

RESOLUTION 4-08-2002

DIGEST

Duties of Attorneys: Allowing Disclosure of Confidential Information Regarding Client's Violent Criminal Acts Amends Business and Professions Code section 6068 to permit an attorney to disclose confidential information regarding certain criminal acts.

RESOLUTION COMMITTEE RECOMMENDATION

APPROVE IN PRINCIPLE

Reasons:

This resolution amends Business and Professions Code section 6068 to permit an attorney to disclose confidential information regarding certain criminal acts. This resolution should be approved in principle because it would bring California in line with the rest of the United States in dealing with this issue.

Confidentiality is considered to be a core principle of the attorney-client relationship. Accordingly, Business and Professions Code section 6068, subdivision (e), provides for confidentiality without exception. Thus, an attorney who is told by her client that the client intends to kill her husband may not disclose this information.

By contrast, Evidence Code section 956.5 provides that if the lawyer reasonably believes that the disclosure of a client's confidential communication "is necessary to prevent the client from committing a criminal act that the lawyer believes is likely to result in death or substantial bodily harm," that information is not protected from disclosure by the lawyer-client privilege. Therefore, in the event that the attorney were called to testify regarding such an unexecuted threat, the attorney would be in a dilemma. There being no attorney-client privilege under Evidence Code section 956.5, attorney could be compelled to testify under threat of contempt. But by doing so, the attorney would violate Business and Professions Code section 6068's absolute rule of confidentiality and become subject to professional discipline.

California is the only state that prohibits disclosure under these circumstances. (See Ethics Rules on Client Confidences, Attorney's Liability Assurance Society, Inc.; Morgan & Rotunda, 2002 Selected Standards on Professional Responsibility, Foundation Press, pp. 134-144.)

During the past 15 years, the State Bar has, on at least three occasions, submitted to the California Supreme Court a proposed Rule of Professional Responsibility that would allow disclosure of this information. On all three occasions, the Supreme Court has refused. It has been suggested by experts on ethics and professional responsibility that the Supreme Court's refusal to act is based upon the fact that the duty of confidentiality is contained in the Business and Professions Code, a legislative enactment. By amending the statute, this resolution could facilitate a change in the professional rules of conduct as well.

SECTION/COMMITTEE REPORT

THE STATE BAR OF CALIFORNIA (Professional Competence Unit)

Recommendation: DISAPPROVE

Reasons:

This opposition is based on the pending status of a related legislative proposal and potential further consideration to amend rule 3-600 (Organization as Client) of the Rules of Professional Conduct. A proposal to amend rule 3-600 was adopted by the Board at its January 26, 2002 meeting and submitted to the Supreme Court on February 27, 2002 for approval. On May 10, 2002 the Supreme Court issued an order denying the State Bar's request for approval. In its order, the Court included the following notation:

The State Bar Board of Governors' request to adopt amendments to the Rules of Professional Conduct, rule 3-600, is denied because the proposed modifications conflict with B & P Code section 6068, (e).

The rule 3-600 proposal was developed in response to the professional responsibility issues raised by Assembly Bill 363 ("AB 363"), a pending two-year bill introduced in 2001 by Assembly Member Darrell Steinberg. If passed by

the Legislature and approved by the Governor, the current version of the bill would enact "The Public Agency Attorney Accountability Act." This new law would require the State Bar to consider rule of professional conduct amendments that provide guidance to attorneys who represent government agencies in circumstances where they must consider reporting governmental misconduct. The attorney professional responsibility issue raised by AB 363 has been stated as whether an attorney representing a government agency may act as a "whistle-blower?" It is important to note that as introduced in 2001, the original version of AB 363 sought to add new Bus. & Prof. Code §6068.5 enacting an unprecedented express exception to Bus. & Prof. Code §6068(e) intended to permit government attorneys to disclose client confidential information to prevent or rectify governmental misconduct.

In cooperation with Assembly Member Steinberg, the State Bar developed a proposal to amend rule 3-600 notwithstanding the pending status of AB 363. The State Bar understands that Assembly Member Steinberg is evaluating the Supreme Court's recent action on proposed amended rule 3-600 and is duly considering whether, and to what extent, AB 363 should be amended to address the desired policy in this area. Although the issue raised by Conference Resolution 4-8-2002 is an important one, it is also complex given: (1) the primacy of the Supreme Court's role in regulating attorney professional standards; and (2) the distinct, yet interrelated, concepts of an ethical duty of confidentiality under the Business and Professions Code and an evidentiary attorney-client privilege under the Evidence Code. The pending nature of AB 363 makes it untimely for the State Bar to endorse Conference consideration of resolution 04-08-2002.

