

# Los Angeles County Bar Association Professional Responsibility and Ethics Committee

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FORMAL OPINION No. 506  
January 2, 2001

Initial Client Interview - Duty of Confidentiality

## SUMMARY

Conflicts of interest – An attorney has a duty to preserve the confidentiality of information obtained in the course of initial consultations with a prospective client, where the consultations do not result in the retention of the attorney. An attorney has no duty to disclose such information to an existing client, even though it may be significant to the existing client, where the information is unrelated to the attorney's representation of the existing client.

## AUTHORITIES CITED

*Flatt v. Superior Court (Daniel)*, 9 Cal. 4<sup>th</sup> 275 (1994)

*People v. Speedee Oil Change Systems, Inc.*, 20 Cal. 4<sup>th</sup> 1135 (1999)

Business and Professions Code

§ 6068(e)

§ 6068(m)

Evidence Code § 951

Rules of Professional Conduct, Rule 3-500

LACBA Formal Opinion No. 366

State Bar of California Standing Committee on Professional Responsibility and Conduct, Formal Opinion No. 1984-84

## ISSUE PRESENTED

In an initial consultation with a potential client (where the attorney is not subsequently retained), an attorney learns information that would be important to an existing client, but which

is unrelated to the present representation of the existing client. Does the attorney (a) have a duty to preserve the confidentiality of the information, (b) have a duty to disclose that information to the existing client, and (c) if both duties apply, how should they be resolved?

### STATEMENT OF FACTS

Lawyer L has an initial communication with potential client A to obtain information for a conflicts check. In the communication A discloses to L important information relating to the potential representation. In the inquiry presented to the Committee, for example, the important information is that A is considering filing a bankruptcy petition.

For the conflicts check, L discloses the important information to the other members of the firm.<sup>[1]</sup> The conflicts check discloses that current client C is engaged in unrelated litigation against A, in which C is represented by a different law firm. Because of the conflict resulting from the fact that C is a present client of the firm, even though the firm does not represent C in that litigation, L declines to represent A. See *Flatt v. Superior Court (Daniel)*, 9 Cal. 4<sup>th</sup> 275, 284-87 (1994). In the inquiry's example, a potential bankruptcy filing is important information to C because the filing would automatically stay the litigation brought by C against A, limit C's chances of obtaining or collecting a judgment against A, and affect settlement terms and strategies.

### DISCUSSION

#### A. Duty to Protect Confidential Information of Potential Client

We first consider whether an attorney has a duty to protect the confidentiality of information received from a prospective client in an initial communication, where the lawyer is not ultimately retained to represent the client.

##### 1. Definition of "Client"

Neither the California statutes nor case law clearly defines who is a "client" for the purposes of this inquiry.

##### a. California Statutes

The relevant California statutes are not clear as to whether a prospective client who consults an attorney for representation qualifies as a "client" for the purposes of protecting confidential information disclosed in an initial consultation.

An attorney's duty to protect confidential information relating to a client is provided by Business and Professions Code § 6068(e), which requires a lawyer "to maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client." The rule does not specify whether this statutory duty applies to a prospective client where no representation of the client ensues.

In contrast, California Evidence Code § 951, which provides the duty of confidentiality that a lawyer owes to a client, defines a "client" as "a person who . . . *consults* a lawyer for the purpose

of retaining the lawyer or securing legal service or advice from [the lawyer] in [the lawyer's] professional capacity . . ." (emphasis added). This definition apparently covers a potential client as well as an actual client.

The California Rules of Professional Conduct provide no assistance on this subject: they do not define "client" in any context.

#### b. California Case Law

While not defining "client" in this context, two California Supreme Court decisions do help to resolve the issue in this inquiry.

