

L.A. COUNTY BAR ASSOCIATION
PROFESSIONAL RESPONSIBILITY AND ETHICS COMMITTEE

FORMAL ETHICS OPINION NO. 498
MARCH 8, 1999

**DISCLOSURE OF CLIENT MISREPRESENTATION
IN A FEE DISPUTE**

SUMMARY

An attorney who withdraws as counsel in order to avoid making misrepresentations of fact may disclose such misrepresentations as being the basis for withdrawal in a subsequent fee dispute with the former client only if relevant to the dispute and reasonably necessary due to an issue raised by the client. The disclosure should be made in a manner that avoids unnecessary disclosure of confidential information.

AUTHORITIES CITED

Brockway v. State Bar (1991) 53 Cal.3d 51, 278 Cal.Rptr. 836
Caplin & Drysdale, Chartered v. U.S., 491 U.S. 617, 627, 109 S.Ct. 2646 (1989)
Commercial Standard Title Co. v. Superior Court (1979) 92 Cal.App.3d 934
Dubrow v. Rindlisbacher, 225 B. R. 180 (9th Cir. Bankruptcy Appellate Panel 1998) Business & Professions Code § 6068(e) and 6202
Evidence Code § 950, et seq.
California Rules of Court, Rule 376(b)
COPRAC Formal Opinion No. 1997-151
Los Angeles County Bar Opinions Nos. 264, 274, 386, 389, 396 and 452

FACTS AND ISSUES PRESENTED

Attorney represents a plaintiff in a personal injury action under a typical contingent fee agreement. During the course of the representation, defendant's counsel subpoenas various medical records from the plaintiff's treating physician. In reviewing these medical records with the client, Attorney learns that although the client had been treated by the physician for injuries suffered in the accident, the billings submitted by the physician are for a substantially greater number of physician visits than actually occurred. While it is unclear from the inquiry whether, at the time the physician's billings were submitted, the client knew or had reason to know that the physician would be submitting billings for non-existent visits, the client now insists that the claim be pursued utilizing the falsified billings. Attorney determines that this makes it improper to continue to represent plaintiff. Attorney thereafter withdraws from the representation and the plaintiff proceeds with another attorney.

The question presented to the Committee is whether Attorney may disclose the reasons for withdrawal in a subsequent fee dispute with the client. Attorney also inquires regarding entitlement to fees on a quantum meruit basis or otherwise.

DISCUSSION

An attorney has a duty to "maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client." Bus. & Prof. Code § 6068(e). The scope of this duty of secrecy includes all information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client. See Los Angeles County Bar Opinion 452.

The duty of secrecy is owed to both present and former clients. Commercial Standard Title Co. v. Superior Court (1979) 92 Cal.App.3d 934, 945. The prohibition against disclosing clients' secrets extends to instances of civil fraud perpetrated by the client. Los Angeles County Bar Opinions Nos. 264, 274, 386.

Unless the disclosure is compelled by law, a lawyer generally cannot disclose client secrets to a third party without the client's informed consent. (Los Angeles County Bar Opinion No. 389; Commercial Standard, supra, at 945.) Certain narrow exceptions to the duty of confidentiality exist when there is a dispute between attorney and client regarding breach of duty arising out of the attorney-client relationship. Specifically, Evidence Code § 958 provides:

"There is no [attorney-client] privilege. . . as to a communication relevant to an issue of breach, by the lawyer or by the client, of a duty arising out of the lawyer-client relationship."

Although Evidence Code § 958 by its terms is an exception to the evidentiary attorney-client privilege contained in Evidence Code § § 950 et seq., it previously has been found to apply equally to the broader duty of secrecy contained in Business & Professions Code § 6068(e). See Los Angeles County Opinion No. 452.

Further, Business & Professions Code § 6202 provides that the provisions of Evidence Code § 950, et seq.:

"[S]hall not prohibit the disclosure of any relevant communication nor shall the provisions of Section 2016 of the Code of Civil Procedure be construed to prohibit the disclosure of any relevant work product of the attorney in [the arbitration of a fee dispute, a trial after arbitration, and proceedings to confirm, correct or vacate such an award]. In no event shall such disclosure be deemed a waiver of the confidential character of such matters for any other purpose."

