LOS ANGELES COUNTY BAR ASSOCIATION
PROFESSIONAL RESPONSIBILITY AND ETHICS COMMITTEE

OPINION NO. 519

February 26, 2007

WHETHER THERE IS A SELF-DEFENSE EXCEPTION TO AN ATTORNEY'S DUTY TO PROTECT AND PRESERVE CONFIDENTIAL CLIENT INFORMATION IN ORDER TO PERMIT THE ATTORNEY TO DEFEND AGAINST THIRD PARTY CLAIMS

SUMMARY

Under current California law, an attorney cannot, without his or her former or present client's consent, disclose the client's privileged communications with the attorney or the client's confidential information, for the purpose of defending allegations brought against the attorney by a third party. No matter how critical the client's information is to the lawyer's defense, there is no statutory "self-defense" exception to the attorney-client privilege or the lawyer's duty to maintain the confidentiality of client information under Business and Professions Code § 6068(e). Of course, such evidence would be available upon the client's informed consent to such disclosure or as to information otherwise protected by the lawyer-client privilege. While there is authority for such disclosures in other jurisdictions and in the federal courts, it remains an open question whether a California court, on application by the attorney, may order the limited disclosure of the privileged communication or, in the alternative, may dismiss the action against the attorney because of the attorney's inability to use the evidence to defend the third party action.

AUTHORITIES CITED

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Treatises

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FACTS AND ISSUES PRESENTED

Attorney assisted her corporate client in preparing a Private Placement Memorandum ("PPM"), including a Trust Indenture which became an exhibit to the PPM and was distributed by the corporation's agents to potential note purchasers. After many notes had been sold and Attorney was no longer representing the corporation, an involuntary Chapter 7 bankruptcy proceeding was brought against the corporation. Almost all of the note purchasers filed claims in the proceeding. At the same time, purported class representatives of the note purchasers filed a class action against the corporation's principals, Attorney and other parties. The causes of action against Attorney are violations of state and federal securities laws, common law fraud and legal malpractice. The principals cannot be located, are insolvent, or both. Although they have not appeared in the class action, their defaults have not been taken.

The Chapter 7 trustee has filed a separate suit on behalf of the corporation against Attorney in state court for legal malpractice, alleging different acts of negligence than those alleged in the class claims. The malpractice action has not been consolidated or coordinated with the class action. The trustee has not acknowledged that this suit constitutes a waiver of the corporation's attorney-client privilege.

Attorney contends that she cannot defend against the class claims without disclosing communications between her and representatives of the corporation. Nonetheless, the bankruptcy trustee has refused to waive the attorney-client privilege for purposes of the class action and has instructed Attorney that under no circumstances is she to disclose in the class action any privileged confidential communications between herself and the corporation's representatives regarding her representation of the corporation.

The Inquirer seeks the Committee's opinion as to whether Attorney may disclose the

attorney-client communications with the corporation to defend against the third-party class claims and, assuming that she may, in this instance, avail herself to a "self-defense exception" to the attorney-client privilege, how she can most prudently assert that right. Lastly, the Inquirer asks whether the privileged communications she may use in her defense of the malpractice action may also be used in her defense of the class claims.

The Committee's Opinion below is presented in three parts. First we examine the relevant rules and statutes relating to our determination that there is no currently recognized self-defense exception in the context of third party actions against attorneys. In the second part of this Opinion, we briefly analyze case law, primarily federal and from other jurisdictions, suggesting that the courts may, on application, permit limited disclosures in aid of an attorney's defense of a third party claim. Third, we discuss the ethical issues that arise in the context of seeking client consent to waive the attorney-client privilege.

