

THE DUTY OF CONFIDENTIALITY v. DUTY TO COMMUNICATE

1. Introduction

The proposed opinion will address the conflict between the duty to communicate significant developments to one client with the duty to keep the confidences of a client or prospective client.

In *Flatt v. Superior Court* (1994) 9 Cal. 4th 275, the California Supreme Court held that an attorney's duty of loyalty to any existing client not only precluded the attorney from representing a prospective client against the existing client but also insulated the attorney from liability in failing to advise the prospective client of the potential statute of limitations of any claim the prospective client may have against the attorneys existing client. The court in *Flatt* did not address the obligation, if any, of the attorney to disclose to the existing client the information the prospective client provided to the attorney about a potential lawsuit against existing client.

To our knowledge no California case has addressed the attorney's duty to keep confidential the information imparted by the prospective client from the attorneys existing client. Research to date indicates that there are a COPRAC decision (Opinion 2003-163), and two Los Angeles County Bar opinions (LA County 528 and LA County 506) and at least one out-of-state decision (*A v. B* (1993) 158 A. J. 51) that have addressed the issue.

In Opinion 2003-163 this committee opined that when an outside lawyer represents a corporation and also simultaneously represents a corporate constituent (the Chief Financial Officer) in an unrelated matter, the duty of confidentiality and the duty of loyalty preclude the attorney ~~of~~ from disclosing the confidences of the CFO to the corporation without the CFO's consent. In many ways this decision would appear to be directly on point, thus making the question of whether an opinion in this area is warranted. However, our preliminary decision is to proceed with addressing this issue in greater depth than Opinion 2003-163 and focus more on the direct issue presented in *Flatt* resulting from confidences shared by a prospective client.

In LA County 528 (2017), LA County 528 opined that when an attorney is engaged by an insurance carrier to defend the interests of an insured and obtains information that could provide a basis for the insurance carrier to deny coverage, the attorney is prohibited from disclosing that information to the insurance carrier. In such a situation the committee opined the attorney must withdraw from representation.

In LA 506 (2001) a law firm learned in an interview with a prospective client that the client was considering filing bankruptcy. The prospective client was a defendant in a separate action brought by an existing client of the firm in which the existing client was represented by a different law firm. LA County 506 concluded that the firm had a duty of

confidentiality to the prospective client and that the confidential information could be significant to the existing client, but no conflict arose between the duty of confidentiality and the duty to communicate, because ~~the~~ a law firm was not representing the existing client in the matter to which the information was relevant.

In *A v. B*, 158 A. J. 51(1999) a law firm was representing husband and wife jointly in planning their estates. Through an error in the firm's conflict checking system, the firm started to represent a woman in a paternity action against the husband. When the firm realized the error, it withdrew from the representation against the husband and asked the husband for consent to disclose the existence of the illegitimate child to the wife, but the husband refused. The New Jersey Supreme Court held that the information was confidential, but that the broad New Jersey exception for ~~proper~~ fraud prevention permitted the firm to disclose to the wife. California has not recognized such an exception to the duty of confidentiality.

The existing authority suggests that the duty of confidentiality would prevent an attorney from disclosing client confidences. The proposed opinion will address this issue with respect to the prospective client as in *Flatt* and in the process attempt to work through the underlying rationale more clearly and effectively buttress Opinion 2003-163. In addition, with respect to existing clients we propose addressing whether the lawyer and his client or clients can make a prior agreement with respect to such issues that would be binding, even if a subsequent client has a change of heart.

2. Scenario :

a. Facts:

Attorney's law firm, but not Attorney, has been engaged to defend a corporation Agri-Pure in an action against ~~the corporation~~ it for damages for fraud and rescission of a contract pursuant to which the plaintiff purchaser was to be the exclusive distributor of a combination fertilizer/a herbicide product (the "Product") recently developed for application in citrus orchards. The purchaser alleges that ~~the defendant, Attorney's client~~ Agri-Pure, failed to disclose that the ~~herbicide-Product~~ when applied to citrus caused shrinkage, discoloration and impeded sugar production, thus impairing market acceptance of the fruit which caused plaintiff's customers to bring an action against plaintiff.

