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California Ethics in Review 1996

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CALIFORNIA ETHICS IN REVIEW 1996

Each year, the Standing Committee on Ethics and Professional Responsibility of the State Bar of California releases formal opinions regarding current ethical issues. These opinions are advisory only and are not binding on the courts, the State Bar of California, its Board of Governors, its members or any person or tribunal charged with regulatory responsibility. Below is a summary of the formal opinions released during 1996.

1. *Formal Opinion 1996-145*

Under Rule 2-100 of the California Rules of Professional Conduct (CRPC), if an attorney knows or should know that an opposing party is represented by counsel, she cannot communicate with that party about the subject of the representation without the permission of the party's attorney. The reason for this rule is to prevent an uncounseled party from making statements to the opposing party's lawyer that could later be used against her in court.¹ Formal Opinion 1996-145 deals with three issues related to CRPC 2-100.

The opinion first addresses whether an attorney is required to *ask* an opposing party if she is represented by counsel. Because the purpose of CRPC 2-100 is to preserve "the attorney-client relationship and the proper functioning of the administration of justice,"² it is logical to think that one is expected to ask. However, according to the opinion, "because the courts have held that an attorney has knowledge based on an objective standard and there is no express requirement in CRPC 2-100," the lawyer does *not* have to ask. The reasoning is apparently this: whether an attorney knows about a party's representation is determined by an objective standard; therefore, even if the attorney asks, and the party falsely claims not to be represented, the lawyer violates CRPC 2-100 if she *should have known* the party was represented.

1. *Continental Ins. Co. v. Superior Court*, 37 Cal. Rptr. 2d 843, 854-55 (Ct. App. 1995).

2. *Mitton v. State Bar*, 455 P.2d 753, 758 (Cal. 1969).

CRPC 2-100 does not contain an express inquiry requirement, and the opinion does not find an implied one. The Opinion cautions the reader, however, that local bar rules might require a lawyer to ask if a party is represented before communicating with her about the subject of representation. Such a requirement protects a represented party, even when the opposing lawyer has no reason to know about the representation. As long as the party answers truthfully when asked, CRPC 2-100 protects her by prohibiting the communication. Regardless of the local rules, however, it is prudent for a lawyer to tell every client not to talk to opposing counsel unless she is present.

The second issue is whether an attorney's obligation under CRPC 2-100 is affected by the means of communication (written, telephonic, or in person), or by who initiates the contact. The obligation is not affected by the circumstances and means of communication; however, these factors can be taken into account in determining whether the attorney knew or should have known that the opposing party was represented. An example³ would be a registered letter from a party. The means of communication, that is, the fact that the party wrote rather than telephoned or visited, does not affect the duty of the lawyer. However, depending on the circumstances, the fact that the party took care to send it by registered mail might put the lawyer on notice that the party is represented. Another example: suppose a party telephones opposing counsel. The call might be the first contact between the two or it might be in reply to a phone message from the lawyer. The lawyer's obligation is the same regardless of who initiated the contact. However, who initiated the contact may be taken into account when determining if the lawyer should have known the party was represented. If, for example, the lawyer receives a return call one week after leaving a message, she might have reason to suspect that the party retained a lawyer in the interim.

The third issue discussed is whether an attorney can rely upon a party's statement that she is not represented by counsel. As alluded to above, the answer is no. Under CRPC 2-100, an attorney's duty is to not communicate with a represented party without the consent of counsel if she knows or

3. The opinion did not offer any examples.

should know that the party is represented. This duty is not changed by a party's statement, although the statement can help determine whether the attorney knew or should have known about the representation. An example might be a situation where Lawyer A reasonably suspects a party is represented because she saw the party leaving a law office. Suppose that when asked, the party falsely claims that it was her office, and that she is a lawyer and is representing herself. In this case, it might be reasonable for Lawyer A to believe that she may ethically talk to the party about the subject of representation.

2. *Formal Opinion 1996-146*

Client fraud creates a difficult situation because it requires a lawyer to carefully balance several ethical obligations. Formal Opinion 1996-146 concerns an attorney's obligations in two situations: when she knows her client has used her services to commit a fraud, and when she knows her client is committing a fraud or will commit a fraud.

Let us suppose a client is constructing a residential development in three phases, each phase to be completed before the next is begun. She has a lawyer draft a standard sales contract to be used in all the phases, and a provision in the contract warrants the quality of the materials to be used.

