

**THE STATE BAR OF CALIFORNIA
STANDING COMMITTEE ON
PROFESSIONAL RESPONSIBILITY AND CONDUCT
FORMAL OPINION NO. 2015-192**

ISSUE: What information may an attorney ethically disclose to the court to explain her need to withdraw from a representation – particularly in the face of an order to submit to the court, in camera or otherwise, the substance of the attorney-client communications leading to the need to withdraw?

DIGEST: An attorney may disclose to the court only as much as is reasonably necessary to demonstrate her need to withdraw, and ordinarily it will be sufficient to say only words to the effect that ethical considerations require withdrawal or that there has been an irreconcilable breakdown in the attorney-client relationship. In attempting to demonstrate to the court her need to withdraw, an attorney may not disclose confidential communications with the client, either in open court or in camera. To the extent the court orders an attorney to disclose confidential information, the attorney faces a dilemma in that she may not be able to comply with both the duty to maintain client confidences and the duty to obey court orders. Once an attorney has exhausted reasonable avenues of appeal or other further review of such an order, the attorney must evaluate for herself the relevant legal authorities and the particular circumstances, including the potential prejudice to the client, and reach her own conclusion on how to proceed. Although this Committee cannot categorically opine on whether or not it is acceptable to disclose client confidences even when faced with an order compelling disclosure, this Committee does opine that, whatever choice the attorney makes, she must take reasonable steps to minimize the impact of that choice on the client.

AUTHORITIES

INTERPRETED: Rules 3-100 and 3-700 of the Rules of Professional Conduct of the State Bar of California.^{1/}

Business and Professions Code sections 6068(b), 6068(e)(1), and 6103.

STATEMENT OF FACTS

CEO is the Chief Executive Officer of Client, a closely held corporation. Client hired Attorney to prosecute a trade secret misappropriation case against a former employee of Client who left Client to join Client's primary competitor ("Competitor"). Near the close of discovery, about six weeks before trial, Attorney learns some information that causes her to conclude Client's claim lacks probable cause. Attorney meets with CEO to discuss this new information and advises CEO that Client should dismiss the claim, and that Attorney may not ethically continue to prosecute the claim for Client. CEO tells Attorney he does not want to do anything until the day before trial at the earliest because that is the date of a big trade show in which Client and Competitor both will be participating. CEO further tells Attorney that he does not really care about winning or losing the lawsuit, but that he merely wants to keep the lawsuit going in order to damage Competitor's public image leading up to the trade show.

Attorney advises CEO she cannot continue to represent Client in a lawsuit in which the Client's position lacks probable cause and the primary purpose is to harass or maliciously injure another person or company. Under such circumstances, Attorney tells CEO, she would have a mandatory duty to withdraw from the representation. CEO becomes angry and says, "I am paying you a lot of money, and I expect you to do what I say." Attorney leaves the meeting and says she will call CEO the next day after they both have slept on the issue.

^{1/} Unless otherwise indicated, all references to rules in this opinion will be to the Rules of Professional Conduct of the State Bar of California.

The next day, Attorney phones CEO and asks him if he has reconsidered whether to continue prosecuting the case. Again, CEO becomes angry and says he does not want to hear another word about dropping the case until after the trade show. Attorney then informs CEO that she will need to withdraw from the representation, and asks CEO if Client will consent to the withdrawal. CEO refuses to consent, saying he would not be able to find another lawyer this close to trial.

Attorney immediately begins drafting a motion to withdraw, which she convinces the court to hear on shortened time. In the moving papers, Attorney states, “Ethical considerations require my withdrawal as counsel for Client.”

Client appears at the hearing to oppose Attorney’s motion. The judge asks Attorney to explain the reason for her need to withdraw. The following colloquy ensues:

Attorney:	My duty of confidentiality to Client prevents me from saying more.
Judge:	I’m concerned about potential prejudice to Client, so you’ll have to give me a little more information.
Attorney:	Your Honor, I have an irreconcilable conflict of interest with Client that precludes my continued representation. My duty of confidentiality to Client prevents me from saying any more.
Judge:	Here is what we are going to do. You are ordered to provide me a detailed declaration, filed under seal, about what your client said to you that makes you think you need to withdraw. Then, one week from today you will appear in my chambers for an in camera hearing to discuss the declaration.

DISCUSSION

The Statement of Facts raises several issues and pits certain ethical duties of Attorney directly against her other ethical duties. First, to the extent Attorney knows or should know – as is apparent from the Statement of Facts – that Client is pursuing the lawsuit “for the purpose of harassing or maliciously injuring any person,” Attorney has a mandatory duty to withdraw.^{2/} Rule 3-700(B)(1). Second, in seeking to withdraw, Attorney must take reasonable steps to avoid reasonably foreseeable prejudice to Client’s rights, pursuant to rule 3-700(A)(2). Third, in asking the court for permission to withdraw, Attorney must continue to uphold her duty of confidentiality under rule 3-100 and Business and Professions Code section 6068(e)(1).

