

**THE STATE BAR OF CALIFORNIA
STANDING COMMITTEE ON
PROFESSIONAL RESPONSIBILITY AND CONDUCT
FORMAL OPINION NO. 2012-183**

ISSUE: May an attorney disclose client confidences to her own attorney to evaluate a wrongful discharge action against her former firm and, in pursuing her claim, may she or her attorney publicly disclose those client confidences?

DIGEST: While an attorney may disclose client confidences to her own attorney to evaluate a potential wrongful discharge claim against her former firm, neither she nor her attorney may publicly disclose those confidences except in the narrowest of circumstances.

**AUTHORITIES
INTERPRETED:**

Rules 1-120, 3-100, and 3-110 of the Rules of Professional Conduct of the State Bar of California.^{1/}

Business and Professions Code section 6068, subdivision (e)(1) and (e)(2).

STATEMENT OF FACTS

Senior Associate engages Attorney to represent her in a potential wrongful discharge action against her former Firm. If litigation ensues, embarrassing confidential information about at least one Firm client might need to become public because the information is inextricably bound to the core of Senior Associate's wrongful discharge claim. Attorney believes Senior Associate has a valid claim, but both are concerned that pursuit of such a claim could lead to violations of their professional responsibilities with respect to confidential information of the Firm's clients and may not be permissible.

DISCUSSION

1. Senior Associate's duty of confidentiality to Firm's client does not bar her right to seek legal advice.

Senior Associate has a duty of confidentiality to her former clients. (Bus. & Prof. Code, § 6068(e)(1) (duty 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(A) ("A member shall not reveal information protected from disclosure by Business and Professions Code section 6068, subdivision (e)(1) without the informed consent of the client, or as provided in paragraph (B) of this rule").^{2/}

The duty of confidentiality continues even after termination of the attorney-client relationship. The term "client," as used in both section 6068(e) and the attorney-client privilege (see Evid. Code, §§ 950, *et seq.*), applies to both present and former clients. (See, e.g., *Wutchumna Water Co. v. Bailey* (1932) 216 Cal. 564, 571 [15 P.2d 505] (attorney's lips are sealed forever, notwithstanding client's discharge of lawyer); *David Welch Co. v. Erskine & Tully* (1988) 203 Cal.App.3d 884, 890 [250 Cal.Rptr. 339]; *Commercial Standard Title Co. v. Sup. Ct. (Smith)*

^{1/} Unless otherwise noted, all rule references are to the Rules of Professional Conduct of the State Bar of California.

^{2/} According to the Discussion, comment [2] of rule 3-100: "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. (See *In The Matter of Johnson* (Rev. Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179; *Goldstein v. Lees* (1975) 46 Cal.App.3d 614, 621 [120 Cal. Rptr. 253].)"

(1979) 92 Cal.App.3d 934, 945 [155 Cal.Rptr. 393] (duty owed to present and former clients); see also rule 3-310(E).) As a consequence, Senior Associate must guard against disclosure of client confidential information unless otherwise permitted by law.

Does this duty, however, prevent Senior Associate from seeking legal advice from Attorney and in doing so, disclosing to Attorney client confidential information?

Notwithstanding section 6068(e)(1) and rule 3-100(A), case law would permit Senior Associate to disclose confidential information both about the Firm and the Firm's client to Attorney to obtain legal advice about her rights against the Firm. (See *Fox Searchlight Pictures, Inc. v. Paladino* (2001) 89 Cal.App.4th 294, 308-315 [106 Cal.Rptr.2d 906].)

In *Fox Searchlight*, the court held that a former in-house counsel could disclose to her attorney all facts relevant to her termination, including employer confidences and privileged communications, in order to seek advice about, and to prosecute, a wrongful termination lawsuit against her former employer-client. *Id.* at p. 308. The court, however, added this caveat:

In the present case we are not faced with, and do not decide, whether the former in-house counsel or her attorney can be held liable to the employer for the *public* disclosure of those confidences and communications. *Id.* (emphasis added).

The *Fox Searchlight* court reasoned that the California Supreme Court in *General Dynamics v. Superior Court* (1994) 7 Cal.4th 1164 [32 Cal.Rptr.2d 1] contemplated that, in a wrongful termination case, a limited disclosure of employer-client confidences to the plaintiff's own attorney is necessary. In addition, *Fox Searchlight* recognized that the attorneys for the in-house counsel were themselves bound by the rules of confidentiality and attorney-client privilege and, thus, disclosure to them would not be a *public* disclosure. *Fox Searchlight, supra*, 89 Cal.App.4th at p. 311.

