

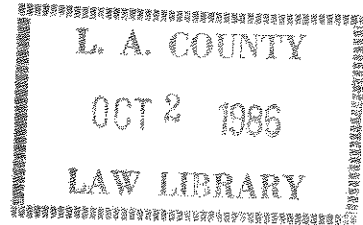
KB258
L.89
1968
Calif

LOS ANGELES COUNTY BAR ASSOCIATION

ETHICS COMMITTEE

OPINION NO. 436

(APRIL 15, 1985)



ATTORNEY AND CLIENT - CONFIDENTIAL INFORMATION. An attorney may not disclose confidential information that would reveal his client's unauthorized practice of law without the consent of his client.

AUTHORITIES CITED:

Calif. Business and Professions Code Section 6068(e)

Calif. Evid. Code Section 950 et seq.

Calif. Code of Civ. Proc. Section 2016(b) and (g)

Calif. Rules of Prof. Conduct, Rule 3 - 101

A.B.A. Model Rules of Prof. Conduct, Rule 1.6

Former A.B.A. Code of Prof. Resp., DR 4 - 101(A)

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

L.A. County Opinions No.s 264, 274, 353, 386, 417, 422

The Committee has received an inquiry from a law firm concerning its duty to report the apparent unauthorized practice of law being performed by a client. The law firm was involved in representing a client in a case in which there was, among other things, a dispute on the issue of whether or not

the client, who is not an attorney, had ever represented himself to be an attorney. The client has consistently under oath denied the allegations.

The law firm, while it was representing the client, found out that its client was involved in another transaction with a third party in the course of which he represented himself to be an attorney. The law firm subsequently obtained stationery which bears the name of the client and underneath it the legend "attorney at law." Additionally, a phone call to the client's office further substantiates that he is representing himself as an attorney. The law firm confronts the client with these facts. The client neither denies nor affirms them. The law firm then withdraws from the pending action.

The law firm inquires as to whether it has a duty to disclose the unauthorized practice of law.

California Business and Professions Code Section 6068(e) provides that it is the duty of an attorney "to maintain inviolate the confidence, and at every peril to himself to preserve the secrets of his client."

The first question is whether the communication, obtained from a third party, is within the scope of the statute. There is much confusion as to the scope of an attorney's obligation under Business and Professions Code Section 6068(e), as opposed to the attorney - client privilege of Evidence Code Section 950 et seq. or the work - product doctrine (C.C.P. Section 2016(b) and (g)). The attorney - client privilege of Evid. Code Section 950 et seq. is an evidentiary privilege which pertains

principally to "information between a client and his lawyer in the course of that relationship and in confidence . . ." Evid. Code Section 952. The information obtained in the present case was obtained from a third party and through the attorney's personal investigative efforts. Thus, it most probably would not be considered subject to the "attorney - client" privilege. Additionally, to the extent the information could be considered the attorney's "work product" it is merely protected from unwarranted discovery pursuant to C.C.P. Section 2016(b).

While no California case has specifically defined the terms "confidence" and "secrets" as used in Business and Professions Code Section 6068(e) it has been the consistent position of this Committee that its coverage is far broader than the attorney - client privilege. In L.A. County Opinion No. 386, this Committee adopted the definition of the former A.B.A. Code of Professional Responsibility DR 4 - 101(A) which provided:

"'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."

Moreover, the newly adopted A.B.A. Model Rules of Professional Conduct, Rule 1.6, extends this standard even further, changing "information gained in the professional relationship" to "information relating to representation of a

client."

In L.A. County Opinion No. 386 this Committee considered documents and information obtained from a third party to be within the scope of Section 6068(e). Again, in L.A. County Opinion No. 417, the Committee included information obtained from third parties, an oil company and title company, to be within the scope of Section 6068(e). None of this information would have been subject to the attorney - client privileges or otherwise prohibited from disclosure.

Thus, the information in the present case, though obtained from a third party or through the attorney's private investigative efforts (and thus not privileged), is nevertheless subject to the proscription of Section 6068(e). Since the disclosure of the information in this case would clearly be embarrassing to the client and would likely be detrimental as well, the disclosure is foreclosed pursuant to Business and Professions Code Section 6068(e).

