THE STATE BAR OF CALIFORNIA
STANDING COMMITTEE ON
PROFESSIONAL RESPONSIBILITY AND CONDUCT
INTERIM OPINION NO. 12-0001

ISSUE: What information may an attorney ethically disclose to the court to explain her need to withdraw from a representation – particularly in the face of an order to submit to the court, *in camera* or otherwise, the substance of the attorney-client communications leading to the need to withdraw?

DIGEST: An attorney may disclose to the court only as much as is reasonably necessary to demonstrate her need to withdraw, and ordinarily it will be sufficient to say only words to the effect that ethical considerations require withdrawal or that there has been an irreconcilable breakdown in the attorney-client relationship. In attempting to demonstrate to the court her need to withdraw, an attorney may not disclose confidential communications with the client, either in open court or *in camera*, absent an express court order compelling such disclosure. In the face of such a court order, however, and only after exhausting other options, an attorney may disclose confidential communications rather than disobey the court order, but should take reasonable steps to minimize prejudice to the client.

AUTHORITIES INTERPRETED: Rules 3-100 and 3-700 of the Rules of Professional Conduct of the State Bar of California.[1/]

Business and Professions Code section 6068(b).

Business and Professions Code section 6068(e)(1).

Business and Professions Code section 6103.

STATEMENT OF FACTS

CEO is the Chief Executive Officer of Client, a closely held corporation. Client hired Attorney to prosecute a trade secret misappropriation case against a former employee of Client who left Client to join Client's primary competitor ("Competitor"). Near the close of discovery, about six weeks before trial, Attorney learns some information that substantially vindicates the former employee's position in the litigation. Attorney sets up a meeting with CEO to discuss this new information and to advise CEO to try to settle the matter, which she believes still can be settled in good faith for a minimal value. CEO tells Attorney that he does not want to settle until the day before trial at the earliest because that is the date of a big trade show in which Client and Competitor both will be participating. CEO further tells Attorney that he does not really care about winning or losing the lawsuit, but that he merely wants to keep the lawsuit going so as to damage Competitor's public image leading up to the trade show.

Attorney advises CEO that he cannot continue to prosecute for Client a lawsuit in which the Client's position lacks probable cause and the primary purpose is to harass or maliciously injure another person or company. CEO becomes angry and says, "I am paying you a lot of money, and I expect you to do what I say." Attorney leaves the meeting and says she will call CEO the next day after they both have slept on the issue.

[1/] Unless otherwise indicated, all rule references are to the Rules of Professional Conduct of the State Bar of California.

The next day, Attorney phones CEO and asks him if he has reconsidered the need to settle the lawsuit. Again, CEO becomes angry and says he does not want to hear another word about settlement until after the trade show. Attorney then informs CEO that she will need to withdraw from the representation, and asks CEO if Client will consent to the withdrawal. CEO refuses to consent, saying he would not be able to find another lawyer this close to trial.

Attorney immediately begins drafting a motion to withdraw, which she convinces the court to hear on shortened time. In the moving papers, Attorney states, "Ethical considerations require my withdrawal as counsel for Client."

Client appears at the hearing to oppose Attorney's motion. The Judge asks Attorney to explain the reason for her need to withdraw. The following colloquy ensues:

> Attorney: My duty of confidentiality to Client prevents me from saying more.
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> Judge: I'm concerned about potential prejudice to Client, so you'll have to give me a little more information.
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> Attorney: Your Honor, I believe I have an irreconcilable conflict of interest with Client that precludes my continued representation.
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> Judge: Here is what we are going to do. You are ordered to provide me a detailed declaration, filed under seal, about what your client said to you that makes you think you need to withdraw. Then, one week from today you will appear in my chambers for an in camera hearing to discuss the declaration.

DISCUSSION

The Statement of Facts raises several issues and requires Attorney to balance potentially competing ethical duties. First, to the extent Attorney knows or should know – as is apparent from the Statement of Facts – that Client is pursuing the lawsuit "for the purpose of harassing or maliciously injuring any person," Attorney has a duty to withdraw. Rule 3-700(B)(1). Second, Attorney must take reasonable steps to avoid reasonably foreseeable prejudice to Client's rights, pursuant to rule 3-700(A)(2). Third, in asking the court for permission to withdraw, Attorney must continue to uphold her duty of confidentiality under rule 3-100 and Business and Professions Code section 6068(e)(1). Notwithstanding such duties, however, if ordered by the court to disclose attorney-client communications, we conclude that Attorney may comply with the court's order, but only after she has exhausted all other reasonable measures short of disclosure.

