

LOS ANGELES COUNTY BAR ASSOCIATION

PROFESSIONAL RESPONSIBILITY AND ETHICS COMMITTEE

FORMAL OPINION NO. 471

DECEMBER 21, 1992

CONFLICTS OF INTEREST - INFORMED CONSENT. When a law firm proposes to jointly represent two distinct clients who are co-defendants in a lawsuit with potentially conflicting interests, it is not improper for the law firm to seek advance consent to its later representing one client against the other client in litigation arising out of the same transaction, provided (1) the lawyer can jointly represent both clients competently, and (2) both clients give their informed written consent.

AUTHORITIES CITED

California Rules of Professional Conduct, Rules 3-110, 3-310, 3-400 and, 3-700;

State Bar of California Formal Opinion 1989-115;

Los Angeles County Bar Association Formal Opinion Nos. 435 (1985) and 463 (1991);

Code of Civil Procedure Section 125(a)(5);

Evidence Code Section 962;

City and County of San Francisco v. Superior Court, 37 Cal.2d 227 (1951);

Commercial Standard Title Co. v. Superior Court, 92 Cal.App.3d 934 (1979);

Cornish v. Superior Court, 209 Cal.App.3d 467 (1989);

Elliott v. McFarlane Unified School District, 165 Cal.App.3d 562 (1985);

Hammitt v. McIntyre, 114 Cal.App.2d 148 (1952);

Grove v. Grove Valve & Regulator Co., 213 Cal.App.2d 646 (1963);

Klemm v. Superior Court, 75 Cal.App.3d 97 (1977);

Maxwell v. Superior Court, 30 Cal.3d 606 (1982);

Pennix v. Winton, 61 Cal.App.2d 761 (1943);

Wortham & Van Liew v. Superior Court, 183 Cal.App.3d 927 (1987).

FACTS AND ISSUES

Pursuant to an employment separation agreement between a corporation ("Corporation") and a former employee ("Employee"), the Corporation agreed to defend and indemnify the Employee if a lawsuit was brought against the Employee for conduct committed during the course and scope of his employment for the Corporation. Under the agreement, the Corporation's defense and indemnity obligations were excused if the Employee was found to have engaged in willful misconduct with respect to the transactions involved in the lawsuit.

Subsequently, a lawsuit was brought against both the Corporation and the Employee alleging, among other things, intentional wrongful conduct by the Employee (the "Lawsuit"). When the Employee requested a defense from the Corporation, the Corporation offered to have the Employee jointly defended by the law firm defending the Corporation in the Lawsuit.

The law firm offered to defend the Employee, provided the Employee agreed that in the event the Corporation disputed its defense and indemnity obligations or decided to sue the Employee in connection with events involved in the Lawsuit, the law firm could withdraw from representing the Employee and continue representing the Corporation in the Lawsuit and in connection with any dispute or litigation against the Employee.

The question presented to the Committee is whether it is unethical for the law firm to seek the Employee's advance consent to its continued representation of the Corporation in the Lawsuit and in a dispute with or litigation against the Employee arising out of the same transaction in the event it withdraws from representing the Employee. It is the Committee's opinion that such agreements are not prohibited and it is not unethical for a lawyer to seek such an agreement, provided (1) the lawyer can jointly represent the Corporation and the Employee competently, and (2) both the Corporation and the Employee give their informed written consent.¹

DISCUSSION

A. ADVANCE INFORMED WRITTEN CONSENT TO ACTUAL CONFLICTS IS NOT IMPROPER IF THE LAWYER CAN REPRESENT THE CLIENTS COMPETENTLY

Rule 3-310(C) of the California Rules of Professional Conduct (effective September 14, 1992) states in pertinent part:

(C) A member shall not, without the informed consent of each client:

(1) accept representation of more than one client in a matter in which the interests of the clients potentially conflict; or

(2) accept or continue representation of more than one client in a matter in which the interests of the clients actually conflict.

¹ Although not stated in the inquiry, the Committee assumes that consent to joint representation on the terms set forth by the law firm was requested from the Corporation as required by Rule 3-310.

