

RESOLUTION 09-02-2016

DIGEST

Duty of Confidentiality: Permit Disclosure to Prevent Death or Substantial Bodily Harm

Amends Business and Professions Code section 6068 to allow an attorney discretion to reveal confidential information if it is necessary to prevent death or substantial bodily harm.

TEXT OF RESOLUTION

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

§6068

- 1 It is the duty of an attorney to do all of the following:
- 2 (a) To support the Constitution and laws of the United States and of this state.
- 3 (b) To maintain the respect due to the courts of justice and judicial officers.
- 4 (c) To counsel or maintain those actions, proceedings, or defenses only as appear to him
- 5 or her legal or just, except the defense of a person charged with a public offense.
- 6 (d) To employ, for the purpose of maintaining the causes confided to him or her those
- 7 means only as are consistent with truth, and never to seek to mislead the judge or any judicial
- 8 officer by an artifice or false statement of fact or law.
- 9 (e)(1) To maintain inviolate the confidence, and at every peril to himself or herself to
- 10 preserve the secrets, of his or her client.
- 11 (2) Notwithstanding paragraph (1), an attorney may, but is not required to, reveal
- 12 confidential information relating to the representation of a client to the extent that the attorney
- 13 reasonably believes the disclosure is necessary to prevent an ~~criminal~~ act that the attorney
- 14 reasonably believes is likely to result in death of, or substantial bodily harm to, an individual.
- 15 (f) To advance no fact prejudicial to the honor or reputation of a party or witness, unless
- 16 required by the justice of the cause with which he or she is charged.
- 17 (g) Not to encourage either the commencement or the continuance of an action or
- 18 proceeding from any corrupt motive of passion or interest.
- 19 (h) Never to reject, for any consideration personal to himself or herself, the cause of the
- 20 defenseless or the oppressed.
- 21 (i) To cooperate and participate in any disciplinary investigation or other regulatory or
- 22 disciplinary proceeding pending against himself or herself. However, this subdivision shall not
- 23 be construed to deprive an attorney of any privilege guaranteed by the Fifth Amendment to the
- 24 Constitution of the United States, or any other constitutional or statutory privileges. This
- 25 subdivision shall not be construed to require an attorney to cooperate with a request that requires
- 26 him or her to waive any constitutional or statutory privilege or to comply with a request for
- 27 information or other matters within an unreasonable period of time in light of the time
- 28 constraints of the attorney's practice. Any exercise by an attorney of any constitutional or
- 29 statutory privilege shall not be used against the attorney in a regulatory or disciplinary
- 30 proceeding against him or her.
- 31 (j) To comply with the requirements of Section 6002.1.
- 32 (k) To comply with all conditions attached to any disciplinary probation, including a
- 33 probation imposed with the concurrence of the attorney.

