

**LOS ANGELES COUNTY BAR ASSOCIATION
PROFESSIONAL RESPONSIBILITY AND ETHICS COMMITTEE**

OPINION NO. 521
May 21, 2007

**DOES A LAWYER OR LAW FIRM HAVE AN
ETHICAL CONFLICT OF INTEREST WHEN A FEE DISPUTE ARISES
WITH A CLIENT DURING THE REPRESENTATION?**

Summary

Fee disputes between attorneys and clients are a fact of life. In Committee Opinion No. 476, the Committee opined that it is improper for an attorney to sue a client for unpaid fees while remaining counsel of record for the client. This Opinion addresses whether a lawyer or law firm has an ethical conflict of interest in continuing to represent a client after a fee dispute arises during the course of the representation. The Committee concludes: (1) a fee dispute does not require a lawyer or law firm to seek to withdraw; (2) a fee dispute, by itself, does not create an ethical conflict of interest; and (3) a fee dispute, where the lawyer does not have any lien rights, is not an adverse pecuniary interest in a client's property.

TABLE OF AUTHORITIES

Cases

Aldasoro v. Kennerson (S.D.Cal. 1995) 915 F.Supp. 181
Barnard v. Langer (2003) 109 Cal.App.4th 1453
Flatt v. Superior Court (1994) 9 Cal.4th 275
Fletcher v. Davis (2004) 33 Cal.4th 61
Floro v. Lawton (1960) 187 Cal.App.2d 657
Hawk v. State Bar (1988) 45 Cal.3d 589
In re Friedman (2002) 100 Cal.App.4th 65
Manfredi & Levine v. Superior Court (1998) 66 Cal.App.4th 1128
People v. McKenzie (1983) 34 Cal.3d 616
Pineda v. State Bar (1989) 49 Cal.3d 753

Ramirez v. Sturdevant (1994) 21 Cal.App.4th 904
Santa Clara County Counsel Attys. Assn' v. Woodside (1994) 7 Ca1.4th 525
Setzer v. Robinson (1962) 57 Ca1.2d 213
Vann v. Shilleh (1975) 54 Ca1.App.3d 192
Walton v. Broglio (1975) 52 Cal.App.3d 400

Statutes

Business and Professions Code § 6201
Civil Code § 2235
Probate Code § 16004

Rules of Professional Conduct

Rule 3-110
Rule 3-300
Rule 3-310
Rule 3-700
Rule 4-200

Opinions

COPRAC Formal Opinions 2006-170
LACBA Formal Opinions 212
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Cal. Rules of Court, rule 3.1362

FACTS AND ISSUES PRESENTED

Client retained Law Firm to defend it in connection with an action filed in state court (the "Litigation"). They entered into a standard written retainer agreement, calling for Law Firm to provide legal services on an hourly basis. The written retainer agreement informs Client of its right to discharge Law Firm at any time. The written retainer agreement does not give Law Firm a lien on, or any other security interest in, any of Client's property.

During the Litigation, disputes arose between Client and Law Firm over Law Firm's billings. Client, through its general counsel, contends Law Firm's bills are too high and refuses to pay the bills. At no time during the representation were claims made by the Client regarding the quality of legal services provided.

Law Firm does not represent Client in any other matter.

ISSUES

Can Law Firm continue to represent Client in the Litigation after the fee dispute arises? Is a fee dispute during legal representation an ethical conflict of interest? Is a lawyer's fee claim against a client an adverse pecuniary interest?

I. IT IS NOT AN ETHICAL CONFLICT OF INTEREST FOR LAW FIRM TO CONTINUE WITH THE REPRESENTATION IN LIGHT OF FEE DISPUTE.

A. Introduction.

None of the California Rules of Professional Conduct¹ specifically addresses whether a lawyer or law firm has an ethical conflict of interest when a dispute arises with the client over the attorney's compensation. Instead, the Rules address specific issues regarding the attorney-client relationship, some of which may have a bearing on the attorney's compensation, such as Rule 3-300's requirement that an attorney not obtain an "interest adverse to a client" unless certain criteria are satisfied (discussed in Section D below). Another example is Rule 3-310(b)(4), which provides that a lawyer may have an ethical conflict of interest where the lawyer has a "financial . . . interest in the subject matter of the representation." However, that Rule, by its

¹ Hereafter, any reference to a "Rule" or "Rules" is to the California Rules of Professional Conduct, unless otherwise indicated.

plain terms, does not apply to the facts presented in this Opinion because Law Firm does not have any financial interest in the Litigation.

