



Legal Ethics  
**Ethics Opinions**

LEGAL ETHICS

**OPINION 2011-1**

An attorney who represents a client and is considering advising the client to discharge co-counsel must comply with a number of professional obligations including the duties of communication, confidentiality, and competence. The attorney must also be truthful with the client, act in the client's best interest and exercise independent professional judgment.

**ISSUE:**

When Attorney A represents a client as co-counsel with Attorney B, who is not a member of Attorney A's firm, what ethical issues are implicated with regard to Attorney B advising the client to discharge Attorney A and continue with Attorney B as Client's sole legal counsel?

**DIGEST:**

An attorney who, along with co-counsel, represents a client and who contemplates advising the client to discharge co-counsel so that the first attorney is the sole legal representative of the client, must comply with a number of professional obligations, including (1) the duty to be truthful to the client, (2) the duty to keep the client reasonably informed of significant developments related to the representation, (3) the duty to act solely in the best interests of the client, (4) the duty to exercise independent professional judgment, (5) the duty to maintain the client's secrets and confidence, and (6) the duty to perform legal services competently.

**AUTHORITIES INTERPRETED:**

Business and Professions Code sections 6068(d) & (e); Rules of Professional Conduct, Rules 2-200; 3-100; 3-110; 3-500; 3-700; 4- 200

**FACTS**

Attorney A has represented Client in one or more legal matters previously. Client hires Attorney A to represent Client in a personal injury case involving serious physical injuries to Client. Attorney A, who primarily handles business matters, informs Client that A would like to associate Attorney B, a lawyer with more personal injury experience and not a member of Attorney A's firm, as co-counsel in Client's personal injury matter. Client agrees and Attorney B is hired. A month later, Attorney B contemplates advising Client to fire Attorney A and to continue the representation only with Attorney B.

**DISCUSSION**

Few Rules of Professional Conduct, statutes or cases discuss the relationship between co-counsel and its impact, if any, on the ethical obligations of co-counsel to their mutual client. The question raised by this opinion is whether any ethical considerations, by virtue of the co-counsel's relationship or their relationship with Client, are implicated by Attorney B advising Client to discharge Attorney A, and retain Attorney B as her sole counsel.

This Opinion does not discuss the ethical implications of an attorney who does not already represent a client advising a non-client to discharge her present counsel and hire the attorney. Nor does this Opinion address any civil liability Attorney B might have to Attorney A for interfering with A's relationship with Client, or otherwise. The question of civil liability is beyond the scope of this Opinion and is outside this Committee's purview. The Committee further notes that a client has the absolute right to terminate a lawyer at any time, with or without cause. (*Fracasse v. Brent* (1972) 6 Cal.3d 784, 790.) This Opinion does not address what remedies, if any, the discharged attorney might have against Client.

The California Supreme Court has held that co-counsel do not owe each other fiduciary duties similar to those they owe the client. (*Beck v. Wecht* (2002) 28 Cal.4th 289, disapproving *Pollack v. Lytle* (1981) 120 Cal.App.3d 931; see also *Joseph A. Saunders, P.C. v. Weissburg & Aronson* (1999) 74 Cal.App.4th 869.) The Court in Beck reasoned that a fiduciary duty between co-counsel could interfere with each attorney's fiduciary

obligations to the client, including the duty of undivided loyalty and total devotion to the client. (*Beck*, supra, 28 Cal.4th at 297.) Therefore, Attorney's B's ethical constraints are based on B's obligations to Client.

This Committee finds that Attorney B has several ethical obligations to Client that influence what B may do under the situation presented:

### **1. The Duty of Truthfulness**

The first obligation is that of truthfulness. This obligation arises from the attorney's fiduciary duty to the client. (See Bus. & Prof. Code section 6068, subd. (d).) In handling a matter, an attorney must employ "those means only as are consistent with truth, ...." (Ibid.) Thus, Attorney B may not manufacture reasons for Client to discharge Attorney A. B may not, for example, inform Client that B believes Attorney A was acting negligently if B does not believe it. Attorney B may, however, under the circumstances of a given case, advise Client that Client would be better served by having one lawyer, Attorney B, represent Client, rather than Attorneys A and B, if Attorney B maintains a good-faith belief that Client would in fact be better served by Attorney B alone. Attorney B's good faith belief might be based, among other things, on the increased efficiency through use of one rather than two lawyers, the decreased costs without a corresponding decrease in the likelihood of success, or Attorney A's neglect of A's duties to Client.

### **2. The Duty of Communication**

An attorney is required to "keep a client reasonably informed about significant developments relating to the employment or representation." (See Rule of Prof. Conduct, 3-500.) What is "significant" depends on the nature of the matter involved and the particular client's needs. The Committee believes that the facts supporting Attorney B's recommendation and the recommendation itself constitute significant developments in the case. Therefore, Attorney B would be obligated to provide all relevant facts to Client. For example, if Attorney B had a good faith belief that Attorney A was neglecting A's duties to Client, or breaching A's duty of competence, in a manner that had or could materially prejudice Client's interests, Attorney B must communicate those facts to Client. As part of Attorney B's duties of communication and competence, B must advise Client of the reasonably foreseeable adverse consequences of discharging Attorney A. For example, if grounds exist for counseling discharge, but doing so could adversely effect current events in the case, such as a pending hearing that Attorney A prepared to handle, Client should be advised of the impact that discharge prior to the hearing could have on the case. Depending on the circumstances, immediate discharge could be sufficiently prejudicial to preclude Attorney B from advising such discharge.