DISCUSSION

The attorney's duty to maintain client confidences is fundamental to the profession. This duty is captured in statutory law (Business and Professions Code and Evidence Code) and in the California Rules of Professional Conduct. Under California Business and Prof. Code § 6068(e)(1), an attorney has a duty "to maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client." This fundamental duty is also set forth in the newly approved Rule 3-100(A), which provides that "A member shall not reveal information protected from disclosure by Business and Professions Section 6068, subdivision (e)(1) without the informed consent of the client, or as provided in paragraph (B) of this rule." Subsection (B) states that "A member may, but is not required to, reveal confidential information relating to the representation of a client to the extent that the member reasonably believes the

disclosure is necessary to prevent a criminal act that the member reasonably believes is likely to result in death of, or substantial bodily harm to, an individual."[1] Further, pursuant to the California attorney-client privilege[2], an attorney has a duty to maintain the confidentiality of attorney-client communications.[3] The duty requires the affirmative assertion of the privilege in the absence of a client (and, by inference, a client directive otherwise). (California Evidence Code § 955.)

There are various statutory exceptions to the attorney-client privilege recognized in the California Evidence Code, such as "crime-fraud" (section 956) and "joint clients" (section 962), and yet none of these are cross-referenced or have been cited as exceptions to the ethical prohibition in section 6068(e)(1).[4] These are but two instances where the Evidence Code and the

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[1] This disciplinary rule was an outgrowth of the only legislative exception to section 6068(e) ever enacted and its related exception to the attorney-client privilege, California Evidence Code § 956.5, which provides that: "A member shall not reveal information protected from disclosure by Business and Professions Code section 6068, subdivision (e)(1) without the informed consent of the client, or as provided in paragraph (B) of this rule."

[2] "Client" in both section 6068(e) and the attorney-client privilege (*see* Evidence Code §§ 950 *et seq*.) applies to both present and former clients. *See, e.g., Wutchumna Water Co. v. Bailey* (1932) 216 Cal. 564, 571; *David Welch Co. v. Erskine & Tulley* (1988) 203 Cal.App.3d 884, 890; *Commercial Standard Title Co. v. Superior Court* (1979) 92 Cal.App.3d 934, 945.

[3] Whereas the attorney-client privilege concerns "confidential communications" between lawyer and client (California Evidence Code § 952), the scope of the ethical mandate in section 6068(e) is broader. In fact, paragraph 2 of the Discussion accompanying Rule 3-100 indicates that the attorney's duty extends to protecting information that is encompassed by the attorney work product doctrine: "*Client-lawyer confidentiality encompasses the attorney-client privilege, the work-product doctrine and ethical standards of confidentiality.* The principle of client-lawyer confidentiality applies to information relating to the representation, whatever its source, and encompasses matters communicated in confidence by the client, and therefore protected by the attorney-client privilege, matters protected by the work product doctrine, and matters protected under ethical standards of confidentiality, all as established in law, rule and policy. (*See In the Matter of Johnson* (Rev. Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179; *Goldstein v. Lees* (1975) 46 Cal.3d 614, 621 [120 Cal. Rptr. 253].)." *See also* State Bar of California Formal Opn. 2003-161; and Los Angeles County Bar Assn. Formal Opns. 456, 436, and 386.

[4] We do not suggest that an attorney who testifies pursuant to one of these exceptions is subject to discipline, only that the Legislature has not always kept in mind the need for alignment between evidentiary rules and ethical commandments.

Business and Professions Code do not align.

Of import here, Evidence Code § 958 permits an attorney to disclose attorney-client communications in a dispute with a client or former client when the communication is "relevant to an issue of breach, by the lawyer or by the client, of a duty arising out of the lawyer-client relationship."[5] As with sections 956 and 962, this self-defense exception is not recognized in section 6068(e). Nonetheless, it is clear that attorneys are allowed to make disclosures in aid of their defense to a *client* malpractice action, in support of a claim for unpaid legal fees against a *client*[6] and in defense of *client*-initiated State Bar disciplinary complaints.[7] Less clear are the circumstances where a terminated lawyer-employee may make disclosures in aid of his or her wrongful termination claim against the employer-client based on an alleged public policy violation.[8] What is clear, however, is that attorneys may themselves seek legal advice concerning

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[5] The language of the statute is not framed in terms of a waiver of the privilege. Waiver is covered separately in Evidence Code § 912(a) as to all of the evidentiary privileges, providing that a privilege "is waived with respect to a communication protected by the privilege if any holder of the privilege, without coercion, has disclosed a significant part of the communication or has consented to disclosure made by anyone." Subsection (b) deals with waivers by fewer than all of those who are "joint holders" of the privilege (*i.e.*, joint clients), providing that a waiver by one is not a waiver by others.

