

LOS ANGELES COUNTY BAR ASSOCIATION  
PROFESSIONAL RESPONSIBILITY AND ETHICS COMMITTEE

OPINION NO. 520  
June 18, 2007

DUTY TO INFORM ADVERSE PARTY  
REGARDING ERRONEOUS SETTLEMENT PAYMENT

SUMMARY

This opinion addresses questions regarding an attorney's duty, if any, to inform his or her client and the adverse party of an overpayment made directly to the client under a settlement agreement. Counsel is obligated to inform his/her client of the overpayment under the California Rules of Professional Conduct, Rule 3-500. Under California Business & Professions Code § 6068(e) an attorney is obligated to maintain the confidence and preserve the secrets of his or her client. Under the circumstances presented here, where the client has requested the information be held in confidence, the attorney is obligated to preserve the secret.

The attorney should counsel the client to disclose and return the overpayment. If the client refuses, however, the attorney must consider whether the failure to disclose constitutes fraud. The attorney must then determine whether he/she may or must withdraw from the representation pursuant to California Rules of Professional Conduct, Rule 3-700.

AUTHORITIES CITED

Cases

*Chambers v. Kay*, 29 Cal.4th 142 (2002)

*Considine Co., Inc. v. Shadle, Hunt & Hager*, 187 Cal.App.3d 760 (1986)

*In re O.S.*, 102 Cal.App.4th 1402 (2002)

*In re Young*, 49 Cal.3d 257 (1989)

*People v. Singh*, 123 Cal.App. 365 (1932)

*Skarbrevik v. Cohen, England & Whitfield*, 231 Cal.App.3d 692 (1991)

## Statutes

California Business & Professions Code §§ 6068(e), 6068(m) and 6106

## Other

California Rules of Professional Conduct, Rules 3-100, 3-210, 3-500 and 3-700

American Bar Association Model Rules, Rule 1.4(b)

Los Angeles County Bar Association, Committee on Professional Responsibility and Ethics, Formal Opinion Nos. 504 (2000), 498 (1999), 452 (1988), 417 (1983), 386 (1980), 274 (1962), 267 (1960) and 264 (1959)

State Bar of California Standing Committee on Professional Responsibility and Conduct, Formal Opinion Nos. 2003-161, 1988-96 and 1981-58

## FACTS AND ISSUES PRESENTED

In a settlement between Plaintiff and Defendant, Defendant was required to make a series of payments to Plaintiff, the amount of which depended on a complicated series of contingencies. After the first payment, which was mailed to Plaintiff's counsel (hereinafter "Counsel") by Defendant's attorney and then forwarded to Plaintiff, the remaining payments were sent directly by Defendant to Plaintiff. Defendant did not copy Plaintiff's Counsel on those remaining payments.

Counsel wrote to Plaintiff and asked about the payments, volunteering to look into the complicated contingencies to make sure that Defendant was abiding by the agreement. Plaintiff sent Counsel a copy of four checks and a letter. Counsel reviewed the letter and checks, and concluded that Defendant had made a mistake. Defendant had overpaid Plaintiff. Three of the checks were correctly calculated and paid, but one of the checks, which Defendant mailed directly to Plaintiff (without copying Plaintiff's Counsel), should not have been paid at all. Plaintiff is not aware of Defendant's mistake.

1. Does Counsel have an ethical obligation to inform Plaintiff of Defendant's mistake?
2. If Counsel advises Plaintiff of the mistake and Plaintiff asks that Counsel keep the mistake confidential from Defendant, is Counsel ethically obligated to do so?

3. If Plaintiff refuses to disclose, or allow Counsel to disclose, the overpayment to Defendant, is Counsel required to withdraw from the representation?

### DISCUSSION

#### I. Counsel Has an Ethical Duty to Inform His/Her Client of Defendant's Mistake

Under the California Rules of Professional Conduct, Rule 3-500 Counsel is obligated to keep his or her client informed "about significant developments relating to the employment or representation." Similarly, California Business & Professions Code § 6068(m) provides that it is the attorney's duty to "keep clients reasonably informed of significant developments in matters with regard to which the attorney has agreed to provide legal services."

In the situation presented here, the erroneous overpayment made by Defendant to Plaintiff is a significant development that Counsel is obligated to discuss with his or her client. *See Chambers v. Kay*, 29 Cal.4th 142, 156 (2002) (attorney required to inform client of division of fees); *In re O.S.*, 102 Cal.App.4th 1402, 1410 (2002) (attorney has a duty to communicate with client regarding client's desires about paternity). Disclosure to the client is particularly important here where the attorney may not know of other pertinent communications or transactions between Plaintiff and Defendant and where Defendant may be able to sue Plaintiff upon discovery of the mistake. Even without the threat of legal action, however, Plaintiff is entitled to make an informed decision about reporting the erroneous payment. *See also* ABA Model Rule 1.4(b) ("A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.").

Here, it is the ethical duty of Counsel to discuss with Plaintiff the possible risks of keeping the funds paid to Plaintiff in error. *See Considine Co., Inc. v. Shadle, Hunt & Hager*, 187 Cal.App.3d 760, 765 (1986) (noting attorney's duty to "fully inform the client about his or her rights and the alternatives available under the circumstances"). There is no justification for the attorney to make a unilateral decision to withhold the information in order, for example, to create a laches defense. To the contrary, it is the attorney's duty to provide the client with information to make an informed decision. Cal. Rules of Prof. Conduct, Rule 3-500.

