

**THE STATE BAR OF CALIFORNIA
STANDING COMMITTEE ON
PROFESSIONAL RESPONSIBILITY AND CONDUCT
FORMAL OPINION NO. 2012-185**

ISSUES: In settling a dispute with a former client, may an attorney seek: (1) the former client’s written representation that no State Bar complaint has been filed; (2) the former client’s representation that he or she has no present intention to file a State Bar complaint; (3) the former client’s written contractual agreement not to file a State Bar complaint against the attorney based on matters relating to or arising out of the representation; or (4) the former client’s oral agreement not to file a State Bar complaint against the attorney based on matters relating to or arising out of the representation?

DIGEST: Business and Professions Code section 6090.5 prohibits an attorney from seeking a client’s written or oral agreement not to file a State Bar complaint against that attorney. “Seeking” an agreement includes any attorney communication to a client proposing or suggesting a prohibited agreement. “Seeking” also may encompass factual recitations in the settlement agreement that the client has not filed a State Bar complaint, or concerning the client’s future intentions regarding filing a State Bar complaint. Section 6090.5 might prohibit these types of recitations because they could produce an impermissible chilling effect on the client’s future filing of a State Bar complaint. If a lawyer seeks an oral or written agreement to not file a State Bar complaint, withdrawal of that request does not cure the ethical violation.

**AUTHORITIES
INTERPRETED:**

Rules 1-500(B) of the Rules of Professional Conduct of the State Bar of California.^{1/}

Business and Professions Code section 6090.5.

STATEMENT OF FACTS

Attorney represented Former Client in litigation which has concluded. Attorney sent a closing letter and final bill. Former Client agrees that the representation has concluded. During that representation, Attorney and Former Client had a dispute about Attorney’s litigation tactics. Former Client claimed Attorney violated State Bar ethics rules, and Former Client threatened to file a State Bar complaint against Attorney. Attorney and Former Client reached a preliminary agreement to settle their dispute by Attorney writing-off a portion of Former Client’s final bill, and by Former Client agreeing to include the following provisions proposed by Attorney in a signed settlement agreement: (1) Former Client represents that she has not filed a State Bar complaint against Attorney; (2) Former Client represents that she has no present intention to file a State Bar complaint against Attorney; and (3) Former Client agrees not to file any complaint against Attorney with the State Bar relating to or arising out of the representation. After consulting Business and Professions Code section 6090.5, Attorney informed Former Client that the final written settlement agreement need not include a written agreement that Former Client would not report Attorney to the State Bar – because Attorney told Former Client he was satisfied with taking Former Client at her word that she would not do so.

DISCUSSION

1. Business and Professions Code section 6090.5

This opinion illustrates various applications of California Business and Professions Code section 6090.5, which provides in part:

^{1/} Unless otherwise indicated, all future references to rules in this opinion will be to the Rules of Professional Conduct of the State Bar of California.

(a) It is cause for suspension, disbarment, or other discipline for any member, whether as a party or as an attorney for a party, to agree or seek agreement, that:

(1) The professional misconduct or the terms of a settlement of a claim for professional misconduct shall not be reported to the disciplinary agency.

This section applies to all settlements, whether made before or after the commencement of a civil action.

Section 6090.5 initially was adopted by the Legislature in 1986 after a well-publicized and comprehensive review of the State Bar's disciplinary structure and procedures. Specifically, the purpose was "to provide for closer monitoring of attorney activity, and greater breadth in attorney punishment." Analysis of the Senate Committee on Judiciary regarding Senate Bill 1569 (Presley) as amended February 24, 1986.^{2/} With regard to the specific language of section 6090.5, committee analysis addressed the harm in situations where attorneys, against whom civil actions for misconduct were filed, required plaintiffs to agree not to file complaints with the Bar as conditions of settlement. To address this harm, section 6090.5 provided that it was a cause for suspension, disbarment, or discipline for an attorney to engage in such settlement agreements.