None of the specific prohibitions in the Rules regarding an attorney's compensation agreement with a client provide that in the event of a dispute with the client over the attorney's compensation, the attorney has an ethical conflict of interest. Nor does case law hold that a fee dispute creates an ethical conflict of interest.

In reaching this conclusion, it is important to keep two points in mind. First, this Opinion only addresses ethical conflicts of interest under the Rules of Professional Conduct. Although Law Firm and Client may have a "conflict" in the lay sense of that phrase, such "conflicts" do not raise ethical issues under the Rules, unless they escalate to a level where one of the other ethical rules becomes an issue. Thus, the Committee concludes that the Rules do not compel Law Firm to take any affirmative steps merely because of the fee dispute. As one court has noted, "the tension between lawyer and client about fees always exists" ² Second, so long as Law Firm stays as counsel of record in the Litigation it must continue to "perform legal services with competence."

B. Rule 3-700 Permits The Law Firm To Remain Counsel Of Record During The Litigation, Notwithstanding A Fee Dispute.

Once the fee dispute arises, the fee dispute by itself does not require Law Firm to seek to withdraw as counsel of record in the Litigation. Withdrawal is governed by Rule 3-700, which

² *Barnard v. Langer* (2003) 109 Cal.App.4th 1453, 1459.

³ Rule 3-110(A) reads in relevant part:

(A) A member shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence.

provides that withdrawal is mandatory in some instances (subparagraph (B)) and permissive in other instances (subparagraph (C)). Rule 3-700(C)(1)(0 provides that withdrawal may be permissive in the event the "client breaches an agreement or obligation" to an attorney regarding fees. Therefore, when a fee dispute arises, withdrawal can be permissive, not mandatory, although a lawyer may not abandon a client⁴ or withdraw "at a critical point and thereby prejudic[e] the client's case."⁵

The implication in making withdrawal permissive, rather than mandatory, is that an attorney *may* continue to represent a client notwithstanding the existence of a fee dispute and, hence, no ethical conflict of interest exists under the Rules. Therefore, by making withdrawal permissive when a fee dispute arises, Rule 3-700 effectively permits an attorney or law firm to make a "business judgment" about whether to remain counsel of record and continue representation of the client or to seek to withdraw. Inherent in such a decision is the lawyer's and/or law firm's pecuniary and self-interest.

The Committee's conclusion is also drawn from other factors. Generally, the negotiation of fees, including retainer agreements, between an attorney and a client is an arms-length transaction.⁶ While there is a statutory presumption that transactions between an attorney and a client entered into during an attorney-client relationship "is presumed to be a violation of the trustee's fiduciary duties,"⁷ that statutory presumption does *not*, by its plain terms, apply to

4 *See Pineda v. State Bar* (1989) 49 Ca1.3d 753, 758-759.

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Ramirez v. Sturdevant (1994) 21 Cal.App.4th 904, 915, citing Rules Prof. Conduct, rule 3-700(A)(2) and *Vann v. Shilleh* (1975) 54 Cal.App.3d 192, 197; *see also* L.A. County B. Ass'n Prof. Resp. Ethics Committee (1994) Opinion No. 476, electronically available at <<http://www.lacba.org/showpage.cfm?pageid=456>>.

6 *Setzer v. Robinson* (1962) 57 Ca1.2d 213, 217.

7 Prob. Code § 16004(c).

attorney-client fee agreements.⁸ Therefore, attorneys are generally permitted to negotiate their fees with their clients on an arms-length basis, subject to the general rule that a lawyer may not "enter into an agreement for, charge, or collect an illegal or unconscionable fee."⁹

However, the Committee's conclusion that Law Firm is not *required* to file a motion to withdraw is not the end of the matter. So long as Law Firm remains counsel of record, it must not "fail to perform legal services with competence," under Rule 3-110(A), or otherwise breach its ethical duties. The fee dispute does not relieve Law Firm of those obligations so long as it remains counsel of record.¹⁰ If the fee dispute reaches a point where Law Firm believes that it can no longer adequately represent Client's interests in the Litigation, then it should file a motion to withdraw." Moreover, if the fee dispute becomes sufficiently contentious or adversarial, the attorney may seek to withdraw, not because of the mere existence of the fee dispute, but because the nature of the consequences of the fee dispute are such that it is "unreasonably difficult . . . to carry out employment effectively," under Rule 3-700(C)(1)(d). Such issues are not raised by the facts of this Opinion.

⁸ *Walton v. Broglio* (1975) 52 Cal.App.3d 400, 404; *see also Ramirez v. Sturdevant* (1994) 21 Cal.App.4th 904, 917.

