

California Lawyers Association
Ethics Committee
Formal Opinion No. 2022-1
April 22, 2022

Use of Confidential Client Information to Collect a Fee

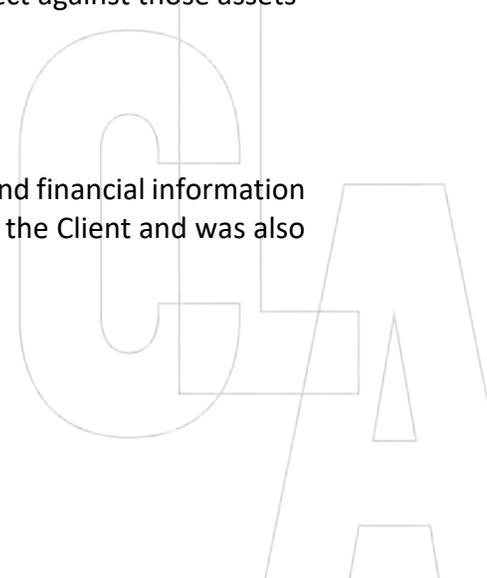
Information about a client's assets and bank accounts acquired by virtue of the attorney's representation of a client is generally confidential within the meaning of Business and Professions Code section 6068, subdivision (e), and cannot be used or disclosed by the attorney. Evidence Code section 958 may provide an exception to this general rule, permitting an attorney for purposes of establishing the amount and entitlement to an unpaid legal fee to reveal otherwise confidential information as reasonably necessary to establish the claim. Disclosure of financial or asset information relevant to collectability would generally not be reasonably necessary to establish the claim for unpaid fees. Once the judgment is entered against the client, the claim is established and the policy underlying Evidence Code section 958 would be satisfied. Because no exception to confidentiality would then apply, the attorney would not be permitted to use the client's confidential information to collect the judgment. Like any judgment debtor, an attorney may enforce the judgment through post-judgment collection procedures, including post-judgment discovery, but would be prohibited from using or disclosing the previously acquired confidential information in so doing. If the same information is independently obtained through post-judgment collection procedures, such as a judgment debtor's examination or document demand, the information may be used, provided the attorney's confidential knowledge about the client's assets was not used or disclosed to fashion post-judgment discovery specifically aimed at those assets.

ISSUES

To enforce a judgment against a former client for unpaid legal fees, may an attorney use information concerning the client's assets and bank accounts that the attorney received by virtue of the attorney's representation of that client to levy upon or collect against those assets and accounts?

STATEMENT OF FACTS

Attorney represented Client in an action in which certain banking, asset and financial information of Client was relevant. The information was provided to the Attorney by the Client and was also



obtained from banks and other financial institutions through discovery in the action. During the course of the representation, Client informed Attorney that he had additional assets, but those assets were not relevant to the matter in which Attorney represented Client and no information concerning them was produced or used to litigate that matter. None of Client's banking, asset and financial information was otherwise generally known to the public.

Attorney represented Client on an hourly basis and submitted monthly bills to Client, who, for the most part, paid them promptly by check. However, Client did not pay Attorney's last three invoices. Client did not raise any disputes over the amount of the invoices or Attorney's right to payment, but simply did not pay them. After the representation concluded, Attorney filed suit against Client for payment of the invoices. Attorney obtained a judgment against Client for the balance owed. Client has not voluntarily paid the judgment.

Having obtained the judgment against Client, may Attorney:

- (1) Levy upon or encumber Client's assets to enforce the judgment, using or disclosing the banking and financial information provided in the accounting action in which Attorney represented Client?
- (2) File a complaint or take other actions against Client seeking to reach the assets that were not relevant to the matter but about which Client informed Attorney?
- (3) Use or disclose the banking account number and financial institution information reflected on the checks Client used to pay Attorney's invoices to levy on the account?

DISCUSSION

Is the banking, asset and financial information received by Attorney confidential information subject to Attorney's duty of confidentiality that may not be used or disclosed by Attorney?

The first step in determining whether Attorney may use or disclose the banking, asset and financial information received from Client by virtue of the representation is to determine whether it is subject to the attorney-client privilege, the lawyer's duty of confidentiality, or both. An attorney's duty of confidentiality is a core aspect of the attorney-client relationship. The duty, well recognized as a "very high and stringent one," imposes on the attorney an obligation to "maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client." (Bus. & Prof. Code, § 6068, subd. (e)(1); *Flatt v. Super. Ct.* (1994) 9 Cal.4th 275, 289.) "Secrets" in this context include "information obtained by the lawyer during the professional relationship, or relating to the representation, which the client has requested to be inviolate or the disclosure of which might be embarrassing or detrimental to the client." (State Bar Formal Opns. 1993-133, 1988-96, 1986-87, 1981-58 and 1980-52; L.A.

