

FORMAL OPINION NO. 513
July 18, 2005

CROSS-EXAMINATION OF FORMER CLIENT AS EXPERT WITNESS

I. QUESTION PRESENTED

What ethical considerations apply when an attorney learns that a former client has been designated as an expert witness by an opposing party in a new matter?

II. SUMMARY OF OPINION

Whether the attorney can undertake or continue the new representation depends largely on the nature of the information the attorney may have received from the prior representation and whether that information is material to his or her employment in the new litigation such that confidential information from the former client might be used or disclosed in the course of the new representation. The options available to the attorney may also depend upon whether the conflict exists at the time the attorney undertakes the representation or arises at a later date when the former client is designated to appear as an expert witness. In either case, there is no ethical impropriety for the attorney to continue with the representation in the current matter, even in the absence of consent from the former client to the attorney's new representation, so long as the attorney does not possess confidential information from the former client that would be material to the employment in the new matter.

III. AUTHORITIES CITED

Business and Professions Code, section 6068(e)(1)
Cal. Rules Prof. Conduct, 5 (former); 3-310(B); 3-310(C)(1); 3-310(C)(2); 3-310(C)(3); 3-310(E)
Cal. State Bar Formal Opinion 1996-146
American Airlines, Inc. v. Sheppard, Mullin, Richter & Hampton (2002) 96 Cal.App.4th 1017
Collins v. State of California (2004) 121 Cal.App.4th 1112
Flatt v. Superior Court (1994) 9 Cal.4th 275
Goldstein v. Lees (1975) 46 Cal.App.3d 614
Hernandez v. Paicius (2003) 109 Cal.App.4th 452
In re Complex Asbestos Litigation (1991) 232 Cal.App.3d 572
People ex rel. Dept. of Corporations v. SpeeDee Oil Change Systems, Inc. (1999) 20 Cal.4th 1135
People v. Cox (2003) 30 Cal.4th 916
River West, Inc. v. Nickel (1987) 188 Cal.App.3d 1297
Shadow Traffic Network v. Superior Court (1994) 24 Cal.App.4th 1067

IV. FACTS

Twenty years ago, the inquiring Attorney represented a doctor (the "Former Client") in a medical board proceeding. The subject matter of the medical board proceeding and its disposition are contained in public records. After plaintiff's counsel designated the doctor, who had been treating the plaintiff, as an expert witness in the case-at-hand, the attorney, without revealing any confidences, notified plaintiff's counsel of his prior professional relationship with the expert. The client-expert had apparently not fully revealed to plaintiff's counsel his former attorney-client relationship with the Attorney. The plaintiff's attorney eventually moved to disqualify the Attorney.

V. DISCUSSION

One of an attorney's primary duties to a client is that of confidentiality. This duty survives the termination of the attorney-client relationship and forever precludes the attorney from using or disclosing the confidential information to the detriment of the former client. This duty is captured in Business and Professions Code, section 6068(e)(1):

6068. It is the duty of an attorney to do all of the following:

...

(e)(1) To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.¹

In order to protect clients and the duty of confidentiality, California has adopted Rule of Professional Conduct 3-310(E), which provides:

(E) 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.

At its core, this rule is designed to prohibit an attorney from accepting a new engagement which will cause a conflict between the duty owed to a present or former client to maintain inviolate that client's confidences and the duty owed to the new client to competently represent that client. Where the attorney possesses confidential information from a former or existing client that would be utilized in the representation of the new client, a conflict arises.²

The adversity requirement in Rule 3-310(E) does not require formal adversity, such as litigation between the two clients. Rather, as explained in *American Airlines, Inc. v. Sheppard, Mullin, Richter & Hampton* (2002) 96 Cal.App.4th 1017, 1039, adversity within the meaning of this rule can be created in a variety of contexts where the former client's interest in confidentiality may be put at risk by an attorney's new employment:

It is inconsequential that American was not a party to the ADO lawsuit. The proscription against adverse representation exists whenever counsel's employment is adverse to the client or former client, and can exist even though a prior client is not a party to the litigation. (*Metro-Goldwyn-Mayer, Inc. v. Tracinda Corp.* (1995) 36 Cal.App.4th 1832, 1843.) Conflicts of interest may arise in a variety of circumstances where an attorney assumes a role other than as an attorney at law adverse to an existing client. (Cf. *Manfredi & Levine v. Superior Court* (1998) 66 Cal.App.4th 1128, 1132-1133.)