Potential conflicts under Rule 3-310(C)(1) arise in circumstances that may later result in a direct conflict. The representation of more than one client in a common engagement frequently raises a potential conflict. Although the clients' interests may appear harmonious at the outset of the representation, there is often a potential for the clients to give the lawyer conflicting instructions. In some instances, as in this case, there is a potential for the clients to assert claims against each other. In these situations, Rule 3-310(C)(1) requires that a lawyer obtain both clients' informed written consent. At the point that the potential conflict becomes realized, a lawyer must again obtain the clients' informed written consent under Rule 3-310(C)(2). See Rule 3-310 Discussion.²

The purpose behind the consent rules is to allow clients their choice of counsel and to avoid economic hardships that may result from an inflexible application of the conflict rules. Nevertheless, potential and actual conflicts cannot be waived when the lawyer cannot competently represent both parties.

Under Rule 3-110(A), a lawyer has a duty to "perform legal services with competence". Rule 3-110(B) defines "competence" in rendering legal services as "to apply (1) diligence, (2) learning and skill, and (3) mental, emotional and physical ability reasonably necessary for the performance of such service." A lawyer's competent performance of legal services includes the duty to represent a client with undivided loyalty and to exercise independent judgment on the client's behalf. Commercial Standard Title Co. v. Superior Court, 92 Cal.App.3d 934, 945 (1979); LACBA Formal Opinion No. 435 (1985). A lawyer also has duties to maintain client confidences and secrets, pursuant to Business and Professions Code section 6068(e) and to keep a client reasonably informed about significant developments relating to the representation pursuant to Rule 3-500 or the California Rules of Professional Conduct and Business and Professions Code section 6068(m).

No matter what disclosure is made, a client cannot waive a conflict that makes it unlikely that the lawyer can represent the client competently.³ California courts have routinely held that lawyers may not concurrently represent conflicting interests, where to do so the lawyer must necessarily adversely affect one client's interests while advancing the other client's interests. Klemm v. Superior Court, 75 Cal.App.3d 97 (1977) (concurrent representation of a husband and wife in a divorce in which the court stated, "[I]t would be unthinkable to permit an attorney to assume a position at a trial or hearing where he could not advocate the interests of one client without adversely injuring those of the other."); Hammitt v. McIntyre, 114 Cal.App.2d 148 (1952)(a lawyer may not represent a civil defendant and insurer at trial when the insurer is seeking to prove facts that establish no coverage for the defendant.); Pennix v. Winton, 61 Cal.App.2d 761 (1943)

² Since the Corporation will be paying the law firm's fees for representing the Employee, Rule 3-310(F) also applies. The Rule states in pertinent part:
(F) A member shall not accept compensation for representing a client from one other than the client unless:
(1) There is no interference with the member's independence of professional judgment or with the client-lawyer relationship; and
(2) Information relating to representation of the client is protected as required by Business and Professions Code section 6068, subdivision (e); and
(3) The member obtains the client's informed written consent...

³ See e.g., Rule 3-400(A). ("A member shall not . . . contract with a client prospectively limiting the member's liability to the client for the member's professional malpractice.")

(lawyer acted improperly by advancing interests of insurer over defendant client at trial and should have withdrawn.)

Provided that the law firm can adequately perform its duties to both the Corporation and the Employee, there is no reason why it could not seek their informed written consent to its continuing to represent the Corporation in the Lawsuit and against the Employee after withdrawing as the Employee's counsel.⁴

This view is shared by the State Bar's Standing Committee on Professional Responsibility and Conduct ("State Bar"). In Formal Opinion 1989-115, the State Bar concluded that it was not unethical per se for a lawyer to condition employment on a client's agreement to waive its right to disqualify the lawyer in subsequent representations adverse to the client, if the waiver is informed. The State Bar cautioned that such agreements would not be valid if the lawyer could not represent the client competently.

The State Bar relied in part on Maxwell v. Superior Court, 30 Cal.3d 606 (1982), in which an indigent criminal defendant charged with a capital offense entered into a fee agreement granting his attorneys the right to exploit his life story, including the events involved in the pending criminal matter. The agreement discussed the potential conflict and inherent risks in the arrangement.

The Supreme Court found that the agreement created a potential conflict of interest. It held that the defendant's lawyers could not be disqualified solely on the basis of the agreement, where the trial court had determined that the client had given knowing and willful consent to the potential conflict. The Court observed that the defendant's "right to decide for himself who best can conduct the case must be respected wherever feasible." 30 Cal.3d at 615. However, the Court noted that the trial court could still disqualify the lawyers "when an actual conflict materializes during the proceedings, producing an obviously deficient performance." Id., at 614, n.10.

The State Bar concluded that Maxwell stands for the general proposition that an advance waiver of a conflict of interest is not per se invalid. This Committee agrees with the State Bar's conclusion.

