

# MCLE ON THE WEB

(\$20 PER CREDIT HOUR)  
TEST # 52  
1 HOUR CREDIT  
LEGAL ETHICS

To earn one hour of MCLE credit, read the substantive material, then download the test, answer the questions and follow the directions to submit for credit.

## Lawyers' Dangerous Liaisons

### *Two recent decisions have changed the landscape of disqualification motions in successive representation cases*

By ELLEN R. PECK  
©2005 All rights reserved

Cali!" rasped the familiar voice of Sidney Sideswitch. "I need to consult with you about another ridiculous claim of conflicts of interest!" California Joan had agreed to become Sid's ethics counsel when Sid started getting a rash of disqualification motions in his plaintiff's consumer rights practice.

"Before I started my own practice about five years ago, I worked in an insurance defense firm. I worked for the firm for about 10 years handling coverage work for Universal Insurance (Uni). I never did any litigation for them and certainly never handled any bad faith claims. I am now suing Uni for bad faith refusal to pay a claim for plaintiffs after their \$3 million home burned in a wild fire in the hills. Uni's counsel, for tactical reasons, claims that I have a conflict of interest. Clearly, Uni cannot keep me from working for other clients by using this tactic, can they?" Sid asked.

"Sid, two recent cases from California's Fifth District have changed the landscape of disqualification motions in successive representation cases (taking an adverse action against a former client). If the trial court adopts this reasoning, it is very likely that Uni will prevail." Cali always delivered bad news quickly.

Cali explained the law's changes: "Since 1932, California common law policy has not precluded a lawyer from forever accepting employment in different matters adverse to a former client. After severing a relationship with a former client, the California Supreme Court has forbidden an attorney to do *either* of two things: (1) take any action that will injuriously affect the attorney's former client in any matter in which the attorney formerly represented the client; or (2) use knowledge or information acquired by virtue of the previous relationship against the former client. (*Brand v. 20th Century Ins. Co./21st Century Ins. Co.*, (2004 [2d Dist.]) 124 Cal.App.4th 594, 602, 21 Cal.Rptr.3d 380 (*Brand*))"

Sid started to sputter. "But Cali, the practice of law has changed a lot since 1932. The business marketplace has expanded from small town centers to the world. Law firms are international and have merged, demerged and been extinguished. Lawyers move from firm to firm, switch from field to field and even from representing one class of parties (e.g., insurers, employers, etc.) to another (e.g., injured plaintiffs, employees, etc.)!"

Cali responded, "From 1981 to 2003, courts and lawyers used the three part 'substantial relationship' test first adopted by *H.F. Ahmanson & Co. v. Salomon Brothers Inc.* ((1991) 229 Cal.App.3d 1445, 1454, 280 Cal.Rptr. 614) to determine whether a lawyer or law firm could take on a new engagement or would be disqualified from the new case adverse to a former client. That test evaluated (1) factual similarities between the two representations; (2) similarity of legal issues in the two representations; and (3) the nature and extent of the lawyer's involvement (which also permitted the lawyer to prove that no confidential information had been received). (*Adams v. Aerojet-General Corp.* (2001) 86 Cal.App.4th 1324, 1332, 104 Cal.Rptr.2d 116.)

"In *Jessen v. Hartford Casualty Ins. Co.* ((2003) 111 Cal.App.4th 698, 3 Cal.Rptr.3d 877 (*Jessen*)) and *Farris v. Fireman's Fund Ins. Co.* ((2004) 119 Cal.App.4th 671, 14 Cal.Rptr.3d 618 (*Farris*)), the Court of Appeal for the Fifth Appellate District attempted to 'simplify' the 'substantial relationship' test by paring it down to just two elements:

"First, the court will evaluate: Is the relationship between the attorney and the former client (a) direct or (b) peripheral or attenuated?"

Sid interrupted to question what the difference was. Cali answered, "The relationship is direct 'where the lawyer was personally involved in providing legal advice and services to the former client'; 'peripheral' or 'attenuated' have not been defined. (*Jessen*, at 709.)

“That’s overbroad,” Sid protested. “Any work, including the singular personal preparation of memoranda or taking a deposition, for a client could fit within that definition! It doesn’t factor whether the time spent with the client was hundreds or thousands of hours or just a few.”