⁹ Rules Prof. Conduct, rule 4-200(A). The facts of this Opinion do not implicate any such issues.

¹⁰ Nothing in this Opinion should be interpreted as suggesting that the nonpayment of fees by a client results in the lawyer or law firm rendering legal services below the standard of care. This Opinion does not address standard of care issues, which are outside the jurisdiction of this Committee.

See Manfredi & Levine v. Superior Court (1998) 66 Cal.App.4th 1128, 1135 ["unpaid fees to counsel" may constitute grounds for a motion to withdraw; decision discusses other situations where an attorney may seek withdrawal].)

Accordingly, the Committee believes that a fee dispute, by itself, does not require a lawyer or law firm to seek to withdraw as counsel of record.¹²

C. A Fee Dispute, By Itself, Does Not Create An Ethical Conflict Of Interest Within The Scope Of Rule 3-310.

The general definition of a conflict of interest is "when in behalf of one client, it is [the lawyer's] duty to contend for that which another client requires him to oppose."¹³ Conflicts of interest are usually governed by Rule 3-310. Rule 3-310, however, generally involves "conflicts of interest" that arise by virtue of the attorney's relationship among various clients.¹⁴ Nothing in Rule 3-310 addresses fee disputes between an attorney and a client and no case has ever held that a fee dispute, by itself, constitutes a conflict of interest under Rule 3-310.

As noted, Rule 3-310(b)(4) does not apply because Law Firm does not have any financial interest in the Litigation. Moreover, the California Supreme Court has held that Rule 3-310(b)(4) "addresses not the existence of general antagonism between lawyer and client, but tangible conflicts between the lawyer's and client's interests in the subject matter of the representation."¹⁵ The Committee believes that the fee dispute between Law Firm and Client falls within the rubric of "general antagonism between lawyer and client" which does not implicate Rule 3-310.¹⁶

¹² A fee dispute may also form part of the basis for an attorney seeking mandatory withdrawal under Rule 3-700(B), but the facts of this Opinion do not implicate such issues.

¹³ *Flatt v. Superior Court* (1994) 9 Ca1.4th 275, 282, fn.2.

¹⁴ See Rules of Prof. Conduct, rule 3-310(C).

¹⁵ *Santa Clara County Counsel Attys. v. Woodside* (1994) 7 Ca1.4th 525, 547.

¹⁶ *Ibid.*; see also *Barnard v. Langer, supra*, 109 Cal.App.4th at p. 1459 [rejecting contention that a fee dispute between a law firm and client created a conflict of interest, citing *Santa Clara County Counsel Attys. Ass'n v. Woodside, supra*, 7 Ca1.4th at p. 547].

The Committee's opinion is supported by other considerations. Attorneys by their very nature act in a dual role: as an advocate for their client and as a business for themselves." As noted, the *potential* for a "conflict" (in the lay, not ethical, sense) between the lawyer's financial interests and those of the client exists in *every* attorney-client relationship, whether on a contingency basis or for an hourly fee, just as they do in any other commercial transaction.¹⁸ Fee disputes arise in a variety of contexts. A client may simply call a lawyer and ask for a \$500 reduction in an invoice for no reason at all. Or a client may be experiencing financial difficulties and is asking for a reduction in fees for that reason. Once a dispute is created, the amount is irrelevant. In the experience of the members of the Committee, the vast majority of "fee disputes" are resolved amicably between the client and the lawyer/law firm with little if any acrimony. Some do not resolve amicably and the client has legal options available. However, the Committee does not believe that a fee dispute, by itself, creates a conflict of interest under Rule 3-310.

Therefore, the Committee concludes that a fee dispute, by itself, is not an ethical conflict of interest under Rule 3-310. This conclusion is consistent with Rule 3-700 because, as discussed above, that Rule permits a lawyer to remain as counsel of record, notwithstanding a fee dispute. Because the Committee concludes that Rule 3-310 is not implicated, it follows that Law Firm does not have to make any disclosures, obtain Client's written, informed consent to

¹⁷ "The lawyer occupies an anomalous position. *He practices a profession but in doing so he carries on a business*; he is an officer of the court and as such he should not attempt to evade or impede the orderly administration of justice; he is the agent of a citizen in matters of dispute between citizens or between the citizen and the state; and at the same time and in all things he must pursue the course which is consistent with recognized professional conduct." (*Floro v. Lawton* (1960) 187 Cal.App.2d 657, 673, italics added.)

