LOS ANGELES COUNTY BAR ASSOCIATION
PROFESSIONAL RESPONSIBILITY AND ETHICS COMMITTEE

FORMAL ETHICS OPINION NO. 501
May 17, 1999

I. SUMMARY

CONFLICTS OF INTEREST - CHANGING LAW FIRMS - CONFLICTS THAT FOLLOW A LAWYER FROM ONE FIRM TO ANOTHER - CIRCUMSTANCES UNDER WHICH CONFLICTS MAY BE IMPUTED TO OTHERS AT A NEW LAW FIRM.

Attorney has left one law firm and joined another law firm. Attorney's old firm represented Insurance Company. Attorney's new law firm wishes to undertake a representation that might be adverse to Insurance Company. Attorney wishes to know what ethical considerations are raised by the following two scenarios: (a) Attorney did not work for Insurance Company, nor actually acquire any confidential information from or about Insurance Company, while working at the old firm; and alternatively, (b) while employed at the old law firm, Attorney worked as a "panel counsel" for the Insurance Company and defended it and some of its insureds against claims of third parties.

Attorney does not violate Rule 3-310(E) of the Rules of Professional Conduct by undertaking a representation at the new firm that is adverse to Insurance Company, provided that Attorney does not possess *confidential* information from or about Insurance Company that is material to the new representation. Other lawyers in the Attorney's new law firm do not violate Rule 3-310(E) if they undertake the representation under such circumstances. If an attorney did not work on a substantially related matter or obtain confidential information while at the former firm about that firm's client that is material to a matter at his new law firm, neither the Rules of Professional Conduct nor the "imputed knowledge" rule should apply to prohibit either the attorney or others at the attorney's new law firm from handling the matter.

Although, by its express terms, Rule 3-310(E) reaches only to the lawyer who obtains confidential information material to the new representation from a former client, and not to every other lawyer in the law firm, the new law firm should still consider the civil disqualification issues raised where one of its lawyers is barred from a representation by Rule 3-310(E). Aside from the practical consequences of a civil disqualification, it is possible that a disregard of Court-made civil disqualification rules could have ethical consequences under, for example, 3-110 or 3-310(b)(2) of the Rules of Professional Conduct, or Section 6068(m) of the California Business & Professions Code.

For purposes of civil disqualification, Attorney takes to the new firm all of the conflicts that result from Attorney's own knowledge. These conflicts would apply to each lawyer in the new firm as a result of the "imputed knowledge" rule. However, Attorney does not take to the new firm any conflicts that would have merely been imputed to that Attorney had Attorney remained with the old firm.

AUTHORITIES CITED

Cases:

American Can Co. v. Citrus Feed Co., 436 F.2nd 1125 (5th Cir. 1971)
American Mutual Liability Insurance Co. v. Superior Court (1974) 38 Cal.App.3rd 579
Assurance Company of America v. Haven (1995) 32 Cal.App.4th 78
Blanchard v. State Farm Fire & Casualty Co. (1991) 2 Cal.App.4th 345
Brockway v. State Bar (1991) 53 Cal.3rd 51, 63
Chadwick v. Superior Court (1980) 106 Cal.App.3rd 108
Chambers v. Superior Court (1981) 121 Cal.App.3rd 893
Cho v. Superior Court (1995) 39 Cal.App.4th 113
Dieter v. Regents of the University of California, 963 F.Supp. 908 (E.D. Cal. 1997)
Dill v. Superior Court (1984) 158 Cal.App.3rd 301
Dynamic Concepts, Inc. v. Truck Insurance Exchange (1998) 61 Cal.App.4th 999
Employers Insurance of Wausau v. Albert D. Seeno Construction 692 F.Supp. 1150 (N.D. Cal. 1988)
Executive Aviation, Inc. v. National Insurance Underwriters (1971) 16 Cal.App.3rd 799
Gas-A-Tron of Arizona v. Union Oil Co. of California, 534 F.2nd 1322 (9th Cir.), cert. denied, 429 U.S. 861 (1976)
Golden Eagle Insurance Company v. Foremost Insurance Company (1993) 20 Cal.App.4th 1372
Henriksen v. Great American Savings & Loan (1992) 11 Cal.App.4th 109
H.F. Ahmanson & Co. v. Salomon Brothers, Inc. (1991) 229 Cal.App.3rd 1445
Higdon v. Superior Court (1991) 227 Cal.App.3rd 1667
In re Complex Asbestos Litigation (1991) 232 Cal.App.3rd 572
Klein v. Superior Court (1988) 198 Cal.App.3rd 894
Panduit Corp. v. All States Plastic Manufacturing Co. 744 F.2d 1564 (7th Cir. 1984)
Rosenfeld Construction Co. v. Superior Court (1991) 235 Cal.App.3rd 566
San Diego Naval Federal Credit Union v. Cumis Insurance Society, Inc. (1984) 162 Cal.App.3rd 358
Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 518 F.2nd 751 (2nd Cir. 1975)
State Farm Fire & Casualty Co. v. Superior Court (1989) 216 Cal.App.3rd 1222
Toyota Motor Sales, U.S.A., Inc. v. Superior Court (1996) 46 Cal.App.4th 778
Trone v. Smith, 621 F.2nd 994 (9th Cir. 1980)
Truck Insurance Exchange v. Superior Court (1997) 51 Cal.App.4th 985
Woods v. Superior Court (1983) 149 Cal.App.3rd 931
Yorn v. Superior Court (1979) 90 Cal.App.3rd 669

Statutes & Rules:

Cal. Civ. Code § 2860
Cal. Business & Professions Code § 6068(m)
Rule 3-310(B)(2), Rules of Professional Conduct
Rule 3-310(E), Rules of Professional Conduct

Ethics Opinions

LACBA Formal Opinion No. 396
LACBA Formal Opinion No. 464
State Bar of California Standing Committee on Professional Responsibility and Conduct, Formal Opinion No. 1998-152

II. Facts

Law Firm B has been asked by Client to act as Client's "Cumis counsel" in a matter where Insurance Company ("Insurance Co.") is providing a defense to the claims against Client under a reservation of rights. Law Firm B wishes to represent Client as Cumis counsel and, in the process, negotiate its rates with Insurance Co.. Law Firm B might also act as counsel for Client in reviewing insurance coverage issues relating to the reservation of rights asserted by Insurance Co.

Attorney is a litigation partner in Law Firm B. Before joining Law Firm B, Attorney was a litigation partner in Law Firm A. Insurance Co. was a client of Law Firm A. Law Firm A provided claims and coverage advice to Insurance Co.. Attorney was not involved in the representation of Insurance Co. and does not have actual knowledge of any confidential information relating to Insurance Co.

Law Firm B wishes to know whether a conflict of interest could exist if it represents Client as Cumis counsel because Attorney used to be an attorney in Law Firm A and, while there, Law Firm A provided claims and coverage advice to Insurance Co. Insurance Co. is Client's insurance carrier.

As a second scenario, Law Firm B seeks our opinion on whether a conflict of interest could exist if, instead of having no involvement with Insurance Co. at the prior firm, Attorney acted as "panel counsel" for Insurance Co. in several matters and in that capacity defended both Insurance Co. and its insured against claims brought by third parties.

III. Analysis

The primary issues raised by this inquiry concern how the conflict of interest rules contained in the Rules of Professional Conduct and the court-made principles of disqualification based on imputed knowledge apply when a lawyer changes law firms. Stated differently, what potential conflicts does a lawyer take with him when he leaves one firm to join another, under what circumstances do those conflicts extend to other members of the new law firm, and what ethical risks are associated with a violation of the conflicts rules under such circumstances?

A. What Ethical Limitations Apply to Attorney's Future Representations?

The facts presented can have different ethical and practical consequences to Attorney, Law Firm B, and other attorneys working at Law Firm B. We first focus on the ethical implications of the hypothetical facts from the perspective of Attorney. In Section B of this Opinion, we focus on the ethical issues affecting Law Firm B and its other attorneys.