Cali advised Sid about the effect of a relationship being found direct. “If the representation is direct, the court must presume that confidential information has passed to the attorney: the attorney is precluded from rebutting the presumption. If the relationship is peripheral or attenuated, the lawyer may present evidence that he/she did not receive confidential information during the former representation. (*Id.*, at 710-11, 3 Cal.Rptr.3d 877.)”

“This is a real change,” Sid groaned. “Under the *Ahmanson* substantial relationship test, I could introduce evidence rebutting the presumption of confidentiality to show that my direct, personal services were so de minimis that no confidential information was acquired or that whatever confidential information I may have acquired is stale or useless or that the confidential information is no longer confidential.”

In describing part two, Cali warned, “You’re not going to like step two any better. Step two gives the similarity of the ‘subject matter’ of the current and former representations a broader interpretation. Step two is met ‘when the evidence before the trial court supports a rational conclusion that information material to the evaluation, prosecution, settlement or accomplishment of the former representation is also material to the evaluation, prosecution, settlement or accomplishment of the current representation given its factual and legal issues.’ (*Id.*, at 712, 3 Cal.Rptr.3d 915.)”

Sid continued his protest: “Almost any information learned from a client is material to the evaluation, prosecution, settlement or accomplishment of the representation. This is overbroad, too!”

Cali presented the other side. “This seems to be a policy shift towards broader protection of client confidential information. In addition to disqualification for having factually and legally similar material information, it also protects information about client attitudes, decision-making, practices and policies.”

“It seems to me that the policy is moving toward protecting loyalty to past clients rather than confidentiality,” Sid complained. “Once I have personally and directly represented a client, I may never be able to take an adverse position to that client. How far does this go? I am an expert for a plaintiff in a bad faith insurance case against Big Insureco. About 12 to 15 years ago, I handled some coverage work for Big Insureco, but I never handled any bad faith litigation for them. Big’s counsel wants me disqualified. What are my chances?”

“In *Brand*, at 603-605, the Court of Appeal for the Second District, extended the *Jessen-Farris* test in disqualifying an attorney from serving as an expert witness in a bad faith/breach of contract case for the plaintiff against a former client insurance company for whom the lawyer had performed legal services 12 years previously,” Cali said. “The lawyer-expert had directly handled 14 disputed coverage matters for the insurance company, supervised two or three of his firm’s attorneys in handling additional cases for the insurance company. He also gave educational seminars to the insurance company’s claims department on claims handling.”

“But how were the coverage matters related to bad faith actions?” Sid asked.

“Citing *Farris*, at p. 684,” Cali said, “the court found that handling coverage matters created subject matter similarity, observing: ‘A coverage attorney’s responsibility to his client includes advising the client on these subjects . . . Coverage disputes are substantially related to bad faith actions for the purpose of attorney disqualification because they both turn on the same issue — whether or not there is coverage under the terms of the policy . . .’ (*Brand*, at 606).”

Cali added: “The court completely discounted the passage of time of 12 years between the last time the lawyer provided legal services and accepted the employment as an expert witness against the former client. (*Brand*, at 607.)”

“If the trial court follows these cases, you will probably be disqualified in both cases, since you rendered personal and direct legal services to both insurance companies and since there is ‘subject matter similarity’ between the coverage matters you handled and the current bad faith case. Even if a trial court applied the *Ahmanson* test, your recent representation of the insurer in coverage matters is factually and legally similar to the current bad faith matters based upon *Brand*. Moreover, in your expert case, a trial court is likely to discount the passage of time, as did the *Brand* court,” Cali advised.

Sid was silent for a moment. “I understand that the *Jessen-Farris-Brand* line of cases takes a broad view of protecting client confidentiality and that the two-part test may be easier for busy trial courts grappling with disqualification and attorney conflict issues to apply. The breadth of the test and discounting the passage of time as a relevant factor creates a great opportunity for me to seek disqualification of a number of firms who are my opponents. I may have to get out of a few cases, but the courts have handed me a powerful tactical tool to use as a disqualification spear. Thanks, Cali,” Sid said as he hung up.

Doris Dewey of Dewey, Cheatham & Howe (DCH) called. “Cali, one month ago we agreed to defend ZYCO, which is being sued for wrongful termination by a former in-house counsel, Brigitte J’Oanes. J’Oanes claims that a DCH partner, Smythe, received her proposed employment contract, wrote comments on it and

gave her advice about the contract. At the time, DCH had just started representing ZYCO in other matters. We have no record of any file being opened for J'Oanes, no papers, documents or other files, no indication that any other lawyer in the firm was involved and no billing for any advice. Smythe left our firm three years ago. J'Oanes' counsel demands that we get off the case."