In 1996, the Legislature amended section 6090.5 by adding the language "to agree or seek agreement." Previously, section 6090.5 stated that a member could not "require" as a condition of settlement that misconduct not be reported.^{3/} The added term "to agree or seek agreement" implies that the Legislature sought to expand section 6090.5's application. No California ethics case has yet interpreted the phrase "to *seek* agreement," yet the common usage of the word "seek" is broad. Webster's Dictionary defines "seek" as "to resort to, to go to," "to go in search of," "look for," and to "inquire for." Webster's Third New International Dictionary (3d ed. 2002) p. 2055.

Indeed, a settlement offer by an attorney to a complaining witness to withdraw a State Bar complaint is a violation of section 6090.5. *In re McCarthy* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 364 involved an attorney who committed defalcation against a business partner while acting as a fiduciary. While attempting to settle the dispute, the attorney offered a settlement term that would have the complaining witness "contact the State Bar to withdraw any claims." The complaining witness refused, and settlement was never consummated. In disciplinary proceedings, the court held that the attorney's *intent* to agree to withdrawal of the State Bar complaint in the civil settlement agreement was itself a violation of section 6090.5.^{4/} In *In re Brockway* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 944, an attorney violated section 6090.5(a)(2) when he entered into a settlement agreement resolving a fee dispute in that the client "agreed to settle [the fee] dispute and to withdraw the complaint pending before the State Bar, all in accordance with the terms of this Agreement."^{5/}

^{2/} The legislative history reveals that the Legislature addressed and identified shortcomings of the then-existing system for disciplining and taking action against attorneys who engaged in illegal or unethical conduct. The legislation particularly addressed reports of attorney misconduct to the State Bar, due to criticism leveled at the Bar "that attorneys with poor criminal or professional records often continue to practice for years without penalty." Analysis of the Senate Committee on Judiciary regarding Senate Bill 1569 (Presley) as amended February 24, 1986.

^{3/} The 1996 amendment rewrote the section that had read: "It is a cause for suspension, disbarment, or other discipline for any member of the State Bar *to require* as a condition of a settlement of a civil action for professional misconduct brought against the member that the plaintiff agree to not file a complaint with the disciplinary agency concerning that misconduct." (Emphasis added.)

^{4/} Section 6090.5(a)(2), which is not applicable directly under the facts of our hypothetical, nonetheless uses the same language. An attorney is subject to discipline should the attorney "agree or seek agreement," that a complaining party withdraw a disciplinary complaint. In addition, the attorney in *In re McCarthy* was represented by counsel who attempted to negotiate the prohibited settlement term in violation of section 6090.5. The court also referred that counsel to the State Bar for negotiating an improper settlement on the attorney's behalf. *In re McCarthy* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. at pp. 381-382, fn. 19.

^{5/} By contrast, disciplinary proceedings under the prior version of section 6090.5 were more lenient concerning offers to settle. In *Matter of Fonte* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 752, the court found that an attorney's attempt to have clients withdraw existing State Bar complaints did not violate section 6090.5: "[C]lients had filed complaints with the State Bar when the settlements were proposed and the statute does not address settlements in which the client agrees to withdraw a complaint pending with the State Bar." In *Matter of Blum*

Based upon legislative intent as reflected the 1996 amendment, we conclude that section 6090.5 must be broadly interpreted as prohibiting attorneys from seeking to conceal from the State Bar unethical conduct through a written or oral client agreement. Section 6090.5, accordingly, also augments rule 1-500(B): “A member shall not be a party to or participate in offering or making an agreement which precludes the reporting of a violation of these rules.”

2. Factual Application

A. Former Client’s Factual Representations

The first contractual provision in question – “Former Client represents that she has not filed a State Bar complaint against Attorney” – concerns a factual representation. The representation does not seek a settlement term that Former Client will refrain from reporting misconduct to the State Bar. It does not involve any enforceable promise from Former Client to do or refrain from doing anything. Arguably, Attorney does not violate section 6090.5 by seeking such a factual representation. The provision refers only to events that have occurred in the past and, therefore, cannot be construed as Attorney’s attempt to “seek” a Former Client agreement not to report in the future.

Yet, from the Former Client’s perspective, this factual representation may have a chilling effect. In our facts, Former Client had already threatened filing of a State Bar Complaint, and this contractual provision might dissuade Former Client from doing so. In particular, an unsophisticated client may mistakenly believe that such a factual representation would waive that client’s right to file a complaint. Further, a substantial delay between the time of negotiation and the time of signing of the agreement may have the same effect as seeking an agreement not to file a State Bar complaint during the delay. Accordingly, while this provision itself may not be a violation of section 6090.5, we conclude the chilling effect on Former Client’s future actions could be a violation under certain circumstances.