~~The purchaser dealt exclusively with the former CEO of the corporation in connection with the purchase transaction.~~

While Attorney's firm was representing ~~the corporation~~ Agri-Pure in the lawsuit arising over claims regarding the ~~herbicide~~ Product, the former ~~CEO-head of product development~~ of the company, Ted Trueheart, who was not a party to the lawsuit filed by the plaintiff purchaser, consulted with Attorney concerning his imminent marital dissolution proceeding. During that consultation, the ~~CEO-Ted Trueheart~~ disclosed that he had valuable information against Agri-Pure and was considering a wrongful termination case against it which could potentially

83 increase his marital assets. According to Mr. Trueheart, his research team made
84 him aware the Product in development had precisely the adverse effects reported
85 by Plaintiff's customers and he reported this fact to the CEO, who promptly
86 instructed him to destroy all test results that were critical of the new herbicide and
87 retest the product in order to achieve better test results. After Ted Trueheart did as
88 he was instructed, he asked for a "raise." Instead of a raise, he was terminated and
89 reminded of the non-disclosure agreement he had signed during his employment.
90 ~~he had provided the purchaser with a confidential internal research memoranda~~
91 ~~that discussed at length the potential adverse effects of the herbicide and the~~
92 ~~purchaser and he agreed the potential risks were outweighed by the potential~~
93 ~~rewards of moving forward with the transaction. The former CEO did not disclose~~
94 ~~to anyone at the corporation that he had shared the internal memo with the~~
95 ~~purchaser. Ted Trueheart disclosed he had kept a copy of the research data and~~
96 ~~report for insurance and wanted advice as to what his options were.~~

97
98 ~~While the corporation had shared the research memo with the Attorney, there was~~
99 ~~no evidence provided to the Attorney that the purchaser had been made aware of~~
100 ~~the potential risks. The former CEO disclosed to Attorney that he had emailed the~~
101 ~~memo to the potential purchaser and upon his termination had deleted the email,~~
102 ~~B gives he had no desire to help the corporation that had fired him and because he~~
103 ~~had received a substantial bonus from the transaction that was consummated with~~
104 ~~the purchaser. The CEO Ted Trueheart was bitter about the corporation having~~
105 ~~terminated him for other reasons and told the attorney to keep that information~~
106 ~~confidential because he did not want to help the corporation in anyway~~ uncertain
107 as to how and when he could most effectively use the information.

108 :

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110 b. Issues:

111
112 i. ~~Should A~~ attorney decline to represent ~~the former CEO~~ Ted Trueheart in his
113 divorce?

114 i. _____

115 ii. Should Attorney provide any advice to Ted Trueheart as to the applicable
116 statute of limitations of any claims he might have against Agri-Pure?

117 iii. Should attorney provide any advice as to the community property interest,
118 if any, of any settlement with Agri-Pure and whether the potential claim
119 against Agri-Pure should be disclosed as a marital asset?

120 ~~ii.iv.~~ Can Attorney disclose to the corporation that the CEO Agri-Pure had any
121 of the information shared by Ted Trueheart? ~~warned the purchaser of the~~
122 ~~risks and provided it with the internal research memorandum disclosing~~
123 ~~those risks?~~

124 ~~iii.v. Does materiality of the disclosure from the CEO affect the duty to~~
125 ~~communicate to client corporation~~ Would the answer be any different if
126 Attorney was aware that not only was Agri-Pure in litigation over the
127 product, but also that Agri-Pure was in sensitive negotiations to merge
128 Agri-Pure with an international chemical company.?

129 ~~vi. Under what circumstances can Attorney use the knowledge of this~~
130 ~~memorandum to commence an investigation into its continued existence,~~
131 ~~by for example, searching the former CEO's deleted emails and pursuing~~
132 ~~focused discovery from the purchaser~~ Can attorney use the information
133 provided by Ted Trueheart in any way? For example, can Attorney:

134 (a) Advise his law firm that he has reason to believe their
135 client has intentionally destroyed evidence?

136 (b) Advise his law firm to withdraw from representing Agri-
137 Pure in the litigation and/or the merger negotiations?

138 ~~—~~ Advise his law firm to have Agri-Pure make full disclosure
139 to the potentialL?

140 (c) _____

141 vii. If Attorney was in fact representing ~~the former CEO~~ Ted Trueheart in his
142 marital dissolution proceeding at the same time his law firm was
143 representing ~~and~~ the corporation at the time of disclosure does the analysis
144 change?

145 viii. Would the analysis change if Ted Trueheart disclosed that he was
146 instructed to and did destroy the test results after Agri-Pure had been sued
147 and had retained Attorney's firm to represent it?