County Bar Ass'n Formal Opn. Nos. 386 (1980), 436 (1985), 452 (1988) and 498 (1999); *Wutchumna Water Co. v. Bailey* (1932) 216 Cal. 564, 574 [lawyer may not "use against his former client knowledge or information acquired by virtue of the previous relationship"].)

Rules of Professional Conduct, rule 1.6 prohibits an attorney without informed client consent from revealing information protected by Business and Professions Code section 6068, subdivision (e), and rule 1.8.2 similarly prohibits use of a current client's confidential information to the client's disadvantage. Rule 1.9 likewise prohibits attorneys from using or disclosing to the former client's disadvantage information protected by Business and Professions Code section 6068, subdivision (e), acquired by virtue of the representation. (Rules Prof. Conduct, rule 1.9(c)(1), (2).) If such information about a former client has become "generally known," rule 1.9 would permit the lawyer to use that information. However, there is no "generally known" exception to Business and Professions Code section 6068, subdivision (e), which has long been interpreted as prohibiting both use and disclosure of a client's confidential information without informed client consent.¹ It is as of now unclear how courts will resolve disparity.

Confidential information includes attorney-client privileged information, but protects a much broader scope of information than the privilege. (State Bar Formal Opn. 2016-195.) Unlike the attorney-client privilege, for example, confidential information may not be revealed regardless of the source of the information. (Rules Prof. Conduct, rule 1.6, cmt. [2] ["The principle of client-lawyer confidentiality applies to information relating to the representation, whatever its source, and encompasses matters communicated in confidence by the client, and therefore protected by the attorney-client privilege, matters protected by the work product doctrine, and matters protected under ethical standards of confidentiality, all as established in law, rule and policy."]; L.A. County Bar Ass'n Formal Opn. No. 436 (1985).) Also unlike attorney-client privileged communications, where the presence of a third party may destroy the privilege, confidential information may include any information relating to the representation, even if that information is publicly available or revealed to others. (See Rules Prof. Conduct, rules 1.6, cmt. [2] & 1.9, cmt. [5] ("The fact that information can be discovered in a public record does

¹ Under long-standing California case law, lawyers are prohibited not only from disclosing, but also from using, a former client's confidential information against the former client or acting "in a way which would undermine [an attorney's] continuing duty to protect the confidential relationship." (*Styles v. Mumbert* (2008) 164 Cal.App.4th 1163, 1168; see also *Wutchumna Water Co. v. Bailey* (1932) 216 Cal. 564, 574; *Elan Transdermal Ltd. v. Cygnus Therapeutic Sys.* (N.D. Cal. 1992) 809 F. Supp. 1383, 1387; *Oasis West Realty LLC v. Goldman* (2011) 51 Cal.4th 811, 823; *Matter of Lilly* (1993) 2 Cal. State Bar Ct. Rptr. 473.)

not, by itself, render that information generally known* under paragraph (c).”); *Matter of Johnson* (Rev. Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179, 189; L.A. County Bar Ass’n Formal Opn. No. 436 (1985).)

1. Client’s financial information provided or received to litigate the action

Here, Attorney acquired Client’s banking and asset information during the course, and by virtue, of the representation. The banking and asset information received directly from the client is both privileged and confidential. The information acquired from others through discovery in the case is also confidential because it was obtained by virtue of Attorney’s representation of Client and its disclosure by Attorney to levy upon Client’s assets would be detrimental to Client. It is therefore “secret” information within Business and Professions Code section 6068, subdivision (e). Thus, Attorney may not freely disclose or use the financial information provided or received to litigate the case, and may not use it to levy upon or encumber Client’s assets to enforce the judgment unless an exception to confidentiality applies. (See Rules Prof. Conduct, rule 1.9(c)(1).)²

2. Information concerning Client’s other assets

Even though not directly related to Attorney’s representation of client in the lawsuit, the information communicated to Attorney during the professional relationship about the other assets owned by Client is confidential, secret information, as disclosure of it for purposes of collecting a debt would be detrimental to Client. The fact that the information was not relevant to the matter does not change its confidential nature because Attorney received it by virtue of the professional relationship with Client. Moreover, as the information was communicated to Attorney in confidence during the course of Attorney’s representation of Client, in addition to being confidential, it would also be privileged. (Evid. Code, §§ 952, 954.) Thus, Attorney cannot use the information unless exceptions to both the privilege and confidentiality apply or the information is later obtained independent of the prior representation.³

² If Attorney, directly or through a third-party collection agent or investigator, receives that banking or other asset information in post-judgment discovery, the information would not be acquired by virtue of the Attorney’s representation of Client and therefore would not be confidential within the meaning of Rules of Professional Conduct, rule 1.6 or Business and Professions Code section 6068, subdivision (e). However, Attorney cannot use the confidential knowledge of Client’s banking and asset information to specifically target post-judgment discovery at those assets or direct a collection agent or investigator.