[6] *See, e.g.*, *Glade v. Superior Court* (1978) 76 Cal.App.3d 738, 746-747 ("Section 958 is invoked when either the attorney or client charges the other with a breach of duty arising from their professional relationship. The Legislature deemed it unjust for a party to that relationship to maintain the privilege so as to preclude disclosure of confidential communications relevant to the issue of breach which another party thereto has raised."); *Carlson, Collins, Gordon & Bold v. Banducci* (1967) 257 Cal.App.2d 212, 227-228 (In an action to recover unpaid attorney's fees for legal services rendered in the settling of a will contest and a cross-action to recover payments allegedly made under duress and undue influence, the court held that "[i]t is an established principle involving the relationship of attorney and client that an attorney is released from those obligations of secrecy which the law places upon him whenever the disclosure of the communication, otherwise privileged, becomes necessary to the protection of the attorney's own rights. [citations omitted] Accordingly, when, in litigation between an attorney and his client, an attorney's integrity, good faith, authority, or performance of his duties is questioned, the attorney is permitted to meet this issue with testimony as to communications between himself and his client.")

[7] *Brockway v. State Bar of California* (1991) 53 Cal.3d 51, 63-64.

[8] Compare *Fox Searchlight Pictures, Inc. v. Paladino* (2001) 89 Cal.App. 4th 294 with *General Dynamics v. Superior Court* (1994) 7 Cal. 4th 1164, 1190. *General Dynamics* recognizes the general rule:

whether and to what extent disclosures are permitted and in the course of which disclose to the consulting attorney confidential communications with the client.[9] It is likewise true that the client may seek advice whether to risk disclosures by alleging a breach on the part of prior counsel, without fear that such communications with successor counsel will be subject to scrutiny.[10]

Applied here, it is clear that, pursuant to section 958, there is no privilege relevant to the charging allegations and the attorney's defenses in the malpractice action initiated by the Trustee, who is the successor to the corporate client and, by law, the holder of the privilege. (*Commodity Futures Trading Com. v. Weintraub* (1985) 471 U.S. 343, 348-349, 352-353.)

There are two limitations on the application of section 958 relevant to this inquiry. First, the scope of the attorney's license to disclose is limited by (a) the "relevancy" requirement of Section 958 ("relevant to an issue of breach") and (b) the ethical directive that an attorney's disclosures pursuant to this exception be limited to the necessities of the case and its issues. A

["T]he in-house attorney who publicly exposes the client's secrets will usually find no sanctuary in the courts. Except in those rare instances when disclosure is explicitly permitted or mandated by an ethics code provision or statute, it is never the business of the lawyer to disclose publicly the secrets of the client. In any event, where the elements of a wrongful discharge in violation of fundamental public policy claim cannot, for reasons peculiar to the particular case, be fully established without breaching the attorney-client privilege, the suit must be dismissed in the interest of preserving the privilege." 7 Cal.4th at 1190, but suggests that disclosure may be permitted under trial court imposed limitations, such as sealing or protective orders. (*Id.* at 1191.) *Fox Searchlight* makes clear the right of lawyers to make disclosure of client confidential information in seeking advice from their own legal counsel whether for their own protection or in aid of the client's cause. (89 Cal. App. 4th at 313-314.)

[9] It is also permitted that the attorney may make disclosures to a defending malpractice insurer where the communications are intended to be directed to the attorney who will be appointed to represent the lawyer. (*Travelers Insurance Companies v. Superior Court* (1983) 143 Cal.App. 3d 436, 445-46.)

