ETHICALLY SPEAKING

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The Self-Defense Exception to the Ethical Duty of Confidentiality

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If you believe what you read, we are at an historical peak in attorney malpractice litigation. Cases in the new millennium have increased by 155% over the previous decade. Lawyers throughout the country are concerned that premiums are on the rise and the size of malpractice awards is increasing. Even non-clients are joining the fray with claims by third parties – such as shareholder legal malpractice suits against the corporation's outside counsel — accounting for 10% to 15% of new claims against large law firms. In light of these trends, this article explores the ramifications for the ethical duty of confidentiality, and its cousin, the attorney-client privilege, when the lawyer must defend herself against a malpractice claim.

By necessity, a lawyer sued by a client is excused, to some extent, from the obligation to "maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets of, his or her client." (Cal. Bus. & Prof. Code § 6068(e).) Lawyers are similarly released, to some extent, from the duty of confidentiality in disputes with former clients over legal fees. The law in California lacks clarity, however, about the extent to which otherwise confidential communications between attorney and client may be revealed under these circumstances. In this article, we examine the exceptions to the ethical duty of confidentiality and to the attorney-client privilege under California law and explore the permissible scope of such disclosures. We also consider how judges manage disclosures of confidential information to avoid the excessive disclosure of confidential client information. Finally, we address the possible adverse consequences of excessive disclosures. Before embarking on those discussions, however, a brief comparison of the ethical duty of confidentiality and the attorney-client privilege is in order.

Of Confidentiality and the Attorney-Client Privilege

The ethical duty of confidentiality is, in several respects, broader than the attorney-client privilege. (*See*, *e.g.,* Kevin E. Mohr, *California's Duty of Confidentiality: Is it Time for A Life Threatening Criminal Act Exception?,* 39 San Diego L. Rev. 307, 317-320 (2002).) The ethical duty applies broadly to "information relating to the representation, whatever its source." (Cal. Rule Prof. Conduct 3-100, Comment [2].) There are no express exceptions permitting disclosure of otherwise confidential information in litigation between attorney and client. (*In re: Rindlisbacher,* 225 B.R. 180, 183 (9th Cir. BAP 1998).)

By contrast, the attorney-client privilege is a narrow evidentiary privilege that protects from compelled disclosure *communications* between a lawyer and client. Unlike the ethical duty of confidentiality, the Evidence Code provides an express exception permitting disclosure of communications "relevant" to issues of breach of duties arising out of the lawyer-client relationship. (Cal. Evid. Code § 958.) Under Section 958, "the attorney is released from the obligations of secrecy when the disclosure of communications, otherwise privileged, becomes necessary to the protection of the attorney's own rights, such as when the attorney's integrity, good faith, authority or performance of duties is questioned." (*In re: Rindlisbacher,* 225 B.R. at 183, *citing Arden v. State Bar of Cal*., (1959) 52 Cal.2d 310, 320; *see also*, *Carlson, Collins, Gordon & Bold v. Banducci* (1967) 257 C.A. 2d 212, which held that a lawyer is permitted to meet such issues with testimony regarding the communications between lawyer and client.) Other statutory exceptions to the attorney-client privilege, such as the "crime-fraud" exception (Cal. Evid. Code § 956), and the "joint client" or "common interest" exception (Cal. Evid. Code§ 962), may also provide a basis for a lawyer to reveal otherwise privileged communications, in an appropriate case.

There is an inherent tension between California's evidentiary exceptions to the privilege, on the one hand, and the absolute nature of the attorney's duty of confidentiality, on the other. (Fred C. Zacharias, *Privilege and Confidentiality in California,* 28 U.C. Davis. L. Rev. 367, 397 (1995).) Case law and ethics opinions have endeavored to reconcile this tension. Although Section 6068(e), which creates the duty of confidentiality, "on its face brooks no exceptions . . . it must be read in conjunction with other statutes and ethical rules which specifically permit the attorney to depart from the usual rules of client confidentiality." (*Fox Searchlight Pictures , Inc. v. Paladino*, (2001) 89 Cal.App. 4th 294, 313.) *Fox Searchlight* concluded that Section 6068(e) is "modified by the exceptions to the attorney-client privilege contained in the Evidence Code."[1] Thus, such provisions would appear to fall within the "other law" exception referred to in Rule 3-100, Comment [2], and permit some level of disclosure of otherwise privileged information notwithstanding the ethical duty of confidentiality. (Wydick, Perschbacher & Basset, CALIFORNIA LEGAL ETHICS, at 189 (4th ed. 2003); *L. A. County Bar Assoc. Formal Opin. No. 498 (1999).*) However, lawyers must proceed with caution in this area because the extent of permitted disclosure is not well defined in the law.

