

**THE STATE BAR OF CALIFORNIA
STANDING COMMITTEE ON
PROFESSIONAL RESPONSIBILITY AND CONDUCT
FORMAL OPINION NO. 2003-163**

ISSUE: What are the duties of a lawyer who represents a corporation as its outside counsel, and who also simultaneously represents an officer of that corporation individually, when the lawyer receives information that creates a conflict between the lawyer's duties to the two clients?

DIGEST: When an outside lawyer represents a corporation and also simultaneously represents a corporate constituent in an unrelated personal matter, information which the lawyer learns from the constituent or as a result of representing the constituent is a client secret of the constituent if the constituent asks the lawyer to keep the information confidential or if the information is embarrassing or detrimental to the constituent. The lawyer may not provide advice to the corporation on a matter which is adverse to the constituent, and substantially related to the lawyer's work for the constituent, without the constituent's consent.

Even if the lawyer owes no duty of confidentiality to the constituent, the lawyer owes a duty of undivided loyalty to the constituent while the constituent is a current client. That duty prevents the lawyer from advising the corporation adversely to the officer, without the officer's consent, while the officer is the lawyer's current client.

If the lawyer's duty of competent representation of the corporation requires the lawyer to provide advice to the corporation adverse to the constituent, then the lawyer must withdraw if providing such advice to the corporation would violate the lawyer's duties to the constituent. The lawyer is not required to withdraw as to any other matter. The lawyer must withdraw in a manner that does not violate her duties to the corporation or to the officer.

AUTHORITIES

INTERPRETED: Rules 3-110, 3-310, 3-500, and 3-700 of the Rules of Professional Conduct of the State Bar of California.

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

STATEMENT OF FACTS

Lawyer serves as an outside attorney for a closely held corporation, Corp. Lawyer handles most of Corp's general legal matters, including alerting Corp to, and advising Corp about, potential liabilities. Corp has been run for some time by its two principal shareholders, Prexy, the President, and CFO, the Chief Financial Officer, who are old friends. Lawyer has represented CFO on a number of personal matters not related to Corp. Some of CFO's personal matters remain pending, including the purchase and sale of real and personal property, a reckless driving charge, and family matters. Most recently, CFO consulted Lawyer on a modification of a support matter relating to his former marriage, and this support issue remains open. Lawyer does not represent Corp and CFO as joint clients on any single matter.^{1/}

Lawyer learns that CFO might have sexually harassed several Corp employees. We are asked to consider Lawyer's duties if she learns of the possible sexual harassment in either of two ways: (1) CFO goes to Lawyer's office and asks to speak to Lawyer privately on a "personal matter," Lawyer asks CFO to continue, and CFO admits incidents of sexual

^{1/} Accordingly, we need not address the rules governing representation of joint clients in the same matter.

harassment; or (2) Prexy tells Lawyer that Prexy has learned of a particular incident of sexual harassment by CFO, plus rumors of several others, and needs Lawyer's advice concerning what Corp should do.

Lawyer has no written engagement agreement with CFO or with Corp and has not excluded from the scope of either lawyer-client relationship matters relating to CFO's employment with Corp.

DISCUSSION

I. Lawyer's Duty Where CFO Provides Information

The facts state that both Corp and CFO are current clients of Lawyer on different matters. If CFO informs Lawyer privately about CFO's harassment, with the objectively reasonable belief that CFO is speaking to Lawyer as CFO's personal lawyer, the information CFO conveys is confidential and cannot be revealed without CFO's approval. (Bus. & Prof. Code, § 6068, subd. (e).)^{2/} Client secrets, which section 6068, subdivision (e) requires an attorney to preserve, are not limited to information that is within the scope of the attorney-client privilege. That is, client secrets are not limited only to information communicated confidentially by a client to the client's lawyer for the purpose of obtaining legal advice. (See Evid. Code, § 952, which defines "confidential communication" for purposes of the attorney-client privilege.) In addition to confidential information that a client provides to his lawyer, a "client secret" also includes information that the lawyer gains as a result of the professional relationship and which the client has requested to be kept confidential or the disclosure of which would be embarrassing or would likely be detrimental to the client. (See Cal. State Bar Formal Opns. Nos. 1996-146, 1986-87, 1981-58, and 1980-52 and L.A. Cty. Bar Opns. Nos. 456 (1990), 436 (1985), and 386 (1980).)