The question then posed is whether there is some countervailing policy given the particular facts of this case which would permit disclosure.

Despite the absolute language of Section 6068(e), this Committee has consistently recognized certain narrow exceptions when warranted by a strong countervailing policy. Nevertheless, the policy against disclosure is strictly enforced and any exceptions are narrowly construed. People v. Singh, 123 Cal. App. 365 (1932). A countervailing policy raised by the inquiring law firm is that of Calif. Rules of Professional Conduct, Rule 3 - 101 prohibiting a member of the

State Bar from aiding in the unauthorized practice of law. While this specific policy has never been previously addressed, this Committee has held that a lawyer cannot divulge client confidences to reveal violations of the State Bar Act by a member of the Bar. L.A. Opinion No. 422 (fraudulent filing of a bankruptcy petition). See also, L.A. County Opinion No. 274. Moreover, nothing in the State Bar Act or the Calif. Rules of Professional Conduct impose upon an attorney a duty to disclose violations of the Act. There does not seem to be any reason to distinguish the disclosure of the unauthorized practice of law from the disclosure of other State Bar Act violations as mentioned in Opinion No. 422. Thus, it is the opinion of this Committee that the present situation is analogous to that mentioned in Opinion No. 422 and that the threatened violation of Rule 3 - 101 is not sufficient to permit disclosure.

A more serious concern is posed by the threat of serious harm to the public due to the criminal fraud practiced by the client in the course of his unauthorized practice. In certain circumstances an attorney may be permitted to divulge future crimes where it "may prevent immediate and serious injury" (L.A. County Opinion No. 264). A.B.A. Model Rules, Rule 1.6(b)(1) limits such disclosure to crimes which are "likely to result in imminent death or substantial bodily harm." While California cases have never limited disclosure solely to cases involving physical injury they have expressed similar concern with the gravity of the crime. Thus, in L.A. County Opinion

No. 353 this Committee considered the disclosure of potential securities fraud to be unethical. In L.A. County Opinion No. 386 the Committee likewise considered the disclosure of ongoing perjury to be unethical conduct. See also L.A. County Opinion No. 417 (potential theft of oil revenues); L.A. County Opinion No. 422 (fraudulent filing of a bankruptcy petition and forgery).

The standard utilized in these cases is described in L.A. County Opinion No. 353:

" . . . information even as to an intended future crime should not be divulged unless the intended acts of the client are of a nature so serious that the benefits of their prevention outweigh the policies underlying the confidentiality principle."

Id. at .

Unfortunately, this standard provides little guidance to lawyers in determining their responsibilities in individual cases. The victims of many economic crimes are seriously injured. Nevertheless, we have held it unethical to disclose such criminal conduct as securities fraud, theft and forgery. The lawyer debating his duties is torn between serious obligations to his client and a conflicting generalized duty to the potential future victims.

The recent debate over the proposed A.B.A. Model Rules centered largely on this identical conflict. The proposed A.B.A. Model Rule 1.6 significantly broadened the scope of the lawyer's duty to disclose confidential information including in its scope victims of purely economic crimes. That proposed rule was defeated and the present Model Rule 1.6 was adopted in

the belief that strict observance of client confidentiality is essential for the lawyer-client relationship and that any exceptions should be clear and narrowly drawn.

Given the absolute standard of Section 6068(e) the argument for such a standard in California is even more compelling. The legislature has expressed a clear policy that the duty of confidentiality is paramount. Therefore, we believe it essential that we, too, adopt a standard that is narrow and clear. We believe that A.B.A. Model Rule 1.6 incorporates just such a standard. We therefore adopt it.

We realize that this is a departure from the standard expressed in prior opinions. However, we also believe it is in fact, a codification of the results of those opinions in that the preservation of confidentiality has been consistently recognized as being more important than the potential injury to victims of purely economic crimes.

Thus, we believe that disclosure of future crimes is only permitted in situations where such crimes are likely to result in imminent death or serious bodily injury. Since there is no information in this case that such a result is likely, we believe that disclosure of the client's conduct would be unethical. Thus, the firm, having assured itself that it is no longer assisting the client in his enterprise, has an obligation to maintain the secret.

This opinion is advisory only, the Committee acts on specific questions submitted ex parte and its opinion is based only the facts set forth in the question submitted.