II. Counsel Has an Ethical Duty Not to Disclose the Overpayment to the Adverse Party

A fundamental statutory and ethical duty of an attorney is to “maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.” Cal. Bus. & Prof. Code § 6068(e)(1); Cal. Rules of Prof. Conduct, Rule 3-100. The scope of this duty of secrecy is broader than the attorney-client privilege. It extends to all information gained in the professional relationship that the client has requested be kept secret or the disclosure of which likely would be detrimental or embarrassing to the client. *See* State Bar of California Standing Committee on Professional Responsibility and Conduct (“COPRAC”) Formal Opinion No. 2003-161; Los Angeles County Bar Association (“LACBA”) Opinion Nos. 498 and 452.

Section 6068(e) has been rigidly adhered to by the courts and, any exceptions are narrowly construed. *See* LACBA Opinion Nos. 452, 386 and 274; *People v. Singh*, 123 Cal.App. 355 (1932). The rule applies even where the facts are already part of the public records or where there are other sources of information. LACBA Opinion No. 386.

Applied here, where Counsel has obtained information detrimental to the client and the client asks Counsel to keep that information confidential, the duty to preserve secrets obligates Counsel to abide by his or her client’s wishes not to disclose the overpayment. LACBA Opinion No. 504 (attorney ethically prohibited from disclosing information regarding sexual abuse disclosed by the client to the attorney in confidence); LACBA Opinion No. 417 (attorney may not disclose confidential information learned through the attorney-client relationship, absent client consent, even where the client has determined to follow a future course of conduct which will result in receiving monies to which it would appear the client is not entitled); LACBA Opinion No. 452 (attorney may not disclose information regarding his former client to bankruptcy trustee without client consent); *see also* COPRAC Formal Opinion No. 1988-96 (attorney may not disclose fact that client, while serving as a trustee of an insurance trust for a minor, had misappropriated a substantial portion of the trust proceeds); and COPRAC Formal Opinion No. 1981-58 (attorneys may not disclose the contents of a report from an engineer where

the client has instructed the attorneys not to disclose, even though the report warns that a structure on the property may not survive an earthquake).<sup>1</sup>

It is equally clear that Counsel should use every effort to cause the client to disclose the overpayment without violating the confidential communication rule. LACBA Opinion No. 267. However, Counsel's duty of loyalty is to the client and not the adverse party. *Skarbrevik v. Cohen, England & Whitfield*, 231 Cal.App.3d 692, 702 (1991) ("An attorney has no duty to protect the interests of an adverse party for the obvious reasons that the adverse party is not the intended beneficiary of the attorney's services, and that the attorney's undivided loyalty belongs to the client."). Thus, should the client insist on nondisclosure, Counsel is obligated to preserve his/her client's secrets. LACBA Opinion No. 386 ("The exception to the requirement to preserve client [] secrets in the case of an announced intention of a client to commit a crime does not extend in California to the prevention of an intended civil fraud, as opposed to an actual criminal act.").

### III. Counsel Must Consider Whether Withdrawal Is Appropriate or Required

Although Counsel is required to preserve the client's secrets, Counsel is not obligated to continue representing the client. Under Rule 3-700(B)(2) of the Rules of Professional Conduct Counsel *must* withdraw if Counsel "knows or should know" that continued representation will result in a violation of the Rules of Professional Conduct or the State Bar Act (Cal. Bus. & Prof. Code § 6000 et seq.). Under Rule 3-700(C)(2), Counsel *may* withdraw if the continued employment "is likely to result" in a violation of the Rules or the State Bar Act. *See* LACBA Opinion No. 498 and COPRAC Formal Opinion No. 1988-96. To assist the client in committing a fraud on the adverse party would be a violation of the State Bar Act. Cal. Bus. & Prof. Code

---

<sup>1</sup> COPRAC Formal Opinion No. 1981-58 was published before the amendment of section 6068 by the addition of section 6068(e)(2) which provides: "Notwithstanding paragraph (1), an attorney may, but is not required to, reveal confidential information relating to the representation of a client to the extent that the attorney reasonably believes the disclosure is necessary to prevent a criminal act that the attorney reasonably believes is likely to result in death of, or substantial bodily harm to, an individual." *See also* Cal. Rules of Prof. Conduct, Rule 3-100(B). However, an "attorney should not determine that he has the right to make a voluntary disclosure pursuant to the exception for preventing future crimes unless he has no doubt of the existence of an imminent danger that a crime will be committed." LACBA Opinion No. 264.

§ 6106; *see also* Cal. Rules of Prof. Conduct, Rule 3-210. However, the issue of whether the facts presented here constitute fraud by the client is a legal issue and, in keeping with its long-standing policy, the Committee declines to address legal issues raised by an inquiry. LACBA Opinion No. 504.<sup>2</sup>

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

---

<sup>2</sup> It should be noted, however, that “[a]n attorney’s duty to maintain the client’s confidences does not extend to affirmative acts which further a client’s unlawful conduct.” *In re Young*, 49 Cal.3d 257, 265 (1989).