Attorney B should also discuss with Client any ramifications that discharging Attorney A could have on Client's fees and/or costs. For example, if Attorneys A and B were representing Client under a contingent fee arrangement, and Client had agreed in writing to a fee split between the two of them (pursuant to Rule of Prof. Conduct 2-200), Attorney B should advise Client that Attorney A may still be entitled to recover fees and costs from Client for the reasonable value of A's services, and of Attorney B's continued entitlement to fees and costs pursuant to the contingent fee agreement. (See *Olsen v. Harbison* (2010) 191 Cal.App.4th 325; *Matter of Van Sickel* (2006) 4 Cal. State Bar Ct.Rptr. 980, 987-988; Bar Ass'n of San Francisco Form.Opn. 1989-1.) Moreover, Attorney B must ensure that the total fee Client pays does not become unconscionable. (Rule of Prof. Conduct 4-200, subd. (a); *Spires v. American Bus Lines* (1984) 158 Cal.App.3d 211, 216.)

### **3. The Duty of Undivided Loyalty**

Attorney B's advice must be based on the Client's best interests. As part of an attorney's fiduciary duties to a client, Attorney B owes Client an undivided duty of loyalty. (*Flatt v. Sup. Ct. (Daniel)* (1994) 9 Cal.4th 275, 282, 289.) Attorney B may not place B's own interests, or the interests of others, above Client's interests. Attorney B may not, for example, advise Client to discharge Attorney A and keep Attorney B as Client's sole attorney in order to increase Attorney B's fee or to garner the publicity for Attorney B that might result from representing Client alone, if discharging Attorney A is not in Client's best interest.

Attorney B must also exercise independent professional judgment with respect to any advice B provides Client about Attorney A's possible discharge. (*Joseph A. Saunders, P.C.*, supra, 74 Cal.App.4th at 869, 874.) Attorney B may not permit B's professional or personal relationship with Attorney A to hinder the exercise of B's independent professional judgment in rendering legal services to Client. Accordingly, if Attorney B believes that advising Client to discharge Attorney A will facilitate Client's best interests, the potentially adverse consequences of such action to B's relationship with Attorney A should not prevent Attorney B from recommending A's discharge. Conversely, if Attorney B does not have a reasonable basis for believing that it is in Client's best interests Client to discharge Attorney A but is unable to effectively work with Attorney A, then Attorney B should consider the possibility of withdrawing from the representation of Client.

Rule of Prof. Conduct, 3-700(C)(3) recognizes that the inability to work with co-counsel is a permissive basis for withdrawal if the lawyer believes that the best interests of the client will likely be served by the withdrawal. If, however, Attorney A is not acting in Client's best interests, or is harming Client's interests, withdrawal could conflict with Attorney B's duties to Client and require that Attorney B first advise Client regarding the possible discharge of Attorney A. (See *Beck*, supra, 28 Cal.4th at 297: "If the associate attorney really believes the principal attorney is not acting in the client's best interests, it is difficult to understand how the associate attorney could conclude the client's best interests would be served by his withdrawal.")

#### **4. The Duty of Confidentiality**

In order to assess what should be done, Attorney B may want to discuss the underlying facts with Attorney A before making a recommendation to Client, or to have a joint discussion with Attorney A and the Client. However, the Committee can foresee instances where it may be impractical, or even detrimental, to Client's interests, for Attorney B to confer with Attorney A about Attorney A's conduct before independently consulting with Client. For example, if Attorney B reasonably believed that going to Attorney A would prompt Attorney A to take steps that would further prejudice Client, Attorney B should not talk to Attorney A until Attorney B has discussed the matter with Client and Client has had the opportunity to consider the matter and take appropriate action. Additionally, if Client comes to Attorney B in confidence to discuss issues or concerns about Attorney A's conduct, Attorney B must comply with B's duty of confidentiality to Client in determining what information, if any, to disclose to Attorney A. (See Rule of Prof. Conduct, 3-100; Bus. & Prof. Code §6068, subd. (e).)

#### **5. The Duty of Competence**

Attorney B also must ensure that B can continue to provide competent services to Client if Attorney A is discharged. An attorney has an obligation to act competently in the provision of legal services. (Rule of Prof. Conduct 3-110.) This means the lawyer must apply the diligence, learning and skill, and mental, emotional and physical ability reasonably necessary for the performance of such services. (Ibid.) If Attorney B cannot provide competent legal services in Client's matter, then B is obligated to advise Client of this fact and to further advise Client to engage competent co-counsel or replacement counsel.

#### **CONCLUSION**

In sum, Attorney B must be truthful with Client, act in Client's best interests and fully advise Client of the reasonably foreseeable adverse consequences of discharging Attorney A. Attorney B also must not take advantage of Client for B's own benefit in recommending that Client discharge Attorney A. On the other hand, if Attorney B believes that Attorney A's representation is adversely affecting Client's interests, Attorney B must so inform Client. Attorney B must exercise independent judgment in determining whether to include Attorney A in those communications with Client, consistent with B's duty of confidentiality to Client. If Attorney B will be the only attorney who continues to represent Client, B must ensure that B can competently to do so without the assistance of other co-counsel, or advise Client to obtain additional or new counsel.

**All opinions of the Committee are subject to the following disclaimer:**

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