

STATE BAR OF CALIFORNIA
STANDING COMMITTEE ON
PROFESSIONAL RESPONSIBILITY AND CONDUCT

[VIA E-MAIL TO: suedaly@staff.abanet.org]

February 3, 2005

Sue Daly
ABA Section of Business Law
321 North Clark Street
Chicago, IL 60610

Re: American Bar Association Task Force on Attorney-Client Privilege

Dear Ms. Daly:

The State Bar of California's Committee on Professional Responsibility and Conduct ("COPRAC") appreciates this opportunity to contribute to the American Bar Association ("ABA") study being conducted by the ABA's Task Force on Attorney-Client Privilege ("Task Force"). COPRAC shares the ABA's concerns about the erosion of client-lawyer confidentiality and is very interested in this study. COPRAC awaits the Task Force's tentative conclusions and recommendations and looks forward to providing further input at that time. COPRAC received notice of the Task Force hearing scheduled for February 11, 2005 in Salt Lake City, Utah but will not be sending a representative to testify. As provided for in the hearing notice, COPRAC is submitting written comment in lieu of in-person testimony. This comment has been approved for submission by the members of COPRAC but this comment does not constitute the position of the State Bar of California or its Board of Governors. The Board of Governors is free to submit its own comment on behalf of the State Bar of California.

INTRODUCTION

This comment reports on recent California experience in addressing issues of client-lawyer confidentiality arising under both the evidentiary attorney-client privilege and the ethical duty of an attorney to maintain a client's confidence and secrets. Although the evidentiary privilege and ethical duty are distinct legal concepts, COPRAC believes that the legal developments and public policy concerns under consideration by the Task Force impact both concepts.

The California matters COPRAC addresses in this comment are the following: (1) new California laws permitting disclosure of confidential client information necessary to prevent a criminal act likely to result in death or substantial bodily harm; (2) action taken by the Governor of

California and the Supreme Court of California in declining to approve recent proposals for new California laws that would have permitted an attorney for a governmental agency to act as whistle-blower; (3) COPRAC comment to the U.S. Securities and Exchange Commission (“SEC”) concerning proposed federal attorney conduct rules on “noisy withdrawal” developed pursuant to section 307 of the Sarbanes-Oxley Act of 2002; and (4) COPRAC testimony before the ABA Task Force on Corporate Responsibility.

CALIFORNIA’S DEATH/BODILY HARM EXCEPTION

In California, the obligation to assure the confidentiality of client information is found in: (1) the State Bar Act, California Business and Profession §6068, subd. (e) [“It is the duty of an attorney to do all of the following: . . . ¶(e) to maintain inviolate the confidence and, at every peril to himself or herself to preserve the secrets, of his or her client.”]; (2) California Evidence Code § 950 et. seq. [setting forth the evidentiary attorney-client privilege and express exceptions to that privilege]; and (3) the Rules of Professional Conduct of the State Bar of California [the duty of confidentiality is incorporated in various rules, such as rule 2-300 (re sale of a law practice) and rule 3-310 (re conflicts of interest)]. Operative July 1, 2004, each of these bodies of law was amended to permit, but not require, an attorney 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.” (See: Bus. & Prof. Code §6068, subd. (e)(1) and (2); Evid. Code §956.5; and Rule 3-100 of the Rules of Professional Conduct.)

The background of California’s adoption of a permissive death/bodily harm exception, including the full text of the new laws, is provided in the following enclosures: (1) June 24, 2004 News Release from the Judicial Council of California - Administrative Office of the Courts; and (2) State Bar of California memorandum dated June 2004 and captioned: “Request that the Supreme Court of California Approve Proposed Rule 3-100 of the Rules of Professional Conduct of the State Bar of California, and Memorandum and Supporting Documents in Explanation.”

A review of the provided enclosures reveals that California’s adoption of a permissive death/bodily harm confidentiality exception reflects a public policy that is consistent with the ethical rules adopted in a majority of states. However, California’s policy may be regarded as unique to the extent that California’s Rule 3-100 contains detailed guidance on how an attorney may implement the exception and still acknowledge and account for other professional responsibility obligations. For example, if reasonable under the circumstances, Rule 3-100 requires an attorney to inform a client about the attorney’s permissive ability to reveal confidential information and to make a good faith effort to persuade a client not to commit the anticipated criminal act.

The death/bodily harm confidentiality exception is California's only exception to the ethical duty of confidentiality that is expressly stated in the State Bar Act and the Rules of Professional Conduct. The State Bar of California has a long history of opposing the promulgation of exceptions to the ethical duty of confidentiality. For example, California has resisted the concept and policy of an exception to confidentiality to address fraudulent activities. In 1983, the State Bar Board of Governors directed its representatives to the ABA House of Delegates to vote "no" on a proposal to amend the ABA Model Rules of Professional Conduct because that proposal included provisions that could result in revealing client information concerning fraud. (See *California Lawyer*, Vol. 3, No. 12, Dec. 1983, "1982-1983 State Bar of California Annual Report" at pp. 59, 60-61.) In 2001, California delegates to the ABA House of Delegates again opposed proposed amendments to the ABA Model Rules of Professional Conduct due to concerns about the abrogation of confidentiality. (See *ABA/BNA Lawyers' Manual on Professional Conduct*, 17 Current Rep. 17 (2001).)