1. Duty To Withdraw

Rule 3-700(B)(1) provides that withdrawal is mandatory where, “[t]he member knows or should know that the client is bringing an action, conducting a defense, asserting a position in litigation, or taking an appeal, without probable cause and for the purpose of harassing or maliciously injuring any person.” Rule 3-700(B)(2) provides that withdrawal is mandatory where, “[t]he member knows or should know that continued employment will result in violation of these rules or of the State Bar Act.” Thus, in light of the Statement of Facts, Attorney correctly concluded that she had a mandatory duty to withdraw.^{3/}

^{2/} For purposes of this opinion, we assume Attorney has exhausted any reporting up obligations she might have under rule 3-600(B). We also assume no conflict between CEO and Client.

^{3/} In addition, rule 3-700(C)(1)(d) provides that withdrawal is permissive where the client “by other conduct renders it unreasonably difficult for the member to carry out the employment effectively.” Thus, even if withdrawal was not mandated by rule 3-700(B)(1) or (2) under the facts, Attorney still may withdraw if she concludes that hostility between her and CEO was such that she could not effectively continue to represent Client. See *People v. Robles* (1970) 2 Cal.3d 205, 215 [85 Cal.Rptr. 166] (finding that a breakdown in the attorney-client relationship may be “of such magnitude as to jeopardize the defendant’s right to effective assistance of counsel,” thereby necessitating substitution of counsel); *Aceves v. Superior Court* (1996) 51 Cal.App.4th 584, 592 [59 Cal.Rptr.2d 280] (citing “complete breakdown in the attorney-client relationship” as a basis for withdrawal). Moreover, it is an open question whether, after deciding that she must withdraw, Attorney still could try to settle the case for Client. See *Estate of Falco* (1987) 188 Cal.App.3d 1004, 1015, n.11 [233 Cal.Rptr. 807] (“We refrain from determining the

Rule 3-700(A)(2), however, provides in part that, “A member shall not withdraw from employment until the member has taken reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client, including giving due notice to the client, [and] allowing time for employment of other counsel” See also *Ramirez v. Sturdevant* (1994) 21 Cal.App.4th 904, 915 [26 Cal.Rptr.2d 554] (“A lawyer violates his or her ethical mandate by *abandoning* a client [citation], or by withdrawing at a critical point and thereby prejudicing the client’s case.” (Original italics)); see also *In the Matter of Riley* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 91, 115 (finding that attorney’s duties to client continue until a substitution of counsel is filed or the court grants leave to withdraw); Cal. State Bar Formal Opn. No. 1994-134 (discussing duty to provide competent representation pending court determination on issue of withdrawal). Moreover, notwithstanding Attorney’s ethical obligation to withdraw – and how she may weigh her need to withdraw against any prejudice to Client – Attorney may not withdraw absent either client consent or a court order. (Code Civ. Proc., § 284; rule 3-700(A)(1).)

Here, both Client and the court have raised concerns about potential prejudice to Client should Attorney withdraw. In particular, trial is only six weeks away, and it is unclear whether Client will be able to obtain substitute counsel.^{4/} Thus, Attorney’s duty to withdraw appears to clash with her separate duty to ensure that Client suffers no prejudice as a result of her withdrawal. Ultimately, it will be the court that weighs Attorney’s duty to withdraw against prejudice to Client. See *Mandell v. Superior Court* (1977) 67 Cal.App.3d 1, 4 [136 Cal.Rptr. 354]. Attorney, however, must take reasonable steps to convince the court of her need to withdraw, all the while taking reasonable steps to minimize the prejudice to Client and to maintain her duty of confidentiality under rule 3-100(A) and Business and Professions Code section 6068(e)(1).^{5/}

2. Duty of Confidentiality

One of the most important duties of an attorney is to preserve the confidences of her client. “No rule in the ethics of the legal profession is better established nor more rigorously enforced than this one.” *Wutchumna Water Co. v. Bailey* (1932) 216 Cal. 564, 572 [15 P.2d 505]. Business and Professions Code section 6068(e)(1) requires an attorney “[t]o maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.” Rule 3-100(A) provides, “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” except under certain limited exceptions not applicable here. An attorney moving to withdraw from representation faces a difficult dilemma – how to present sufficient facts to enable the court to consider the motion, while still maintaining the client’s confidences.^{6/} See California Rules of Court, rule 3.1362(c) (requiring party moving to

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corollary issue of whether an attorney who is ethically prohibited from proceeding to trial in a case the attorney believes lacks merit is similarly prohibited from settling the case.”).

^{4/} Because Client is a corporation, it may not represent itself; thus, it only can proceed with the lawsuit if it is represented by counsel. See *Paradise v. Nowlin* (1948) 86 Cal.App.2d 897, 898 [195 P.2d 867]. However, at least one court has found that this ban on corporate self-representation does not prevent a court from granting a motion to withdraw as attorney of record, even if it leaves the corporation without representation, because such an order puts pressure on the corporation to obtain new counsel. *Ferruzzo v. Superior Court* (1980) 104 Cal.App.3d 501, 504 [163 Cal.Rptr. 573].

