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TEST #9

1 HOUR CREDIT

LEGAL ETHICS (Part 2)

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Ethics and Your Clients

California Joan and the Ark of Confidentiality: Beware conflicts when adding a partner or associate

By Ellen Peck

"Happy New Year, Professor Ethics!" California Joan greeted her favorite former law school professor fondly. "Thanks to your help last month, my firm was able to steer clear of conflicts of interest which arose from the duties of loyalty to current clients.

"Now the senior partners think of me as their in-house ethics expert. They assigned me to the hiring committee to help manage conflicts of interest. This is great for my advancement within the firm, but I need a refresher. O great guru of good lawyering, can you point me to what I would look for to prevent conflicts when the firm is contemplating adding a partner or associate?

"Cali, in this area," Professor Ethics responded, "the preventive ethics road is treacherous because there are some big areas where the law is unsettled and it's rocky because compliance with legal ethics can be counter-productive to the business of law.

"The principles involved in the duty of loyalty which we discussed last month apply to any new clients which would come to the firm with the new partner or associate. In this case, your firm should ask for a list of all matters on and clients for which the lawyer is working; then check those client names and matters with your firm's current clients and matters for direct and potential adversity consistent with the principles we discussed last month. If any of the new clients are adverse to any of your firm's current clients, your firm can not accept representation of the new clients unless you get both clients' written consent after written disclosure.

"But don't stop there. Also ask each potential partner or associate for a list of every matter on and client for which that lawyer ever worked. Then check those matters and clients against your firm's current clients and matters. If the proposed partner or associate ever worked on any pending matter for an opposing party or even for the opposing party on other matters, further inquiry is required."

Cali already sensed that Meryl Terpitute, the hiring committee chair, would object on the grounds that these requirements were too onerous and that many lawyers would not have kept track of every client matter they ever worked on. Wanting to be forearmed, Cali asked, "Gee, P.E., what's the basis for this kind of conflict checking?"

"To prevent your firm from representing adverse interests in which you have confidential information. Rule 3-310(E), California Rules of Professional Conduct, prohibits lawyers from

accepting employment adverse to a 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, unless the lawyer obtains the consent of the client or former client. This rule's purpose is to protect current and former client confidentiality and the confidential relationship between attorney and client." (Flatt v. Superior Court (1994) 9 Cal.4th 275, 283 [36 Cal.Rptr.2d 537].)

"Confidentiality is the cornerstone of the foundation upon which the attorney-client relationship is built. Confidentiality is our covenant with our clients that we will maintain their confidence and secrets inviolate (Bus. & Prof. Code §6068(e)), that we will assert the attorney-client privilege whenever disclosure of attorney-client communications is sought (Evid. Code, §950 et seq.) and that we will keep our work product confidential (Code Civ. Proc., §2018). 'Confidence' is the trust which a client reposes in a lawyer and includes communications protected by the attorney-client privilege. A 'secret' refers to any information obtained by the attorney during the attorney-client relationship which the client has requested to be inviolate or the disclosure of which might be embarrassing or detrimental to the client." (Dixon v. State Bar (1982) 32 Cal.3d 728, 735; State Bar Committee on Professional Responsibility and Conduct Formal Opinion Nos. 1993-133 and 1986-87.)

"Rule 3-310(E) serves as kind of an ark of confidentiality. In this ark we carry this bundle of duties regarding our client's confidential information with us everywhere, even beyond death. (Swidler & Berlin v. United States (1998) ___ U.S. ___, 118 S.Ct. 2081, 141 L.Ed.2d 379 [98 DJ DAR 6932].) The ark of confidentiality cannot be shrugged off in the service of other clients without risk of dire consequences including disqualification, ineligibility to receive fees, or malpractice or discipline claim, complaint, damages or sanction." (The Rutter Group California Practice Guide Professional Responsibility, paragraphs 4:18-4:23.)

"Does this mean, P.E.," queried Cali, getting more and more disheartened, "that a lawyer can never take an adverse position against a former client? Will every lawyer ultimately be limited to representing only one client?"

"No," responded the professor. "Prior representation of a client would not preclude you from accepting employment thereafter which is adverse to that client unless the new employment requires you to use confidential information to the detriment of the current or former client or act in a manner that will injure the former client in matters involving the former representation." (Wutchumna Water Co. v. Bailey (1932) 216 Cal. 564, 573; Grove v. Grove Valve & Regulator Co. (1963) 213 Cal.App.2d 646, 651-652.)

"I'm confused, marvelous mentor," queried Cali. "How can we tell whether a lawyer's prior representation of one of our client's adversaries would risk disqualification of our firm?"

