LOS ANGELES & SAN FRANCISCO
Daily Journal
www.dailyjournal.com
FRIDAY, SEPTEMBER 22, 2017
PROFESSIONAL RESPONISBILITY

Keeping bills confidential isn't a game

By Allen Michel

The 1950s era game show "I've Got a Secret" was on the air for over a decade; its run coincided with my primary and secondary education, so most of the panelists' double entendres sailed far over my head. Still, I understood the program's premise — if something is secret, people will stay tuned until it is revealed.

Now, of course, *I'm* the one with the secret. As a lawyer I am required by law to "maintain inviolate the [client's] confidence, and at every peril" to myself, to "preserve the secrets" of my clients. Business and Professions Code Section 6068(e) (1). In this regard, we lawyers are no different from doctors, psychiatrists and clergy — we all function behind a cloak of confidentiality, understanding that if the client, patient or penitent were uncertain whether what he or she is about to disclose might be posted online the next day, the communication might never occur in the first instance.

In California, the right to maintain confidentiality is described as a "privilege," and the rules for when disclosure may occur — and when it may not be compelled — are set out in Division 8 of the Evidence Code. The various statutory privileges seem parallel and co-equal, but in practice the attorney-client privilege is attacked most often. For some reason, like the privilege against self-incrimination (universally portrayed in the media and misunderstood by the public as tantamount to an admission of guilt), the assertion of attorney- client privilege has taken on a sinister connotation, as if it were a mere legal technicality created to stand in the way of truth and justice.

Decades of decisions by California's appellate courts had underscored the sanctity to be afforded attorney-client confidences, but in a 4-3 decision last year, the California Supreme Court signaled, for the first time, that some confidential communications may somehow lose their protected status over time. Like a bag of potato chips with a "sell by" date,


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some written communications that are confidential when created can be discovered by the adversary at some future point, even if neither the client nor the attorney consent.

That case, *Los Angeles County Board of Supervisors v. Superior Court (ACLU of Southern California)*, 5 Cal. 5th 282 (2016), engrafted onto the law of attorney-client confidentiality the idea that if a communication is old enough, it can be made public even if it reveals the specifics of an otherwise privileged conversation. It is thus the camel's nose under the tent of privilege, so the question remains whether there is something we as attorneys can do to prevent the tent's complete collapse.

L.A. County was digested and discussed in an excellent article, "California Legal Bills: Privileged Until They Aren't?" by Steve Fleischman, Lisa Perrochet and Mathew Samet, all of appellate powerhouse Horvitz & Levy LLP. The authors suggest a possible legislative fix to the erosion of confidentiality for which the case stands. (It warrants noting that a recent Court of Appeal decision in that same case, after remand, narrowly interprets the language of the Supreme Court's decision and denies the ACLU access to most of the material in question. 12 Cal. App. 5th 1264 (2017).) But while we wait for that, there are some practical ways to provide extra protection for billing communications that are not intended for prying eyes.

If you abhor the suggestion that confidential billing records can be rendered public merely by the passage of time (after the case in question has been concluded, which was the illogical compromise enunciated by the Supreme Court in *L.A. County*), consider the following risk-avoidance steps:

1. Mark all invoices "Confidential Attorney-Client Communication" at the top. *Comment:* The Supreme Court justices spoke in generalities about billing entries, as though none of them ever had to submit a time entry with enough detail to clear a bill-reducer's red pen. Most institutional clients and insurers now require substantial detail, failing which the line item will be disallowed or reduced, especially if it relates to a phone call or email with a client. If the client or its proxy requires detail in the bill, that detail is almost certain to describe what the lawyer and the client have discussed. So label the bill accordingly; when your bill is the subject of a subpoena, you can distinguish it from the general bill referenced in *L.A. County*, and note that in your particular case, the billing entries were expressly labeled as confidential.

2. Provide in your engagement letter language that prevents you from sharing confidences, whether in bills or otherwise, even after the matter is concluded. This issue was not mentioned in *L.A. County*, as it was not part of the fact pattern.

3. Never attach unredacted bills to motions for fees or costs — always black out or delete text that would reveal the substance of a communication between lawyer and client.

4. Consider creating a summary cover sheet for all invoices that provides financial information only. To the extent third parties might have a legitimate interest in the billing (which was the interest the ACLU was purportedly vindicating in *L.A. County*), they should be satisfied with a document that says something like "For services rendered during the month of X: Y hours, $Z; specific dates and description of services are reflected in confidential invoice submitted concurrently herewith." Especially in the case of litigation, it is usually no secret that a lawyer or law firm has provided legal services in a particular matter, so such a summary can be offered in response to a subpoena, thereby keeping the truly sensitive, and confidential, information private.

Admittedly, confidentiality of attorney- client communications may sometimes impede the quest for truth, but the Legislature and most commentators conclude that any detriment is far outweighed by the overall societal benefit of allowing clients to communicate freely with counsel without fear of subsequent disclosure.

In any event, we lawyers still have a mandate to maintain our clients' secrets, notwithstanding the confusing and somewhat troubling holding of *L.A. County*. So until the Legislature repeals the statutes noted above, there is only one proper response to outsiders who ask you to provide confidential client information — it is the name of a different TV game show: "You Don't Say!"

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