[10] *Schlumberger Limited v. Superior Court* (1981) 115 Cal.App.3d 386, 392 ("Evidence code section 958 was not intended to abrogate the privilege as to communication between the client and the lawyer representing the client when suit is filed against a former lawyer for malpractice. *The exception is limited to communications between the client and the attorney charged with malpractice*. [citation omitted] '*Clearly, in an attorney breach case this exception applies only where the alleged breach is by the attorney from whom the information is sought. Where, as here, the client has not alleged a breach by the attorney involved in the communication in question, the privilege for that communication remains intact*.'") (Emphasis added.)

lawyer who discloses confidential information not bearing on the issues of breach in the attorney-client litigation is subject to discipline.[11]

Second, section 958 is not premised on the concept of "waiver." The statutory language instead states "There is no privilege…." This, coupled with the client's well established right to preserve unrelated confidential information, and the public policy underlying section 958, leads us to conclude that the targeted Attorney is not ethically permitted to exploit the confidential information disclosed in the malpractice action for other, unrelated purposes, whether it be public disclosure outside the confines of the malpractice litigation proceedings, or use in connection with other third party initiated litigation[12], such as the class action litigation referenced in the subject inquiry.

We therefore conclude that even if the Attorney is allowed to make or compel disclosures in the Trustee's malpractice action that would otherwise be relevant to the class action, section

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[11] *Dixon v. State Bar* (1982) 32 Cal. 3d 728 (In response to a client filing suit seeking to enjoin an attorney from harassing her, the attorney filed a declaration, which included gratuitous and embarrassing information about the client that "was irrelevant to any issues then pending before the court" and was found by the State Bar court to have been made for the purpose of "harassing and embarrassing" the former client.)

[12] Section 958 has been extended to criminal proceedings where the client or former client, but not the attorney, is a party, and where the client puts the lawyer's advice in issue, usually claiming misrepresentations inducing a plea or ineffective assistance of counsel in a *habeas corpus* proceeding. *See, e.g., People v. Morris* (1971) 20 Cal.App.3d 659 (citing Witkin, *California Evidence* § 824 (2d ed. 1966): "If, in litigation between an attorney and his client or *between the client and a third person, or in any other proceeding*, the attorney's integrity, good faith, authority or performance of his duties are questioned, the attorney should be permitted to meet this issue with testimony as to communications between himself and his client."). *See also In re Scott* (2003) 29 Cal. 4th 783, 814 ("by claiming trial counsel provided ineffective assistance, petitioner waived the attorney-client privilege to the extent relevant to the claim."). It has also been held that section 958 authorizes a court to compel an attorney to testify against a client who has attacked counsel, claiming a breach of duty. *Durdines v. Superior Court* (1999) 76 Cal.App. 4th 247, 255, n. 14 ("Durdines may be willing to sacrifice his professional interests in aid of his former client if he is eventually called upon again by the court. However, insofar as there is no privilege not to respond, he would risk a finding of contempt if he refused to answer or otherwise cooperate.").

958 does not sanction such disclosures in defense of the third party action initiated by the investor class.

This then brings us to the question whether there is a self-defense exception in California that permits an attorney to disclose confidential information when necessary to defend a third party's claims and in the absence of the client's consent or waiver.

Clearly, there is no California authority that allows an attorney to disclose attorney-client communications or confidential information in her defense of a lawsuit or other attack by a third party (*i.e.*, someone other than the client or former client). There is no such exception in the Business and Professions Code or the Evidence Code; nor do the Rules of Professional Conduct recognize such an exception.

Additionally, while no California appellate court has specifically confronted the exception issue, there is *dictum* in various cases strongly suggesting that it does not exist. (*See, e.g., Commercial Standard Title Co. v. Superior Court*, 92 Cal.App.3d 934, 945 (1979) (assuming without discussion that no self defense exception to section 6068(e) exists); *Glade v. Superior Court, supra*, 76 Cal.App.3d at 746-747). It is also the case in California that the courts lack the authority to create exceptions to the attorney-client privilege and other privileges in the California Evidence Code.[13] *See, e.g., Titmas v. Superior Court* (2001) 87 Cal.App.4th 738, 745.[14] While there is authority amongst the federal courts[15] recognizing a self-defense

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[13] Evidence Code § 911, one of the basic introductory provisions underlying all privileges in the California Evidence Code, also stands for the proposition that there cannot be judicially created exceptions from (or extensions of) the statutory privileges. It states that: "Except as otherwise provided by statute . . . (b) No person has a privilege to refuse to disclose any matter or to refuse to produce any writing, object, or other thing."