^{5/} What specific steps Attorney should take if the court ultimately denies her motion to withdraw is beyond the scope of this opinion. At a minimum, however, Attorney must continue to competently represent Client, notwithstanding any animosity that may have developed between them. See rule 3-110. In addition, under these facts, Attorney likely has a duty to advise Client of potential adverse consequences under Code of Civil Procedure Code section 128.7, or even civil liability for malicious prosecution, should Client continue to pursue its lawsuit for improper purposes. See Cal. Code Civ. Proc., § 128.7; *Zamos v. Stroud* (2004) 32 Cal.4th 958, 970 [12 Cal.Rptr.3d 54] (finding that lawyer could be liable for malicious prosecution where he continues to prosecute a lawsuit after learning that it lacked probable cause).

^{6/} The client’s confidences or secrets, of course, go beyond just attorney-client privileged communications. “Client secrets means any information obtained by the lawyer during the professional relationship, or relating to the

withdraw to file a declaration stating “in general terms and without compromising the confidentiality of the attorney-client relationship why a motion” is necessary).

In *Aceves v. Superior Court* (1996) 51 Cal.App.4th 584 [59 Cal.Rptr.2d 280], the Court of Appeal reversed (on a writ of mandate) the trial court’s denial of a motion to withdraw filed by a public defender. In that case, the public defender advised the trial court on the morning of the scheduled trial that he had an actual conflict with his client, declaring that “the conflict caused a ‘complete, utter and absolute’ breakdown in the attorney-client relationship and precluded him from continuing the representation.” *Id.* at p. 588. The public defender also told the trial court that “he could not reveal the nature of the conflict without divulging client confidences or breaching ethical duties.” *Id.* The trial court denied the motion after the public defender refused to reveal privileged communications to further explain the conflict. The Court of Appeal then denied the public defender’s first writ of mandate “without prejudice to file a renewed application to be relieved as counsel founded upon a showing of the nature of the conflict, which showing may be made in camera.” *Id.* (Citation omitted.) The public defender subsequently renewed his motion, but still refused to reveal privileged or confidential information. Rather, the public defender explained in open court that the conflict arose from a statement by defendant: “[i]t’s a statement no one can ignore,” the statement caused an absolute, irretrievable breakdown in the attorney-client relationship such that no member of the public defender’s office could represent [defendant]” *Id.* at p. 589. He further stated that he “could not describe the facts which generated the conflict without violating the privilege or breaching ethical obligations.” *Id.* The court again denied the motion because it “was unsatisfied it knew anything more about the conflict than it knew at the last juncture” *Id.*

Following the denial of its second motion, the public defender’s office filed a second writ, which the Court of Appeal this time granted. In so doing, the court first discussed a number of cases addressing a criminal defendant’s constitutional right to effective assistance of counsel free from conflict of interest. *Id.* at p. 590 (discussing, *e.g.*, *Uhl v. Municipal Court* (1974) 37 Cal.App.3d 526, 528-29 [112 Cal.Rptr. 478]). On the issue of the duty of confidentiality, the court quoted *Leveresen v. Superior Court* (1983) 34 Cal.3d 530 [194 Cal.Rptr. 448], where the Supreme Court criticized a trial court’s failure to accept the attorney’s representation that a conflict existed:

[Counsel’s] duty not to use [the witness’s] confidences against him prevented [counsel] from even discussing these or other possibilities with his client, [the defendant], let alone revealing them in open court. Having accepted the good faith and honesty of [counsel’s] statements on the subject, the court was bound under the circumstances to rule that a conflict of interest had been sufficiently established.

Aceves, supra, 51 Cal.App.4th at p. 591 (quoting *Leveresen, supra*, 34 Cal.3d at p. 539). The court ultimately held, “Where as here the duty not to reveal confidences prevented counsel from further disclosure and the court accepted the good faith of counsel’s representations, the court should find the conflict sufficiently established and permit withdrawal.” *Id.* at p. 592. The court rejected the argument that a defense lawyer’s word alone is not sufficient absent additional evidence of a conflict:

[I]f there is no reason to doubt counsel’s sincerity, the trial court properly relies on the lawyer. [Citation omitted.] Regardless of how others might react, only the trial lawyer can realistically appraise whether the conflict may have an impact on the quality of the representation or whether counsel’s self-interest might stand in the way. [Citations omitted.] In such cases, the court by necessity relies on the lawyer.