The concepts of confidentiality and privilege are not identical concepts, but are nevertheless closely related. While there is no qualification to the duty of confidentiality in Business & Professions Code § 6068(e), Business & Professions Code § 6202 is an express exception to the duty of confidentiality in specific situations (i.e., statutory fee arbitrations and subsequent proceedings). Although Business & Professions Code § 6202 does not address the issue of attorney-client disputes in other contexts, Evidence Code § 958 must be understood to imply an exception, because removing the bar to testimony on the issue of breach of duty of lawyer to client or client to lawyer impliedly allows disclosure of that information by means of testimony to the trier of fact and the trier of law in the proceeding in which breach is at issue.

Failing to allow the attorney to present evidence regarding otherwise confidential matters that relate to an alleged breach would allow the client to use the confidential information as the proverbial sword, rather than a shield, and would render meaningless the exception to the attorney-client privilege in Evidence Code § 958. Los Angeles County Bar Opinions Nos. 396 and 452.

In reconciling the principles of client confidentiality and of allowing testimony of communications relevant to breach of duty in disputes between attorney and client, it is the opinion of the Committee that an attorney is permitted to disclose, in a judicial proceeding, arbitration or mediation, the reasons for the attorney's withdrawal if those reasons are relevant in such a proceeding and reasonably necessary to support the attorney's position.¹ On the other hand, the confidentiality (beyond the particular proceeding) of that

information must be preserved by the attorney. Los Angeles County Bar Opinion No. 452. See, Brockway v. State Bar (1991) 53 Cal.3d 51, 278 Cal.Rptr. 836.

Dubrow v. Rindlisbacher, 225 B. R. 180 (9th Cir. Bankruptcy Appellate Panel 1998), involved an unusual variation on the facts presented here. The attorney sought to use information, acquired from the client in confidence during the course of representation, to deny the client a discharge in a subsequent bankruptcy proceeding. The B.A.P. pointed out the broad nature of the attorney's duty of maintaining the client's confidences and noted that "in fairness, the attorney must be allowed to defend [against the claim of the attorney's breach of duty] even if that defense involves the use of communications that the attorney would be otherwise bound to maintain as confidential." The court, however, refused to allow the attorney's testimony to bar a discharge, because a debtor's pursuit of a bankruptcy discharge is not a breach of the duty to pay the fee, and does not otherwise call into question the validity of the attorney's fees or conduct, but rather, the court held, the former client is merely exercising rights afforded under the Bankruptcy Code.

Thus, Attorney may disclose that the reason Attorney withdrew from the representation was the client's instructions to use falsified medical billings, if use of such information is relevant in the fee dispute with the client, but only to the extent reasonably necessary due to an issue raised by the client in the fee dispute proceeding. Los Angeles County Bar Opinion No. 452. Such disclosure should be made in a manner that best preserves the confidentiality of the client's affairs.

Ordinarily, such confidentiality may be maintained by making a generalized disclosure² of the fact of the withdrawal, perhaps with a generalized allegation that the withdrawal was "for good cause" in pleadings and other materials that are available in the court file for public inspection, and then, to the extent necessary, by disclosing more detailed reasons for the withdrawal only in an in camera proceeding, or in some other manner consistent with the policy of protecting the confidentiality of attorney-client communications.

The inquiry also sought to determine whether Attorney has a claim for recovery of fees on a quantum meruit or other basis after Attorney's withdrawal from representation of the client. Because this determination is a legal, not an ethical issue, this opinion does not address that aspect of the inquiry, as the Committee responds only to inquiries regarding professional responsibility and ethics. The Committee notes, however, that there are legal proscriptions against seeking payment of fees from funds an attorney knows or has reason to know were obtained through fraud. Cf. Drysdale, Chartered v. U.S. 491 U.S. 617,626, 109 S. Ct. 2646 (1989).

This opinion is advisory only. The Committee acts only on specific questions ex parte, and opinions are based only on facts set forth and the questions presented.

¹ This opinion does not address the issue of disclosure in disputes between attorneys concerning division of a fee and application of issues of confidentiality and privilege in that context, or duties of confidentiality in criminal representation.

² Compare California Rules of Court, Rule 376(b) which provides that motions to be relieved as counsel shall be accompanied by a declaration "stating in general terms and without compromising confidentiality of the attorney-client relationship . . ." Compare also COPRAC Formal opinion 1997-151 which discusses the issue of the attorney's responsibility to the client when there is a disagreement concerning the possible imposition or payment of court ordered sanctions.