A rationale for California's historical reluctance to endorse confidentiality exceptions can be found in the commentary to new Rule 3-100 that states:

"the duty to preserve the confidentiality of client information involves public policies of paramount importance. (In *Re Jordan* (1974) 12 Cal.3d 575, 580 [116 Cal.Rptr. 371].) Preserving the confidentiality of client information contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct." (California Rule of Professional Conduct 3-100, Cmt. [1].)

CALIFORNIA REJECTS WHISTLE-BLOWER EXCEPTION FOR ATTORNEYS REPRESENTING GOVERNMENTAL AGENCIES

In February 2002, the State Bar submitted to the Supreme Court of California for approval proposed amended California Rule of Professional Conduct 3-600 (Organization as Client). Proposed amended Rule 3-600 was adopted by the State Bar Board of Governors at its January 26, 2002 meeting. The proposed amendments were intended to provide guidance to attorneys who serve as attorneys for governmental organizations by clarifying and expanding the permissive "up-the-ladder" reporting options included in the rule. This proposal was developed in response to the professional responsibility issues raised by Assembly Bill No. 363 ("AB 363"), a pending two-year bill introduced in 2001 by Assemblymember Darrell Steinberg entitled "The Public Agency Attorney Accountability Act." The attorney professional responsibility issue raised by AB 363 was

characterized as whether an attorney representing a government agency may act as a "whistle-blower?"

In cooperation with Assemblymember Steinberg, COPRAC studied this issue with the helpful assistance of various interested parties including representatives of: the Administrative Office of the Courts, Office of Governmental Affairs; the Office of the California Attorney General; the City Attorneys Department of the League of California Cities; Public Employees for Environmental Responsibility; the Executive Committee of the State Bar Public Law Section; the California Association of Sanitation Agencies; and the County Counsels' Association of California. This cooperative effort conducted by COPRAC resulted in the proposal to amend Rule 3-600. As proposed, the amended rule would have permitted, in limited certain circumstances, an attorney representing a government agency to report governmental misconduct (such as fraud or wilful misuse of public funds) to an appropriate oversight or law enforcement agency. (See enclosed copy of State Bar of California memorandum dated February 2002 and captioned: "Request that the Supreme Court of California Approve Proposed Amendments to Rule 3-600 of the Rules of Professional Conduct of the State Bar of California, and Memorandum and Supporting Documents in Explanation.")

Upon consideration by the Supreme Court of California, the Court determined not to approve the State Bar's proposed amended rule. The Court's May 10, 2002 order indicated that approval was denied because the proposed modifications conflict with an attorney's statutory duty of confidentiality.

Following the Court's disposition of the Rule 3-600 proposal, the State Bar served as a technical resource to Assemblymember Steinberg and other interested parties in modifying AB 363 to codify, by its own terms, "whistle-blower" statutory language similar to the terms of the rule 3-600 proposal. This revised AB 363 was passed by the Legislature but vetoed by California Governor Gray Davis on September 30, 2002. In his veto message, Governor Davis observed that:

"While this bill is well intended, it chips away at the attorney-client relationship which is intended to foster candor between an attorney and client. It is critical that clients know they can disclose in confidence so they can receive appropriate advice from counsel."

In 2004, AB 363 was re-introduced by Assemblymember Fran Pavely as AB 2713. The terms of the whistle-blower exception were slightly modified but were very similar to the terms of AB 363. AB 2713 was approved by the Legislature and submitted to Governor Arnold Schwarzenegger who vetoed the bill on September 28, 2004. In his veto message, Governor Schwarzenegger stated that:

“This is a well-intended bill and I applaud the efforts to expose wrongdoing within government. However, this bill would condone violations of the attorney-client privilege, which is the cornerstone of our legal system. This bill will have a chilling effect on when government officials would have an attorney present when making decisions. It is an attorney's duty to advise the governmental officials when they are about to engage in illegal activity. This bill will ensure that advice is not conveyed in every situation and therefore it is too broad to affect the intended purposes.

Existing law already addresses the most egregious situations, which is the only time the attorney-client relationship should be breached. It is critical to evaluate the recent changes to the law as it relates to the attorney-client privilege prior to further eroding this important legal principle.

For the reasons stated I am unable to support this measure.”

In view of the foregoing, COPRAC does not anticipate in the near future that the State Bar of California will initiate any rule or statutory proposals intended to establish a government attorney whistle-blower exception to confidentiality.