Other cases seem to suggest the same conclusion. California courts have long recognized that a lawyer may represent an interest adverse to a client in a matter directly related to the lawyer's prior representation of that client "where the client expressly or impliedly consents to the adverse representation." Grove v. Grove Valve & Regulator Co., 213 Cal.App.2d 646, 652-653 (1963).

⁴ The inquirer suggests that the Discussion to Rule 3-310 prohibits such an agreement until an actual conflict arises. The Discussion explains that when there is a potential conflict between jointly represented clients, consent is required under Rule 3-310(C)(1). The Discussion then states, "if the potential adversity should become actual, the member must obtain the further consents of the clients pursuant to [Rule 3-310(C)(2)]." However, Rule 3-310(C)(2) applies to concurrent representation of conflicting interests. Here the law firm would be withdrawing from representing the Employee when an actual conflict arises. Since the law firm would not be concurrently representing conflicting interests at that point, Rule 3-310(C)(2) does not apply.

In Cornish v. Superior Court, 209 Cal.App.3d 467 (1989), the court denied the plaintiff's petition to disqualify a defendant's counsel which had previously represented both parties in a related matter. The court's decision was based on its conclusion that the plaintiff had no expectation that its communications with the firm during the joint representation would not be disclosed to the defendant. Because the plaintiff had no expectation of confidentiality, the court concluded that consent was not required under former Rule 4-101 (requiring consent when a representation adverse to a former client related to a matter in which the lawyer acquired confidential information).

In reaching this conclusion, one of the factors on which the Cornish court relied was a letter sent by the firm informing the plaintiff that the defendant was its primary client, and that the firm would continue to represent the defendant in any dispute between the parties. There are several factors which distinguish Cornish from this inquiry;⁵ however, Cornish illustrates that a joint representation may be premised on a lawyer's ability to represent one client against the other in the event of an actual conflict.

To the extent the Corporation and the Employee share a common objective and a common agenda in the Lawsuit, the agreement sought by the law firm may not impact its ability to represent both competently. To the extent the objectives and agendas are at odds, the law firm may not be able to concurrently represent both clients competently. If the law firm cannot fulfill its basic duties to both clients, it may not ethically accept the representation of both clients.

B. INFORMED CONSENT REQUIRES DISCLOSURE OF POTENTIAL ADVERSE CONSEQUENCES.

Rule 3-310(A) sets forth the basic requirement of informed consent as follows:

- (1) "Disclosure" means informing the client or former client of the relevant circumstances and of the actual or reasonably foreseeable adverse consequences to the client or former client;
- (2) "Informed written consent" means the client's or former client's written agreement to the representation following written disclosure.

The Committee believes there are several factors which should be considered in obtaining informed consent of the Corporation and Employee under the facts presented. However, the Committee hastens to add that the following factors are neither exclusive nor all encompassing. They should not be applied without a thorough review of the representation by the law firm.

⁵ Cornish does not involve the kind of agreement in question here. The law firm's prior representation of the plaintiff had been nominal. The plaintiff was advised by its own attorney throughout the prior representation. There was no indication that the firm had given any advice to the plaintiff during the joint representation. While the joint representation was pending, the parties had remained adverse on other issues relating to the representation. On those issues, the law firm had represented the defendant and the plaintiff had been represented by its own counsel.

The specific requirements of informed consent of the Corporation and Employee to the arrangement in question depend on all of the facts and circumstances. What is adequate in one case may not be adequate in another. The overall objectives are (1) to assure that both clients are apprised of significant facts and possible adverse consequences in a manner the clients can understand and appreciate, and (2) to provide a structure for the representation that will allow the law firm to represent competently both clients.

In providing written disclosure, it is imperative that the clients understand the significance of facts presented and the adverse consequences. If either client is unable to do so, informed consent is not possible and the law firm may not represent the clients under the arrangement in question.

1. Disclosure of the Conflicts.

The law firm should disclose to both clients the scope of its engagement and its role in the Lawsuit. It should disclose the potential that the Corporation might conclude that its not obligated to continue defending the Employee under the Agreement and what might happen in that event. The law firm should also disclose the potential that the Corporation or Employee may pursue claims against each other, the circumstances under which such claims may arise, and that the law firm may be required to withdraw from representing the Employee in that event.

The disclosure should also cover the possibility that the law firm may be required to withdraw if it receives conflicting instructions from the clients which render the law firm unable to carry out one client's instruction without violating the other's instruction. In such situations the clients must decide on a common instruction the law firm can follow for the law firm to continue representing them jointly.

