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Protecting Client Confidences “At Every Peril”

Article By:

Keith Paul Bishop

California expects a lot from attorneys when it comes to client confidences and the attorney-client privilege.

- Evidence Code Section 955 imposes an affirmative duty on every lawyer who received or made a communication subject to the attorney-client privilege to claim the privilege whenever she is present when the communication is sought to be disclosed and she is authorized to claim the privilege.
- Business & Professions Code Section 6068(e) enjoins members of the California bar to “maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client”.
- Rule 3-100 of the California Rules of Professional Conduct forbids lawyers from disclosing information protected from disclosure by Section 6068(e) without the informed consent of the client.

Attorneys appearing in federal courts located in California need to keep these rules in mind, for they have adopted California’s statutes, rules and decisions governing attorney conduct. Central District Local Rule 83-3.1.2, Eastern District Local Rule 180(e), Northern District Local Rule 11-4, and Southern District Local Rule 83.4(b).

If A Judge Orders You, Should You, Would You?

But how far must a lawyer go to observe these obligations? Justice Shinn in his concurring opinion in *People v. Kor,* 129 Cal.App.2d 436 (1954) took a very hard line on this question:

> The privilege of confidential communication between client and attorney should be regarded as sacred. It is not to be whittled away by means of specious argument that it has been waived. Least of all should the courts seize upon slight and equivocal circumstances as a technical reason for destroying the privilege. Here the attorney was compelled to testify against his client under threat of punishment for contempt. Such procedure would have been justified only in case the defendant with knowledge of his rights had waived the privilege in

open court or by his statements and conduct had furnished explicit and convincing evidence that he did not understand, desire or expect that his statements to his attorney would be kept in confidence. **Defendant's attorney should have chosen to go to jail and take his chances of release by a higher court.** This is not intended as a criticism of the action of the attorney. It is, however, a suggestion to any and all attorneys who may have the misfortune to be confronted by the same or a similar problem.

This Lawyer Didn't

Perhaps San Diego attorney Terry Zimmerman had Justice Shinn's advice in mind when she refused to answer questions from a Superior Court judge regarding the circumstances under which she came into possession of specific evidence (a portfolio and mail) relevant to the prosecution's case against her former client. The court found Ms. Zimmerman in contempt and ordered her into custody "until she testified or the proceedings were concluded". The court's order was stayed and Ms. Zimmerman was allowed to file a writ of prohibition with the Court of Appeal.

In *Zimmerman v. Superior Court,* Cal. Ct. of Appeal Case No. D064531 (October 9, 2013), the Court of Appeal held that the party asserting the existence of a privilege bears the burden of establishing it exists, *Mahoney v. Superior Court,* 142 Cal.App.3d 937 (1983). Ms. Zimmerman did not receive the evidence directly from her former client but claimed that it was delivered by her former client's agents. The Court of Appeal acknowledged that Ms. Zimmerman cannot be compelled to disclose the content of an allegedly privileged communication to allow the court to determine if the privilege exists. However, the court was unwilling to expand the law of privilege to allow an attorney to claim the privilege exists in an agency situation without proving the preliminary fact of agency.

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