The *Fox Searchlight* court also focused on the practical result of such consultation. Given the warnings in *General Dynamics* about public disclosure of client confidences, except in the most limited circumstances, in-house counsel must consider whether she can assert her claims without publicly disclosing the employer's confidences or, if not, whether she has an applicable exception to the confidentiality requirement. In such circumstances, *Fox Searchlight* held that in-house counsel "should be permitted to seek out independent, candid, professional advice about their ethical duties under their particular circumstances." *Id.* at p. 312. The court added:

Indeed, the employer's confidentiality would seem better protected if, early on, in-house counsel consults her own attorney about the ethical issues in a wrongful termination case rather than risk having confidential communications disclosed inadvertently in the later stages of the litigation. *Id.*, citing, *inter alia*, Model Rule 1.6(b)(2).

Thus, *Fox Searchlight* makes clear that lawyers have the right to disclose employer-client confidential information when seeking legal advice from their own lawyers whether for their own protection or in aid of the client's cause. *Fox Searchlight, supra*, 89 Cal.App.4th at pp. 313-314.

In *Fox Searchlight*, the client was the employer against whom in-house counsel wished to assert a wrongful discharge claim. That court deemed the employer-client confidential information necessary for her lawyer to evaluate her potential claims. *Id.* at p. 310. Here, however, Senior Associate's claim is against her former Firm, a claim she believes will necessarily implicate the confidential information of at least one Firm client. The client itself will not be a party to the wrongful discharge action. Under our facts, Firm client's confidential information is necessary for Attorney to evaluate Senior Associate's claim against Firm, and to properly to advise her. We conclude that *Fox Searchlight* and *General Dynamics* permit Senior Associate to reveal only so much of the Firm client's confidential information to Attorney as is necessary for him to evaluate her potential claims against Firm.

Solin v. O'Melveny & Myers, LLP (2001) 89 Cal.App.4th 451 [107 Cal.Rptr.2d 456]—decided two days after *Fox Searchlight* by a different division of the same Court of Appeal—impliedly reinforces a limited right to privately reveal a client's confidential information. In *Solin*, Solin (an attorney) consulted with his own counsel at O'Melveny about, *inter alia*, potential criminal liability in his continued representation of his clients. Although the heart of the dispute was O'Melveny's need to disclose that third-party client's confidential information in its defense

of Solin’s subsequent malpractice action against the firm, neither the trial court nor the Court of Appeal expressed any concern that Solin had revealed his clients’ confidences to his counsel at O’Melveny.

Thus, we conclude that Senior Associate may at least reveal Firm client’s confidential information to Attorney in her consultation about a potential wrongful termination claim against her former Firm without violating Business and Professions Code, section 6068(e)(1) and rule 3-100(A). The facts state that the client confidential information is at the core of Senior Associate’s wrongful discharge claim, so the gratuitous revelation of client confidences unrelated to any legitimate claim is not an issue. See *Dixon v. State Bar* (1982) 32 Cal.3d 728 [187 Cal.Rptr. 30]; San Diego County Bar Ethics Opinion 2008-1.

2. Senior Associate may not publicly disclose Firm’s client’s confidential information to pursue her own claim.

To what extent, however, may Senior Associate and Attorney use that information in pursuit of Senior Associate’s claims? While Senior Associate may have the right to consult with Attorney—to get ethics advice or otherwise to determine her rights and responsibilities—neither *Fox Searchlight* nor *General Dynamics* addresses specifically how far Senior Associate and Attorney may go in using that information. May they use it in pleadings and open court?^{3/}

In *General Dynamics, supra*, 7 Cal.4th 1164, the Court addressed two questions: (1) whether the in-house counsel’s relationship with a former employer necessarily precluded a wrongful discharge retaliation claim against the former employer as a matter of law; and (2) whether and to what extent former in-house counsel could use client confidential information in the pursuit of that claim.^{4/}

The Court concluded that, while nothing inherent in an attorney’s role as in-house counsel precludes a retaliatory discharge claim, the attorney must establish the claim without breaching the attorney-client privilege or unduly endangering the values lying at the heart of the professional relationship. *Id.* at p. 1169.

[T]he in-house attorney who publicly exposes the client’s secrets will usually find no sanctuary in the courts. Except in those rare instances when *disclosure is explicitly permitted or mandated by an ethics code provision or statute*, it is never the business of the lawyer to disclose publicly the secrets of the client. In any event, where the elements of a wrongful discharge in violation of fundamental public policy claim cannot, for reasons peculiar to the particular case, be fully established without breaching the attorney-client privilege, the suit must be dismissed in the interest of preserving the privilege.” 7 Cal.4th at p. 1190 (emphasis added).^{5/}

General Dynamics permits retaliatory discharge remedies in instances where “*mandatory ethical norms* embodied in the Rules of Professional Conduct *collide with illegitimate demands of the employer* and the attorney insists on *adhering to his or her clear professional duty*.” *Id.* at p. 1186 (emphasis in original). The *General Dynamics* Court cites being party to the commission of a crime, destroying evidence or suborning perjury as examples of such a “collision.” Thus, *General Dynamics* would allow an in-house lawyer access to a judicial remedy (while concurrently prohibiting the public disclosure of client confidences in doing so) when fired for “adhering to the requirements of just such a mandatory professional duty, either by an *affirmative act* required by the ethical code or statute or by resisting a demand of the employer on the ground that it is unequivocally barred by the professional code.” *Id.* at p. 1186 (emphasis in original).