Cali responded, "I think I have good news. In *Goldberg v. Warner/ Chappell Music Inc.* (2005 [2d Dist. Div. 4]) 125 Cal.App.4th 752, 23 Cal.Rptr.3d 116), the law firm was not disqualified in a wrongful termination action where, six years earlier, the plaintiff-employee had briefly consulted with one of the law firm's partners concerning her contract with the employer and where the partner had left the law firm three years before the action was filed."

"What a coincidence! What did the case hold?" Doris asked.

"The court found that an attorney-client relationship between the employee and a former partner of the employer's attorney law firm had been formed concerning advice about the employment contract with the employer and that a conclusive presumption of confidentiality applied. But the presumed possession of confidential information concerning a former client did not automatically disqualify the employee's former firm, where the evidence established that no one other than the departed partner had any dealings with the client or obtained confidential information, and where the law firm had never opened a file for the employee; never billed her; had no notes or records in any file about the meeting; no documents were prepared; no telephone calls made; and the partner left several years before the instant litigation began (*Id.*, pp. 755, 758)," Cali responded.

"But what about imputation of confidential information from the tainted partner to the rest of the firm?" Doris asked.

"Concerning imputation," Cali answered, "the court observed that when tainted attorneys and non-tainted attorneys work at the same firm, there is a 'pragmatic recognition that the confidential information will work its way to the non-tainted attorneys at some point.' When tainted attorneys and non-tainted attorneys have a past relationship, there is no need to rely on the fiction of imputed knowledge to safeguard client confidentiality; the court should then make a 'dispassionate assessment' of whether confidential information was actually exchanged. *Id.*, p. 765.

"The chances are good that you will not be disqualified, Doris," Cali concluded.

"The *Goldberg* case warned that if the departed partner had still been affiliated with the firm, the result would have been different. *Goldberg* demonstrates that unknown and undocumented legal services rendered by a member of the firm pose the risk of disqualification or other risks."

Cali proceeded to give some risk management tips:

"1. Lawyers should decline to give any advice to any potential client until a conflict check is run and the firm's procedures for client acceptance are followed.

"2. If a corporation is a current client, the firm may represent a constituent personally if the firm complies with CRPC 3-600(F) and 3-310.

"3. No lawyer affiliated with the firm should provide legal services to any client outside the firm, unless approved by the firm and all data is entered into the conflict-checking system.

"4. *Brand* teaches us that other types of professional activity (e.g., expert, arbitrator, mediator, corporate director services) by firm lawyers can create the potential for conflict and disqualification. All lawyer professional activities must be entered in a conflict-checking system.

"5. While ethics screens are tools widely used to wall off lawyers who might have some confidential information about a former client that is now an adverse party, California state published appellate opinions have not expressly authorized their use. (*People ex rel. Dept. of Corporations v. SpeeDee Oil Change Systems Inc.* (1999) 20 Cal.4th 1135, 1151-1152, 86 Cal.Rptr.2d 816, 980 P.2d 371.)

"6. If any affiliate of a lawyer or law firm has had a professional relationship with an adverse party which the lawyers believe will not result in disqualification, the lawyers should consider whether the potential risk should be disclosed to the affected new client. (Rule 3-500, Rules of Professional Conduct.)

As soon as Doris hung up, Chris Classact called. "Cali, I just got a motion trying to disqualify my firm from bringing a class action because an associate in the firm is the class representative based on some *Apple Computer* case. Tell me what that case is about, please!"

"Chris, *Apple Computer Inc. v. Superior Ct., Los Angeles County* (2005 126 Cal.App.4th 1253, 24 Cal.Rptr.3d 818) involved class action litigation which decided that disqualification of a class action plaintiff's firm was warranted where the plaintiff's firm represented a class in which the named lead plaintiff was an attor-

ney working in the firm,” Cali said.

“What was the basis for the disqualification?” Chris asked.

“The court opined that the attorneys placed themselves in a position of divided loyalties, i.e., their own financial interest in recovering attorneys’ fees was pitted against their obligation to the putative class to maximize the recovery of monetary and other relief,” Cali explained. “The court further held that the withdrawal of the law firm from representation of the class on appeal did not render the matter moot. The court also disqualified a second law firm that serves as co-counsel with the disqualified firm in other cases.”

“Why?” asked Chris.