The Scope of the Disclosure: Relevance and Necessity

One difficulty for a lawyer invoking the self-defense exception lies in determining the extent of the permitted disclosure. Neither statutes nor case law define specific limits. Notwithstanding this lack of specific guidance, however, it can be assumed that policy considerations do not contemplate the total evaporation of either the attorney-client privilege or the duty of confidentiality. Rather, there may be a partial yielding of these protections to the extent necessary for a lawyer to respond to the charges.

California Evidence Code § 958 permits disclosure of communications "relevant to an issue of breach" but this refers to communications relevant to an issue of breach in a lawsuit *between* a lawyer and her client. It does not open the door to discovery *by*

third parties of such communications. (*Schlumberger Limited v. Superior Court* (1981) 115 Cal.App.3d 386, 392-394.) The California Supreme Court has stated that Section 958 "is not a general client-litigant exception allowing disclosure of *any* privileged communications simply because it is raised in litigation." *Brockway v. State Bar of Cal.* (1991) 53 Cal.3d 51.

For example, the State Bar's Committee on Professional Responsibility and Conduct (COPRAC) considered whether an attorney might disclose otherwise confidential information in order to exonerate himself in connection with a motion for sanctions. (*Cal. State Bar. Formal Opin. No. 1997-151.*) COPRAC advised that, if the client refuses to authorize disclosure, the attorney should withdraw from the representation and, after withdrawing, may disclose otherwise confidential information that is relevant to the sanctions request, to the extent necessary for the attorney to defend against such a request.

In the federal arena, one Central District decision, considering the self-defense exception a matter of first impression, determined that federal common law should recognize the self-defense exception to the attorney-client privilege. (*In re National Mortgage Equity Corp. Mortgage Pool Certificates Securities Litigation,* 120 F.R.D. 687 (C.D. Cal. 1988). In this case involving a massive scale securities fraud in which attorneys and other parties were charged with wrongdoing, the court held that the disclosure should be no greater than the lawyer reasonably believes is necessary to vindicate his innocence. The court rejected the argument that the selective disclosure necessitated under the self-defense exception required disclosure of all privileged materials, describing the proposition as "directly contrary to the reasonable necessity standard."

Given that *National Mortgage* was decided under federal common law, it is questionable whether it actually defines a California lawyer's ethical duties. A more recent decision suggests that there may be stronger limitations on the scope of disclosures sought by third parties than in litigation with clients. In *McDermott, Will & Emery v. Sup. Ct.* ((2000) 83 Cal. App. 4th 378), a shareholder brought a shareholders' derivative suit against the corporation's outside legal counsel for legal malpractice. The issue involved whether the defendant law firm could defend itself in view of the corporation's privilege. Somewhat in passing, the court stated, "Generally, the filing of a legal malpractice action against one's attorney results in a waiver of the privilege, thus enabling the attorney to disclose, to the extent necessary to defend against the action, information otherwise protected by the attorney client privilege." (*Id* at 385.) However, ultimately, the court determined that the derivative action could not proceed because the corporation's counsel would be unable to defend itself without revealing privileged communications, and the corporate client had not waived privilege.

The Risks of Excessive Disclosure

What are the consequences of revealing client confidences beyond what might be necessary to respond to or assert a claim? The disclosure of irrelevant information in client-lawyer litigation can result in professional discipline and perhaps fee forfeiture. For example, in *Dixon v. State Bar* ((1982) 32 Cal.3d 728), the client discharged her attorney and filed suit seeking to enjoin the attorney from harassing her. In response, the attorney filed a declaration disclosing that the client worried about an affair her husband supposedly had with the client's sister eight years earlier. The Court described the declaration as irrelevant to any of the issues pending in the action, and ruled that it had been filed for the purpose of harassing both the client and her sister, to cause embarrassment to both in violation of the attorney's duty of confidentiality. The attorney was disciplined by two years actual suspension, five years probation, and other sanctions.

In another case, the use of confidential information against a former client in a bankruptcy adversary proceeding was held to violate the lawyer's ethical duty of confidentiality. (*In re: Rindlisbacher, supra,* 225 B.R. 180.) The lawyer had used confidential information obtained from the prior representation of the client as the basis for the lawyer's adversary proceeding seeking to deny the client a discharge, which would in turn enable the lawyer to collect his fees from the client. The court held that use of confidential information for this purpose was not permitted under the ethical rules, and that the privilege was not impliedly waived because the debtor/client's pursuit of a discharge did not constitute a breach of the client's duty to pay the lawyer or in any way call into question the attorney's conduct. (*Id.* at 183.)