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representation, which the client has requested to be inviolate or the disclosure of which might be embarrassing or detrimental to the client.” Cal. State Bar Formal Opn. No. 1993-133. Information can be “confidential” even if it is not “privileged.” See *Goldstein v. Lees* (1975) 46 Cal.App.3d 614, 621 n.5 [120 Cal.Rptr. 253] (“The attorney-client privilege is more limited than the ethical obligation of a lawyer to guard the confidences and secrets of his client.”) (citations omitted); see also rule 3-100, Cmt. [2]; Cal. State Bar Formal Opn. Nos. 2003-161 and 1986-87.

Id. at p. 594.^{7/} Depending on the circumstances, courts may require additional factual information in order to rule on a motion to withdraw.^{8/}

Aceves not only is consistent with cases like *Uhl* and *Leveresen*, but is supported by non-California authorities and opinions as well. For example, Comment [3] to ABA Model Rule 1.16 (the ABA counterpart to rule 3-700) provides, “The court may request an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. The lawyer’s statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient.” Comment [15] to ABA Model Rule 3.3 provides, “In connection with a request for permission to withdraw that is premised on a client’s misconduct, a lawyer may reveal information relating to the representation only to the extent reasonably necessary to comply with this Rule or as otherwise permitted by Rule 1.6.”^{9/} See also Or. Formal Opn. No. 2011-185 (finding that, under Oregon Rule 1.6(b), a lawyer may not reveal the basis for his withdrawal unless disclosure is permitted by one of the narrow exceptions to Rule 1.6); Ariz. Ethics Opn. No. 09-02 (discussing the general requirement that an attorney disclose no more than is reasonably necessary when moving to withdraw).

a. In Camera Review

One issue raised in *Aceves* but not decided is whether an attorney can satisfy her obligations under rule 3-100 by providing the court more detailed information in camera.^{10/} In *Manfredi & Levine v. Superior Court* (1998) 66 Cal.App.4th 1128, 1136 [78 Cal.Rptr.2d 494], the court noted that the attorney “could have requested an in camera hearing. This would have afforded the opportunity to furnish details on the claim of conflict and to provide the court with sufficient information as to why the law firm could not continue to represent [the client].” *Manfredi* did not, however, expressly address whether an attorney fulfills her obligations under rule 3-100 by disclosing confidential information in camera rather than in open court. Similarly, *Forrest v. State of California Dept. of Corporations* (2007) 150 Cal.App.4th 183 [58 Cal.Rptr.3d 466], discussed the possibility of an in camera hearing, but did not expressly decide whether it is appropriate in light of rule 3-100. In *Forrest*, the Court of Appeal merely recited that

^{7/} The dissent in *Aceves* distinguished between a request for withdrawal made early in a case and one that occurs on the eve of trial, like the one before it. In the latter case, the dissent was less willing to accept the attorney’s representation “without an inquiry sufficient to convince the court a conflict exists.” *Aceves, supra*, 51 Cal.App.4th at p. 599.

^{8/} In *Manfredi & Levine v. Superior Court* (1998) 66 Cal.App.4th 1128, 1135-36 [78 Cal.Rptr.2d 494], the court cited *Aceves*, *Uhl*, and *Leveresen* approvingly, but distinguished those cases from the facts before it. In *Manfredi*, the attorney sought to withdraw from an ongoing arbitration matter based on his receipt of unsolicited and confidential information, which he claimed created a conflict between him and his client. *Id.* at p. 1131. The court was skeptical, based on what it characterized as the prior “use of every [delaying] tactic known to man,” and requested further details of the alleged conflict. *Id.* at p. 1131. The lawyer would not provide any additional information, and the court denied the motion. The Court of Appeal noted, “Counsel would have done well to give the court some information as to the shape and size of the conflict here.” *Id.* at p. 1134. For example whether it concerned “divided loyalty between current client and former clients,” a pecuniary interest by counsel adverse to the client’s interest, a breakdown in the relationship between counsel and client, or other types of conflicts. *Id.* at pp. 1134-35. Instead, unlike counsel in *Aceves*, *Leveresen*, and *Uhl*, “[Counsel] failed to supply the trial court with the slightest inkling of the nature of the alleged conflict.” *Id.* at pp. 1135-36.

^{9/} ABA Model Rule 1.6, paragraph (a) provides: “A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).”

^{10/} When the trial court suggested an in camera hearing, the public defender declined, saying:

Our obligation to the client is to maintain his confidences, period. I don’t think that telling the court, even in camera with [the transcript] sealed, lives up to that obligation. I would gladly do it . . . if I thought I could serve both masters at the same time. [¶] But my understanding of the law is I can’t disclose that information to anyone outside of the law firm – outside of the attorneys that represent this gentleman. I cannot disclose [that information] to the court.

Aceves, supra, 51 Cal.App.4th at p. 588, n.4.

the trial court in fact had conducted an in camera hearing to accept evidence of a claimed conflict of interest. *Id.* at p. 194. Specifically, the Court of Appeal stated, “In order to protect attorney-client privileged matters, the court conducted a hearing with [counsel] in camera with a court reporter present.” *Id.* One could infer from this language that the court believed in camera disclosure was permissible as a way to protect the attorney-client privilege. We believe, however, that such a reading of *Forrest* goes too far.