[14] "In its codified form (Evid. Code §§ 950 *et seq*.), the attorney-client privilege is accorded special status as a "'legislatively created privilege protecting important public policy interests ....'" (*Korea Data Systems Co. v. Superior Court, supra*, 51 Cal.App.4th at p. 1516 . . .) California courts are powerless to judicially carve out exceptions to the rule, even if other states freely do so. (*Wells Fargo Bank v. Superior*

exception[16], this notion was rejected in *McDermott, Will & Emery v. Superior Court* (2000) 83 Cal.App.4th 378, 385.[17]

We recognize that California attorneys are permitted to make a good faith argument for

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Court (2000) 22 Cal.4th 201, 209 . . . [declining to judicially create fiduciary exception to allow trust beneficiaries to discover privileged communications between trustee and trustee's attorneys: "We ... do not enjoy the freedom to restrict California's statutory attorney-client privilege based on notions of policy or ad hoc justification."].)."

[15] The general principles of the application of the attorney-client privilege in federal court are as follows: If the case is in federal court under federal jurisdiction, or under a combination of federal question jurisdiction and diversity jurisdiction, then the applicable attorney-client privilege is the federal common law attorney-client privilege. There is no express attorney-client privilege under general federal statutes or the Federal Rules of Civil Procedure. Rather, the privilege is under federal common law. However, if the case is venued in federal court under diversity jurisdiction only, then the state law attorney-client privilege applies. (Jones, Rosen, Wegner and Jones, Rutter Group Practice Guide: *Federal Civil Trials and Evidence*, §§ 8:3360 – 8:3370 (1999-2006)). *See* Federal Rules of Evidence Rule 501 (General Rule).

[16] In a case quite similar to the subject inquiry, a California federal district court held that the self-defense exception exists in federal court in a case arising under federal question jurisdiction, as opposed to diversity jurisdiction. (*In re National Mortgage Equity Corp. Pool Certificates Securities Litigation* 120 F.R.D. 687, 690-692 (C.D. Cal. 1988) [attorney charged with securities fraud can reveal client confidences in defense of third party action].) Other federal trial courts have recognized its holding. (*See, e.g., Apex Mun. Fund v. N-Group Securities*, 841 F.Supp. 1423, 1430, (S.D. Tex. 1993); *Aclara Biosciences, Inc. v. Caliper Technologies Corp*. 2001 WL 777083 (N.D. Cal. 2000) (unreported).) *George v. Siemens Indus. Automation, Inc.*, 182 F.R.D. 134, 139 (D. N.J. 1998) goes so far as to state: "A third highly recognized exception is the 'self-defense' exception. Counsel may waive client's privilege in order to defend himself against accusations of wrongful conduct. (*See, e.g.,* N.J.S.A. 2A:84A-20(2)(c); N.J.R.E. 504(2)(c).) Indeed, long before the 1988 ruling of the California federal district court, the 2nd Circuit Court of Appeals permitted an attorney to "blow the whistle" on securities violations by a client in *Meyerhofer v. Empire Fire & Marine Ins.*, 497 F.2d 1190, 1194-1196 (2d Cir. 1974), *cert. denied*, 419 U.S. 998, 95 S.Ct. 314, 42 L.Ed.2d 272 (1974).

[17] There, the court expressly held that a shareholder's derivative action could not proceed against the lawyer because there was no waiver by the corporate client, and the self defense exception did not apply. "[B]ecause a derivative action does not result in the corporation's waiver of the privilege, such a lawsuit against the corporation's outside counsel has the dangerous potential for robbing the attorney defendant of the only means he or she may have to mount any meaningful defense. It effectively places the defendant attorney in the untenable position of having to "preserve the attorney client privilege (the client having done nothing to waive the privilege) while trying to show that his representation of the client was not negligent." The Court also dismissed the application of federal precedents in California and elsewhere ("[L]ong-standing California case authority has rejected this application of the federal doctrine, noting it contravenes the strict principles set forth in the Evidence Code of California which precludes any judicially-created exceptions to the attorney-client privilege. (*Dickerson v. Superior Court* (1982) 135 Cal.App.3d 93, 99 [185 Cal.Rptr. 97]; *Hoiles v. Superior Court, supra*, 157 Cal.App.3d at p. 1198.").")