When an attorney leaves one law firm to join another, he/she naturally takes along certain knowledge as a result of prior work . That knowledge places ethical limitations on the work attorney can do at the new law firm. Thus, for example, an attorney who obtains confidential information from one client at his/her first firm cannot engage in a representation adverse to that client at a second firm where the confidential information possessed by attorney would be material to the new representation, without obtaining the informed written consent of the first client. See, e.g. Rule 3-310(E), Rules of Professional Conduct; Henriksen v. Great American Savings & Loan (1992) 11 Cal.App.4th 109; Dill v. Superior Court (1984) 158 Cal.App.3rd 301.

From an ethics perspective, Rule 3-310(E) prohibits Attorney from accepting a representation adverse to a former client where, by reason of representing the former client, the attorney obtained material confidential information. Rule 3-310(E) states:

A member shall not, without the informed written consent of the client or former client, accept employment adverse to the client or former client, where, by reason of the representation of the client or former client, the member has obtained confidential information material to the employment.

Under the first factual variant presented in the hypothetical, Attorney did no work for Insurance Co. at Law Firm A, and does not have actual knowledge of any confidential information relating to Insurance Co.. In this situation, Attorney is not subject to discipline under Rule 3-310(E) if either Attorney or Law Firm B undertakes a representation adverse to Insurance Co. while Attorney works at Law Firm B.

Under the second factual variant, Attorney acted as "panel counsel" for Insurance Co. while at Law Firm A. Attorney defended the insurance carrier and its insureds in several cases brought against Insurance Co.'s insureds by third parties. In Attorney's capacity as "panel counsel" Attorney had an attorney-client relationship with both Insurance Co. and its insured. See, e.g., San Diego Naval Federal Credit Union v. Cumis Insurance Society, Inc., supra, 162 Cal.App.3rd at 364; American Mutual Liability Insurance Co. v. Superior Court (1974) 38 Cal.App.3rd 579.

As panel counsel for Insurance Co., Attorney no doubt learned *some* confidential information from Insurance Co. during those representations. Under Rule 3-310(E), if that confidential information would be *material* to a new representation by Attorney adverse to Insurance Co., then Rule 3-310(E) would prohibit Attorney from accepting that representation without the informed written consent of Insurance Co. Whether confidential information learned in a prior representation is material to a new representation depends, among other things, upon the facts relevant to the old and new representations, the legal positions of the parties, and the legal claims asserted in both the old and new representations. See LACBA Formal Opinion No. 463 (discussing when confidential information is material to another representation).

In analyzing whether Attorney possesses confidential information material to the new representation, the nature of the proposed new representation must also be examined. In this case, Client is requesting that Law Firm B act as "Cumis counsel" for the insured. "Cumis counsel" refers to the situation in which an insurance company has reserved its rights on certain questions of coverage, but nonetheless agrees to provide a defense to the insured. In such circumstances, the insured is entitled to select independent counsel to represent the insured, at the insurance company's expense. See Assurance Company of America v. Haven (1995) 32 Cal.App.4th 78, 83-86; San Diego Naval Federal Credit Union v. Cumis Insurance Society, Inc. (1984) 162 Cal.App.3rd 358; Cal. Civ. Code § 2860. See also Blanchard v. State Farm Fire & Casualty Co. (1991) 2 Cal.App.4th 345, 349; (mere fact that insurer disputes coverage does not entitle the insured to Cumis counsel, nor does the mere presence of claims for punitive damages or damages in excess of policy limits).

When a lawyer acts as Cumis counsel to an insured, the client is the insured, not the insurance company. There is no attorney-client relationship between the lawyer and the insurance company. Assurance Company of America, supra, 32 Cal.App.4th at 86; Truck Insurance Exchange v. Superior Court (1997) 51 Cal.App.4th 985, 994; Cumis, supra 162 Cal.App.3rd at 369; Executive Aviation, Inc. v. National Insurance Underwriters (1971) 16 Cal.App.3rd 799, 809; Employers Insurance of Wausau v. Albert D. Seeno Construction 692 F.Supp. 1150, 1153-1160 (N.D. Cal. 1988); LACBA Formal Opinion No. 464.