¹⁸ *Barnard v. Langer, supra*, 109 Cal.App.4th at p. 1459.

continue with the representation, or otherwise comply with any of the procedural requirements in Rule 3-310(C).¹⁹

D. A Fee Dispute Is Not An Adverse Pecuniary Interest To A Client Within The Scope Of Rule 3-300.

Rule 3-300 provides that an attorney shall not "enter into a business transaction with a client, or knowingly acquire an ownership interest, possessory or other pecuniary interest adverse to a client," unless the criteria of paragraphs (A)-(C) of the Rule are satisfied. The Discussion Note to Rule 3-300 clearly states that Rule 3-300 is not intended to apply to "the agreement by which the member is retained by the client, unless the agreement confers on the member an ownership, possessory, security or other pecuniary interest adverse to the client."

In *Fletcher v. Davis* (2004) 33 Ca1.4th 61, 67-69, the California Supreme Court held that a charging lien contained in an attorney's retainer agreement was an adverse pecuniary interest within the meaning of Rule 3-300.²⁰ The Court based its ruling upon the fact that a

"charging lien could significantly impair the client's interest by delaying payment of the recovery or settlement proceeds until any disputes over the lien can be resolved. For example, when there is a dispute over the existence or amount of an attorney's charging lien, the attorney can prevent the judgment debtor or the settling party from remitting the recovery to the client until the dispute is resolved."

¹⁹_____ It is difficult to see what practical effect requiring Law Firm to obtain written, informed consent would have, or how Client is prejudiced by the lack thereof. Once the fee dispute arose, Client is undoubtedly aware of the fee dispute, has an in-house general counsel representing its interests, was informed in the retainer agreement of its right to discharge Law Firm, and impliedly consents to the representation continuing. (*Cf. In re Friedman* (2002) 100 Cal.App.4th 65, 71; *Ramirez v. Sturdevant, supra*, 21 Cal.App.4th at p. 918.) In addition, if obtaining written, informed consent were mandated, if the client withheld such consent, the lawyer would then be forced to seek to withdraw, contrary to Rule 3-700, which makes withdrawal permissive rather than mandatory.

²⁰ *Cf. Cal. State Bar Form. Opn. No. 2006-170* [opining that rule of *Fletcher v. Davis, supra*, 33 Ca1.4th 61, does not apply to contingent fee agreements].

(*Id.* at pp. 68-69.) The Court, however, contrasted a charging lien with a with an unsecured promissory note, which

"gives an attorney only a right to proceed against the client's assets in a contested judicial proceeding at which the client may dispute the indebtedness. The note allows the attorney to obtain a judgment, and to seek to enforce the judgment against the client's assets, if any. *It does not give the attorney a present interest in the client's property which the attorney can summarily realize.*"

(*Id.* at p. 68, italics added.)

Here, Law Firm's retainer agreement does not give Law Firm any lien rights. Instead, Law Firm's billing statements sent to Client are simply a demand for payment. Like an unsecured promissory note, the billing statements do "not give the attorney a present interest in the client's property which the attorney can summarily realize."²¹ Law Firm would have to bring a judicial action against Client for unpaid fees, which Client could contest. Law Firm would have to reduce its claim to fees to a judgment after an adversarial proceeding.²² Thus, Law Firm's unsecured demand for payment of fees is similar to an unsecured promissory note, which *Fletcher* and *Hawk* held did not implicate Rule 3-300.

As noted, in Committee Opinion No. 476, the Committee opined that it is improper for an attorney to sue a client for unpaid fees while remaining counsel of record for the client. Opinion No. 476 also noted that in Opinion No. 212, the Committee opined that an attorney should withdraw from all matters in which representation is being provided to the client *prior to* commencing litigation for costs or fees. The Committee reaffirms these Opinions and believes that is where the "line should be drawn" in the context of fee disputes between attorneys and

²¹ *Hawk v. State Bar* (1988) 45 Ca1.3d 589, 600-601.

²² Even then, a judgment under California law does not create lien rights. (*Aldasoro v. Kennerson* (S.D.Cal. 1995) 915 F.Supp. 181, 191 ["A judgment does not automatically constitute a lien on anything in California, absent further actions by the judgment creditor".])

clients, *i.e.* Law Firm cannot sue Client for unpaid fees *during* the representation.²³ Because Law Firm's demand for payment cannot be reduced to a judgment or lien without first filing a judicial action, it follows that the fee dispute itself is not obtaining an adverse pecuniary interest to Client within Rule 3-300 and does not require compliance with the requirements of that Rule.

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

²³ Although outside the scope of this Opinion, the reader is reminded that prior to suing a client for fees, an attorney must send a notice of right to arbitrate under California Business & Professions Code section 6201, et seq.