In *Solin, supra*, Solin sued O’Melveny for alleged negligent legal advice given to Solin about Solin’s clients. The *Solin* court had to decide whether to allow Solin’s malpractice action against O’Melveny to proceed when

^{3/} Although the California Evidence Code is implicated, our inquiry is focused on issues of professional responsibility and conduct.

^{4/} *General Dynamics* reached the Court on a demurrer, *General Dynamics* having staked its defense on a client’s unfettered right to discharge a lawyer for any reason or no reason at all. *Id.* at p. 1171. Unlike our facts here, in *General Dynamics*, the termination allegedly resulted from an in-house attorney’s attempt to comply with his ethical obligations. See *id.* at p. 1169.

^{5/} The court made clear that, in California, the ethical prescriptions at issue are those embodied in the Rules of Professional Conduct and certain provisions of the Business and Professions Code (e.g., §§ 6068, 6090.5-6107). *Id.* at p. 1190, fn. 6; see also *Green v. Ralee Engineering Co.* (1998) 19 Cal.4th 66, 78-79 [78 Cal.Rptr.2d 16].

O'Melveny contended that it needed testimony concerning the substance and details of discussions between Solin and the O'Melveny partner, including Solin's clients' secrets, and to introduce notes the O'Melveny partner took to corroborate his testimony. Since Solin would be duty bound (Evid. Code, § 955) to object to any evidence that revealed his clients' secrets, and since the trial court must exclude that evidence on a claim of privilege (Evid. Code, § 916), Solin would obtain an unfair advantage against O'Melveny. Accordingly, following the *General Dynamics* mandate if a lawsuit was "incapable of complete resolution without breaching the attorney-client privilege" (*General Dynamics, supra*, 7 Cal.4th at p. 1170), Solin's action could not proceed.^{6/} *Solin, supra*, at p. 467.

In *McDermott, Will & Emery v. Superior Court* (2000) 83 Cal.App.4th 378, 385 [99 Cal.Rptr.2d 622], the court determined that the attorney-client privilege belonged to the corporation and refused to carve out a shareholder exception to that privilege even in a derivative action. The law firm would be unable to mount a defense in the shareholder derivative action, absent a waiver by the corporation, because it could not disclose the privileged communications that were alleged to constitute the breach of duty. As a consequence, the court directed the entry of judgment in the firm's favor.^{7/}

Both *Solin* and *McDermott, Will & Emery* are consistent with *General Dynamics'* mandate that "where the elements of a wrongful discharge in violation of fundamental public policy claim cannot, for reasons peculiar to the particular case, be fully established without breaching the attorney-client privilege, the suit must be dismissed in the interest of preserving the privilege." 7 Cal.4th at p. 1190.^{8/} But note that, in *Favila v. Katten Muchin Rosenman LLP* (2010) 188 Cal.App.4th 189 at p. 221 [115 Cal.Rptr.3d 274], the court concluded that a conditional stay, rather than dismissal, might be an appropriate remedy where there is a realistic possibility that the attorney-client privilege might be waived or an exception to the privilege may apply.^{9/}

While no case directly addresses to what extent Senior Associate may *publicly* disclose client confidential information to the extent necessary to further her claims in a legal proceeding, in light of the absolute language in Business and Professions Code section 6068(e)(1), amended only to allow permissive disclosure in more dire

^{6/} But see Evidence Code section 965.5 ["There is no privilege under this article if the lawyer reasonably believes that disclosure of any confidential communication relating to representation of a client is necessary to prevent a criminal act that the lawyer reasonably believes is likely to result in the death of, or substantial bodily harm to, an individual."]; see also Business and Professions Code section 6068(e)(2) and rule 3-100(B). The duty under Business and Professions Code section 6068(e)(1) is broader than the reach of the attorney-client privilege and covers "secrets" in addition to client confidences. *Goldstein v. Lees* (1975) 46 Cal.App.3d 614, 621 [120 Cal.Rptr. 253], fn. 5; State Bar Formal Opinions 2003-161 and 1993-133.

^{7/} The court also rejected what it characterized as the "federal doctrine" with respect to the attorney-client privilege, holding that it contravened the strict principles in the Evidence Code that preclude any judicially-created exceptions to the privilege. (*McDermott, supra*, 83 Cal.App.4th at p. 385.)