The existing professional relationship between Lawyer and CFO might well have given CFO a reasonable basis for believing that he was speaking to Lawyer in her professional capacity and in confidence. (See *Miller v. Metzinger* (1979) 91 Cal.App.3d 31, 39 [154 Cal.Rptr. 22]; see also *Listerv. State Bar* (1990) 51 Cal.3d 1117, 1126 [275 Cal.Rptr. 802].) In that event, Lawyer would be obligated to preserve the confidentiality of CFO's statements to Lawyer even if Lawyer did not subjectively intend to provide legal advice to CFO when CFO asked to discuss a "personal" matter with Lawyer. On the other hand, if the course of dealing between Lawyer and CFO would not permit CFO to believe reasonably that his "personal" discussion with Lawyer was in fact an attorney-client consultation, then Lawyer would not be obligated as a matter of legal ethics to maintain that information in confidence. (See, e.g., *People v. Gionis* (1995) 9 Cal.4th 1196 [40 Cal.Rptr.2d 456] [attorney disclaimed attorney-client relationship in advance of discussion].)

Assuming that CFO did have an objectively reasonable basis for believing that CFO was speaking to Lawyer in confidence as CFO's personal attorney, then Lawyer's duty to preserve CFO's secrets would prevent Lawyer from revealing any information about the sexual harassment that Lawyer learned directly from CFO or as a result of her representation of CFO. Such information would be embarrassing or detrimental to CFO. This restriction means that Lawyer could not reveal CFO's admitted harassment to anyone affiliated with Corp, including Corp's Board or Prexy.

Lawyer's duty to preserve CFO's secrets could thus impede Lawyer's ability to discharge her duties to Corp. Lawyer has a duty to inform Corp of significant developments related to Lawyer's representation of Corp under rule 3-500 of the California Rules of Professional Conduct^{3/} and Business and Professions Code section 6068, subdivision (m). Further, rule 3-110(A) imposes on Lawyer a duty to represent Corp competently. Competent representation requires the diligence, learning and skill "reasonably necessary for the performance of . . . [legal] service." (Rule 3-110(B).) Here, CFO's alleged sexual harassment, which could result in liability to Corp, appears to fall within the scope of Lawyer's representation of Corp, which includes alerting Corp to, and advising Corp about, potential liabilities. Thus, Lawyer's

^{2/} California Business and Professions Code section 6068, subdivision (e) requires Lawyer to "maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client."

^{3/} All further rule references are to the Rules of Professional Conduct of the State Bar of California.

duties to Corp probably require Lawyer to disclose CFO's alleged sexual harassment to Corp and would conflict with any duty Lawyer owed to CFO to maintain information about the harassment in confidence. Unless CFO were to give Lawyer consent to disclose CFO's admission of harassment to Corp, Lawyer would have a conflict of interest in continuing to represent Corp concerning matters which encompass CFO's harassment. (See Cal. State Bar Formal Op. No. 1995-141 [a conflict of interest occurs when a lawyer's ability to fulfill basic duties to a client is impeded by the lawyer's own interests extraneous to the lawyer-client relationship or by conflicting duties that the lawyer owes to another present or former client].)

If CFO denies Lawyer permission to share with Corp the information that CFO has given to Lawyer, then Lawyer must withdraw from representing Corp on those matters to which the confidential information given to the lawyer by CFO is pertinent. Rule 3-700(B)(2) requires withdrawal where "[t]he member knows or should know that continued employment will result in a violation of these rules or of the State Bar Act." Lawyer's inability to fulfill simultaneously her duties to CFO and Corp with respect to the sexual harassment would result in a violation of the duties stated in the rules and the State Bar Act and would therefore trigger Lawyer's duty to withdraw, at least from those matters where his duties to CFO and Corp conflict.

Lawyer may not need to withdraw from representing Corp altogether if she can fashion a more limited withdrawal that does not imperil CFO's confidentiality. In making such a limited withdrawal, however, Lawyer must be careful to avoid an implicit disclosure of information about CFO which Lawyer otherwise could not disclose expressly without violating her duty of confidentiality to CFO. Thus, Lawyer withdrawing only from representation concerning the terms and conditions of CFO's employment might not be the appropriate course of action as it may result in an implicit disclosure that CFO has engaged in conduct that may injure Corp. In any withdrawal, Lawyer should take care to take "reasonable steps to avoid reasonably foreseeable prejudice" to Corp's legal rights. (Rule 3-700(A)(2).)