Accordingly, Rule 3-310(E) "seek[s] to avoid allowing an attorney to take a role that places him in actual or potential conflict with a client." (*Id.* at p. 1040.)

Relying on *Goldstein v. Lees* (1975) 46 Cal.App.3d 614, American Airlines read Rule 3-310(E), which was preceded by former Rule 5, as follows:

Clearly, the acceptance of employment which threatens the revelation or improper monopolization of a former client's confidences is adverse to the interests of the former client. To be sure, rule 5 implies that an attorney may accept employment on a matter in reference to which he has before obtained confidential information, but nothing in rule 5 sanctions the acceptance of such employment when the representation of the interests of the new client inherently tempts the attorney to reveal or improperly monopolize the confidences of the old. Such a reading of rule 5 would conflict with the policies underlying section 6068, subdivision (e), of the Business and Professions Code; it would needlessly permit attorneys to create the appearance of impropriety. Nor would such an interpretation offer assistance to the new client. Clients are entitled to vigorous and determined representation by counsel. It is difficult to believe that a counsel who scrupulously attempts to avoid the revelation of former client confidences--i.e., who makes every effort to steer clear of the danger zone--can offer the kind of undivided loyalty that a client has every right to expect and that our legal system demands. Rule 5 operates to preclude any impediment to the fulfillment of an attorney's professional obligation to his client by proscribing any conflict of interest in his representation of past and present clients.

Id. at pp. 1041-1042.

When an attorney does possess material, confidential information from a former client, the attorney must

obtain the former client's informed written consent, and may not attempt to evade the conflict by agreeing with the new client to restrict the use of any confidential information. As the *American Airlines* court explained

It is anathema to the Rules of Professional Conduct to suggest that an attorney can place himself in a situation in which he undertakes adverse representation of a third party, and the client cannot object because the attorney has promised not to disclose the client's confidential information even though the information may be decidedly helpful to the new client. It is precisely this compromised situation, when the burden of deciding which client to favor is placed solely on the attorney's shoulders and within the attorney's sole power to decide, that Rule 3-310 is designed to avoid.

Id. at p. 1039.

We believe that the application of an attorney's duty of confidentiality, where a former client has been retained as an expert by an adverse party in pending litigation in which the attorney is of record, involves different considerations and analysis, depending on whether the client/expert has been retained before or after the attorney's involvement in the litigation. Accordingly, to discuss that distinction, we have presented the following two scenarios:

SCENARIO ONE – THE EMPLOYMENT OF AN ATTORNEY AFTER A FORMER CLIENT HAS BEEN DESIGNATED AS AN EXPERT BY AN OPPOSING PARTY

The first scenario, in which an attorney is offered employment by a new client after his or her former client has been designated as an expert by the opposing party, presents a straightforward application of Rule 3-310(E) to an attorney who is evaluating whether he or she is ethically permitted to take on the new representation. Consistent with the requirements of Rule 3-310(E), the threshold question is whether the attorney has "obtained confidential information (from the former client) material to the (new) employment."

Information from a prior representation could conceivably be material in a variety of ways. For example, it could be material to the very substance of the dispute in the new litigation. More likely, on the facts presented here, confidential information obtained during the course of representing the former client might be useful in cross-examining the expert to discredit him or her in the new litigation. It may or may not be the case that such information is sufficient to implicate the proscription of Rule 3-310(E). (See, e.g., *People v. Cox* (2003) 30 Cal.4th 916, 950, holding that, in the context of a criminal trial, no conflict existed when the prosecution witness was the defense attorney's former client and the attorney did not possess confidential information.)

Accordingly, if the attorney possesses confidential information from the former client that would be material to his or her employment in the new matter (i.e., information that would be used or disclosed in the representation of the new client) — the attorney may not accept the new representation in the absence of an informed, written consent from both the former and current clients. As noted above, the attorney cannot circumvent the proscription set forth on Rule 3-310(E) by agreeing with the new client that he or she will not use any confidential information obtained from the former client in the new representation.