2. Confidential Information.

A lawyer has a duty to maintain client confidences and secrets under Business and Professions Code section 6068(e), and at the same time, a duty of disclosure under section 6068(m) and Rule 3-500. Under Evidence Code section 962, a jointly represented client may not invoke the attorney-client privilege to prevent disclosure to the other jointly represented client of a communication with the lawyer during the course of the common engagement. Wortham & Van Liew v. Superior Court, 183 Cal.App.3d 927, 931-933 (1987).⁶

The ramifications of the foregoing rules should be explained to the Corporation and the Employee. See Rule 3-310 Discussion. The law firm should make it clear whether there will be unrestricted disclosure of information about one client to the other. If there is to be a free exchange of information, the law firm should disclose the risk that the clients may

⁶ Rule 3-310(F) requires that a member must protect "information relating to representation of the client," whose representation is paid for by someone other than the client, "as required by Business and Professions Code Section 6068, subdivision (e)." A member's duty under Section 6068(e) is qualified by Evidence Code Section 962, which establishes that there is no confidentiality between jointly represented clients with respect to communications made in the course of the joint representation.

not be as candid with the law firm as they might be if separately represented.⁷

It should also be disclosed to the Employee that in the event of withdrawal, the information the law firm obtained and the Employee's communications with the law firm during the representation could be used by the law firm against the Employee. The Employee's consent to the adverse use of such information is required under Rule 3-310(E), before the law firm may represent the Corporation against the Employee in connection with the facts presented.⁸

If the joint representation impairs the law firm's ability to obtain significant information from either client, the firm may not be able to accept or continue the representation of both clients. City & County of San Francisco v. Superior Court, 37 Cal.2d 227, 235 (1951). ("Adequate legal representation in the ascertainment and enforcement of rights or the prosecution or defense of litigation compels full disclosure of the facts by the client to his attorney. Unless he makes known to the lawyer all the facts, the advice that follows will be useless, if not misleading.")

3. Loyalty and Independent Judgment.

Under the facts of the inquiry, the law firm has an existing relationship with the Corporation. The nature and extent of that relationship should be disclosed to the Employee. The law firm should also disclose the potential that its relationship with the Corporation now and in the future will adversely affect its ability to represent the Employee with complete loyalty and to exercise independent judgment on the Employee's behalf.⁹ The extent to which the law firm's representation of the Employee may affect the law firm's loyalty and exercise of independent judgment should be disclosed to the Corporation.

Ultimately, loyalty and independent judgment are issues that reflect the law firm's ability to represent the clients competently. Although the clients should be encouraged when possible to make their own assessment, the law firm should explain why it believes it can adequately represent both clients. For example, the common interests of the Corporation

⁷ The Committee recognizes there may be situations where a lawyer may obtain consent not to disclose certain confidential or secret information about one client to the other when instructed not to do so. In such situations, the risk that the clients might not learn information they might want to know and might have been able to learn if separately represented should be disclosed. Such agreements are not ethically permissible if the lack of disclosure impairs the lawyer's ability to represent the clients competently.

⁸ This inquiry involves a former employee. The Committee is aware that in many cases joint representations of this nature will involve employers and their current employees. In such cases it should be disclosed to the employee whether his or her disclosures to the lawyer may affect the employer-employee relationship by, for example, exposing to employee to possible termination, discipline or loss of advancement opportunities.

⁹ Under Rule 3-310(F)(1), a member may not accept compensation for representing a client from someone other than the client unless there is no interference with the member's independent judgment. However, Rule 3-310(F) deals with fee payment situations and not joint representations, which are covered under Rule 3-310(C). The thrust of Rule 3-310(F)(1) is that the lawyer's independent judgment should not be affected by the fact that someone other than the client is paying the lawyer's fees. The other influences on the lawyer's independent judgment should be analyzed under the other parts of Rule 3-310.

and Employee in the Lawsuit may provide assurance that the lawyer can adequately represent both.¹⁰

4. Effect of Withdrawal.

The Employee should be advised of the adverse consequences that may attend the law firm's withdrawal, particularly if it occurs when the Lawsuit is at an advanced stage. For example, the law firm should disclose to the Employee the possibility that in the event it withdraws, the Employee will likely be required to retain new counsel who may not be as familiar with the case as the law firm.¹¹

The corporation should be advised that despite the agreement, a court might, as a matter of law, disqualify the law firm from representing the Corporation in the event of a conflict with the Employee. In a litigated matter, the Court retains the right to disqualify counsel despite the agreement if enforcing it would seriously compromise the integrity of the judicial process or fairness in a particular proceeding. Code Civ. Proc. §128(a)(5); Elliott v. McFarlane Unified School District, 165 Cal.App.3d 562, 567 (1985).