1. Duty To Withdraw

Rule 3-700(B)(1) provides that withdrawal is mandatory where:

> The member knows or should know that the client is bringing an action, conducting a defense, asserting a position in litigation, or taking an appeal, without probable cause and for the purpose of harassing or maliciously injuring any person.

Rule 3-700(B)(2) provides that withdrawal is mandatory where, "[t]he member knows or should know that continued employment will result in violation of these rules or of the State Bar Act." Thus, in light of the Statement of Facts, Attorney rightfully concluded that she had a mandatory duty to withdraw.[2/]

[2/] In addition, rule 3-700(C)(1)(d) provides that withdrawal is permissive where the client "by other conduct renders it unreasonably difficult for the member to carry out the employment effectively." Thus, even if withdrawal was not mandated by rule 3-700(B)(1) or (2) under the facts, Attorney may withdraw if she concludes that hostility between her and CEO was such that she could not effectively continue to represent Client. See

Rule 3-700(A)(2), however, provides, "A member shall not withdraw from employment until the member has taken reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client, including giving due notice to the client, allowing time for employment of other counsel, . . ." See *Ramirez v. Sturdevant* (1994) 21 Cal.App.4th 904, 915 [26 Cal.Rptr.2d 554] ("A lawyer violates his or her ethical mandate by *abandoning* a client [citation omitted], or by withdrawing at a critical point and thereby prejudicing the client's case." (citing rule 3-700(A)(2)); *Moore v. United States*, 2008 WL 1901322 at *3 ("[I]n California, withdrawal is proper when the client's interest will not be unduly prejudiced or delayed."); see also *In the Matter of Riley* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 91, 115 (finding that attorney's duties to client continue until a substitution of counsel is filed or the court grants leave to withdraw); Cal. State Bar Formal Opn. No. 1994-134 (discussing duty to provide competent representation pending court determination on issue of withdrawal). Moreover, notwithstanding Attorney's ethical obligation to withdraw – and how she may weigh her need to withdraw against any prejudice to Client – Attorney may not withdraw absent either client consent or a court order. (Code Civ. Proc., § 284; rule 3-700(A)(1).)

Here, both Client and the court have raised concerns about potential prejudice to Client should Attorney withdraw. In particular, trial is less than two months away, and it is unclear whether Client will be able to obtain substitute counsel.[3/] Thus, Attorney's duty to withdraw appears to clash with her separate duty to ensure that Client suffers no prejudice as a result of her withdrawal. Ultimately, it will be the court that weighs Attorney's duty to withdraw against prejudice to Client. See *Mandell v. Superior Court* (1977) 67 Cal.App.3d 1, 4 [136 Cal.Rptr. 354]. Attorney, however, must take reasonable steps to convince the court of her need to withdraw, all the while taking steps to minimize the prejudice to Client and to maintain her duty under rule 3-100(A) and Business and Professions Code section 6068(e)(1).[4/]

2. <u>Duty of Confidentiality</u>

Business and Professions Code section 6068(e)(1) requires an attorney "[t]o maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client." Rule 3-100 provides, "A member shall not reveal information protected from disclosure by Business and Professions Code section 6068(e)(1) without the informed consent of the client, . . ." except under certain limited exceptions not applicable here. An attorney moving to withdraw from representation faces a difficult dilemma – how to present sufficient facts to enable the

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(Footnote continued…)

People v. Robles (1970) 2 Cal.3d 205, 215 [85 Cal.Rptr. 166] (finding that a breakdown in the attorney-client relationship may be "of such magnitude as to jeopardize the defendant's right to effective assistance of counsel," thereby necessitating substitution of counsel); *Aceves v. Superior Court* (1996) 51 Cal.App.4th 584, 592 [59 Cal.Rptr.2d 280] (citing "complete breakdown in the attorney-client relationship" as a basis for withdrawal).

[3/] Because Client is a corporation, it may not represent itself; thus, it only can proceed with the defense of the lawsuit if it is represented by counsel. See *Paradise v. Nowlin* (1948) 86 Cal.App.2d 897, 898 [195 P.2d 867]. However, at least one court has found that this ban on corporate self-representation does not prevent a court from granting a motion to withdraw as attorney of record, even if it leaves the corporation without representation, because such an order puts pressure on the corporation to obtain new counsel. *Ferruzzo v. Superior Court* (1980) 104 Cal.App.3d 501, 504 [163 Cal.Rptr. 573].