##### i. *Flatt*

The leading California case on the duties owing to a potential client who has consulted an attorney concerning representation is *Flatt, supra*. In *Flatt*, a lawyer (Flatt) held an hour-long initial consultation with a prospective client (Daniel), in which Daniel disclosed confidential information about the performance of his prior attorney (Hinkle). After hearing Daniel's story, Flatt stated that Daniel definitely had a legal malpractice claim against Hinkle. However, Flatt learned through a conflicts check that her firm represented Hinkle's firm in an unrelated matter. *See id.*, at 282. Consequently, Flatt advised Daniel that she could not represent him. However, Flatt did not advise Daniel of the danger that his claim could become barred by the statute of limitations, or of the need to act promptly in seeking other counsel.

When Daniel filed suit against Hinkle some two years later, the statute of limitations had run. Daniel then sued Flatt for legal malpractice, on the grounds that Flatt had breached a duty to advise Daniel to seek other counsel promptly to avoid the statute of limitations bar.

Under these facts, the California Supreme Court found that the duty of undivided loyalty that Flatt's firm owed to Hinkle, the existing client, was higher than the narrower duty to advise Daniel of his statute of limitations risks with respect to his prospective lawsuit against Hinkle. *Id.* at 290. However, the Supreme Court warned that the duty to advise a prospective client, after a decision to decline the representation, may well be more extensive where there is no conflict with an existing client. *Id.* at 279.

The court in *Flatt* relied on the need to preserve an existing client's sense of trust and confidence in counsel. The court found that requiring Flatt to provide legal advice to Daniel, which would have been in direct conflict to the interests of the firm's existing client (Hinkle), could have irreparably damaged that trust and confidence. *Id.* at 285.

##### ii. *SpeedDee Oil*

A second relevant California Supreme Court case is *People v. SpeedDee Oil Change Systems, Inc.*, 20 Cal. 4<sup>th</sup> 1135 (1999), where the Court disqualified a law firm from representing complainants in intervention in a franchise case because the law firm had also been consulted by the defendant in intervention. *SpeedDee* began as an action by the California Attorney General on behalf of the Department of Corporations against a franchiser for violations of the California Franchise Investment Law. & A number of franchisees intervened as parties plaintiff and brought in Mobil Oil as a defendant in intervention.

Counsel for the plaintiffs in intervention associated Shapiro, Rosenfeld & Close (the "Shapiro firm") as their attorneys. A few weeks later Mobil met with a lawyer at the Shapiro firm, who had

no knowledge of the prior retention,<sup>[2]</sup> to discuss associating the Shapiro firm on Mobil's side. The discussions included Mobil's theories of the case, its discovery strategy, an analysis of the procedural and substantive issues in the case and specific factual issues. The attorney checked some statutes and case law, and called back later that day with his analysis of a few of the issues that they had discussed. When Mobil learned the next day that the Shapiro firm was representing the other side, it immediately informed the attorney that it would not be using his services.

Mobil thereafter moved to disqualify the Shapiro firm from representing the plaintiffs in intervention, on the grounds that the firm had represented clients on both sides of the litigation. The California Supreme Court overruled the denial of the motion by the lower courts. The Court found that "[a]n attorney represents a client, for the purposes of a conflict of interest analysis, when the attorney knowingly obtains material confidential information from the client and renders legal advice or services as a result." *Id.* at 1148. The Court found that this representation of a client on one side of a case, where the Shapiro firm already represented clients on the other side, required the Shapiro firm's disqualification from the case altogether.

### c. California Ethics Opinions

There are two ethics opinions in California that take the view that § 6068(e) applies to prospective clients as well as to actual clients. Formal Opinion No. 366 involved two brief interviews with a murder defendant, where the prospective client related his version of the events at issue. Thereafter the attorney declined to represent the defendant. After the prospective client had been granted immunity from prosecution, a second defendant in the same case requested representation by the same attorney. This Committee took the view that the interviews with the first defendant created an attorney-client relationship within the scope of § 6068(e) that prevented the attorney from representing the second defendant.