COPRAC COMMENT TO THE SEC ON “NOISY WITHDRAWAL”

As indicated in the Task Force’s public hearing notice, one of the topics of interest to the Task Force is “policies and practices of the SEC. . .conditioning favorable resolution of civil investigations and enforcement proceedings on the disclosure of privileged material.” Pursuant to the Sarbanes-Oxley Act of 2002, the SEC developed proposed attorney conduct rules. Among the SEC proposed rules was a proposal to require, under certain circumstances, a lawyer's "noisy withdrawal" from representing a client issuer (as defined by the SEC rules) or, as in an alternative SEC proposal, to require the client issuer to announce a lawyer's withdrawal. (See: SEC “Proposed Rules,” SEC File No. S7-45-02, Release No. 33-8186; and “Final Rules,” SEC File No. S7-45-02, Release No. 33-8185].) Enclosed is COPRAC’s written comment to the SEC dated April 4, 2002. COPRAC believes that its views on the SEC’s “noisy withdrawal” proposal may be helpful to the Task Force’s study. COPRAC’s comment is summed-up in the conclusion stating:

“We do not believe lawyers can be effective advocates or advisors for their clients if they are placed in a role where they are in effect government watchdogs over their clients. Far from imposing "Standards of Professional Conduct," the rules we have addressed would impose a radical change in the nature and scope of an attorney's engagement, a change from independent advisor to an enforcer of duties

under the Exchange Act or the common law. Instead of being the clients' advisor with the obligation to preserve the client's secrets, the lawyer would become an enforcer, with obligations, or at least discretion, to disclose the client's secrets. The substantial and deleterious effect the extra-corporate reporting rules will have on client trust and the attorney-client relationship that is so crucial to the effectiveness of our legal system warrants the Commission's rethinking of its proposal. The rules we have addressed jeopardize the client-lawyer trust relationship by effectively shutting off communication between lawyer and client and rendering the lawyer ineffective in helping to achieve the client's compliance with the law. The Commission should not overturn the settled area of confidentiality when there is dearth of evidence that such a change would have avoided the recent corporate scandals.”

Following consideration of public comments, the SEC did not act to adopt the “noisy withdrawal” proposal. However, to date, COPRAC is not aware of any action by the SEC to affirmatively withdraw the proposal.

In addition to the written comment to the SEC, once the SEC rules became operative, COPRAC jointly authored an “Ethics Alert Article” with the Corporations Committee of the Executive Committee of the State Bar Business Law Section. A copy of that article is enclosed.

COPRAC TESTIMONY TO THE ABA TASK FORCE ON CORPORATE RESPONSIBILITY

On November 11, 2002, COPRAC testified at a public hearing of the ABA Task Force on Corporate Responsibility. For convenient reference, a copy of COPRAC’s testimony is enclosed. COPRAC believes that the various points discussed in this comment may be helpful to the Task Force’s study. COPRAC’s testimony addressed regulatory concerns about, and proposed responses to, corporate scandals involving Enron, WorldCom and Adelphia. In part, COPRAC observed that:

“The question before you, in our view, is to determine whether lawyers had a significant role in the business scandals and, if so, to examine how it is that certain members of our profession could have strayed so far as to violate the fundamental rule that lawyers do not facilitate crimes or frauds. We do not believe that there is a widespread problem with lawyers facilitating crimes or frauds, and the rules of legal ethics should not be changed based on a mere assumption about such a problem or a few high-profile cases of lack of compliance with existing rules.

* * * * *

[A] solution to a culture problem is self-examination and education. The ABA is well placed to pursue those solutions to a possible culture problem in our profession. If there is a widespread problem of lack of personal and institutional integrity, such that a significant number of lawyers are willing to ignore their ethical and legal obligations to further crimes and frauds, then we had better confront it directly. And we had better not assume that adopting more rules will solve that problem. New rules are not a panacea. Rather, the way to solve a culture problem is by an increased emphasis on each lawyer's personal responsibility to comply with ethical strictures. One way of doing that is education. Another is to conduct a real and systematic inquiry into whether our profession has a "culture" problem, the extent of the problem, how the problem came about and what the profession needs to do to reform its culture. We emphasize that one important task in this endeavor is identifying whether we do have a significant culture problem as opposed to a few notably bad apples."

COPRAC's commentary on the importance of emphasizing compliance with existing ethical rules and laws is a view that can be extended beyond the corporate scandal context. A key part of the Task Force's study should be to: (1) ascertain whether a lack of compliance with existing rules is causing federal and state regulators to pursue new and amended regulatory provisions; and (2) whether there is a culture problem, beyond some bad apples, that calls for a concerted educational and enforcement effort within the legal profession.

CONCLUSION

The goal of this written comment has been to provide the Task Force with general information about California's recent experience on issues of client-lawyer confidentiality. COPRAC awaits the issuance of the Task Force's tentative report and looks forward to reviewing, and possibly commenting on, the Task Force's recommendations for ABA action.

Sincerely,

/ S /

Dominique Snyder
Chair

cc: COPRAC Members & Staff