[4/] What specific steps Attorney should take if the court ultimately denies her motion to withdraw is beyond the scope of this opinion. At a minimum, however, Attorney must continue to competently represent Client, notwithstanding any animosity that may have developed between them. See rule 3-110. In addition, under these facts, Attorney must consider advising Client of potential adverse consequences under Code of Civil Procedure section 128.7, or even civil liability for malicious prosecution, should Client continue to pursue its lawsuit for improper purposes. See Code of Civil Procedure section 128.7; *Zamos v. Stroud* (2004) 32 Cal.4th 958, 970 [12 Cal.Rptr.3d 54] (finding that lawyer could be liable for malicious prosecution where he continues to prosecute a case after learning that lawsuit lacked probable cause).

court to consider the motion, while still maintaining the client's confidences.[5/] See California Rules of Court, rule 3.1362(c) (requiring party moving to withdraw to file a declaration stating "in general terms and without compromising the confidentiality of the attorney-client relationship why a motion" is necessary).

In *Aceves v. Superior Court* (1996) 51 Cal.App.4th 584 [59 Cal.Rptr.2d 280], the court of appeal reversed (on a writ of mandate) the trial court's denial of a motion to withdraw filed by a public defender. In that case, the public defender advised the trial court on the morning of the scheduled trial that he had an actual conflict with his client, declaring that "the conflict caused a 'complete, utter and absolute' breakdown in the attorney-client relationship and precluded him from continuing the representation." *Id.* at p. 588. The public defender also told the trial court that "he could not reveal the nature of the conflict without divulging client confidences or breaching ethical duties." *Ibid.* The trial court denied the motion after the public defender refused to reveal privileged communications to further explain the conflict. The court of appeal then denied the public defender's first writ of mandate "'without prejudice to file a renewed application to be relieved as counsel founded upon a showing of the nature of the conflict, which showing may be made *in camera*.'" *Ibid.* (citation omitted). The public defender subsequently renewed his motion, but still refused to reveal privileged or confidential information. Rather, the public defender explained in open court that the conflict arose from a statement by defendant: "'It's a statement no one can ignore,' the statement caused an absolute, irretrievable breakdown in the attorney-client relationship such that no member of the public defender's office could represent [defendant], ..." *Id.* at p. 589. He further stated that he "could not describe the facts which generated the conflict without violating the privilege or breaching ethical obligations." *Ibid.* The court again denied the motion because it "was unsatisfied it knew anything more about the conflict than it knew at the last juncture, ..." *Ibid.*

Following the denial of its second motion, the public defender's office filed a second writ, which the court of appeal this time granted. In so doing, the court first discussed a number of criminal cases addressing a criminal defendant's constitutional right to effective assistance of counsel free from conflict of interest. *Id.* at p. 590 (discussing, *e.g.*, *Uhl v. Municipal Court* (1974) 37 Cal.App.3d 526, 528-29 [112 Cal.Rptr. 478]). On the issue of the duty of confidentiality, the court quoted *Leversen v. Superior Court* (1983) 34 Cal.3d 530 [194 Cal.Rptr. 448], where the Supreme Court criticized a trial court's failure to accept the attorney's representation that a conflict existed:

> '[Counsel's] duty not to use [the witness's] confidences against him prevented [counsel] from even discussing these or other possibilities with his client [the defendant], let alone revealing them in open court. Having accepted the good faith and honesty of [counsel's] statements on the subject, the court was bound under the circumstances to rule that a conflict of interest had been sufficiently established.'

(*Aceves v. Superior Court, supra*, 51 Cal.App.4th at p. 591 (quoting *Leversen v. Superior Court*, at p. 539).)

The court ultimately held, "Where as here the duty not to reveal confidences prevented counsel from further disclosure and the court accepted the good faith of counsel's representations, the court should find the conflict sufficiently established and permit withdrawal." (*Aceves v. Superior Court, supra*, 51 Cal.App.4th at p. 592.) In so holding, the court rejected the argument that a defense lawyer's word alone is not sufficient absent additional evidence of a conflict:

> [I]f there is no reason to doubt counsel's sincerity, the trial court properly relies on the lawyer . . . . Regardless of how others might react, only the trial lawyer can realistically appraise whether the conflict may have an impact on the quality of the representation or whether counsel's self-interest might stand in the way. [citations omitted]. In such cases, the court by necessity relies on the lawyer.