The issue of reviewing potentially privileged information in camera is addressed in Evidence Code section 915(a), but only in the context of determining whether the information is privileged in the first instance. Section 915(a) states that, with certain inapplicable exceptions, “the presiding officer may not require disclosure of information claimed to be privileged . . . in order to rule on the claim of privilege.” The California Supreme Court has ruled similarly, specifically addressing in camera inspections. *Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725, 739 [101 Cal.Rptr.3d 758] (“Evidence Code section 915 prohibits a court from ordering in camera review of information claimed to be privileged in order to rule on the claim of privilege.”); see also *Southern Cal. Gas Co. v. Public Utilities Com.* (1990) 50 Cal.3d 31, 45, n.19 [265 Cal.Rptr. 801] (prohibiting in camera inspection of privileged document to determine whether attorney-client privilege had been waived). Because a court cannot order an in camera inspection or otherwise review potentially privileged communications in order to rule on a claim of privilege, it logically follows that a court may not review information that unquestionably is privileged – like the communications between Attorney and Client here – for purposes of ruling on a motion to withdraw.^{11/}

For purposes of ruling on a claim of privilege, an attorney may testify about certain circumstances giving rise to the privileged communication – just ***not to the communication itself***. *Costco, supra*, 47 Cal.4th at p. 737 (“Evidence Code section 915, while prohibiting examination of assertedly privileged information, does not prohibit disclosure or examination of *other* information to permit the court to evaluate the basis for the claim, such as whether the privilege is held by the party asserting it.”) (original italics). The duty of confidentiality, however, is broader than the privilege, and may prevent or limit an attorney from testifying in detail even about the circumstances of a confidential communication where doing so would disclose client “confidences” or “secrets.” See Cal. State Bar Formal Opn. Nos. 1993-133, 1988-96, 1986-87, 1981-58, and 1980-52.

b. Court Order To Disclose

Finally, in the Statement of Facts, the court ordered Attorney to provide additional facts in camera. As discussed above, Attorney may be able to tell the court some of the circumstances leading to her request to withdraw, but she must not cross the line and disclose confidential client information – here, for instance, CEO’s statements about his reasons for wanting to continue the litigation or any facts about the representation that would tend to portray Client in a poor light. To the extent, however, the court expressly orders Attorney to disclose any confidential client information, Attorney faces a dilemma: disclose confidential client information or risk disobeying a court order, and possibly being held in contempt. In such a case, we believe Attorney has a duty to take all reasonable steps to avoid the dilemma – either by obtaining Client’s consent to the in camera disclosure^{12/} or some other compromise measure, or by filing a writ petition with the Court of Appeal challenging the court’s order. In short, Attorney must exhaust all reasonable measures short of disclosing confidential client information against Client’s wishes before making the ultimate decision of whether to disclose confidential information or disobey the court’s order. If Client will not consent to the in camera disclosure, the court will not stay its ruling pending the filing of a writ petition, and Attorney cannot find a way to satisfy both Client and the court, then Attorney ultimately must choose between the important and conflicting obligations of protecting Client’s confidential information and obeying a court order.

^{11/} We do not believe the Supreme Court’s discussion in *General Dynamics Corp. v. Superior Court* (1994) 7 Cal.4th 1164 [32 Cal.Rptr.2d 1], of possible procedures, including in camera inspections, to allow limited disclosure suggests a different result, as the Court declined to articulate what circumstances would warrant such disclosures. See *id.* at p. 1191 (“The use of sealing and protective orders, limited admissibility of evidence, orders restricting the use of testimony in successive proceedings, and, where appropriate, in camera proceedings, are but some of a number of measures that might usefully be explored by the trial courts *as circumstances warrant*.”) (Emphasis added).

^{12/} Under the hypothetical facts, it likely is not in Client’s best interests to consent to an in camera disclosure, as that disclosure will paint Client in a bad light to the trial judge. Thus, Attorney must explain this possibility, even while requesting Client’s consent. See rule 3-500.

With one exception, where the issue was addressed only in a concurring opinion,^{13/} no California case or ethics opinion directly addresses this dilemma.^{14/} Given that fact, and given that the two duties are central to an attorney's ethical obligations, it is this Committee's view that there is no one rule that should apply in every situation. Attorneys must decide whether to obey the court order, or whether to continue to protect client confidences, and the Committee cannot categorically opine which ethical obligation should prevail. The Committee endeavors here to provide some guidance to assist attorneys in making this important decision.