B. Former Client’s Representations About Future Intentions

The second contractual provision in question – “Former Client represents that she has no present intention to file a State Bar complaint against Attorney” – does not violate section 6090.5 in and of itself. It could be argued that, like the first provision, it is a factual recitation. It factually recites Former Client’s present intention. It does not obligate Former Client to do or refrain from doing anything.

Nonetheless, we conclude under our facts that this provision objectively reflects Attorney’s intent to suppress the complaint. Former Client previously threatened to file a complaint with the State Bar. A statement that Former Client “has no present intention to file a State Bar complaint” implies that Attorney may have intent, which may itself constitute “seeking” an implicit agreement. The statement of Former Client’s present intent also may be a material part of the settlement bargain from the perspective of Attorney, particularly if Attorney intended the provision to produce a chilling effect on any filing of a State Bar complaint. Thus, the provision would have the effect of deterring a future report. Section 6090.5 was adopted and amended to prohibit settlements seeking to dissuade or prevent filing of disciplinary complaints. Accordingly, including a provision stating that Former Client “has no present intention to file a State Bar complaint” is considered an ethical violation.

C. Former Client’s Agreement Not to Report

The third contractual provision in question – “Former Client agrees not to file any complaint against Attorney with the State Bar relating to or arising out of the representation” – would violate section 6090.5 if included in the settlement agreement. The provision is directly contrary to section 6090.5.

We also conclude that Attorney’s removal of that language before the contract was signed does not cure the ethical violation. In our facts, Attorney eventually recognized that including this settlement provision would violate section

(Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 170, the court held the attorney did not violate section 6090.5 because the evidence did not show attorney “required [client] to forbear from making a State Bar complaint as a condition of a civil settlement.” *Fonte* and *Blum*, however, were decided under narrower statutory language, which did not impose discipline for “seeking” an agreement.

6090.5. Attorney then sought to withdraw the provision. Nonetheless, section 6090.5 compels the conclusion that an attorney “seeks” a client agreement not to report allegations of ethical breaches simply by proposing such language in a contract draft. We conclude Attorney also violated section 6090.5 by obtaining Former Client’s agreement not to report – albeit orally. The mere fact that the agreement was oral and not written is irrelevant under section 6090.5 – both forms of agreement violate section 6090.5.^{6/}

CONCLUSION

Business and Professions Code section 6090.5 bars an attorney’s attempt, in settling a dispute with his or her client, to seek or obtain a client’s oral or written agreement not to make a State Bar complaint. Section 6090.5 may also prohibit a lawyer from seeking representations of the client’s intentions or actions regarding filing a complaint with the State Bar. Even a simple contractual factual recitation that the client has not yet made a State Bar complaint in the past may be an ethical violation since it could produce a chilling effect on the client’s future actions. Once a lawyer seeks such an oral or written agreement, the withdrawal of that request will not cure the ethical violation.

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 Trustees, any persons or tribunals charged with regulatory responsibilities, or any member of the State Bar.

^{6/} In some circumstances, a client may suffer no harm from the inclusion of a provision in violation of Section 6090.5 in a proposed settlement agreement if the provision is removed prior to execution. Although the Committee expresses no opinion on the application of the State Bar’s Standards for Attorney Sanctions for Professional Misconduct to this scenario, we note that under Standard 1.2, subdivision (e)(iii), the “lack of harm to the client or person who is the object of the misconduct...” is a factor in mitigation. As the Supreme Court held in *Baker v. State Bar* (1989) 49 Cal.3d 804, 822 [263 Cal.Rptr. 798], fn. 7, “[t]he circumstances in which the misconduct occurred or subsequent efforts by the attorney to correct the condition that precipitated the misconduct may demonstrate that the misconduct will not likely recur.” See also *In the Matter of Blum* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 403, 413 (subsequent to her misconduct an attorney’s handling of finances and trust account showed “objective steps to atone for the consequences” of misconduct).