148 ~~iv. —?~~

149 ix. Should Attorney withdraw from representing ~~either or both clients A and~~
150 ~~Client B~~ Agri-Pure?:-

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152
153
154 3. Authorities to Address:

155 As a preliminary matter, additional research will be required to complete this project, but
156 it is anticipated the following authorities will be addressed in the opinion.

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158 a. Cal. Rules of Professional Conduct, Rules :
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160 i. 1.4 [Communication with Client]

- 161
- 162 1. (a) (3) a lawyer shall “Keep the client reasonably informed about
- 163 significant developments relating to the representation including
- 164 promptly complying with reasonable requests for information and
- 165 copies of significant documents when necessary to keep the client
- 166 so informed.”
- 167
- 168 2. Comment [1]: “ a lawyer will not be subject to discipline under
- 169 paragraph (a) (3) of this rule for failing to communicate
- 170 insignificant or irrelevant information. (See Business &
- 171 Professions Code Section 6068 (m).) Whether a particular
- 172 development is significant will generally depend on the
- 173 surrounding facts and circumstances.”
- 174

175 ii. 1.6 [Confidential information of Client]

- 176
- 177 (a) “A lawyer shall not reveal information protected from
- 178 disclosure by Business and Professions Code section 606 8(e) (1)
- 179 unless the client gives informed consent, or the disclosure is
- 180 permitted by paragraph (b) of this Rule.”
- 181
- 182 (b) A lawyer may, but is not required to, reveal information
- 183 protected by Business and Professions Code section 606 8(e) (1))
- 184 to the extent that the lawyer reasonably believes the disclosure is
- 185 necessary to prevent a criminal act that the lawyer reasonably
- 186 believes is likely to result in death, or substantial bodily harm to,
- 187 an individual, as provided in paragraph (c).
- 188
- 189 (c) Before revealing information protected by Business and
- 190 Professions Code section 6068 (E) (one) to prevent a criminal act
- 191 as provided in paragraph (B), a lawyer shall, if reasonable under
- 192 the circumstances:
- 193
- 194 (1) make a good faith effort to persuade the client (i)
- 195 not to commit or to continue the criminal act or (ii) to
- 196 pursue a course of conduct that will prevent the threatened
- 197 death or substantial bodily harm; or do both (i) and (ii); and
- 198 (2) informed the client, at an appropriate time, of the
- 199 lawyer’s ability or decision to reveal information protected
- 200 by Business and Professions Code section 6068 (e) (one) as
- 201 provided in paragraph (b).
- 202
- 203 (d) In revealing information protected by Business and
- 204 Professions Code section 606 8(e) (1), as provided in paragraph
- 205 (B), the lawyer’s disclosure must be no more than is necessary to

prevent the criminal act, given the information known to the lawyer at the time of the disclosure.

(e) A lawyer who does not reveal information permitted by paragraph (b) does not violate this rule.

A lawyer's duty to preserve confidentiality of client information involves public policies of paramount importance. (*In re Jordan* (1974) 12 Cal 3rd 575, 580); see also *Commercial Standard Title Co. v. Superior Court* (1979) 92 Cal app 3rd 934, 945 (see Comment 1 to Rule 1.6)

The principle of lawyer-client confidentiality applies to information an attorney acquired by virtue of the representation, whatever its source, and encompasses matters communicated in confidence by the client, and therefore protected by the lawyer-client privilege, matters protected by the work product doctrine, and matters protected under ethical standards of confidentiality. (See Comment 2 to Rule 1.6)

Despite the important public policies promoted by lawyers adhering to the core duty of confidentiality, the overriding value of life permits disclosure otherwise prohibited... (See Comment 3 to Rule 1.6)

iii. 1.7 [Conflicts of Interest]

(B) A lawyer shall not with, without the informed written consent from each affected client and compliance with paragraph (D), represent a client if there is a significant risk the lawyer's representation of the client will be materially limited by the lawyer's responsibilities to or relationship with another client, a former client or 1/3 person, or by the lawyer's own interest.

(D) representation is permitted under this Rule only if the lawyer complies with paragraphs (a), (b), and (c), and:

(1) The lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

oOo

(3) The representation does not involve the assertion of a claim by one client against another client represented by

the lawyer in the same litigation or other proceeding before a tribe funeral.

