied) (noting that stating more than is necessary results in the loss of a qualified privilege).

150. *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.05(c)(5) (noting a variety of circumstances under which an attorney may reveal confidential client information); MODEL RULES OF PROF'L CONDUCT R. 1.6 (b)(2013) (noting the circumstances under the ABA Model Rules in

qualified privilege, proportionality is required and the attorney is barred from disclosing more than is necessary to defend themselves.[151] Recognition of the qualified privilege, however, is restricted to legal proceedings, or disciplinary hearings as a defense to sanctions, and not directly applicable to protection of the attorney's reputation in response to a public online assault.[152]

As a result of the seemingly inequitable restraints placed on an attorney's ability to promptly respond to criticism under the ABA Model Rules of Professional Responsibility, Minnesota has a adopted a version of Model Rule 1.6(b)(8) that allows an attorney to disclose client confidential information outside of the disciplinary and legal proceeding context.[153] Rule 1.6(8) of the Minnesota Rules of Professional Conduct states that an attorney may reveal confidential client information if "the lawyer reasonably believes the disclosure is necessary to establish a claim or defense on behalf of the lawyer in an actual or potential controversy between the lawyer and the client."[154] Minnesota's Rule 1.6(8) resembles a qualified privilege in that an attorney wishing to respond to an online review must have a reasonable belief that the disclosure of confidential information is necessary to establishing a defense.[155]

Simply by adding "potential controversy" to its version of the Model

which an attorney may reveal confidential client information).

151. *Compare* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.05(c)(5) (permitting attorneys to disclose what is reasonably necessary in their defense), *and* MODEL RULES OF PROF'L CONDUCT R. 1.6 (2013) (permitting disclosure of only what is necessary in defending the attorney), *with Clark*, 248 S.W.3d at 432 (explaining that stating more than is necessary will result in the loss of a qualified privilege), *and* VINCENT R. JOHNSON & ALAN GUNN, STUDIES IN AMERICAN TORT LAW 996 (4th ed. 2009) (stating that abuse of a qualified privilege by exceeding its bounds results in its loss).

152. *See* Tex. Comm. on Prof'l Ethics, Op. 495 (1994), *available at* http://www.legalethicstexas.com/Ethics-Resources/Opinions/Opinion-495.aspx (explaining that disclosure is only proper in a legal proceeding or disciplinary hearing and any disclosure of confidential client information must be as protective of the client as possible); TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.05(c)(6) (noting that Rule 1.05(c)(6) only applies to disciplinary proceedings).

153. *See* MINN. RULES OF PROF'L CONDUCT R. 1.6(b)(8) (2005) (stating that an attorney may disclose confidential client information if the attorney reasonably believes "the disclosure is necessary to establish a claim or defense on behalf of the lawyer in an actual or potential controversy between the lawyer and the client."); *see also* William Wernz, *This Month's Topic: Online Ratings of Lawyers*, MINN. LAW. (Oct. 1, 2013) (on file with the *St. Mary's Law Journal*) (noting that Minnesota permits attorneys to disclose confidential client information to defend their reputations outside of the legal proceeding context).

154. MINN. RULES OF PROF'L CONDUCT R. 1.6(b)(8) (2005).

155. *Compare id*. (noting that a lawyer must have a reasonable belief that it is necessary to protect their interest), *with Clark*, 248 S.W.3d at 432 (noting that in order to be granted a qualified privilege the individual must have an interest in making the statement and not state more than is necessary).

Rules, Minnesota has empowered attorneys to defend their reputations.[156] Adopting a qualified privilege in Texas would similarly empower local attorneys and bring the Texas Disciplinary Rules of Professional Conduct regarding confidentiality into modern times.