[5/] The client's confidences, of course, go beyond attorney-client privileged communications, but rather extend to any information that the client would not want to become public. Evidence Code section 952 defines a "confidential communication between client and lawyer" as "information transmitted between a client and his or her lawyer in the course of that relationship and in confidence . . . ." Information can be "confidential" even if it is not "privileged." See *Goldstein v. Lees* (1975) 46 Cal.App.3d 614, 621, fn.5 [120 Cal.Rptr. 253] ("The attorney-client privilege is more limited than the ethical obligation of a lawyer to guard the confidences and secrets of his client.") (citations omitted); see also rule 3-100, Discussion paragraph [2]; Cal. State Bar Formal Opn. Nos. 2003-161 and 1986-87.

Id. at p. 594.[6/] Depending on the circumstances, courts may require additional factual information in order to rule on a motion to withdraw.[7/]

Aceves not only is consistent with cases like *Uhl* and *Leversen*, but is supported by non-California authorities and opinions as well. For example, Comment [3] to ABA Model Rule 1.16[8/] (the ABA counterpart to rule 3-700) provides, "The court may request an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient." Comment [15] to ABA Model Rule 3.3 provides, "In connection with a request for permission to withdraw that is premised on a client's misconduct, a lawyer may reveal information relating to the representation only to the extent reasonably necessary to comply with this Rule or as otherwise permitted by Rule 1.6."[9/] See also Or. Formal Opn. No. 2011-185 (finding that, under Oregon Rule 1.6(b), a lawyer may not reveal the basis for his withdrawal unless disclosure is permitted by one of the narrow exceptions to Rule 1.6); Ariz. Ethics Opn. No. 93-02 (discussing general requirement that an attorney disclose no more than is reasonably necessary when moving to withdraw).

A. ***In Camera* Review**

One issue raised in *Aceves* but not decided is whether an attorney can satisfy her obligations under rule 3-100 by providing the court more detailed information *in camera*.[10/] In *Manfredi*, the court noted that the attorney "could

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[6/] The dissent in *Aceves* distinguished between a request for withdrawal made early in a case and one that occurs on the eve of trial, like the one before it. In the latter case, the dissent was less willing to accept the attorney's representation "without an inquiry sufficient to convince the court a conflict exists." *Id.* at p. 599.

[7/] In *Manfredi & Levine v. Superior Court* (1998) 66 Cal.App.4th 1128, 1135-36 [78 Cal.Rptr.2d 494], the court cited *Aceves*, *Uhl*, and *Leversen* approvingly, but distinguished those cases from the facts before it. There, the attorney sought to withdraw from an ongoing arbitration matter based on his receipt of unsolicited and confidential information, which he claimed created a conflict between him and his client. The court was skeptical, based on what it characterized as the prior "use of every [delaying] tactic known to man," and requested further details of the alleged conflict. *Id.* at p. 1131. The lawyer would not provide any additional information, and the court denied the motion. The Court of Appeal noted that "[c]ounsel would have done well to give the court some information as to the shape and size of the conflict here," for example whether it concerned "divided loyalty between current clients or former clients," a pecuniary interest by counsel adverse to the client's interest, a breakdown in the relationship between counsel and client, or other types of conflicts. *Id.* at pp. 1134-35. Instead, unlike counsel in *Aceves*, *Leversen*, and *Uhl*, "Manfredi failed to supply the trial court with the slightest inkling of the nature of the alleged conflict." *Id*. at pp. 1135-36.

[8/] The ABA Model Rules are not binding in California but may be used for guidance by lawyers where there is no direct California authority and the ABA Model Rules do not conflict with California policy. *City & County of San Francisco v. Cobra Solutions, Inc.* (2006) 38 Cal.4th 839, 852 [43 Cal.Rptr.3d 771]. Thus, in the absence of related California authority, we may look to the Model Rules, and the ABA Formal Opinions interpreting them, as well as the ethics opinions of other jurisdictions or bar associations for guidance. (Rule 1-100(A) (ethics opinions and rules and standards promulgated by other jurisdictions and bar associations may also be considered); *State Compensation Ins. Fund v. WPS, Inc*. (1999) 70 Cal.App.4th 644, 656 [82 Cal.Rptr.2d 799].)

[9/] ABA Model Rule 1.6 is the counterpart to rule 3-100, and provides in subsection (a), "A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b)."

[10/] When the trial court suggested an *in camera* hearing, the public defender declined, saying:

> Our obligation to the client is to maintain his confidences, period. I don't think that telling the court, even in camera with [the transcript] sealed, lives up to that obligation. I would gladly do it . . . if I thought I could serve both masters at the same time . . . . But my understanding of the law is that I can't disclose that information to anyone outside of the law firm – outside of the attorneys that represent this gentleman. I cannot disclose [that information] to the court.