SCENARIO TWO – A FORMER CLIENT IS DESIGNATED AS AN EXPERT WITNESS BY AN ADVERSE PARTY WHERE THE FORMER ATTORNEY IS ALREADY OF RECORD IN THE SAME MATTER

In this second scenario, the attorney is representing the new client in litigation before the former client has been designated as an expert witness by opposing counsel. Thus, it is the former client and opposing counsel who have created the potential or actual conflict. Additional relevant concerns are whether opposing counsel was aware that the expert was a former client of the attorney and whether he or she may have employed the expert as a tactic to disqualify that attorney. Unlike the attorney in the first scenario, who did not yet represent the new client when the expert witness/former client was designated, this attorney has

already undertaken representation of the new client before the expert witness/former client has come into the case, and the attorney has done nothing to create the potential or actual conflict.³

As discussed in *Goldstein v. Lees, supra*, 46 Cal.App.3d at 620, the attorney's duty of care and loyalty to the new client includes the obligation to provide vigorous representation, which may require a thorough and comprehensive cross-examination of the former client and now opposing expert. As in the first scenario, if the attorney does not possess confidential information material to the new employment, he or she may continue the representation of the new client without violating the attorney's duty of confidentiality to the former client. Consequently, as the first step in the analysis, if the attorney does not possess any confidential information about the expert witness/former client or does not possess confidential information material to the current case, there is no conflict. (For example, if the subject matter of the previous representation was wholly unrelated to the current case and of no use or relevance on cross-examination, the attorney is free to continue representing the new client, and no further analysis is necessary.) However, it must be remembered that the attorney, in any event, will be required by Rule 3-310(B) to disclose in writing to the new client the nature of the attorney's relationship with the expert witness/former client.

The more complex question is raised in the context where the attorney possesses confidential information from the former client that may be material to the new employment, thereby creating potential conflicts with both the former and new clients.

As a threshold matter, we note that under a textual analysis, Rule 3-310(E) does not apply to the second scenario. Rule 3-310(E) states that a member may not accept employment under the constraints set forth in the Rule. The Rule does not — as do other portions of Rule 3-310 — restrict a member from *continuing* representation when the constraints of the Rule are met.⁴ By the very nature of its terms, the rule does not apply if the attorney began his or her employment for the new client in an unrelated matter before learning that a former client was somehow involved in that new matter. In the instant inquiry, the inquiring Attorney had accepted employment of the New Client before learning that his Former Client had treated the plaintiff, which could be read to permit the continuation of the pre-existing representation as the New Client's attorney of record.

Nonetheless, as noted above, Rule 3-310(E) does not stand alone; instead, it must be read with section 6068(e)(1), which requires an attorney to protect the secrets of a former client. In the event that a reasonably prudent attorney would conclude that the secrets and confidences that came into his or her possession when previously representing an expert witness/former client would be material to a new client's case, the attorney can continue representation in the event that the former client provides an informed, written consent after written disclosure, in compliance with Rule 3-310(C). If the expert witness/former client refuses to provide written consent, the attorney may ethically seek judicial determination as to whether the former client has waived confidentiality and the right to assert the conflict, by having agreed to be retained as an opposing expert in a matter in which the former client's attorney has a pre-existing role as counsel for an opposing party.⁵

Judicial intervention might take different forms, depending on the particular facts in potential prejudice to the attorney's new client. For example, the new client may be substantially disadvantaged (both in terms of efficacy and cost) if his or her attorney is forced to leave the case in midstream. (See *In re Complex Asbestos Litigation* (1991) 232 Cal.App.3d 572, 586 [in concurrent conflict situations, considerations, *inter alia*, for disqualification are the client's right to be represented by counsel of his or her choice and the financial burden on the client in replacing disqualified counsel] and *Hernandez v. Paicius* (2003) 109 Cal.App.4th 452, 467 ["A party's right to select counsel of his or her own choosing may trump the opposing party's freedom to choose an expert whose designation creates a conflict."].) Accordingly, the attorney might request that the former client be precluded from acting as an expert because of the unfair consequence to the attorney's current client if the attorney was unable to remain in the case. Alternatively, the attorney might request that the court order, if the former client stayed in the case as an expert witness, that the former client's decision constitutes a limited waiver of the attorney's duty of confidentiality, to the extent the attorney might find it reasonably necessary to use or disclose confidential information in order to

properly represent the new client. (See *River West, Inc. v. Nickel* (1987) 188 Cal.App.3d 1297, 1313 where disqualification of trial counsel for plaintiff was reversed on appeal, notwithstanding that this attorney had represented the defendant thirty years earlier in a substantially related matter, because defendant's present attorney had impliedly waived the right to disqualify the attorney by waiting too long to raise the conflict issue after plaintiff's counsel had engaged in substantial time and discovery in the matter.)⁶