This result is necessitated by the conflict of interest that exists between the insured and the insurance carrier created by the insurance company's reservation of rights. Golden Eagle Insurance Company v. Foremost Insurance Company (1993) 20 Cal.App.4th 1372; State Farm Fire & Casualty Co. v. Superior Court (1989) 216 Cal.App.3rd 1222, 1226; Truck Insurance

Exchange v. Superior Court, supra 51 Cal.App.4th at 994. While Cumis counsel owes certain obligations to the insurance carrier under Civil Code § 2860, and can be liable to the insurance carrier for breach of those obligations, counsel remains independent from the insurance carrier and no attorney client relationship with the insurer is created. Assurance Company of America, supra, (1995) 32 Cal.App.4th at 86-88. See also Dynamic Concepts, Inc. v. Truck Insurance Exchange (1998) 61 Cal.App.4th 999) (Cumis counsel has certain obligations to insurance carrier and must submit to certain reasonable requirements).

As Cumis counsel, Attorney's job is to defend the insured against the claims of a third party. Thus, Attorney must decide whether, in defending the insured, any confidential information that Attorney previously obtained from Insurance Co. could become material to the defense of the insured. If so, then Rule 3-310(E) prohibits the representation of Client absent the informed written consent of Insurance Co. to the representation.

Because of Attorney's prior relationship with Insurance Co. (both as its lawyer and as a attorney in Law Firm A) it is possible that Attorney possesses *confidential* information about the procedures, methods and manner by which Insurance Co. handles and evaluates claims.[1] However, such confidential information is not *necessarily* material to the defense of Client pursuant to the Cumis counsel representation. Attorney must carefully evaluate whether he/she will be called upon during the representation of Client to employ any such confidential information during the representation of Client.[2]

For example, Cumis counsel often also provide coverage advice to their Cumis clients. They may also become involved in subsequent "bad faith" litigation on behalf of the Cumis client against the insurance company. If, in addition to defending Client in the underlying lawsuit, Attorney proposes to render coverage advice to Client, then it is possible that confidential information Attorney obtained from Insurance Co. concerning its internal operations could become material to the new representation. If Attorney does possess material confidential information concerning Insurance Co., Rule 3-310(E) would prohibit Attorney from undertaking such a representation without the informed written consent of Insurance Co.

Ultimately, Attorney must decide whether, based on all of the facts and circumstances, confidential information Attorney learned from Insurance Co. would be material to the new representation and, consequently, Attorney would be under a duty to use and disclose such information for the benefit of his new client. See, e.g. Woods v. Superior Court (1983) 149 Cal.App.3rd 931, 934; Yorn v. Superior Court (1979) 90 Cal.App.3rd 669, 675. If so, then Rule 3-310(E) is applicable.

B. What Ethical Limitations Apply to Law Firm B's Representations as a Result of Attorney's Prior Legal Representations?

When a lawyer joins a new law firm, there are potential ethical and pragmatic issues that the new law firm and its other lawyers face as a result of the lawyer's prior employment. This section of our Opinion examines some of those issues.

As discussed above, a lawyer may not undertake a representation at the lawyer's new law firm adverse to a client the lawyer represented while at his/her former firm, if as a result of the prior representation the lawyer possesses confidential information material to the new representation. This is the mandate of Rule 3-310(E). However, by its terms, Rule 3-310(E) applies only to "a member" rather than to an entire law firm.[3] Thus, on its face, Rule 3-310(E) does not appear to impose *ethical* consequences on *other* lawyers within Attorney's new law firm who might undertake the representation even though Rule 3-310(E) would prohibit Attorney from doing so.

See State Bar of California Standing Committee on Professional Responsibility and Conduct, Formal Opinion No. 1998-152. However, depending on the circumstances, there *could* be civil consequences from such a decision, such as disqualification of the law firm, and potentially, ethical consequences to others within the law firm based upon other ethical considerations.