To illustrate the situation where the client has used the lawyer's services to commit a fraud, assume that Phase I has been built, and all the homes have been sold using the sales contract drafted by the lawyer. In the presence of others, the developer casually mentions to the lawyer that she deliberately used substandard materials to cut costs. Under California Business and Professions Code (CBPC) 6068(e), the lawyer cannot reveal this fraud to anyone without the consent of the client. This duty of confidentiality is extremely broad and should not be confused with the attorney-client privilege. CBPC 6068(e) covers *any* information that the client would not want revealed. It does not matter that the information was not obtained through the attorney-client relationship, and it does not matter that others share the knowledge. The lawyer may not reveal the fraud.

Let us further suppose that the client wants the lawyer to draft a letter to the Phase I homeowners that includes the following statement: "In your sales contract, the developer

warranted the quality of all building materials. The warranty speaks for itself." The lawyer may not do so. The lawyer must maintain client confidences, but under CBPC 6068(d) she can only do so by means that are consistent with truth. Although the statement in the letter might not be untruthful in and of itself, in context it will tend to deceive by giving the impression that quality materials were used. Therefore, the lawyer cannot write the letter.

To illustrate a case of ongoing fraud, suppose that Phase II is now under construction, and the lawyer herself observes that inferior materials are again being used. If an attorney learns that a client is committing fraud, she should advise the client of that fact and about the possibility of future liability. This is part of her general duty under CRPC 3-500 and CBPC 6068(m) to keep her client informed. The lawyer may advise the client to discontinue the fraud. If the client continues, the attorney must at least limit her representation to areas where she will not be participating in it or furthering it. For example, the lawyer would need to refrain from negotiating sales of the substandard Phase II homes. If it is not possible to limit her representation so that she is not furthering the fraud, then she must withdraw from the representation entirely. Under CRPC Rule 3-700(B)(2) withdrawal from representation is mandatory if the lawyer knows or should know that continuing the representation will result in a violation of her ethical duties. In withdrawing from the representation, she must not disclose the fraud and she must act in a manner that reasonably avoids prejudicing the rights of the client.

3. *Formal Opinion 1996-147*

This opinion discusses when an attorney may ethically bill two or more clients for work done at the same time. Such a situation can arise, for example, when an attorney is traveling on behalf of one client and uses some of the travel time to work on another client's matter, or when an attorney represents several clients and spends time doing work which pertains to all their cases.

In any discussion of fees, it is important to remember that the lawyer has the highest fiduciary duty to her client. She must therefore make sure any contract between them is fair and reasonable. This overlaps her duty under CRPC 2-400(A). Under 2-400(A), she must "not enter into an agree-

ment for, charge, or collect an illegal or unconscionable fee.” As a fiduciary, the lawyer also must disclose fully all details of the fee agreement. This is in accord with CBPC 6148, which requires that a written fee agreement contain “any basis for compensation including . . . hourly rates, statutory fees or flat fees, and other standard rates, fee and charges” Therefore, if a lawyer wants to be able to double charge for her time, she must make her intention clear in the fee agreement, and she must not charge an unfair fee under any circumstances. The opinion illustrates these principles in three hypotheticals.

The first is a situation where an attorney has a written fee agreement with Client A in which she is to be paid for time spent traveling to court appearances. While making a six-hour trip for Client A, she spends five hours working on a matter for Client B. The attorney can of course bill Client B for the five hours, but may she also bill Client A for the six hours? If Client A’s matter had monopolized the lawyer’s time during the trip, then it would clearly be appropriate for the lawyer to bill Client A for the entire six hours. Here, however, the lawyer’s time was not monopolized as she was able to spend five hours working for Client B. Therefore she may not charge Client A for the six hours unless her fee agreements with *both* Client A and Client B clearly allow double billing in this situation.

In the second hypothetical one lawyer is representing four defendants in a lawsuit and attends a two-hour status conference in which she represents all four of them. May she charge each client for two hours, for a total of eight? The real issue here is whether any of the clients is being charged an unconscionable fee. If each of the four clients had a separate lawyer, each would have had to pay for two hours of time. Because the lawyer is only charging the clients what they would have paid anyway, had they not all had the same lawyer, she may charge each client for two hours. This, of course, assumes that she has disclosed this billing practice to each client in advance and that each client has consented.

In the final hypothetical, a lawyer represents one client in four different lawsuits. The court schedules conferences for each of the cases, all to be held on the same day. The lawyer spends a total of four hours attending the conferences. Must the attorney bill only for four hours, or may she bill four

hours to each of the four case files for a total of sixteen hours? Here the lawyer worked a total of four hours on behalf of a single client. To charge for sixteen hours would be to charge the client for work not actually performed, and would therefore constitute an unconscionable fee. Therefore, the lawyer must charge only for the time actually spent, in this case, four hours.

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