State Bar of California Standing Committee on Professional Responsibility and Conduct, Formal Opinion No. 1984-84 involved a prospective client with a claim against an insurance carrier, who had consulted an specialist in insurance litigation. The attorney had declined the representation, because the attorney routinely represented insurance carriers, including the carrier in question. Years later the same insurance carrier requested the attorney to pursue an action against the prospective client to recover payments on a series of allegedly fraudulent insurance claims (not including the one on which the prospective client had consulted the attorney). COPRAC opined that the prospective client qualified as a client within the scope of § 6068(e). Thus, unless the information received from the prospective client was so old or different from the new case that there was no reasonably foreseeable likelihood that the information might be useable to the detriment of the prospective client, the attorney was disqualified from taking the new case.

### 2. Committee's View

The inquiry to the Committee is quite different from the issues in both *Flatt* and *SpeedDee*. *Flatt* involved the issue of giving limited advice to the prospective client whose representation was declined on the grounds of conflict of interest with an existing client. *SpeedDee* involved the disqualification of a law firm that had represented both sides in pending litigation. The issues in this inquiry, in contrast, are (a) the protection of significant information imparted by the prospective client and (b) the potential transmission of that information to an existing client. Neither *Flatt* nor *SpeedDee* is directly on point.

In deciding *Flatt*, the Supreme Court found it immaterial to decide Daniel's client status to dispose of the legal issue in that case. In the context of disqualification, on the other hand, the Supreme Court in *SpeedDee* found that Mobil had become a client of the firm.

Because the Supreme Court in *Flatt* found it immaterial to decide the client status of Daniel, the Committee finds it unnecessary to opine on the status of A, the prospective client who has consulted with L concerning legal representation. In the Committee's view, whatever the client status of A, L and the firm have a duty to preserve the confidence of the important information disclosed in the initial consultation.

We thus must examine whether the firm has a duty to disclose to C the confidential information received from A that may be important to C and, if so, how this conflict should be resolved.

#### B. Duty to Disclose Information to Existing Client

The duty of communication requires a lawyer to keep a client reasonably informed about "significant developments" relating to the lawyer's engagement or representation and to comply promptly with reasonable requests for information and copies of significant documents. California Business & Professions Code § 6068(m); California Rules of Professional Conduct, Rule 3-500.

However, Rule 3-500 is explicit in limiting the scope of the duty of communication to circumstances where the disclosed information is related to the representation of a client. In the Committee's view, the duty to inform pursuant to Rule 3-500 does not impose a duty on L or the firm to pass on to C the important information, because this information is unrelated to the firm's representation of C.<sup>[3]</sup>

In our view, the duty of loyalty does not obligate the firm in this case to disclose the important information to C. Although *Flatt* applied the duty of loyalty in determining whether a lawyer was required to disclose certain information to a potential client, the court's application there can be distinguished. *Flatt*, the information to be disclosed was the type of general advice that a client would expect to receive from the lawyer (i.e., information regarding the running of the statute of limitations). However, in this inquiry the disclosure of the important information would constitute a windfall to the client because it is not advice, but merely information about the opposing party. Moreover, unlike in *Flatt*, the information is unrelated to any matter on which the firm represents C.

#### Conclusion

In our opinion, an attorney has a duty to a potential client not to disclose confidential information received in an initial consultation. When limited to the fact pattern presented to the Committee here, this duty to protect the confidential information received from the potential client does not conflict with the duty to communicate material information to an existing client, because the duty to communicate is limited to situations where the information is related to matters on which the lawyer actually represents the existing client.

This opinion is advisory only. The Committee acts on specific questions submitted *ex parte* and its opinion is based on such facts as are set forth in the questions submitted.

<sup>[1]</sup>A conflicts check should normally begin with a check against the law firm's conflicts data base, if the law firm maintains one. If this check discloses a conflict, it may be unnecessary to disclose the information to other members of the firm to complete a conflicts check.

<sup>[2]</sup>The attorney consulted by Mobil apparently had no knowledge of the prior retention because he was of counsel to the firm. The California Supreme Court held that conflicts in interest are imputed between an of counsel attorney and the firm to the same extent as between partners, associates and members of a firm. *Id.* at 1152-57.

<sup>[3]</sup>The Committee declines to address whether the firm would be disqualified from continuing to represent C.