“The second firm was disqualified from representing the class because of the close business connection between the co-counsel firm, the attorney-class representative and the firm in which he worked, including that there was a history of referring cases back and forth and class action cases in which members of both firms served as class representatives,” Cali answered.

---

■ *Ellen R. Peck, a former State Bar Court judge, is a sole practitioner from Escondido and a co-author of The Rutter Group California Practice Guide: Professional Responsibility.*

## **Test — Legal Ethics**

### **1 Hour MCLE Credit**

1. Adverse successive representation occurs when a lawyer, currently representing a client, sues that client in a separate matter on behalf of another.
2. A lawyer may not take any action that will injuriously affect the lawyer's former client in any matter in which the attorney formerly represented the client
3. A lawyer may not use knowledge or information acquired by virtue of a previous attorney-client relationship against a former client.
4. A three-part "substantial relationship" test has traditionally been used by courts and lawyers to determine lawyer disqualification because of successive relationship conflicts.
5. Factual similarities between the subject matter of a former representation and a current one adverse to the former client are irrelevant to determine lawyer disqualification.
6. Similarity of legal issues in a former representation and in a current representation adverse to the former client is another factor in determining lawyer disqualification.
7. The "nature and extent of the lawyer's involvement" factor permits a lawyer to demonstrate that no confidential information relevant to the current engagement had been received from a former client who is now an adverse party.
8. Since California courts have approved ethics screens, they are widely used to wall off lawyers who might have some confidential information about a former client that is now an adverse party.
9. Under the new substantial relationship test, the type of relationship between an attorney and the former client is irrelevant.
10. The attorney-client relationship is direct if the lawyer was personally involved in providing legal advice and services to the former client.
11. If a direct relationship is found, the attorney is precluded from rebutting the presumption.
12. If the relationship is peripheral or attenuated, the lawyer may not present evidence that he/she did not receive confidential information during the former representation.
13. The second factor is met only when a court finds that the lawyer actually knows confidential information.
14. The substantial relationship test may not be used to disqualify lawyers serving as expert witnesses.
15. After the passage of 10 or more years since a lawyer last represented a former client, a lawyer will never be disqualified from accepting representation against the former client.
16. Coverage disputes are substantially related to bad faith actions for the purpose of attorney disqualification because they both turn on whether there is coverage under the terms of the policy.
17. Disqualification is mandatory even if the only firm member who represented a former client departed the firm years before the firm accepted representation in the litigation against the former client.
18. A brief consultation with a person where legal advice is given, in the absence of a contract, legal fee or file-opening memorandum, can result in the formation of an attorney-client relationship.
19. Confidentiality is imputed to every member of a law firm of pragmatic recognition that the confidential information will work its way to the non-tainted attorneys at some point.

**20.** If a lawyer with confidential information departs the firm, the confidential information will still be imputed to the remaining members of a law firm until the former client dies.

**Certification**

- This activity has been approved for Minimum Continuing Legal Education credit by the State Bar of California in the amount of 1 hour in legal ethics.
- The State Bar of California certifies that this activity conforms to the standards for approved education activities prescribed by the rules and regulations of the State Bar of California governing minimum continuing legal education.

**MCLE ON THE WEB**  
**TEST #52 — Lawyers' Dangerous Liaisons**

**1 HOUR CREDIT**  
**LEGAL ETHICS**

- Print the answer form only and answer the test questions.
- Mail only form and check for \$20 to:

MCLE ON THE WEB — CBJ  
The State Bar of California  
180 Howard Street  
San Francisco, CA 94105

- Make checks payable to State Bar of California.
- A CLE certificate will be mailed to you within eight weeks.

\_\_\_\_\_  
Name

\_\_\_\_\_  
Law Firm/Organization

\_\_\_\_\_  
Address

\_\_\_\_\_  
State/Zip

\_\_\_\_\_  
State Bar Number (Required)

- |                      |                      |
|----------------------|----------------------|
| 1. True___ False___  | 11. True___ False___ |
| 2. True___ False___  | 12. True___ False___ |
| 3. True___ False___  | 13. True___ False___ |
| 4. True___ False___  | 14. True___ False___ |
| 5. True___ False___  | 15. True___ False___ |
| 6. True___ False___  | 16. True___ False___ |
| 7. True___ False___  | 17. True___ False___ |
| 8. True___ False___  | 18. True___ False___ |
| 9. True___ False___  | 19. True___ False___ |
| 10. True___ False___ | 20. True___ False___ |