Outside the court system, the defense of one's legal representation in the press can also result in adverse professional consequences. In a high profile police brutality case against the City of New York and individual police officers, plaintiff's former counsel made numerous disclosures to the press involving client secrets. (*Louima v. City of New York,* 2004 U.S. Dist. LEXIS 13707 (2004).) The former counsel asserted the self-defense privilege based on New York's express exception permitting disclosure of confidences and secrets "to establish or collect the lawyer's fee or to defend the lawyer or his or her employees or associates against an accusation of wrongful conduct." (N. Y. Code Prof. Resp., D.R. 4-101.) The court held that the New York disciplinary rules did not permit disclosure in the absence of a disciplinary action, fee litigation, government investigation or civil suit in which the attorney could be reasonably called upon to defend himself from charges of misconduct. "[M]ere press reports regarding an attorney's conduct do not justify disclosure of a client's confidences and secrets, even if the reports are false and the accusations are unfounded." (*Id.*) The court further opined that disclosures to the press are not the appropriate forum for attorneys to defend themselves. As a sanction for the improper disclosures, the court ordered counsel to forfeit a significant portion of their fees.

Judicial Management of Disclosure: An Array of Ad Hoc Measures

The cases cited in the preceding section demonstrate that a lawyer might overstep the permitted parameters for disclosure under a self-defense exception to the ethical duty of confidentiality or attorney-client privilege. In appropriate cases, therefore, to protect clients from unwarranted public disclosure of confidential information, courts "should apply an array of *ad hoc* measures from their equitable arsenal designed to permit the attorney plaintiff to attempt to make the necessary proof, while protecting from disclosure client confidences subject the to privilege." (*General Dynamics Corp. v. Sup. Ct.* (1994) 7 Cal. 4th 764 (permitting former in-house counsel to pursue a claim against his former employer, but requiring that he do so without disclosing privileged or confidential information.)) In *General Dynamics,* the California Supreme Court recommended that judges take an "aggressive managerial role" to protect confidential information, including use of sealing and protective orders, orders limiting the admissibility of evidence, orders restricting the use of testimony in successive proceedings, and *in camera* proceedings.

The federal court in the *National Mortgage* case took a similar approach in determining which potentially confidential materials must be disclosed. The court first held an *in camera* review of the information to determine whether disclosure was reasonably necessary based on whether the materials provided significant assistance to the lawyer's defense. The court also issued a protective order limiting access to those materials to counsel only, and expressly denied access to a third party in a related action, finding no necessity for disclosure.

Another New York court expanded upon the *in camera* process by permitting the attorney to submit both the otherwise privileged and confidential documents that the attorney wished to disclose, along with an affidavit explaining the necessity of disclosing the documents. (*First Federal S&L Assoc. of Pittsburgh v. Oppenheim, Appel, Dixon & Co.,* 110 F.R.D. 557 (S.D.N.Y. 1986).) The judge ordered certain information produced, and redacted confidential information not necessary to the attorney's defense prior to the production. In a case where particularly sensitive information is likely to be revealed and become accessible to third persons, parties should consider whether a protective order is needed to ensure that the rights of both parties, and the confidences and secrets of the client, are fairly preserved.

Conclusion

The ethical duty of confidentiality and the attorney-client privilege are distinct, and there is no express exception to the duty of confidentiality for attorney self-defense in the Rules of Professional Conduct or the State Bar Act. However, case law and the official discussion to California rule 3-100 suggest that the ethical duty of confidentiality may be excused to the extent necessary for a lawyer to defend himself in litigation with a client or against accusations of misconduct made by a third party. The Evidence Code further permits disclosures of otherwise privileged communications in the context of legal proceedings between lawyers and their clients. However, lawyers disclosing information beyond that which is necessary to their claim for recovery of fees or their defense risk professional discipline, civil liability and perhaps also forfeiture of fees. Judicial management of such disclosures requires careful balancing of the necessity of the lawyer to defend herself against the client's right to confidentiality.

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1 However, notwithstanding the holding in *Fox Searchlight* and the existence of a statutory "exception" to the privilege that applies when the lawyer reasonably believes that disclosure is necessary to prevent a crime likely to result in death or substantial bodily harm, (Evid. Code § 956.5), the legislature nevertheless amended Section 6068(e) to provide an express exception permitting a lawyer to reveal confidential information to prevent a crime likely to result in death or substantial bodily harm.