(*Aceves v. Sup. Ct., supra*, 51 Cal.App.4th at p. 588, fn.4.)

have requested an *in camera* hearing. This would have afforded the opportunity to furnish details on the claim of conflict and to provide the court with sufficient information as to why the law firm could not continue to represent [the client]." (66 Cal.App.4th at p. 1136.) *Manfredi* did not expressly address whether an attorney fulfills her obligations under rule 3-100 by disclosing confidential information *in camera* rather than in open court. Similarly, *Forrest v. Dept. of Corps.* (2007) 150 Cal.App.4th 183 [58 Cal.Rptr.3d 466], discussed the possibility of an *in camera* hearing, but did not expressly decide whether it is appropriate in light of rule 3-100. In *Forrest*, the court of appeal merely recited that the trial court in fact had conducted an *in camera* hearing to accept evidence of a claimed conflict of interest. *Id.* at p. 194. Specifically, the court of appeal stated, "In order to protect attorney-client privileged matters, the court conducted a hearing with [counsel] *in camera* with a court reporter present." *Ibid.* (Italics in original). One could infer from this language that the court believed *in camera* disclosure was permissible as a way to protect the attorney-client privilege. We believe, however, that such a reading of *Forrest* goes too far.

The issue of reviewing potentially privileged information *in camera* is addressed in Evidence Code section 915(a), but only in the context of determining whether the information is privileged in the first instance. Section 915(a) states that, with certain inapplicable exceptions, "the presiding officer may not require disclosure of information claimed to be privileged . . . in order to rule on the claim of privilege." The California Supreme Court has ruled similarly, specifically addressing *in camera* inspections. *Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725, 739 [101 Cal.Rptr.3d 758] ("Evidence Code section 915 prohibits a court from ordering *in camera* review of information claimed to be privileged in order to rule on the claim of privilege."); see also *Southern Cal. Gas Co. v. Public Utilities Com.* (1990) 50 Cal.3d 31, 45, fn.19 [265 Cal.Rptr. 801] (prohibiting *in camera* inspection of privileged document to determine whether attorney-client privilege had been waived). Because a court cannot order an *in camera* inspection or otherwise review potentially privileged communications in order to rule on a claim of privilege, it follows that a court may not review information that unquestionably is privileged – like the communications between Attorney and Client here – for purposes of ruling on a motion to withdraw.[11/]

For purposes of ruling on a claim of privilege, an attorney may testify about ***the circumstances*** giving rise to the privileged communication – just ***not to the communication itself***. *Costco v. Sup. Ct. supra*, 47 Cal.4th at p. 737 ("Evidence Code section 915, while prohibiting examination of assertedly privileged information, does not prohibit disclosure or examination of *other* information to permit the court to evaluate the basis for the claim, such as whether the privilege is held by the party asserting it."). The duty of confidentiality, however, is broader than the privilege, and may prevent or limit an attorney from testifying in detail even about the circumstances of a confidential communication where doing so would disclose client "confidences" or "secrets." See Cal. State Bar Formal Opn. Nos. 1993-133, 1988-96, 1986-87, 1981-58, and 1980-52.

B. Court Order To Disclose

Finally, in the Statement of Facts, the court ***ordered*** Attorney to provide additional facts *in camera*. As discussed above, there may be various background facts Attorney may disclose *in camera* without running afoul of her obligations under rule 3-100, Business and Professions Code section 6068(e)(1), or Evidence Code section 955. Attorney must take care, however, not to cross the line and disclose attorney-client privileged or other confidential communications – here, for instance, CEO's statements about his reasons for wanting to continue the litigation. To the extent, however, that the court expressly orders Attorney to disclose what CEO said to her in confidence, Attorney faces a dilemma: disclose privileged information or risk being held in contempt. In such a case, we believe Attorney has a duty to take all reasonable steps to avoid the dilemma – either by obtaining Client's consent to the *in camera* disclosure[12/] or some other compromise measure, or by filing a writ petition with the court of appeal. If the

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[11/] We do not believe the Supreme Court's discussion in *General Dynamics Corp. v. Superior Court* (1994) 7 Cal.4th 1164 [32 Cal.Rptr.2d 1], of possible procedures, including *in camera* inspections, to allow limited disclosure suggests a different result, as the Court declined to articulate what circumstances would warrant such disclosures. ("The use of sealing and protective orders, limited admissibility of evidence, orders restricting the use of testimony in successive proceedings, and, where appropriate, in camera proceedings, are but some of a number of measures that might usefully be explored by the trial courts ***as circumstances warrant.***") *Id.* at p. 1191. (Emphasis added).