an extension, modification or reversal of existing law (Rule 3-200(B)). And, in the Committee's opinion, the lack of direct judicial precedent coupled with supportive precedent amongst the federal courts allows an attorney to make such an argument on the issue before us.[18] We also believe that if a trial court was persuaded to recognize such an exception, disclosures made pursuant to leave of court would not be grounds for discipline.[19] However, absent such judicial authorization, client consent or further development in the case law, we conclude that the attorney in the inquiry may not disclose confidential client communications in aid of her defense. Below, we discuss the ethical issues to be encountered by the Attorney in the inquiry.

The client is the holder of the attorney-client privilege and the party to whom the ethical duty of section 6068(e)(1) is owed. The client is therefore empowered to waive the attorney-client privilege, and to determine the conditions or scope of such a waiver. In the subject inquiry, there is no impediment to the attorney seeking the former client's consent.[20]

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[18] It is clear that an attorney should not make any disclosure of confidential information unless and until securing court authorization and that in undertaking to seek such authorization, the attorney must act in a way that respects the duty to maintain client confidences. Although it is beyond the scope of this Opinion and involves matters of strategy and law, including civil procedure, we presume the issue of whether to recognize a self-defense exception might be raised by way of a motion for protective order (under California Code of Civil Procedure § 2023 or the federal equivalent, which provides the trial courts with substantial discretion to enter "any order that justice requires.") The Supreme Court in *General Dynamics*, *supra*, 4 Cal 4th at 1191 offered a litany of suggestions relating to alternative methods of using evidence of confidential communications and at the same time protecting them from public disclosure.

[19] *See, e.g.*, *Fox Searchlight*, *supra*, 89 Cal.App.4th at 314 ("Finally, fundamental fairness requires the plaintiff be allowed to make a limited disclosure of her former client's ostensibly confidential information to her own attorneys for purposes of preparing and prosecuting a wrongful termination suit against the former client. If the employer can stifle even this limited disclosure, then *General Dynamics* is nothing more than a judicial practical joke because, even if in-house counsel succeeds in a wrongful termination action against the former client, she may be sanctioned or lose her license to practice or be sued separately by the former client for breach of fiduciary duty.")

[20] We assume for the purposes of the inquiry that the sole client was the corporation, and not its individual shareholders, officers or directors, though we are mindful that such individual representation may occur from time to time and that, in some instances, putative clients may be mislead into reasonably

Obtaining a past or present client's consent[21] to disclosure of a significant portion of a confidential communication[22] may involve a conflict of interest between the attorney and the client because the contents of the revealed communication might expose the client to civil or criminal charges or to becoming involved as a witness in litigation while, at the same time, benefiting the attorney. None of the Rules of Professional Conduct explicitly deal with this form of lawyer-client conflict.

The primary rule dealing with lawyer-client transactions is Rule 3-300, which is limited to lawyer-client "transactions" and lawyers who obtain an "adverse interest" to their client's property rights. There is also Rule 3-400, which imposes certain conditions where an attorney seeks to settle a claim or potential claim regarding the attorney's liability to the client for the attorney's professional malpractice. Neither of these ethical rules applies squarely to the situation posed here. Yet both rules address a fundamental precept of professional responsibility that attorneys should not use their position of influence or legal knowledge to a client's or former client's disadvantage.

In the absence of an explicit rule, the Committee concludes that so long as there is the potential for a conflict between the attorney's interest in being able to use confidential communications to mount a defense and the client's right to keep such communications

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believing their communications with the attorney are confidential and protected. This issue is beyond the scope of the Committee's Opinion. We also assume that if the client or former client is then represented by other counsel, that the attorney will communicate through that attorney. (*See* Rule 2-100.)