The use of qualified privilege as a defense against disciplinary action is also in line with the concept of "judicial economy."[157] This principal generally refers to the notion that the legal system only has a limited number of resources.[158] The Texas Supreme Court has often opined about the importance of judicial economy in a society in which legal claims are consistently increasing.[159] If qualified privilege were allowed as a defense to actions leading to possible discipline, it could simplify and reduce the number of cases being brought before both the disciplinary committee and the courts.[160] Rather than hailing the attorney to appear at a hearing where the attorney is then allowed to reveal client confidential information in their defense, the committee could simply review the response, look at the elements of qualified privilege and make a determination.[161]

The knowledge that the qualified privilege may be used to justify online attorney responses, as well as a defense to disciplinary action, may discourage clients without genuine claims against attorney services from posting a negative online review and bring balance to the interests involved.[162] As stated, on the majority of review sites, posters do not have to reveal their identity.[163] It is more likely that false (or at least

156. *See* MINN. RULES OF PROF'L CONDUCT R. 1.6(b)(8) (2005) (noting that an attorney may disclose client confidential information in defense even in only a potential controversy).

157. *See* Cincinnati Life Ins. Co. v. Cates, 927 S.W.2d 623, 627 (Tex. 1996) (noting the importance of judicial economy); Sysco Food Servs., Inc. v. Trapnell, 890 S.W.2d 796, 806 (Tex. 1994) (explaining the concept of, and ideas behind, judicial economy).

158. *See Cincinnati Life Ins.*, 927 S.W.2d at 624 (explaining that judicial economy is an important principal which promotes the efficient use of judicial resources); *Sysco Food Servs.*, 890 S.W.2d at 806 (explaining why judicial economy is an important factor to be considered in a system facing an increasing case load).

159. *See Cincinnati Life Ins.*, 927 S.W.2d at 624 (noting that judicial economy is important because judicial resources are limited); *Sysco Food Servs.*, 890 S.W.2d at 806 (explaining the factors the influenced the creation of judicial economy).

160. *Cf. Clark*, 248 S.W.3d at 432 (Tex. App.—Amarillo 2008, pet. denied) (explaining the criteria for being granted a qualified privilege).

161. *Cf. id.* (providing an example of how qualified privilege is used).

162. *See* Suw Charman-Anderson, *Fake Reviews: Amazon's Rotten Core*, FORBES (Aug. 28, 2012, 1:30 PM), http://www.forbes.com/sites/suwcharmananderson/2012/08/28/fake-reviews-amazons-rotten-core/ (explaining that if posters had some accountability they may be more hesitant to post).

163. *See* Myles Anderson, *Study: 72% of Consumers Trust Online Reviews As Much As Personal Recommendations*, SEARCH ENGINE LAND (Mar. 12, 2012, 10:00 AM),

exaggerated) statements will be made by individuals who feel protected by anonymity.[164] It simply does not make sense to have such an unbalanced system where one side may make a false comment anonymously while the other's identity is revealed and can only respond in generalities. If clients were made aware that attorneys were permitted to reasonably disclose their confidential information under the principals of qualified privilege in responding to an online review, clients would likely more carefully evaluate and modulate the content of their reviews.[165]

Allowing qualified privilege as a defense to disciplinary action would not allow attorneys to run amuck in their response to a negative online review.[166] The elements of the qualified privilege and the requirement for proportionality would limit when and how an attorney responds.[167] The response would have to be in good faith, without malice and only state what was necessary in defending the attorney's reputation.[168] The disciplinary committee would still have a needed discretion in how the elements of qualified privilege are applied and whether to institute sanctions against an attorney. Allowing a qualified privilege as a defense to

http://searchengineland.com/study-72-of-consumers-trust-online-reviews-as-much-as-personal-recommendations-114152 (implying that on many review sites, reviewers need not reveal their identity).

164. *See* Suw Charman-Anderson, *Fake Reviews: Amazon's Rotten Core*, FORBES (Aug. 28, 2012, 1:30 PM), http://www.forbes.com/sites/suwcharmananderson/2012/08/28/fake-reviews-amazons-rotten-core/ (describing the issues behind false reviews); Myles Anderson, *Study: 72% of Consumers Trust Online Reviews As Much As Personal Recommendations*, SEARCH ENGINE LAND (Mar. 12, 2012, 10:00 AM), http://searchengineland.com/study-72-of-consumers-trust-online-reviews-as-much-as-personal-recommendations-114152 (implying that on many review sites, reviewers need not reveal their identity and that being able to review anonymously encourages reviewers to arbitrarily post).