[12/] Under the hypothetical facts, it likely is ***not*** in Client's best interests to consent to an *in camera* disclosure, as that disclosure will paint Client in a bad light to the trial judge. Thus, Attorney must explain this possibility, even

Client will not consent to the *in camera* disclosure and the court will not stay its ruling pending the filing of a writ petition, then Attorney ultimately must choose between the important obligation of protecting Client's privileged communications and obeying a court order. Although, with one exception,[13/] no California case directly addresses this dilemma,[14/] we believe the express mandate of Business and Professions Code section 6103 allows Attorney to resolve this Hobson's choice by disclosing limited confidential communications rather than disobeying the court's order.

Business and Professions Code section 6103 states that an attorney's "willful disobedience or violation of an order of the court requiring him to do or forbear an act . . . which he ought in good faith to do or forbear. . . constitute causes for disbarment or suspension."[15/] Several State Bar Court opinions address the situation where an attorney challenges disciplinary findings under Section 6103 based on the attorney's contention that the court order at issue was void or otherwise improper. In *In the Matter of Klein*, (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 1, for example, the court affirmed a lower court's decision that the attorney's failure to return to his client's husband money collected under a writ of execution constituted a violation of the court order quashing the writ. The court held, "Regardless of respondent's belief that the order was issued in error, he was obligated to obey the order unless he took steps to have it modified or vacated, which he did not do." *Id.* at p. 9. The court further stated, "Respondent's belief as to the validity of the order is irrelevant to the section 6103 charge." *Id.* at p. 9, fn.3[16/]; see

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(Footnote continued…)

while requesting Client's consent. See rule 3-500. Because Client almost certainly would not provide such consent, if the Judge orders Attorney's disclosure under these facts, Attorney likely would have to pursue a writ.

[13/] The only California case of which we are aware that squarely addresses the issue is *People v. Kor* (1954) 129 Cal.App.2d 436 [277 P.2d 94], but in that case the issue is addressed only in a concurring opinion. *Id.* at p. 447 (J. Shinn concurring) ("Defendant's attorney should have chosen to go to jail and take his chances of release by a higher court," rather than disclose privileged information).

[14/] Courts and Bar opinions in other jurisdictions have addressed this issue, with decisions falling on both sides. Compare Ariz. Ethics Opn. No. 2000-11 (2000) (attorney may refuse to disclose confidential client information responsive to a subpoena until tribunal enters final order requiring such disclosure); D.C. Ethics Opn. No. 288 (1999) (lawyer subpoenaed by Congressional subcommittee to produce client file may, but is not required to, produce the file if threatened with contempt); R.I. Ethics Opn. No. 98-02 (1998) (lawyer has duty to object to subpoena of client documents, but must comply with final court order requiring disclosure); Mass. Ethics Opn. No. 94-7 (1994) (lawyer must resist identifying client on Form 8300 until Department of Justice obtains court order requiring disclosure) *with Ex Parte Enzor* (1960) 270 Ala. 254, 260 [117 So.2d 361] (finding that "petitioner correctly refused to answer the propounded question," even though he was cited for contempt and committed to jail); *Dike v. Dike* (1968) 75 Wash.2d 1, 16 [448 P.2d 490] (noting that attorney should not be held in contempt for failing to disclose privileged communication, but stating, "[i]f the attorney's position, in the opinion of the trial court, is wrong to the point of contempt, he should be so adjudged . . . ."); see also H. Brent Helms, Financial Institutions Reform, Recovery, and Enforcement Act: An Ethical Quagmire for Attorneys Representing Financial Institutions (1992) 27 Wake Forest L. Rev. 277, 295 (discussing whistle blowing under FIRREA, noting attorneys' duty to challenge "over-aggressive nature of the federal regulatory agencies," and stating that "attorneys practicing in states having ethical rules modeled after the Model Code should not feel compelled to disclose the confidences of their client financial institution, even in the face of a court order").

[15/] The full text of Section 6103 states: "A willful disobedience or violation of an order of the court requiring him to do or forbear an act connected with or in the course of his profession, which he ought in good faith to do or forbear, and any violation of the oath taken by him, or of his duties as such attorney, constitute causes for disbarment or suspension." In addition to disobedience of a court order constituting possible grounds for attorney discipline, it also may constitute contempt. Thus, unlike reporters – who are constitutionally protected from a finding of contempt for refusing to reveal their sources (Cal. Const. Art. I, Sec. 2(b)) – attorneys face significant legal ramifications for refusing to obey a court order.

