

LOS ANGELES COUNTY BAR ASSOCIATION

ETHICS COMMITTEE

NOVEMBER 21, 1988

OPINION NO. 452

CONFIDENTIAL INFORMATION - DISCLOSURE IN BANKRUPTCY PROCESS BY FORMER COUNSEL OF DEBTOR WHO IS TRYING TO COLLECT FEE. Former counsel of bankruptcy debtor may make claim in bankruptcy case for outstanding fee bill, and may file adversary proceeding to have debt declared nondischargeable. Counsel may not assist trustee or other creditors in locating assets of estate or prosecute objection to discharge.

AUTHORITIES CITED:

California Business & Professions Code § 6068(e)
California Evidence Code § 958
ABA Model Rule of Professional Conduct, Rule 1.6
L.A. County Opinion Nos. 386, 274

The inquiring attorney defended a client who was a debtor in an involuntary bankruptcy case. During the involuntary case the client replaced the attorney, leaving a substantial unpaid bill. The new attorney has since been replaced by the client acting in propria persona. An order for relief has been entered in the bankruptcy case, and it is proceeding under Chapter 7 of the Bankruptcy Code.

Through conversations with and representation of the former client, the attorney acquired substantial knowledge of the former client's complex business affairs. The attorney claims that the information is not unique, but that it amounts to a general overview of the complex business affairs of the client that could be of great assistance to a creditor or the trustee. Because of the complexity of these business affairs, the attorney's knowledge could save the bankruptcy trustee considerable time in locating assets, and make it more likely that assets will be located. It is likely that nobody else has comparable knowledge of the former client's affairs.

The attorney has filed a claim for his fees in the Chapter 7 case. He would include, for example, assisting the trustee in locating valuable assets and in examining the debtor. It may also include objecting to the debtor's discharge, or prosecuting a proceeding to have the attorney's debt declared nondischargeable.

Based on this factual situation, the attorney poses four questions:

1. Would he violate any fiduciary relationship, privilege, or ethical standard by exercising the rights of a creditor in the bankruptcy case?

2. If he possesses confidential information, may he use non-confidential information in the exercise of the rights of a creditor?

3. May he use the confidential information to pursue the rights of a creditor?

4. In exercising the rights of a creditor, would he expose himself to a malpractice action by the former client, who may claim that the attorney was employed to protect the client's assets?

Discussion

California Business and Professions Code § 6068(e) provides:

It is the duty of an attorney:

(e) to maintain inviolate the confidences, and at every peril to himself to preserve the secrets, of his client. Although "confidence" and "secret" are not defined in the statute or in California case law, this Committee has adopted the definitions of these terms in the analogous provisions of the former ABA Model Code of the Professional Responsibility DR 4-101(A). See L.A. Country Opinions No. 436 and No. 386. DR 4-101(A) provides in part: "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 be likely to be detrimental to the client.

The policy against disclosure of confidences and secrets is strictly enforced, and any exceptions are narrowly construed. See L.A. County Opinions No. 436, No. 386 and No. 274; People v. Singh, 123 Cal.App. 355 (1932). The rule applies even where there are other sources of information. L.A. County Opinions NO. 386 and No. 267. The obligation to protect a client's confidences and secrets continues, notwithstanding the termination of the attorney-client relationship. In the inquiry before the Committee the information that the attorney possesses was acquired during the course of his representation of the former client. Any of the information that is not confidential information certainly does qualify as a client secret, because the attorney himself proposes to use it to the detriment of the former client. Cf. L.A. County Opinion NO. 436 (non-confidential information obtained during attorney-client relationship protected by section 6068(e); L.A. County Opinion NO. 386 (Non-confidential information obtained after termination of attorney-client relationship protected by section 6068(e)). Thus unless the former client authorizes disclosure, the information may not be disclosed, unless an exception to section 6068(e) is applicable. There is no privilege under this article 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.

Section 958 is formally addressed only to communications that are privileged, and thus are defined as "**confidences**" under section 6068(e). However, the exception expressed in section 958 applies to "secrets" under section 6068(e) as well.

The section 958 exception is most commonly invoked to permit an attorney to testify in his or her own behalf to collect a fee, or to defend himself or herself in a malpractice action brought by the client. The comment of the Law Revision Commission states: It would be unjust to permit a client either to accuse his attorney of a breach of duty and to invoke the privilege to prevent the attorney from bringing forth evidence in defense of the charge or to refuse to pay his attorney's fee and invoke the privilege to defeat the attorney's claim.

In collecting a fee or defending against a malpractice action an attorney may disclose both confidential information and client secrets, but only to the extent necessary to the action.

Filing a claim in a bankruptcy case to collect a fee is covered by this exception. Thus an attorney may file his or her claim and may use confidences and secrets to litigate it if the claim is contested. However, the attorney should seek appropriate protective orders to prevent disclosure of confidences or secrets beyond what is necessary to litigate the claim. See L.A. County Opinion No. 386; Comment to ABA Model Rule 1.6(b).

An adversary proceeding to have a debt declared non-dischargeable under Bankruptcy Code § 523 is also a fee-collection process that permits the disclosure of client confidences and secrets. Thus the attorney may prosecute such a proceeding, if the attorney has such a cause of action under section 523. However, as in any fee collection action, the attorney should avoid the disclosure of confidences and secrets to the extent feasible, and should obtain appropriate confidentiality orders for this purpose.

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The inquiring attorney apparently also desires to participate in the collective collection effort of the bankruptcy process, and to exercise the rights of any other creditor in this process. This might include providing information to the trustee, examining the debtor in the presence of the trustee or other creditors, and objecting to the discharge of the debtor's debts. Such participation may substantially enlarge the pool of assets available for distribution to the attorney. This raises the question of whether such conduct falls within the fee-collection exception to section 60689e).

In the opinion of this Committee, collective actions to collect debts generally from a former client do not fall within the scope of this (or any other) exception. It is improper for a former attorney to disclose any confidential or secret information concerning a client in the collective collection effort in the client's bankruptcy case. This includes information obtained both during the representation of the former client and outside this

time period. In effect, this requires the attorney to be a bystander in the collective effort. Thus the attorney may not use confidential or secret information to challenge the right of his former client to a discharge, and may not disclose such information to the trustee or other creditors.

A failure by the former client to disclose all of the assets **known** to the attorney in the bankruptcy case may constitute bankruptcy fraud by the former client. Competing with the obligation to protect client confidences and secrets is an attorney's obligation to rectify any fraud or deception which has been imposed upon the court or a party. California Business & Professions Code S 6068(d); L.A. County Opinions No. 386 and No. 271; Hinds v. State Bar, 19 Cal.2d 87, 93 (1943) (dictum). However, this exception applies only to fraud committed during the course of the attorney's representation of the client. L.A. County Opinion NO. 386. Because any such nondisclosure would come after the termination of the attorney-client relationship, the attorney may not base any disclosure of the former client's business relations on this exception to section 6068(e).

Thus, the answers to the specific questions are as follows: 1.

The attorney may make a claim in the bankruptcy case, and may prosecute a dischargeability proceeding as to the claim. However, it is an ethical violation to object to the debtor's discharge, or to assist the trustee or other creditors in recovering assets. The Committee expresses no opinion on whether such actions

would violate any fiduciary duty or privilege, because these are issues of law. 2. The attorney may not use non-confidential information, except as permitted in the response to question No.1, without consent of the former client, because such information constitutes "secrets" protected by section 6068(e). 3. The attorney may use confidential information only as permitted in the response to question No.1.4. This question raises an issue of law, on which the Committee does not give an opinion.

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