Business and Professions Code section 6103 states that an attorney's "willful disobedience or violation of an order of the court requiring him to do or forbear an act . . . which he ought in good faith to do or forbear. . . constitute[s] [cause] for disbarment or suspension."^{15/} Several State Bar Court opinions address an attorney's challenge to

^{13/} The only California case of which the Committee is aware that squarely addresses the issue is the concurring opinion in *People v. Kor* (1954) 129 Cal.App.2d 436 [277 P.2d 94]. In *Kor*, an attorney was ordered to testify about his privileged conversation with his client under threat of contempt. *Id.* at pp. 440-41. The Court of Appeal ultimately found that the order was in error, and vacated the judgment as a result. *Id.* at pp. 446-47. The court did not make any findings about the propriety or lack of propriety of the lawyer following the court's order to testify. In a concurring opinion, however, Justice Shinn stated, "Defendant's attorney should have chosen to go to jail and take his chances of release by a higher court. This is not intended as a criticism of the action of the attorney. It is, however, a suggestion to any and all attorneys who may have the misfortune to be confronted by the same or a similar problem." *Id.* at p. 447.

More recently, in *Zimmerman v. Superior Court* (2013) 220 Cal.App.4th 389 [163 Cal.Rptr.3d 135], a public defender was found in contempt for refusing to testify about the details of how she received an envelope containing incriminating evidence about her client. The public defender argued that those details were privileged because she received them from a third party who was an agent of her client, but she refused to identify the third party or provide evidence supporting the claim of agency. The court found that the public defender had not established the preliminary fact that an agency relationship existed and, thus, could not establish the existence of the attorney-client privilege. Consequently, the court ordered the public defender to testify about the circumstances under which she obtained the envelope, including the identity of the third party. When the public defender refused to do so, the court found her in contempt, and the court of appeal denied her writ petition. Although the facts in *Zimmerman* have some similarities to the hypothetical facts in this opinion, one significant difference is that the court in *Zimmerman* found that the public defender failed to establish the existence of the privilege; in our hypothetical, the court did not make any such finding and it was unlikely that such a finding could or would be made because the privileged nature of the communication cannot reasonably be disputed.

^{14/} Courts and bar opinions in other jurisdictions – all Model Rules states – have addressed this issue, with decisions falling on both sides. *Compare* Ariz. Ethics Opn. No. 00-11 (2000) (attorney may refuse to disclose confidential client information responsive to a subpoena until tribunal enters final order requiring such disclosure); D.C. Ethics Opn. No. 288 (1999) (lawyer subpoenaed by Congressional subcommittee to produce client file may, but is not required to, produce the file if threatened with contempt); R.I. Ethics Opn. No. 98-02 (1998) (lawyer has duty to object to subpoena of client documents, but must comply with final court order requiring disclosure); Mass. Ethics Opn. No. 94-7 (1994) (lawyer must resist identifying client on Form 8300 until Department of Justice obtains court order requiring disclosure) *with Ex parte Enzor* (1960) 270 Ala. 254, 260 [117 So.2d 361] (finding that "petitioner correctly refused to answer the propounded question," even though he was cited for contempt and committed to jail); *Dike v. Dike* (1968) 75 Wash.2d 1, 16 [448 P.2d 490] (noting that attorney should not be held in contempt for failing to disclose privileged communication, but stating, "[i]f the attorney's position, in the opinion of the trial court, is wrong to the point of contempt, he should be so adjudged . . ."); see also H. Brent Helms, *Financial Institutions Reform, Recovery, and Enforcement Act: An Ethical Quagmire for Attorneys Representing Financial Institutions* (1992) 27 Wake Forest L. Rev. 277, 295 (discussing whistleblowing under FIRREA, noting attorneys' duty to challenge "the over-aggressive nature of the federal regulatory agencies," and stating that "attorneys practicing in states having ethical rules modeled after the Model Code should not feel compelled to disclose the confidences of their client financial institutions, even in the face of a court order.").

^{15/} Section 6103 states: "A willful disobedience or violation of an order of the court requiring him to do or forbear an act connected with or in the course of his profession, which he ought in good faith to do or forbear, and any violation of the oath taken by him, or of his duties as such attorney, constitute causes for disbarment or suspension." In addition to disobedience of a court order constituting possible grounds for attorney discipline, it also may

disciplinary findings under section 6103 based on the attorney's contention that the court order at issue was void or otherwise improper. See, e.g., *In the Matter of Klein* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 1, 9 (affirming lower court's decision that the attorney's failure to return his client's husband's money collected under a writ of execution constituted a violation of the court order quashing the writ, and holding, "Regardless of respondent's belief that the order was issued in error, he was obligated to obey the order unless he took steps to have it modified or vacated, which he did not do [fn. omitted]");^{16/} *In re Jackson* (1985) 170 Cal.App.3d 773, 778 [216 Cal.Rptr. 539] ("Once a court has jurisdiction and makes a ruling, an attorney has a duty 'to respectfully yield to the rulings of the court, *whether right or wrong*. [Citation omitted.] '[I]f the ruling is adverse, it is not counsel's right to resist it or to insult the judge – his right is only respectfully to preserve his point for appeal.'"). (Citations omitted, original italics).^{17/} We point out, however, that section 6103 expressly applies only to orders with which the attorney "ought in good faith" comply. It is certainly not obvious that an attorney ought in good faith comply with an order compelling a violation of her duty to maintain client confidences. Thus, this Committee cannot conclude that section 6103 by itself justifies disclosure under the circumstances.^{18/}