[16/] The court noted that an attorney's belief as to the validity of the order may be relevant to a charge of moral turpitude under Business and Professions Code section 6106. *Ibid.*; see also *In the Matter of Riordan* (Review Dept.

also *In re Jackson* (1985) 170 Cal.App.3d 773, 778 [216 Cal.Rptr. 539] ("Once a court has jurisdiction and makes a ruling, an attorney has a duty 'to respectfully yield to the rulings of the court, *whether right or wrong*. [Citation omitted.] '[If] the ruling is adverse, it is not counsel's right to resist it or to insult the judge – his right is only respectfully to preserve his point for appeal.'").[17/]

Nor have arguments that noncompliance was necessitated by the pursuit of the client's interests swayed the courts. In *In re Young* (1989) 49 Cal.3d 257 [261 Cal.Rptr. 59], the California Supreme Court affirmed the imposition of discipline against an attorney who provided a false name to a bail bondsman in order to protect his client's identity and secrets. In finding that the attorney's actions violated Sections 6103 and 6068(b),[18/] the court stated, "An attorney's duty to maintain his client's confidences does not extend to affirmative acts which further a client's unlawful conduct." *Id.* at p. 265. Similarly, the California Supreme Court affirmed a discipline order against an attorney who failed to notify his client or the court of a pending suspension order against him. *Arm v. State Bar* (1990) 50 Cal.3d 763, 775-76 [268 Cal.Rptr. 741]. The attorney had argued that he chose not to make the disclosure because "it was in his client's interest that he continue representing her. . . ." The Court rejected this argument, finding that "protection of the client's interests does not necessitate or justify concealing the fact of the attorney's suspension from practice." *Id.* at p. 775. In *In the Matter of Boyne* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 389, an attorney was disciplined for, among other things, failing to pay a sanctions order. In concluding that the attorney had willfully failed to comply with the court's order, and thereby violated both Sections 6103 and 6068(b), the court stated, "Obedience to court orders is intrinsic to the respect attorneys and their clients must accord the judicial system. As officers of the court, attorneys have duties to the judicial system which may override those owed to their clients." *Id.* at p. 403. Thus, both the Supreme Court and the State Bar Court appear to have rejected the argument that the client's interests justify an attorney's disobedience of a court order.

Moreover, rule 3-100, and specifically Discussion paragraph [2], anticipates that, in some circumstances, a lawyer's duty of confidentiality may give way to some other interest. Specifically, Discussion paragraph [2] states, "[A] member may not reveal such information except with the consent of the client or as authorized or required by the State Bar Act, these rules, or other law." Thus, notwithstanding the seemingly intransigent language of Section 6068(e)(1), the rules clearly contemplate some situations where a lawyer may have to reveal confidential information. We believe that one such situation is when a lawyer is compelled by a court order, provided the lawyer has exhausted all reasonable measures short of disclosure.

2007) 5 Cal. State Bar Ct. Rptr. 41, 47 (finding that "bad faith must be proved if the State Bar alleges that respondent's noncompliance with the Court's orders involves moral turpitude").

[17/] At least one State Bar court opinion describes the attorney as having a choice as to whether to disobey an order and challenge it on appeal:

> Moreover, in California, "'a person affected by an injunctive order has available to him two alternative methods by which he may challenge the validity of such order on the ground that it was issued without or in excess of jurisdiction. He may consider it a more prudent course to comply with the order while seeking a judicial determination as to its jurisdictional validity. [Citation.] On the other hand, he may conclude that the exigencies of the situation or the magnitude of the rights involved render immediate action worth the cost of peril. In the latter event, such a person, under California law, may disobey the order and raise his jurisdictional contentions *when he is sought to be punished for such disobedience*. If he has correctly assessed his legal position, and it is therefore, finally determined that the order was issued without or in excess of jurisdiction, his violation of such void order constitutes no punishable wrong. [Citations.]'"

In the Matter of Respondent X, (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 592, 604 (explaining that the collateral bar rule is not the rule in California). This does not answer the question, however, of whether an attorney can be disciplined if he chooses to obey the court order, declining to risk that the court of appeal ultimately will agree with the trial court's disclosure order.

[18/] Business and Professions Code section 6068(b) provides that it is the duty of an attorney "[t]o maintain the respect due to the courts of justice and judicial officers."