For example, if a lawyer in Law Firm B undertakes a representation knowing that it is likely the firm can be disqualified without advising the prospective client of this risk and obtaining the client's consent thereto, acceptance of the representation may run afoul of the competence requirement of Rule 3-110, the disclosure requirement of Rule 3-310(B)(2), or the obligation to keep clients reasonably informed of significant developments in matters with regard to which the attorney has agreed to provide legal services, as required by Section 6068(m) of the California Business & Professions Code. Thus, some consideration of Court-made civil disqualification law is necessary to evaluate the ethical issues presented by other lawyers in Firm B undertaking work that Attorney would be personally precluded from undertaking.

Recently, in Formal Opinion No. 1998-152, the State Bar of California Standing Committee on Professional Responsibility and Conduct ("COPRAC") addressed the ethical and pragmatic conflict of interest issues that arise in "side-switching" cases. Many of the same issues that arise in side-switching cases also apply in these circumstances, where a lawyer has left one law firm to join another.

One important consideration with civil, and possibly ethical, consequences is the effect of the imputed knowledge rule in attorney disqualification. The imputed knowledge rule presumes that confidential information possessed by one lawyer in a law firm is also possessed by all the other lawyers in that law firm. See, e.g. Henriksen v. Great American Savings & Loan (1992) 11 Cal.App.4th 109, 114; Rosenfeld Construction Co. v. Superior Court (1991) 235 Cal.App.3rd 566, 573; Chambers v. Superior Court (1981) 121 Cal.App.3rd 893, 897-898. The existence of the imputed knowledge rule raises the question whether disregarding the rule could lead to ethical consequences.

In the context of attorney disqualification, the imputed knowledge rule bars each lawyer in a law firm from representing a client in a matter that is "substantially related" to a matter for a different client previously handled by one of the attorneys in the law firm. If a "substantial relationship" exists between the two matters, then the imputed knowledge rule works to establish an irrebuttable presumption that every attorney in the firm possesses material confidential information precluding them from undertaking the new representation. See, e.g., Rosenfeld Construction Co. v. Superior Court (1991) 235 Cal.App.3rd 566, 577; H.F. Ahmanson & Co. v. Salomon Brothers, Inc. (1991) 229 Cal.App.3rd 1445, 1454; In re Complex Asbestos Litigation (1991) 232 Cal.App.3rd 572, 592; Dieter v. Regents of the University of California , 963 F.Supp. 908, 910-911 (E.D. Cal. 1997).

Thus, in the disqualification context, Law Firm B must concern itself with the question of what knowledge is imputed to it as a result of Attorney's former work at Law Firm A. It seems clear that the imputed knowledge rule would preclude any lawyer in Law Firm B from undertaking a representation adverse to a former client of Attorney, where Attorney actually gained, during his/her representation of his/her former client, confidential information material to the new Law Firm B representation or where, under the test employed in disqualification cases, there is a "substantial relationship" between the former representation and the new representation. See H.F. Ahmanson & Co., supra, 229 Cal.App.3rd at 1454; Dieter, supra , 963 F.Supp. at 910-11.

But, would the imputed knowledge rule preclude Attorney from undertaking work adverse to a client of Law Firm A now that Attorney is at Law Firm B, even if Attorney did no work for that client while at Law Firm A and while there learned no confidential information about that client?

Similarly, would other lawyers in Law Firm B be precluded from undertaking a new representation because the representation would be adverse to a client of Law Firm A who was not actually represented by Attorney while he/she was a lawyer at that law firm? These questions raise the issue of whether the confidential information that was imputed to Attorney while at Law Firm A follows him to Law Firm B and, if so, whether that imputed knowledge is reimputed to the other attorneys at Law Firm B.