In several cases, courts have found violations of section 6103 over an attorney's argument that her noncompliance with a court order or other apparent disrespect for the court was necessitated by the pursuit of the client's interests. In *Arm v. State Bar* (1990) 50 Cal.3d 763 [268 Cal.Rptr. 741], the California Supreme Court affirmed a discipline order against an attorney who failed to notify his client or the court of a pending suspension order against him. The attorney had argued that he chose not to make the disclosure because "it was in his client's interest that he continue representing her. . . ." *Id.* at p. 775. The court rejected this argument, finding that "protection of the client's interests does not necessitate or justify concealing the fact of the attorney's suspension from practice." *Id.* Although *Arm* specifically addressed the attorney's violation of his duties to the court under section 6103, and did not address the violation of an express court order, *Arm* nonetheless pits an attorney's duty to the client against the duty to the court. In *In the Matter of Boyne* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 389, an attorney was

(Footnote continued...)

constitute contempt. Thus, unlike reporters – who are constitutionally protected from a finding of contempt for refusing to reveal their sources (Cal. Const. Art. I, Sec. 2(b)) – attorneys face significant legal ramifications for refusing to obey a court order.

^{16/} The court noted that an attorney's belief as to the validity of the order may be relevant to a charge of moral turpitude under Business and Professions Code section 6106. *In the Matter of Klein, supra*, 3 Cal. State Bar Ct. Rptr. at p. 11; see also *In the Matter of Riordan* (Review Dept. 2007) 5 Cal. State Bar Ct. Rptr. 41, 47 (finding that "bad faith must be proved if the State Bar alleges that respondent's noncompliance with the Court's orders involves moral turpitude").

^{17/} At least one State Bar Court opinion describes the attorney as having a choice as to whether to disobey an order and challenge it on appeal:

Moreover, in California, a person affected by an injunctive order has available to him two alternative methods by which he may challenge the validity of such order on the ground that it was issued without or in excess of jurisdiction. He may consider it a more prudent course to comply with the order while seeking a judicial determination as to its jurisdictional validity. On the other hand, he may conclude that the exigencies of the situation or the magnitude of the rights involved render immediate action worth the cost of peril. In the latter event, such a person, under California law, may disobey the order and raise his jurisdictional contentions *when he is sought to be punished for such disobedience*. If he has correctly assessed his legal position, and it is therefore, finally determined that the order was issued without or in excess of jurisdiction, his violation of such void order constitutes no punishable wrong.

In Matter of Respondent X (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 592, 604 (internal quotations and citations omitted) (explaining that collateral bar rule is not the rule in California). This does not answer the question, however, of whether an attorney can be disciplined if he chooses to obey the court order, declining to risk that the Court of Appeal ultimately will agree with the trial court's disclosure order.

^{18/} Section 6103 subjects an attorney to discipline not only for disobeying a court order, but also for "violati[ng] the oath taken by him, or of his duties as such attorney" Thus, violation of the duty of confidentiality could subject a lawyer to discipline under section 6103, as well as under section 6068(e)(1) and rule 3-100.

disciplined for, among other things, failing to pay a sanctions order. In concluding that the attorney had willfully failed to comply with the court's order, and thereby violated both section 6103 and section 6068(b), the court stated, "Obedience to court orders is intrinsic to the respect attorneys and their clients must accord the judicial system. As officers of the court, attorneys have duties to the judicial system which may override those owed to their clients." *Id.* at p. 403. Thus, both the Supreme Court and the State Bar Court appear to have rejected the argument that the client's interests necessarily justify an attorney's breach of the duty to the court, including the obligation to follow a court order.

Neither *Arm* nor *Boyne*, however, addressed an argument that an attorney had to violate a court order in order to comply with the duty of confidentiality. Thus, neither of these opinions directly puts at issue an attorney's conflicting duty of confidentiality under section 6068(e) and rule 3-100 and the duty under section 6103 to comply with court orders. This Committee acknowledges the duty of confidentiality to be among the most sacred duties an attorney owes to a client and cannot lightly – without direct supporting authority – conclude that it is ever acceptable to violate that duty, even in the face of a court order compelling disclosure.^{19/} Nor, however, is this Committee willing to conclude the opposite – that is, that an attorney may violate any court order, even one with which the attorney has a good faith basis to disagree.^{20/}

Although this Committee is unable to categorically opine on how an attorney should respond to an order compelling disclosure of confidential information after she has exhausted all reasonable efforts short of disobedience, this Committee can conclude that an attorney indeed must exhaust all reasonable efforts before concluding that the only options remaining are disclosing confidential information or disobeying a court order. As discussed above, the attorney should seek appropriate relief from the court's order, including filing a writ petition. She also should renew efforts to reach a compromise with the client and the court, which may include further attempts to obtain the client's consent to the withdrawal (albeit with full disclosure to the client of any adverse consequences of such disclosure). To the extent the duty to withdraw is a permissive one (unlike the mandatory one in our hypothetical facts), then the attorney should consider withdrawing the motion to withdraw.