II. Duty of Lawyer Where Prexy Provides Information

We now turn to the second variant of the hypothetical, which posits that Lawyer learns of CFO's alleged harassment from Prexy, the President of Corp, not from CFO. Under these facts, Lawyer learns the information about CFO as a result of Lawyer's representation of Corp, not CFO. Thus, Lawyer is not obligated to treat the information as CFO's client secret. Nevertheless, Lawyer still faces a potential conflict between Lawyer's duties to Corp and Lawyer's duty of loyalty to CFO. An attorney owes a duty of loyalty "to protect his client in every possible way, and it is a violation of that duty for him to assume a position adverse or antagonistic to his client without the latter's free and intelligent consent. . . ." (*Santa Clara County Counsel Attys. Assn. v. Woodside* (1994) 7 Cal.4th 525, 548 [28 Cal.Rptr.2d 617], quoting *Anderson v. Eaton* (1930) 211 Cal. 113, 116 [293 P. 788].) If Lawyer were to provide advice to Corp about how to react to the allegations that CFO has committed sexual harassment, then Lawyer will be giving legal advice to Corp that is adverse to CFO. Such advice would almost certainly involve potential adverse employment consequences to CFO, as well as civil liability.

Lawyer may not cure the conflict by unilaterally dropping CFO as a client. (*Truck Ins. Exchange v. Fireman's Fund Ins. Co.* (1992) 6 Cal.App.4th 1050, 1056-1057 [8 Cal.Rptr.2d 228].) Lawyer may, on the other hand, ask CFO to waive the duty of loyalty and permit Lawyer to advise Corp on the harassment topic. (*Flatt v. Superior Court* (1994) 9 Cal.4th 275 [36 Cal.Rptr.2d 537].) Before seeking CFO's consent, however, Lawyer must consider whether Lawyer would thereby violate her duty of confidentiality to Corp. Here, for instance, if Prexy had indicated a desire to handle the matter confidentially, Lawyer would not be free to announce Lawyer's knowledge of the allegations to CFO without Corp's consent.

If Corp will not allow Lawyer to seek CFO's consent, or if CFO declines to waive the duty of loyalty, then Lawyer must withdraw from representing Corp if Lawyer cannot advise Corp competently without violating Lawyer's duty of undivided loyalty to CFO. Lawyer is obligated to withdraw from representing Corp only to the extent necessary to resolve the conflict of interest. On the facts presented to us, we believe that Lawyer would have to withdraw from her representation of Corp to the extent that Lawyer's representation includes identifying and assessing potential claims against Corp arising from CFO's conduct.

If CFO consents to Lawyer representing Corp concerning CFO's alleged harassment, then Lawyer must consider whether she is capable of advising Corp on the harassment topic competently without regard to her professional or other relationship with CFO. If Lawyer does not believe she can provide advice to Corp about CFO based on independent and objective professional judgment, then Lawyer should not undertake to provide such advice. Lawyer should also consult Rule 3-310(B), which requires written disclosure of certain personal relationships and interests. Here, Lawyer likely has a professional relationship with CFO which must be disclosed in writing to Corp because CFO is a party to the matter on which Lawyer will advise Corp. (Rule 3-310(B)(1).) In addition, Lawyer may have a professional relationship with a person (CFO) likely to be substantially affected by the outcome of Lawyer's advice on CFO's alleged harassment, thus triggering written disclosure to Corp under Rule 3-310(B)(3).

III. Prevention of Conflicts in Corporate Practice

Outside corporate counsel sometimes are requested to perform legal services for corporate constituents, especially corporate directors, officers, and managers. Such personal legal services to corporate constituents usually can be provided without any conflict or violation of the Rules of Professional Conduct. However, on occasion a lawyer's representation of a corporation and certain corporate constituents on unrelated matters can lead to potential or actual conflicts of interests, as demonstrated by the factual scenario we analyze above. Lawyers who represent both a corporation and certain constituents on unrelated matters should be alert for such situations as they arise.

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 on 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.