5. Advice About Conflicting Claims.

The Committee believes the law firm should avoid advising both clients on issues on which their interests conflict.¹² Such advice inherently places the law firm in the situation where it cannot exercise independent judgment on behalf of both clients. Moreover, it would place the law firm in the absurd position of having to counter the advice to one of the clients in its advice to the other, producing an unwaivable conflict.

The better course is for the law firm to refrain from advising either client about their claims against the other. However, the law firm must consider and disclose to their clients whether they can be competently represented by the law firm without receiving such advice during the representation.¹³ It may be advisable for the law firm to recommend that the clients retain separate counsel to render such advice.¹⁴

¹⁰ The Committee recognizes that in some cases a lawyer faces inherent difficulties when advising a client about consenting to potential conflicting loyalties. In some cases the lawyer may not be truly objective and may be subject to the criticism that the advice is tainted by the very divided loyalty to which the lawyer is seeking the client's consent. Although not required by Rule 3-310, it may be prudent in certain situations to suggest that one or both clients consult with independent counsel before consenting, particularly when the clients do not have the experience or sophistication to understand the ramifications of the disclosure.

¹¹ The law firm may not withdraw until it has taken reasonable steps to avoid reasonably foreseeable prejudice to the Employee's rights and has obtained permission from the court when court rules so require. Rule 3-700(A)(1) & (2). As a result, there may be stages in the proceeding where the law firm may not withdraw from representing the Employee. The risk and adverse consequences of that occurring should be disclosed to the clients.

¹² Examples of such conflicting interests may include claims that the Employee or Corporation may have against each other and their respective rights and obligations under the indemnity agreement.

¹³ For example, the Corporation or Employee may have important defenses which turn on their conflicting interests. They may have claims which may become time barred. The duty to

6. Availability of Separate Counsel and Employer Rights.

Without attempting to decide questions of law that are outside the Committee's purview, the Committee recognizes that employment and indemnity law may afford the Employee the right to separate counsel paid for by the Corporation. In addition, the Corporation may have certain legal rights against the Employee for contribution or reimbursement of defense costs or damages.

The availability of such counsel and such rights of the Corporation are "relevant circumstances" which should be explained to the Employee in order to satisfy the requirements of informed consent. The Committee is particularly concerned that the Employee be informed whether paid representation may be available if the Employee chooses not to consent. The Employee may feel compelled to consent if the available alternatives are not disclosed, particularly if the Employee is not sophisticated. In circumstances where a party is not aware of rights to separate paid counsel, without such disclosure, it is questionable whether the party's consent would be informed.

The availability of such rights may be an issue where the interests of the Corporation and the Employee are adverse. For example, the Corporation may want joint representation in order to save costs while the Employee may want separate representation to reduce the risk of harmful disclosures to the Corporation. The law firm's disclosure to the Employee must reflect its independent judgment on the Employee's behalf and must not be influenced by the Corporation's interests. If the law firm is not in a position to exercise independent judgment on either client's behalf on these issues, the law firm should advise that client to seek the advice of independent counsel.

CONCLUSION

A careful review of the potential adverse affects on the law firm's ability to fulfill its basic duties to both clients should inform the law firm about whether it can competently represent both clients under the arrangement in question. If it can represent both clients competently and both clients give their informed written consent, the law firm may ethically represent the Corporation and Employee under the terms it has proposed.

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

practice competently may require the law firm to advise the clients to seek independent advice about such claims and defenses.

14 The Committee recognizes a third possibility where the law firm advises one of the clients, presumably the Corporation in this case, about its claims against the other clients, in this case, the Employee. The Employee would have to be advised about whether the law firm could exercise independent judgment on the Employee's behalf in light of the advice being given to the Corporation. For example, the law firm should disclose whether it may be influenced to pursue a result in the lawsuit more favorable to the Corporation in light of the advice being given. The Employee should also be told whether it will be privy to the advice being given to the Corporation.

The Committee has serious reservations whether such an arrangement is workable based on the facts presented, particularly if the Employee is not being advised by separate counsel. The conflicting claims appear to be central to the issues raised in the lawsuit. As a result, the law firm may not be able to competently represent the Employee under such an arrangement.