Comment 1: Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. The duty of undivided loyalty to a current client prohibits undertaking representation directly adverse to that client without the client's informed written consent. ...A directly adverse conflict under section (a) can arise in a number of ways, for example, when: (i) a lawyer accepts representation of more than one client in a matter in which the interests of the clients actually conflict;...

Comment 5: Even where there is no direct adversity, a conflict of interest requiring informed written consent under paragraph (B) exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities, interest, or relationships, whether legal, business, financial, professional, or personal.

Comment 10: This rule does not preclude an informed written consent to a future conflict in compliance with applicable case law. The effectiveness of an advance consent is generally determined by the extent to which the client reasonably understands the material risks that the consent entails. More comprehensive the explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences to the client of those representations, the greater the likelihood that the client will have the requisite understanding.... A lawyer who obtains from a client an advance consent that complies with this Rule will have all the duties of a lawyer to that client except as expressly limited by the consent.

Comment 11: a material change in circumstances relevant to application of this Rule may trigger a requirement to make new disclosures and, where applicable, obtain new informed written consents. In the absence of such consents, depending on the circumstances, the lawyer may have the option to withdraw from one or more of the representations in order to avoid the conflict. The lawyer must seek court approval where necessary and take steps to minimize harm to the clients. See Rule 1.16. The lawyer must continue to protect the confidences of the clients from whose representation the lawyer has withdrawn. See Rule 1.9 ©

- iv. 1.8.2 [Use of Current Client's Information]: a lawyer shall not use a client's information protected by Business and Professions Code section

6068 (e) (1) to the disadvantage of the client unless the client gives informed consent, except as permitted by these Rules or the State Bar Act.

v. 1.13 [Organization as Client]:

(a) to a lawyer employed or retained by an organization shall conform his or her representation to the concept that the client is the organization itself, acting through its duly authorized directors, officers, employees....”

(b) if a lawyer representing an organization knows that a constituent is acting, intends to act or refuses to act in a matter related to the representation in a manner that the lawyer knows or reasonably should know is (i) a violation of a legal obligation to the organization or a violation of law are reasonably imputable to the organization, and (ii) likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best lawful interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best lawful interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization as determined by applicable law.

(c) in taking any action pursuant to paragraph (B), the lawyer shall not reveal information protected by Business and Professions Code Section 6068 (E).

(f) had in dealing with an organization’s constituents, a lawyer representing the organization shall explain the identity of the lawyer’s client whenever the lawyer knows or reasonably should know that the organization’s interests are adverse to those of the constituent (s) with whom the lawyer is dealing.

Note: comment (g) requires any informed consent to represent both the organization and a constituent to be signed by an appropriate official of the organization other than the constituent member.

vi. 1.18 [Duties to Prospective Clients]:

(b) Even when no lawyer-client relationship ensues, a lawyer who has communicated with a prospective client shall not use or reveal information protected by Business and Professions Code section 6068 (E) and Rule 1.6 that the lawyer learned as result of the consultation, except as Rule 1.9 would permit with respect to information of a former client.

b. Bus. & Prof. Code §6068 [Duties of Attorney]

(e) (1) To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.

(2) notwithstanding paragraph (1), an attorney may, but is not required to, reveal confidential information relating to the representation of a client to the extent that the attorney reasonably believes the disclosure is necessary to prevent a criminal act that the attorney reasonably believes is likely to result in death of, or substantial bodily harm to, an individual.

c. *Flatt v. Superior Court* , 9 Cal. 4th 275 (1994)

d. *Truck Ins. Exchange v. Fireman's Fund Ins. Co.* , 6 Cal. App 4th 1050

~~e.~~ Sheppard, Mullin, Richter & Hampton, LLP v. J-M manufacturing Col., Inc.
(2018) 6 Cal. 5th 59

~~e.~~f. COPRAC Opinion 2003-163

~~f.~~g. L.A. County Bar Opinion 528 (2017)

~~g.~~h. LA County Bar Opinion 506 (2001)

A. v. B. , N.J.51,726 /A. 2d 924 (1999)

2. Ancillary decisions with general principles to incorporate:

a. *Watchumna Water Co. v. Bailey* (1932) 216 Cal 564

b. *Costello v. Buckley parens* 2016) 245 Cal app 4th 748

c. *Elijah W v. Superior Court parens* 2013) 216 Cal app 4th 140