TEXT OF RESOLUTION

RESOLVED that the Conference of Delegates recommends that legislation be sponsored to amend Business and Professions Code section 6068 to read as follows:

- 1 §6068
2 It is the duty of an attorney to do all of the following:
3 (a) To support the Constitution and laws of the United States and of this state.
4 (b) To maintain the respect due to the courts of justice and judicial officers.
5 (c) To counsel or maintain such actions, proceedings, or defenses only as appear to be him or
6 her legal or just, except the defense of a person charged with a public offense.
7 (d) To employ, for the purpose of maintaining the causes confided to him or her means only as
8 are consistent with truth, and never to seek to mislead the judge or any judicial officer by an artifice or
9 false statement of fact or law.
10 (e) To maintain inviolate the confidence, and at every peril to himself or herself to preserve the
11 secrets, of his or her client except as authorized under California Evidence Code Section 956.5 where the
12 attorney reasonably believes that disclosure of a communication is necessary to prevent the client from
13 committing a criminal act that the lawyer believes is likely to result in death or substantial bodily harm.
14 [Subdivisions (f) through (o) remain unchanged.]

(Proposed new language underlined, language to be deleted stricken.)

PROPONENT: Sacramento County Bar Association

STATEMENT OF REASONS

Existing Law. California Business & Professions Code Section 6068(e) requires that an attorney must protect the confidences of a client, even at the attorney's peril. In contrast, California Evidence Code Section 956.5 provides there is no attorney-client privilege if the lawyer reasonably believes that disclosure of a confidential communication relating to a client is necessary to prevent the client from committing a criminal act that the attorney believes is likely to result in death or substantial bodily harm. These two statutes are in conflict. Even though substantial public policy concerns require the attorney to disclose the confidential communication to prevent the commission of a crime, under the Business & Professions Code, the attorney would still be exposed for the client's claim of breach of fiduciary duty and for State Bar Discipline. While the ABA Model Rule 1.6(b)(1) permits disclosure where "the lawyer reasonably believes [it] necessary to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm," the duties of a California attorney under Section 6068 do not provide for any express exception to the duty of confidentiality.

This Resolution: This resolution would reconcile the conflict between the evidentiary rule and the codified rule of conduct for attorneys. By clarifying the limited exception under Section 6068(e) a lawyer faced with this unique and troubling situation, will not face disciplinary and malpractice ramifications for preventing an imminent, serious crime. The ABA has already acknowledged this conflict and has dealt with it in a straightforward manner that doesn't compromise the confidential nature of an attorney-client relationship except in the most extreme, limited circumstances. This proposed amendment to Section 6068(e) deals with a very limited, but important circumstance.

The Problem: Even though California's disciplinary rules provide that the attorney has a duty to preserve the secrets of a client, there are limited circumstances in which the public policy of preventing future serious crime outweighs the client's confidentiality interest. The conflicts between the evidentiary rules and the codified attorney's duty of conduct need to be resolved concerning this issue.

IMPACT STATEMENT

This proposed resolution does not affect any other law, statute or rule.

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COUNTERARGUMENT

ORANGE COUNTY BAR ASSOCIATION

Under Evidence Code section 956.5 an attorney can be forced to testify regarding client communications threatening great bodily injury or death. (*People v. Dang* (2001) 93 Cal. App. 4th 1293.) The language of 956.5 does not, however, otherwise create an exception to the attorney's duty of confidentiality found in Business and Professions Code section 6068(e). The California Supreme Court has come close but not ruled on the issue. (*General Dynamics Corp. v. Superior Court* (1994) 7 Cal. 4th 1164.) The seemingly innocuous introduction of 956.5 into 6068(e) is dangerous, because it tips the scale towards a greater likelihood that courts will eventually find *Tarasoff* liability for harm to third parties caused by their corporate or individual, civil or criminal clients.

It does this by making permissive disclosure of otherwise privileged attorney-client communications explicit, in a similar way to the permissive disclosure provision of evidence Code section 1024 that existed for psychotherapists at the time *Tarasoff* was decided. The legislature's policy decision in enacting 1024, to place public safety concerns over confidentiality concerns in the psychotherapy setting, by allowing disclosure if the psychotherapist reasonably believes it necessary, was a critical reason for the court's holding in *Tarasoff*. Similarly, a change to 6068(e), where disclosure of a privileged client communication is "authorized" if it is reasonably believed necessary to prevent serious harm would evince the same legislative policy decision as to attorney confidences that led to *Tarasoff* liability for psychotherapists. As it is now, the language in 956.5 is critically different from 1024 because, unlike 1024, it contains no language of disclosure.

Of course, such a change would be arguably warranted if it afforded the public greater protection from violent acts leading to serious harm. However, for this to occur, there would have to be some indication that attorneys possess the requisite skills of prescience necessary to be able to realistically predict that their clients were going to actually commit future acts causing great bodily injury or death. Psychiatric predictions of future dangerousness are notoriously unreliable. There can be no basis for arguing that attorneys possess greater skill in this area. The result of the proposed change will therefore be to loosen the confidentiality safeguards currently afforded clients without insuring any increase in the protection of society.

What should an attorney do regarding a corporate client such as a pharmaceutical company whose product, according to information known to the attorney, may cause great bodily injury? Take out ads in newspapers? Secure an injunction to warn potential victims? (15 U.S.C. 2051-84.) How does the lawyer avoid being sued by former client and future drug users?

Will a perceived obligation to report a divorce client's extreme frustrations result in greater societal benefits than what it will destroy – a salutary obligation felt by a client in his attorney's presence to express whatever feelings arise?

The change also critically threatens constitutional rights such as the Fifth Amendment right against self-incrimination and the Sixth Amendment right to counsel.

This resolution should not be passed.