^{19/} Although the Committee is not opining on the evidentiary issue of waiver of the attorney-client privilege, it is significant to note that, in the event an attorney discloses privileged information under the compulsion of a court order, the attorney's disclosure likely would not be held to constitute a waiver of the privilege. See Evidence Code, section 912(a) ("[T]he right of any person to claim a privilege provided by section 954 (lawyer-client 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.") (emphasis added); *Regents of University of California v. Superior Court* (2008) 165 Cal.App.4th 672, 683 [81 Cal.Rptr.3d 186] (holding, "no waiver of the privilege will occur if the holder of the privilege has taken reasonable steps under the circumstances to prevent disclosure. The law does not require that the holder of the privilege take 'strenuous or Herculean efforts' to resist disclosure."); *Schlumberger Limited v. Superior Court* (1981) 115 Cal.App.3d 386, 391-92 [171 Cal.Rptr. 413] ("Disclosure pursuant to a court order is coerced and does not constitute a waiver."); see also *Duplan Corp. v. Deering Milliken, Inc.* (D.S.C. 1974) 397 F.Supp. 1146, 1163 [184 U.S.P.Q. 775] (finding no waiver of the privilege when party turned over the privileged documents to the court for an in camera inspection "upon the suggestion of the court") (discussed in *Regents of University of California, supra.*).

^{20/} The ABA addressed and resolved this issue in Model Rule 1.6(b)(6), which provides, "A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary . . . (6) to comply with other law or a court order . . ." Comment [15] to Model Rule 1.6 further explains:

A lawyer may be ordered to reveal information relating to the representation of a client by a court Absent informed consent of the client to do otherwise, the lawyer should assert on behalf of the client all nonfrivolous claims that the order is not authorized by other law or that the information sought is protected against disclosure by the attorney-client privilege or other applicable law. In the event of an adverse ruling, the lawyer must consult with the client about the possibility of appeal Unless review is sought, however, paragraph (b)(6) permits the lawyer to comply with the court's order.

California has never followed the approach of Model Rule 1.6, and thus this rule is not particularly helpful to our analysis.

In addition, whichever choice the attorney makes, she must take reasonable steps to avoid prejudice to the client. Thus, if the attorney opts to obey the court order and disclose the client information, she must take all reasonable steps to minimize the harm to the client caused by such disclosure. For example, in the hypothetical, Attorney knows that Client's case is likely to be compromised if the trial judge learns that CEO is pursuing the case for improper purposes. Thus, Attorney should consider, for example, asking the court to appoint a judge pro tem or transfer the withdrawal motion to another judge, thus allowing the disclosure – if one ultimately is made – to be made to a judge other than the trial judge. On the other hand, if the attorney refuses to disclose confidential information, even when faced with the court's order to disclose, the attorney must take all reasonable steps to mitigate any potential harm to the client.

CONCLUSION

When an attorney knows or should know that her client is pursuing an action without probable cause and for the purpose of harassing or maliciously injuring another person, the attorney has a mandatory duty to withdraw from the representation if efforts to remonstrate fail. To the extent the attorney cannot obtain the client's consent to the withdrawal, the attorney will need to file a motion to withdraw, taking reasonable steps to avoid reasonably foreseeable prejudice to the client. In attempting to justify the need to withdraw, the attorney may not disclose client confidences. Ordinarily, for purposes of the motion to withdraw, it will be sufficient to state words to the effect that ethical considerations require withdrawal or that there has been an irreconcilable breakdown in the attorney-client relationship. To the extent such general language is deemed insufficient by the court, however, the attorney may only provide additional background information, but may not disclose confidential communications or other confidential information – either in open court or even in camera. If, notwithstanding all efforts by the attorney to prevent the court from entering an order compelling disclosure – including by requesting a stay of the order to allow time to file a writ petition – the court nonetheless orders disclosure, this Committee cannot categorically opine on how the attorney must choose between her competing duties to maintain the client's confidences and to obey the court's order. Whatever the attorney's decision, however, she must take reasonable steps to minimize the impact of that decision on the client.

This opinion is issued by the Standing Committee on Professional Responsibility and Conduct of the State Bar of California. It is advisory only. It is not binding upon the courts, the State Bar of California, its Board of Trustees, any persons, or tribunals charged with regulatory responsibilities, or any member of the State Bar.

[Publisher's Note: Internet resources cited in this opinion were last accessed by staff on February 9, 2015. A copy of these resources is on file with the State Bar's Office of Professional Competence.]