^{8/} The Court reiterated that "the contours of the statutory attorney-client privilege should continue to be strictly observed," rejecting any suggestion that the privilege should be diluted in the context of in-house counsel and corporate clients. "Matters involving the commission of a crime or a fraud or circumstances in which the attorney reasonably believes that disclosure is necessary to prevent the commission of a criminal act likely to result in death or substantial bodily harm, are statutory and well-recognized exceptions to the attorney-client privilege." *Id.* at p. 1191.

^{9/} "It would be unfair to the derivative plaintiff and unnecessary to the preservation of the lawyer-client privilege to dismiss the lawsuit based on the *McDermott, Will* holding only to see the attorneys' client willingly waive its privilege to permit other defendants to defend themselves in the same lawsuit or to discover after such a dismissal that the evidence developed in the lawsuit against the allegedly culpable corporate insiders establishes the applicability of the crime-fraud exception of Evidence Code section 956." *Id.* at p. 221.

circumstances,^{10/} and the case law discussed above, we conclude that Senior Associate may not *publicly* disclose the Firm's client's confidences in order to pursue her own civil action.^{11/}

3. Attorney has a duty to Senior Associate to protect confidential information of Firm's client.

Attorney, unlike Senior Associate, has no prior or current relationship with the Firm or its clients. As a consequence, may Attorney disclose confidences of a Firm client that Senior Associate disclosed in seeking legal advice?

Attorney has two sets of duties to Senior Associate. First, Attorney is bound by the attorney-client privilege and Business and Professions Code section 6068(e)(1) to protect what Senior Associate reveals to him in consulting him about her potential claim against the Firm. As a consequence, unless Senior Associate can publicly disclose her former Firm's client's confidences, and only to the extent that she would be permitted to do so, Attorney is equally bound to protect those confidences from public disclosure because of his duty to protect the confidential information Senior Associate disclosed. (See Bus. & Prof. Code, § 6068(e)(1); rule 3-100.)^{12/}

Second, Attorney also owes Senior Associate a duty of competence under rule 3-110, not only to advance her interests but to avoid harming her. He is Senior Associate's agent and generally his conduct is imputed to her.^{13/} Thus, if Senior Associate cannot publicly disclose the Firm's client's confidential information, we conclude that Attorney is prohibited from engaging in such conduct.

CONCLUSION

While Senior Associate has the right to consult with Attorney concerning a potential wrongful discharge claim against her former Firm, and in that consultation to reveal, as necessary, client confidential information, in the circumstances described here, Attorney may not publicly disclose those client confidences to pursue Senior Associate's wrongful discharge claim.

This opinion is issued by the Standing Committee on Professional Responsibility and Conduct of the State Bar of California. It is advisory only. It is not binding upon the courts, the State Bar of California, its Board of Governors, any persons, or tribunals charged with regulatory responsibilities, or any member of the State Bar.

^{10/} An attorney is permitted to reveal confidential information only "to prevent a criminal act that the member reasonably believes is likely to result in death of, or substantial bodily harm to, an individual." Rule 3-100(B); *accord* Bus. & Prof. Code, § 6068(e)(2).

^{11/} We do not address whether the Firm's client confidences may be disclosed in some other manner (e.g., filing under seal, protective orders, or *in camera* proceedings). See *General Dynamics, supra*, 7 Cal.4th 1164 at p. 1191; *Favila, supra*, 188 Cal.App.4th at p. 221; San Diego County Bar Ethics Opinion 2008-1; *Solin, supra*, 89 Cal.App.4th at pp. 467-468; *Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725 [101 Cal.Rptr.3d 758] at pp. 737-739.

^{12/} See also Cal. State Bar Formal Opn. No. 1986-87; *Anderson v. Eaton* (1930) 211 Cal. 113, 116 [293 P. 788] (fidelity); *Jeffry v. Pounds* (1977) 67 Cal.App.3d 6, 11 [136 Cal.Rptr. 373] (loyalty); *In re Soale* (1916) 31 Cal.App. 144, 153 [159 P. 1065]; Cal. State Bar Formal Opn. No. 1996-146.

^{13/} *Channel Lumber Co., Inc. v. Porter Simon* (2000) 78 Cal.App.4th 1222, 1228 [93 Cal.Rptr.2d 482] (In a dispute between attorney and client, the court stated "a principal...may not employ an agent to do that which the principal cannot do personally.") See also, Cal. State Bar Formal Opn. No. 1995-144 (an attorney who directs investigator to interview witnesses to an accident must make sure that the investigator's communications with witnesses do not violate rule 1-400(A)) and Cal. State Bar Formal Opn. No. 1993-131 (a communication by client to opposing party that originates from the client's attorney is an indirect communication in violation of rule 2-100).