There is some authority suggesting that a rule of "double imputation" should not apply to preclude either Attorney or the new law firm from engaging in a representation adverse to a client of Attorney's former law firm where Attorney was not involved in the former representation and can demonstrate that Attorney does not actually possess confidential information material to the new employment. See, e.g., Dieter v. Regents of the University of California, supra, 963 F.Supp. at 911; Trone v. Smith, 621 F.2nd 994, 998, n.3 (9th Cir. 1980); Gas-A-Tron of Arizona v. Union Oil Co. of California, 534 F.2nd 1322 (9th Cir.), cert. denied, 429 U.S. 861 (1976). See also Toyota Motor Sales, U.S.A., Inc. v. Superior Court (1996) 46 Cal.App.4th 778, 781 (addressing disqualification where plaintiff's counsel hired an expert witness who had been employed by defendant, finding that a refutable presumption arose that the expert had disclosed confidential information to plaintiff's counsel which, if rebutted, would not require attorney disqualification); Panduit Corp. v. All States Plastic Manufacturing Co. 744 F.2d 1564, 1578-79 (7th Cir. 1984) (no imputation where lawyer was not likely to have acquired confidential information at prior firm); American Can Company v. Citrus Feed Co. 436 F.2nd 1125, 1129 (5th Cir. 1971) (no imputation where attorney did not acquire confidential information). Compare Cho v. Superior Court (1995) 39 Cal.App.4th 113; Henriksen v. Great American Savings & Loan (1992) 11 Cal.App.4th 109; Rosenfeld Construction Co. v. Superior Court (1991) 235 Cal.App.3rd 566. No California appellate court has, however, squarely decided this question.

Regardless of the impact of the "substantial relationship" test in the civil disqualification context, under Rule 3-310(E), the focus of the inquiry is on whether the lawyer actually possesses confidential information material to the new matter. Where a lawyer did not obtain confidential information about the former law firm's client that is material to a matter at the new law firm, neither the Rules of Professional Conduct nor the "imputed knowledge" rule should apply to prohibit either the lawyer or the lawyer's new law firm from handling the matter. See, e.g., Silver Chrysler Plymouth. Inc. v. Chrysler Motors Corp ., 518 F.2d 751, 760 (2d Cir. 1975).

This opinion is advisory only. The Committee acts on specific questions submitted ex parte and its opinions are based only on such facts as are set forth in the questions submitted.

---

[1] It is not this Committee's function to render opinions on the substantive law, and we do not opine that all, or indeed any, information about an insurance company's procedures, methods and manner of handling and evaluating claims is, or is not, confidential. Whether any such information is confidential would depend on the facts of each situation.

[2] We do not believe that any ethical concerns are raised by virtue of Attorney having to negotiate his hourly rates as Cumis counsel with Insurance Co. Information pertaining to the hourly rates paid by an insurance company to Cumis counsel is not confidential information.

[3] Rule 1-100(B)(2) defines "member" to mean "a member of the State Bar of California".

[4] The "substantial relationship" test is not a part of Rule 3-310(E) and does not supply the test of whether Rule 3-310(E) has been violated. We discuss here the civil disqualification standard only as contrast to Rule 3-310(E), which provides that a member may not accept employment adverse to a client or former client where the member has obtained confidential information material to the employment.

[5] The question arises whether Law Firm B could represent a client notwithstanding Attorney's actual knowledge of material confidential information concerning the adverse party, learned while Attorney worked at Law Firm A, by erecting an "ethical wall" or "screening" Attorney from the matter at Law Firm B. In California, Courts have been somewhat receptive to ethical walls in the context of government lawyers who move into private practice. See, e.g., Higdon v. Superior Court (1991) 227 Cal.App.3rd 1667, 1680; Chambers v. Superior Court (1981) 121 Cal.App.3rd 893, 903; Chadwick v. Superior Court (1980) 106 Cal.App.3rd 108, 119. However, California has not embraced screening or ethical walls as a defense to disqualification in the case of private attorneys unless approved by the client or former client. See, e.g., Klein v. Superior Court (1988) 198 Cal.App.3rd 894, 912-14; Rosenfeld Construction Co. v. Superior Court (1991) 235 Cal.App.3rd 566, 577. But see Employers Insurance of Wausau v. Albert D. Seeno Construction 692 F.Supp. 1150, 1164 n.17 (N.D. Cal. 1988) (validity of ethical walls an open question in California).