³ See footnote 2.

3. Bank account information from check used to pay Attorney's invoices

The checks received by Attorney from Client to pay Attorney's invoices reveal the Client's bank and checking account number. Whether client payment checks are privileged under Evidence Code section 952 or confidential under Business and Professions Code section 6068, subdivision (e), has not been directly decided in California.

The bank account information on client checks could be considered a client "secret" if deemed to be acquired "by virtue of" the attorney-client relationship or "during the professional relationship" because use or disclosure of the account information to levy upon the account would be using the information against the former client and is likely to be detrimental to the client. Alternatively, the checks could be considered information independent of, and not relating to or by virtue of, the Attorney's representation of Client and therefore not protected by rule 1.9 and section 6068, subdivision (e). (See *Los Angeles County Bd. of Supervisors v. Super. Ct. (ACLU of So. Cal.)* (2016) 2 Cal.5th 282 ["Invoices for legal services are generally not communicated for the purpose of legal consultation. Rather, they are communicated for the purpose of billing the client and, to the extent they have no other purpose or effect, they fall outside the scope of an attorney's professional representation."].) The *ACLU* case, however, dealt with attorney-client privilege and so focuses on whether the invoices were issued "for the purpose of legal consultation." The much broader ethical duty of confidentiality, however, applies to information received "by virtue of" the attorney's representation. Although the checks here were not received "for the purpose of legal consultation," they were received by virtue of it. The *ACLU* case also did not involve a proposed use of the invoices by the attorney against his former client, as Attorney here proposes to use the check information.

Thus, it is likely in this context that the account and bank information contained on the check are client secrets within the meaning of section 6068, subdivision (e), such that Attorney could not use the bank and account information or disclose it to any third party, including a third party levying officer, unless some exception to confidentiality applies or the information is later obtained independent of the prior representation.⁴

Do any exceptions to the duty of confidentiality apply because Attorney is attempting to collect Attorney's fee?

Although the ABA Model Code contained an exception to confidentiality permitting a lawyer to reveal confidences or secrets "necessary to establish or collect [a] fee . . ." (see ABA Code Prof.

⁴ See footnote 2.

Resp., Disciplinary Rules, rule 4-101(C)), that exception was removed from the Model Rules (see ABA Model Rules Prof. Conduct, rule 1.6) and no such exception has ever been included in California's Rules of Professional Conduct or State Bar Act. California, however, does have the so-called self-defense exception to privilege, as set forth in Evidence Code section 958.

Evidence Code section 958

Evidence Code section 958 is an exception to the narrower attorney client privilege. The exception applies only to *communications* "relevant to an issue of breach, by the lawyer or by the client, of a duty arising out of the lawyer-client relationship."

There is no similar exception to confidentiality in either the State Bar Act or Rules of Professional Conduct. Rules of Professional Conduct, rule 1.6 (which prohibits an attorney from revealing confidential information), comment [2], however, indicates that the rule prohibits disclosure "except with the consent of the client or as authorized or required by the State Bar Act, these rules, or other law." (Emphasis added.) Evidence Code section 958 may fall within this "other law" exception. (See also *Fox Searchlight Pictures, Inc. v. Paladino* (2001) 89 Cal.App.4th 294, 313 [the apparently absolute obligation imposed by section 6068, subdivision (e), to maintain client confidences is "modified by the exceptions to the attorney-client privilege contained in the Evidence Code"].)