The committee notes that judicial involvement in such factual scenarios was contemplated by *Hernandez v. Paicius, supra*, 109 Cal.App.4th 452 in which it was stated:

Our disposition of this issue should not be construed as suggesting that disqualification of counsel is the appropriate remedy in all cases in which one party's attorney represents an expert designated by the other side. A party's right to select counselor of his or her own choosing may trump the opposing party's freedom to choose an expert whose designation creates a conflict. And while we know [the expert] was a percipient treating physician as well as a designated expert, the facts developed at trial as to how and when the problems surfaced are not sufficiently clear to allow us to formulate a rule of general application. We can say without hesitation, however, that if the conflict has not been resolved by the time the client/witness is called to the stand, the court is faced with an insuperable obstacle to going forward—an attorney with two clients in circumstances where he or she can be loyal to only one. The court cannot permit, much less preside over, an attorney's attack on his or her own client. Rather, in the interest of the integrity of the bench and bar, it must declare a mistrial.⁷

Id. at pp. 467-468.

VI. CONCLUSION

If an attorney is asked to accept representation of a client in a matter in which a former client of the attorney has already been designated as an expert witness, the attorney must determine if his or her present employment might require the attorney to use or disclose confidences obtained from the former client and now expert. If so, Rule 3-310(E) mandates that the attorney may accept the representation only with the informed written consent of the former client.

Where the attorney's involvement in the matter preceded the former client/expert's designation, or if the former client does not consent to such involvement, the attorney has options other than asking for the consent of the former client. In such a case, the attorney may ethically seek an appropriate order from the court, which could include that the expert be precluded from testifying if another expert is available to the opposing party; that the former client's decision to serve as an expert constitutes a waiver of the privilege; or that the former client may not serve as an expert witness unless the former client agrees to a limited waiver of any duty of confidentiality as it pertains to the pending case.

This opinion is advisory only. The committee acts on specific questions submitted *ex parte*, and its opinion is based on the facts set forth in the inquiry submitted.

¹ Two types of "confidence" are derived from the statute. One refers to confidential information in the sense of a client secret. (*Dept. of Corporations v. Speedee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135, 1146; Cal. State Bar Formal Opn. 1996-146.) The second means that an attorney must maintain the trust given by the client. (Cal. State Bar Formal Opn. 1996-146.)

² *Flatt v. Superior Court* (1994) 9 Cal.4th 275, 277 notes that the chief fiduciary value jeopardized by an attorney's successive representation of clients with potentially adverse interests is that of client confidentiality whereas in potentially conflicting, simultaneous representations, the attorney's duty of loyalty is also implicated.

³ *Collins v. State of California* (2004) 121 Cal.App.4th 1112, 1131 provides, in part, that the knowing employment of an

opposing party's expert may be grounds for disqualification.

⁴ Rule of Professional Conduct 3-310(E) provides that "A member shall not, without the informed written consent of the ... former client, accept employment adverse to the ... former client where, by reason of the representation of the ... former client, the member has obtained confidential information material to the employment,. .."

⁵ It is also probably prudent, before seeking judicial relief, that the attorney advise opposing counsel of his or her former representation of the expert witness and request that the witness be withdrawn. (See *Shadow Traffic Network v. Superior Court* (1994) 24 Cal.App.4th 1067, 1088 recommending that an attorney who learns that his or her previously retained expert has been hired by an opposing party should first talk with that attorney about not using the expert before moving to disqualify the attorney.)

⁶ While the committee believes that the attorney could ethically pursue these orders (and there may be other appropriate remedies as well), the attorney should keep in mind that care must be taken not to reveal any confidential information until an appropriate court issues an order that would permit the attorney to do so. (See *Collins v. State of California*, supra, 121 Cal.App.4th 1112 noting that, as to a motion to disqualify an opposing attorney for having retained an expert already hired by the moving party, that the moving party must provide, without disclosing confidential information, the nature of the information allegedly imparted to and possessed by the expert as well as its material relationship to the proceeding.

⁷ In *Hernandez v. Paicius*, the plaintiff's medical expert, who was concurrently represented by defense counsel's law firm as to malpractice and discipline proceedings, was vigorously cross-examined by that counsel.