[21] Present and former clients are treated similarly in this discussion since the duty to maintain client confidences continues after the termination of the attorney-client relationship, even if it is true that attorneys have a lesser duty of loyalty to former clients (*see Flatt v. Superior Court* (1994) 9 Cal.4th 275), because both groups are being asked to give up the same substantial right and, more importantly, the potential negative consequences of the waiver of that right are not affected by the client's status.

[22] Evidence Code § 912 provides that a waiver of the attorney-client privilege occurs when a client, "without coercion, has disclosed a significant part of the communication."

confidential, the attorney, in requesting an existing or former client's consent to a waiver of the attorney-client privilege in the same, past, related and/or unrelated matter, should follow the guidelines common to both Rule 3-300 and Rule 3-400 and obtain the client or former client's written informed consent.

First, the attorney should advise the client or former client *in writing* about the existence and nature of the conflict or potential conflict, and the reasonably foreseeable adverse consequences of such a waiver.[23] The disclosure of the potential adverse consequences to the client should be as comprehensive as warranted by the facts at hand. Any disclosure should be preceded by an explanation of Business and Professions Code § 6068(e)(1) and what it is intended to cover. Next, the warnings, where appropriate, should discuss the possibilities that the client may become a party in civil litigation, a witness in such litigation, a target of a criminal investigation and/or a defendant in a criminal prosecution. When the possible consequences have criminal implications, the client should also be advised that the revealed communication may be used against the client in a future criminal proceeding and may constitute a waiver of that client's Fifth Amendment right against self-incrimination. As to all of the foregoing, the client should be further advised that his or her potential involvement in a civil or criminal matter may require him or her to hire independent counsel at his or her own expense to defend or represent the client in the matter.[24]

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[23] This formulation is taken from Rule 3-310(A) which defines three key terms:

(1) "'Disclosure' means informing the client or former client of the relevant circumstances and of the actual and reasonably foreseeable adverse consequences to the client or former client;

(2) 'Informed written consent' means the client's or former client's written agreement to the representation following written disclosure;

(3) 'Written' means any writing as defined in Evidence Code section 250."

[24] Though beyond the scope of this Opinion, if the client declines to give a waiver and the court

Second, the written disclosure should also advise the client that he or she has the right or option to seek independent legal advice, at his or her own expense, regarding the waiver of his or her privileged communications with the requesting attorney.

Lastly, the written disclosure should explain the scope of the waiver being sought; in other words, that the revelation of a portion of a privileged communication may cause that party to permanently lose his or her protected status and that there is a further possibility that a third party could argue successfully that the client's waiver of a part of his or her privileged communications with the attorney is grounds for a waiver of the entire privileged communication.

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.

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declines to recognize a self-defense exception, the attorney could seek dismissal of the class action. Two precedents may support such relief. *See McDermott, Will & Emery v. Superior Court, supra*, 83 Cal.App.4th at 385 and *Solin v. O'Melveny & Myers* (2001) 89 Cal.App.4th 451. In *McDermott*, the Court declined to allow an action to proceed against the law firm, stating: "We simply cannot conceive how an attorney is to mount a defense in a shareholder derivative action alleging a breach of duty to the corporate client, where, by the very nature of such an action, the attorney is foreclosed, in the absence of any waiver by the corporation, from disclosing the very communications which are alleged to constitute a breach of that duty. Thus, while we decline to view a shareholder derivative action in the same vein as an assignment, the rationale used to prohibit all assignments of legal malpractice actions, on the ground attorneys would be unable to defend such actions in the absence of a waiver of the privilege by their own client, applies with equal force here." By contrast, *Solin* did not involve a third party action. Rather, the plaintiff was an attorney who sued another law firm from whom he sought advice in connection with his representation of his own clients. Those clients were not a party to the malpractice litigation and refused to waive the attorney-client privilege. Since the defendant law firm could not defend without disclosing their confidential information (which had been transmitted to the defendant firm by the consulting attorney), the Court dismissed the lawsuit. Whether *McDermott* or *Solin* will or should be extended to cover a third party situation such as that posed by this inquiry is not something about which the Committee offers any opinion.