Assuming that the exception does apply to confidential information, the scope of permissible disclosure or use under section 958 is generally limited to that necessary to effectuate the purpose of the exception. The purpose of the exception "is to avoid the injustice of permitting 'a client either to accuse his attorney of a breach of duty and to invoke the privilege to prevent the attorney from bringing forth evidence in defense of the charge or to refuse to pay his attorney's fee and invoke the privilege to defeat the attorney's claims.'" (*People v. Ledesma* (2006) 39 Cal.4th 641, 695, 698 [quoting Recommendation Proposing an Evidence Code (Jan. 1965) 7 Cal. Law Revision Com. Rep., p. 176].) Thus, section 958 permits disclosure only to the extent necessary to respond to an issue raised by the client dispute. (See L.A. County Bar Ass'n Formal Opn. 498 (1999) [Evid. Code, § 958 permits disclosure only of information "reasonably necessary to support the attorney's position"]; *McDermott, Will & Emery v. Super. Ct.* (2000) 83 Cal.App.4th 378, 383-84 [attorney may disclose otherwise privileged information "to the extent necessary to defend against the action"]; *Brockaway v. State Bar* (1991) 53 Cal.3d 51, 63 [section 958 "is not a general client-litigant exception allowing disclosure of any privileged communication simply because it is raised in litigation." (emphasis in original)]; *Matter of Dixon* (Rev. Dept. 1999) 4 Cal. State Bar Ct. Rptr. 23 [scope of permissible disclosure under section 958 is limited to what is essential to preserve the attorney's rights].)

Under section 958, the exception applies only to privileged communications “relevant to an issue of breach.” That phrase is not defined in the Evidence Code. “Relevant evidence” under the Evidence Code, however, is “evidence . . . having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.” (Evid. Code, § 210.) The question here is whether asset information useful to collecting a judgment is information “relevant to an issue of breach” and therefore within the exception. The Client here has certainly breached the agreement by not paying the fee and Attorney is entitled to reveal the information necessary to establish the claim for payment of the unpaid fees. However, once judgment is entered, there is no disputed fact that is of consequence to determining the attorney’s action because the matter has been adjudicated. Even if Client contested Attorney’s claim, evidence of collectability or Client’s financial information or assets would be irrelevant to, and generally inadmissible in, Attorney’s breach of contract action against Client. Once the judgment against Client was entered, all contractual rights and obligations between the parties are extinguished. “When a party recovers a judgment for breach of contract, entry of the judgment absolves the defendant of any further contractual obligations, and the judgment for damages replaces the defendant’s duty to perform the contract. Upon entry of judgment, all further contractual rights are extinguished, and the plaintiff’s rights are thereafter governed by the rights on the judgment, not by any rights which might have been held to have arisen from the contract.” (*Tomaselli v. Transamerica Ins. Co.* (1994) 25 Cal.App.4th 1766, 1770 [citations omitted].) Thus, once judgment is entered, Client is no longer in breach and no “issue of breach” remains outstanding.

The Court in *In re Rindlishbacher* (B.A.P. 9th Cir 1998) 225 B.R. 180 held that section 958 does not apply to permit an attorney who is owed a fee to file a nondischargeability complaint against the Client based on hidden asset information learned by the attorney during the representation.⁵ This is because “[a] debtor’s pursuit of a discharge is not a breach of the duty

⁵ The holding of that case appears at odds with certain aspects of an earlier opinion of the Los Angeles County Bar Association Professional Responsibility and Ethics Committee. That Opinion addresses former bankruptcy counsel’s efforts to collect from the debtor the attorney’s unpaid fee, including whether the attorney can exercise the rights of a creditor in the bankruptcy case, whether the attorney can use non-confidential client information concerning the client’s assets in the exercise of his rights as creditor, and whether the attorney could use confidential asset information to pursue his rights as a creditor. See L.A.C.B.A., Prof. Resp. and Ethics Comm., Form. Opn. No. 452 (November 21, 1998). The Committee concluded the attorney could file a claim, an adversary proceeding to contest dischargeability of his debt and otherwise seek to enforce his debt in the bankruptcy. However, the attorney could not cooperate with other creditors and the trustee to marshal assets - many of which the attorney learned as a result of his representation of the client. This is because such collective collection

to pay; it is a right provided by the Bankruptcy Code. By seeking a discharge, the client does not in any way call into question the validity of the attorney's fee or the attorney's actions. He merely seeks to obtain a benefit that the law allows. Because there is no breach of duty by the client, and no claim against the attorney which the attorney must in fairness be permitted to defend, the exception to the confidences rule for disclosure of communications necessary to allow the attorney to collect a fee does not apply." (*Id.* at p. 184.)

The *Rindlishbacher* court found an attorney breached his ethical duties and the attorney-client privilege by filing an adversary proceeding to deny his former client's discharge. The proceeding was based on the client's failure to disclose certain rental income – a fact the attorney learned during the course of his prior representation of client. Finding an attorney breaches the duty of confidentiality by filing an action based on facts learned in confidence, the Court held the proceeding improper. (*Id.* at pp. 184-85.)

