

LOS ANGELES COUNTY BAR ASSOCIATION

ETHICS COMMITTEE

FORMAL OPINION NO. 456

(August 21, 1989)

CONFIDENTIAL COMMUNICATIONS -- Without the client's informed consent, a lawyer may not voluntarily disclose to a third party who has agreed to indemnify the lawyer's client pursuant to a non-insurance contract information contained in the lawyer's bills for services rendered to the client about the specific work performed, the time spent on the client's matter and the fees and costs incurred.

AUTHORITIES CITED:

LACBA Op. Nos. 267, 305, 374, 386, 409, 417, 436; Commercial Standard Title Co. v. Superior Court (1979) 92 Cal. App. 3d 934; Goldstein v. Lees (1975) 46 Cal. App. 3d 614; Hays v. Wood (1979) 25 Cal. 3d 772; Russo, Johnson, Russo & Ebersold v. Superior Court; (1987) 191 Cal. App. 3d 1514; Willis v. Superior Court (1980) 112 Cal. App. 3d 277; Bus. & Prof. Code § 6068(e); Evid. Code § 952

The inquiring attorney's client has been indemnified by a third party under a written contract. Pursuant to the indemnity, the client has made a demand on the third party for reimbursement of the attorney's fees. In turn, the third party has demanded copies of the attorney's bills.

The attorney's inquiry poses five questions: (1) are the bills confidential, (2) if so, must the attorney preserve the

confidentiality of the information in the bills, (3) is the attorney required to provide the bills to the third party, (4) may the attorney expurgate portions of the bills containing confidential information before producing them to the third party, and (5) does it make any difference that the indemnity pertains only to reimbursement of reasonable attorney's fees.

It is assumed that the bills contain detailed descriptions of work performed and state time spent and the expenses and fees incurred while representing the client. It is also assumed that the attorney and client have maintained the confidentiality of the information contained in the bills. It is further assumed that the contract in question is not an insurance policy and that the inquiring lawyer is therefore not subject to the duties imposed by Civil Code Section 2860. Finally, this opinion does not address disclosure of billing information in connection with an application for payment of attorney fees in a judicial proceeding.

An attorney has a duty "to maintain inviolate the confidence, and at every peril to himself to preserve the secrets, of his or her client." (Bus. & Prof. Code §6068(e).) The duty is owed to both present and former clients. (Commercial Standard Title Co. v. Superior Court (1979) 92 Cal.App.3d 934, 945.) Unless the disclosure is compelled by law, a lawyer cannot disclose client confidences or secrets to a third party without the client's informed consent. (Opinion No. 389; Commercial

Standard, supra, at 945.)

For purposes of the attorney-client privilege, the Evidence Code defines a confidential communication between a client and lawyer as "information transmitted between a client and his lawyer in the course of that relationship in confidence." (Evid. Code §952.) While the foregoing definition would include information in an attorney's bills to a client, the protection afforded client confidences under Business and Professions Code section 6068(e) is broader than the attorney-client privilege. (Goldstein v. Lees (1975) 40 Cal.App.3d 614, 612 n.5.) In previous opinions this Committee has adopted the definition of "confidence" and "secret" in former A.B.A. Code of Professional Responsibility DR 4-101(A) which states:

"'Confidence' refers to information protected by the attorney-client privilege under applicable law, and 'secret' refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would likely to be detrimental to the client." (Opinions 386 and 436.)^{1/}

^{1/} The A.B.A. Model Rules of Professional Conduct, which supersedes the Code of Professional Conduct, expands the standard by eliminating the "confidence"/"secret" distinction. Rule 1.6 states that a lawyer shall not reveal "information relating to the representation of a client" without the client's consent.
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Consistent with the definitions in DR 4-101(A), this Committee has found that section 6068(e) applies to information and documents obtained from third parties in the course of a lawyer's representation of the client. (Opinion Nos. 305, 386, 417 and 436.) The Committee has also found that the rule applies where the facts are already part of the public record or where there are other sources for the information. (Opinion No. 267.)

In Opinion No. 374, the Committee noted that "detailed time records describing the service performed are likely to contain information which is confidential." In particular, specific work descriptions, time charges and amounts of fees and expenses are all types of information commonly found in attorney bills that relate to the representation of the client. Such information may also concern matters affecting the client's finances in situations where the client is paying all or part of the fees. For any number of reasons a client might not want such information disclosed to third parties, including that the information may be embarrassing or detrimental to the client.

In Opinion No. 374, this Committee also recognized that not all of the information in a lawyer's bill is necessarily confidential or secret. The Committee noted that information

The Rule also eliminates the requirement that the client request the information be held inviolate or that disclosure be embarrassing or detrimental to the client. However, because section 6068(e) continues to use the terms "confidence" and "secrets", this Committee continues to rely on the definitions in DR 101(A).

about the name, address, and nature of a client's matter does not normally involve section 6068(e) "since such information usually constitutes neither a confidential communication nor a secret." Information about the nature of the client's fee arrangement is also generally not considered a confidence or secret. (Willis v. Superior Court (1980) 112 Cal.App.3d 277, 291.) However, such information may be within the scope of section 6068(e) if disclosure would expose the client to criminal or civil liability (Hays v. Wood (1979) 25 Cal.3d 772, 785) or necessarily reveals other confidential information (Russo, Johnson, Russo & Ebersold v. Superior Court (1987) 191 Cal.App.3d 1514, 1519).

Based on the foregoing principles, this Committee concludes that information in a lawyer's bills to a client about time spent, expenses and fees incurred and specific work performed in connection with the lawyer's representation of that client may be within the scope of section 6068(e). However, absent special circumstances, information in the bills identifying the client or referring generally to the nature of the work and fee arrangement is not within the scope of section 6068(e). The lawyer must not disclose information in the bills that is within the scope of section 6068(e) without the client's informed consent.

For a client's consent to be informed, the lawyer should fully advise the client about the nature of the information in the bills, the purpose of the disclosure, the benefits and detri-

ments, both legal and otherwise, which may result from the disclosure or non-disclosure and any other facts could have an important bearing on the client's decision. (See Opinion No. 409.) It is advisable that both the lawyer's advice and the client's consent to be in writing, although the Rules of Professional Conduct do not require it. (Id.)

If the client consents to disclosure of only part of the information in the bills, the lawyer may be required to redact information or rewrite the statements in order to protect information which the client chooses to keep confidential. The fact that the contract calls for reimbursement of reasonable fees has no bearing on the confidentiality of information in the bills or on the attorney's duty to maintain the confidentiality of that information.

It is the client's choice whether to reveal the information, not the lawyer's. The Committee expresses no opinion on whether failure to disclose information in the bills might prejudice the client's right to enforce the indemnity agreement. However, the potential for such a result should be considered in advising the client about consenting to disclose.

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