It is significant to note that, in the event an attorney was compelled to disclose privileged information, the attorney's disclosure should not be held to constitute a waiver of the privilege. In *Regents of University of California v. Superior Court* (2008) 165 Cal.App.4th 672 [81 Cal.Rptr.3d 186], for example, the court rejected a claim of waiver of the attorney-client privilege based on counsel's compelled disclosure to the Department of Justice. *Id.* at p. 677 (discussing Evid. Code, § 912(a) "[T]he right of any person to claim a privilege provided by Section 954 (lawyer-client privilege) . . . is waived with respect to a communication protected by the privilege if any holder of the privilege, ***without coercion***, has disclosed a significant part of the communication or has consented to disclosure made by anyone." (emphasis added)). The court upheld the privilege, holding, "No waiver of the privilege will occur if the holder of the privilege has taken reasonable steps under the circumstances to prevent disclosure. The law does not require that the holder of the privilege take 'strenuous or Herculean efforts' to resist disclosure." *Id.* at p. 683; see also *Schlumberger Ltd. v. Superior Court* (1981) 115 Cal.App.3d 386, 391-92 [171 Cal.Rptr. 413] ("Disclosure pursuant to a court order is coerced and does not constitute a waiver."). In one of the cases discussed in *Regents of University of California – Duplan Corporation v. Deering Milliken, Inc.* (D.S.C. 1975) 397 F. Supp. 1146, 1163 [184 U.S.P.Q. 775] – the court held that the party did not waive the privilege when it turned over the privileged documents to the court for an *in camera* inspection "upon the suggestion of the court."[19/]

We also note that our opinion is consistent with the approach taken in the ABA Model Rules. Specifically, Model Rule 1.6(b)(6) provides, "A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary . . . (6) to comply with other law or a court order. . . ." Comment [15] to Model Rule 1.6 further explains:

> A lawyer may be ordered to reveal information relating to the representation of a client by a court. . . . Absent informed consent of the client to do otherwise, the lawyer should assert on behalf of the client all nonfrivolous claims that the order is not authorized by other law or that the information sought is protected against disclosure by the attorney-client privilege or other applicable law. In the event of an adverse ruling, the lawyer must consult with the client about the possibility of appeal. . . . Unless review is sought, however, ***paragraph (b)(6) permits the lawyer to comply with the court's order.***

Model Rule 1.6, Cmt. [15] (emphasis added).[20/]

Finally, even though an attorney may be permitted, when ordered to do so by the court, to disclose confidential or privileged client information, she still should take all reasonable steps to minimize the potential harm to the client that might be caused by such disclosure. See rule 3-700(A)(2). For example, in the hypothetical, Attorney knows that Client's case is likely to be compromised if the trial judge learns that CEO is pursuing the case for improper purposes. Thus, Attorney should consider, for example, asking the Court to appoint a judge pro tem or transfer the withdrawal motion to another judge, thus allowing the disclosure to be made to a judge other than the trial judge. Although this is just one possible example of steps an attorney may and should take to protect her client in the face of an order like the one in the hypothetical, attorneys in a similar situation should think creatively in an effort to minimize the harm done by a court order compelling the disclosure of confidential client information.

CONCLUSION

When an attorney knows or should know that her client is pursuing an action without probable cause and for the purpose of harassing or maliciously injuring another person, the attorney has a duty to withdraw from the representation if efforts to remonstrate fail. To the extent the attorney cannot obtain the client's consent to the withdrawal, the attorney will need to file a motion to withdraw, taking all reasonable steps to minimize any

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[19/] While we do not opine on the legal issue of waiver, given the situation between Attorney and Client giving rise to Attorney's mandatory withdrawal, it is questionable whether Attorney's disclosure of Client's confidences could be deemed a waiver by Client of the attorney-client privilege, even without the element of compulsion.

[20/] The Committee is aware that Model Rule 1.6 is different from rule 3-100, and thus relies on Model Rule 1.6 not as authority for our conclusion, but rather as persuasive support.

prejudice to the client. In attempting to justify the need to withdraw, the attorney may not disclose client confidences. Ordinarily, for purposes of this motion, it will be sufficient to state words to the effect that ethical considerations require withdrawal or that there has been an irreconcilable breakdown in the attorney-client relationship. To the extent such general language is deemed insufficient by the court, however, the attorney only may provide additional background information, but may not disclose confidential communications – either in open court or even *in camera* – absent a court order compelling disclosure. If the court orders disclosure of confidential client communications, however, the attorney must take all reasonable steps – including filing a writ petition – to avoid disclosure, but, absent such relief, the attorney is not ethically obligated to disobey the court's order. In complying with the order, however, the attorney should make all reasonable efforts to disclose the minimum amount of information necessary to comply with the order and take any other steps the attorney believes may be reasonably necessary and appropriate to protect the client against reasonably foreseeable prejudice arising from the disclosure of confidential information.

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.