165. *See* Suw Charman-Anderson, *Fake Reviews: Amazon's Rotten Core*, FORBES (Aug. 28, 2012, 1:30 PM), http://www.forbes.com/sites/suwcharmananderson/2012/08/28/fake-reviews-amazons-rotten-core/ (noting that anonymity is the force behind false online reviews).

166. *See Clark*, 248 S.W.3d at 432 (implying that stating more than is necessary causes a statement to lose any qualified privilege); A.G. Harmon, *Defamation in Good Faith: An Argument for Restating the Defense of Qualified Privilege*, 16 BARRY L. REV. 27, 29 (2011) (noting that a statement must be limited in scope and not state more than is necessary in order to be granted a qualified privilege).

167. *See Clark*, 248 S.W.3d at 432 (noting that criteria for a qualified privilege); Kaplan v. Goodfried, 497 S.W.2d 101, 105 (Tex. Civ. App.—Dallas 1973, no writ) (explaining that qualified privilege only applies to statements that are warranted, proportional and made in good faith); VINCENT R. JOHNSON & ALAN GUNN, STUDIES IN AMERICAN TORT LAW 996 (4th ed. 2009) (explaining the limited circumstances under which a qualified privilege is granted).

168. *See Clark*, 248 S.W.3d at 432 (stating that a qualified privilege is only granted when all of the criteria is met); *Kaplan*, 497 S.W.2d at 105 (explaining that in order for a statement to be granted a qualified privilege it must be proportional and made in good faith); VINCENT R. JOHNSON & ALAN GUNN, STUDIES IN AMERICAN TORT LAW 996 (4th ed. 2009) (explaining that one of the criteria for granting a qualified privilege is proportionality).

disciplinary action would, however, provide attorneys with an important means to protect their interests utilizing principals that have long been held just under civil law.[169]

Turning again to the hypothetical example, below is a response that should plainly be permitted under the current Texas Disciplinary Rules of Professional Conduct.

> *Attorney response*: "The statements made in this review are untrue. I always represent clients to the best of my ability, as economically as possible, and with care and concern for them and any involved children."

Here is a revision of the initial response in the example if qualified privilege were allowed as a defense to its publication and any related disciplinary action.

> *Attorney response*: "The statements made in this review are untrue. I always represent clients to the best of my ability, as economically as possible, and with care and concern for them and any involved children. That was hampered here because this client did not reveal all of the facts of her situation up front in our initial meetings. The facts that later came to light required a great deal of time and effort to sort out and deal with. This added to the cost of representation. Nevertheless, this firm did no 'damage', let alone create any that another attorney had to 'undo.' The client claims that her child suffered, but fails to mention that the child is mentally disabled. The client review also does not mention the fact that she had not been paying according to our agreement. I was as flexible as I could be in obtaining payments when she could make them."

The examples make clear that the use of qualified privilege as a defense to disciplinary action would broaden when and how an attorney could respond to an online review. They also emphasize the inadequacies of the current regime. Under the Texas Disciplinary Rules of Professional Conduct the attorney's response is impersonal and would be likely to leave no impact on the reader. When the attorney is allowed to respond under the principals of qualified privilege, the response feels genuine and convincing. Readers will get a better sense for the attorney and may more clearly understand why the attorney acted as she did.

VII. CONCLUSION

Qualified privilege offers a simple and proven solution that would provide balance to the interests of the parties involved in a battle of online

169. *See Kaplan*, 497 S.W.2d at 105 (exemplifying how qualified privilege could be utilized by attorneys).

reviews. By adopting qualified privilege as a basis for preparing a response to a negative online review, and a defense to possible related disciplinary action, Texas would empower attorneys with a mechanism that would better enable them to adequately protect their reputational interests and, at the same time, better inform a public that might otherwise be left with unmitigated misstatements in an online review. Additionally it would bring Texas in line with other state versions of the Model Rules that are more applicable to modern society.