Unlike the client in *Rindlishbacher*, Client here is not simply availing itself of a right under the Bankruptcy Code. However, once a judgment has been entered in Attorney's favor, there is no issue of breach that remains to be resolved and there is no need to submit any evidence to establish Attorney's claim or client's defense. Nor is there reason "to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) The reason for the evidentiary exception to privilege provided by Evidence Code section 958, then, is not present. (See *In re Rindlishbacher*, *supra*, 225 B.R. at p. 183; see also Tuft et al., Cal. Prac. Guide: Prof. Resp. (The Rutter Group 2020) ¶ 7:126, p. ___ ["Information protected under Bus. & Prof. C. § 6068(e)(1) may be disclosed as necessary to pursue an action for fees *if the claim is contested.*"] [emphasis added]; Evid. Code § 958, Law Rev. Com. Cmts ["It would be unjust to permit a client . . . to refuse to pay his attorney's fee and invoke the privilege *to defeat the attorney's claim.*"] [emphasis added].) Here, Client has not invoked the privilege to defeat the Attorney's claim and could not do so post-judgment, after the case is resolved in Attorney's favor.

Moreover, the exception to privilege provided by section 958 applies only in the proceeding in which an issue of attorney or client breach is being determined. (See *Styles v. Mumbert* (2008)

efforts do not fall within an exception to the attorney's duty to maintain inviolate her clients' secrets. In terms of using information to enforce the debt to the attorney, the Committee found (1) the attorney was barred by section 6068, subdivision (e), from using any information - whether privileged or secret - unless an exception to section 6068, subdivision (e), applies; (2) Evidence Code section 958 is an exception and applies to both "confidences and secrets" under section 6068, subdivision (e); and (3) the attorney could therefore use the information, but only to the extent necessary to litigate the fee collection action in the bankruptcy.

164 Cal.App.4th 1163, 1169.) Because section 958 provides for an *exception* to privilege, not a waiver of privilege, once the proceeding in which the exception applies is adjudicated and no issues of consequence to a determination of the merits of the attorney's action can be disputed, there seems little basis to conclude that the privilege does not remain intact. (See *People v. Ledesma* (2006) 39 Cal.4th 641, 695 [under Evid. Code, § 958, "the attorney-client privilege continues to apply for purposes of retrial after otherwise privileged matters have been disclosed in connection with habeas corpus proceedings"]; *In re Miranda* (2008) 43 Cal.4th 541, 555 [by raising ineffective assistance of counsel, former client "did not *waive* the privilege, he merely triggered an *exception* to it that is not applicable in future proceedings" (emphasis in original)]; see also *Bittaker v. Woodford* (9th Cir. 2003) 331 F.3d 715, 716-723 [waiver of the attorney client privilege by petitioner in an ineffective assistance of counsel case extends only to that litigation, and not for "all time and all purposes"].)

Thus, under the facts presented here – where no contested action is pending and the fee contract has been extinguished and merged into a judgment against Client – section 958 would not permit attorney to use confidential or privileged information to enforce Attorney's judgment against Client.⁶

CONCLUSION

An attorney may not use or disclose information concerning a client's financial or asset information acquired during the professional relationship with client to collect on a judgment against client for unpaid fees. While an attorney is permitted to use or disclose client confidential information to establish a claim for unpaid fees against a former client, an attorney may do so only to the extent necessary to establish the claim. Once the claim is established, the reason for the exception to confidentiality is satisfied. Like all judgment debtors, attorneys may use post-judgment collection procedures to collect a judgment against a former client, but may not use or disclose confidential financial and asset information acquired during the professional relationship to do so. Provided confidential knowledge of a client's banking and asset information is not used or disclosed to specifically target post-judgment discovery at those assets or to direct a collection agent or investigator, banking or other asset information obtained through post-judgment collection procedures may be used to collect a judgment because such information would not be acquired by virtue of an attorney's representation and

⁶ This conclusion is consistent with that reached by the North Carolina State Bar Ethics Committee in its 2016 Formal Ethics Opinion 4, holding that confidential financial information obtained through an attorney's representation cannot be provided to the sheriff to assist with execution on a default judgment for unpaid legal fees because, after judgment is entered, the purpose for the self-defense exception is satisfied and it no longer applies.

therefore would not be confidential within the meaning of Rules of Professional Conduct, rule 1.6 or Business and Professions Code section 6068, subdivision (e).

Caveat: In accordance with California Rules of Professional Conduct, rule 1.0, Comment [4], opinions of ethics committees in California are not binding, but should be consulted for guidance on proper professional conduct.