- 34 (l) To keep all agreements made in lieu of disciplinary prosecution with the agency
35 charged with attorney discipline.
- 36 (m) To respond promptly to reasonable status inquiries of clients and to keep clients
37 reasonably informed of significant developments in matters with regard to which the attorney has
38 agreed to provide legal services.
- 39 (n) To provide copies to the client of certain documents under time limits and as
40 prescribed in a rule of professional conduct which the board shall adopt.
- 41 (o) To report to the agency charged with attorney discipline, in writing, within 30 days of
42 the time the attorney has knowledge of any of the following:
- 43 (1) The filing of three or more lawsuits in a 12-month period against the attorney for
44 malpractice or other wrongful conduct committed in a professional capacity.
- 45 (2) The entry of judgment against the attorney in a civil action for fraud,
46 misrepresentation, breach of fiduciary duty, or gross negligence committed in a professional
47 capacity.
- 48 (3) The imposition of judicial sanctions against the attorney, except for sanctions for
49 failure to make discovery or monetary sanctions of less than one thousand dollars (\$1,000).
- 50 (4) The bringing of an indictment or information charging a felony against the attorney.
- 51 (5) The conviction of the attorney, including any verdict of guilty, or plea of guilty or no
52 contest, of a felony, or a misdemeanor committed in the course of the practice of law, or in a
53 manner in which a client of the attorney was the victim, or a necessary element of which, as
54 determined by the statutory or common law definition of the misdemeanor, involves improper
55 conduct of an attorney, including dishonesty or other moral turpitude, or an attempt or a
56 conspiracy or solicitation of another to commit a felony or a misdemeanor of that type.
- 57 (6) The imposition of discipline against the attorney by a professional or occupational
58 disciplinary agency or licensing board, whether in California or elsewhere.
- 59 (7) Reversal of judgment in a proceeding based in whole or in part upon misconduct,
60 grossly incompetent representation, or willful misrepresentation by an attorney.
- 61 (8) As used in this subdivision, “against the attorney” includes claims and proceedings
62 against any firm of attorneys for the practice of law in which the attorney was a partner at the
63 time of the conduct complained of and any law corporation in which the attorney was a
64 shareholder at the time of the conduct complained of unless the matter has to the attorney's
65 knowledge already been reported by the law firm or corporation.
- 66 (9) The State Bar may develop a prescribed form for the making of reports required by
67 this section, usage of which it may require by rule or regulation.
- 68 (10) This subdivision is only intended to provide that the failure to report as required
69 herein may serve as a basis of discipline

(Proposed new language underlined; language to be deleted stricken)

PROPONENT: Bar Association of San Francisco

STATEMENT OF REASONS

The Problem: Until 2004, California had absolutely no exceptions to the requirement of attorney-client confidentiality set forth in Business and Professions Code section 6068(e). This was in marked contrast to all other jurisdictions in the country, which follow the ABA Model Rules of

Professional Conduct with some minor modifications. (California is the only state that does not.) The ABA rules have long allowed an exception to confidentiality in order to prevent “reasonably certain death or substantial bodily harm.”

In 2004, legislation sponsored by then-Assemblyman Darrell Steinberg at long last brought California closer to the rest of the country. Steinberg’s bill, which became law as Business and Professions Code section 6068(e)(2), made the likelihood of death or substantial bodily injury an exception to confidentiality that would allow (but not require) a lawyer to reveal the danger. Richard Zitrin, the author of this Resolution, assisted in drafting that legislation.

Inclusion of the word “criminal” was not the drafting desire of Mr. Steinberg or anyone else involved in the drafting process. Rather, the word ultimately remained in the bill to assure its passage. California having never had any limitation on confidentiality, some legislators were reluctant to agree to anything but the most narrow exception. There was fear that lawyers would find it too easy to “snitch off” their clients, and that that would become a too-common occurrence. Thus after some internal debate, the word “criminal” remained.

In the decade since, however, as the drafters expected, there has been no flood of confidentiality breaches, and in fact not even a noticeable trickle. The justification for requiring the act to be “criminal” rather than to look at the result of the act – the substantial bodily harm – was always weak and is now basically non-existent. A company that pollutes a schoolyard’s water table through the trickling down of toxic waste may or may not have committed a criminal act. But the act causes great danger. (This example was used in both the ABA and later in California to eliminate the word “imminent,” which was present in an earlier ABA version of the rule.) An individual who tells his lawyer he is going to take his estranged wife and children out for “high speed experience” off-road in a dune buggy with no seat belts may or may not have committed a criminal act, but the act may be reasonably likely to lead to death or great harm.

The Solution: This legislation is limited and tailored: Get rid of the reference to the nature of the act in Business and Professions Code section 6068(e)(2), so that those lawyers facing such rare but life-threatening situations won’t have to go to the Penal Code to try to figure out whether the act involved is criminal or not.

IMPACT STATEMENT

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

CURRENT OR PRIOR RELATED LEGISLATION

Not known.

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RESOLUTIONS COMMITTEE RECOMMENDATION

The CCBA's Resolutions Committee recommended Disapproval of this resolution. The full Conference rejected that recommendation and approved the resolution.