"Since 1983, Cali, California case law has employed the 'substantial relationship' test to determine whether a law firm should be disqualified. If the requisite substantial relationship between the subjects of the prior and the current representations can be demonstrated, the lawyer's access to confidential information in the course of representing the previous client is presumed." (Flatt v. Superior Court, supra, at p. 283.)

"In applying the substantial relationship test, the courts adopted a more precise three-part analysis; first, whether there are similarities between the two factual situations; second, whether the legal questions posed in the two representations are similar; and, finally, what was the nature and extent of the attorney's involvement in the prior matter for the former client." (H.F. Ahmanson & Co. v. Salomon Brothers Inc. (1991) 229 Cal.App.3d 1445, 1453, 1455-1459.) Where a court finds that there is a substantial relationship between an attorney's former and

current employment, disqualification must be ordered to protect the integrity of the attorney-client relationship and resolve the impossible conflict of interest.

"It is important, therefore, to evaluate the prospective firm member's prior representation and the firm's current representation, weighing each of the three prongs of the substantial relationship test in each case. Remember, self-evaluation is dangerous: we are tempted to minimize the similarities and magnify the factors which permit us to take a risky case or continue the representation and add the new lawyer. I usually recommend that, in taking a risk of future disqualification, a firm seriously evaluate the arguments your adversary's counsel would make to determine whether the substantial relationship is likely to be found by a court should a disqualification motion be brought," opined Professor Ethics.

"Just because a prospective associate may have a conflict prior to ever working with our firm, why would that affect our firm's ability to continue representation of our client who just happens to be an adversary?" asked Cali.

"Because if the lawyer would be disqualified, the disqualification extends vicariously to the entire firm. (*Wasson v. Sonoma County Junior College District* (1997 N.D. Cal.) 4F.Supp.2d 893, 910; *Flatt v. Superior Court*, supra, at p. 283.) California courts have adopted the 'imputed knowledge' or 'vicarious disqualification' rule to recuse entire firms, even in the absence of a rule or statute, to protect the confidentiality of current or former clients. (State Bar of California Formal Opinion No. 1998-152.) The imputed knowledge or vicarious disqualification rule provides that if one lawyer or member of a law firm possesses confidential information, knowledge of that confidential information is deemed to be possessed by all other members of the firm. (See e.g. *Rosenfeld Construction Co. v. Superior Court* (1991) 235 Cal. App.3d 566, 573; *Chadwick v. Superior Court* (1980) 106 Cal.App.3d 106, 116.) This presumption that client information has been shared among lawyers in a law firm is based on the common-sense notion that people who work in close quarters talk with each other, and sometimes about their work. (California State Bar Formal Ethics Opinion 1998-152.)

"Therefore, when a lawyer joins a new firm, his or her knowledge from past cases is immediately imputed to all the other members of the firm upon joining the firm. (*Henrikson v. Great American Savings & Loan* (1992) 11 Cal.App.4th 109, 115-116.) And don't forget that partners or associates who depart the firm with certain clients can still be a source of disqualification, because the knowledge they had prior to departing has been imputed to the firm, particularly where the client's files still remain with the former firm." (*Elan Transdermal v. Cygnus Therapeutic Systems* (N.D. Cal. 1992) 809 F.Supp. 1383.)

"Suppose we find that there is a substantial relationship between a prospective lawyer's former clients' case and a current case our firm is handling for a client against that lawyer? What can we do?" pleaded Cali.

Professor Ethics responded: "Law firms basically try three alternatives: not hiring or adding the new lawyer if the conflicts are egregious enough; obtaining the informed written consent of all affected clients; or employing screening devices or cones of silence. All of the alternatives have risk."

"Well, if lawyers become risks to future firms," complained Cali, "lawyers won't be able to change firms. The second suggestion is even less practical. Many departing employees or lawyers are understandably reluctant to discuss these matters with either the law firm from which they are leaving or with their former clients prior to joining a new firm. If there is any discord or dissension between the firm and the departing lawyer or employee, attempts to resolve a

potential risk of disqualification may meet with lack of cooperation or even antagonism (including threats to bring a disqualification motion)."

"On the other hand," retorted Professor Ethics, "there are many clients who will agree to let their prior lawyers join a firm that is currently adverse to them, particularly where the firm establishes an ethical wall, screening or cone of silence."

"How does an ethical wall, a cone of silence or screening work, Professor?" inquired Cali.

"Ethics walls, screening or cones of silence employ the following measures to prevent actual or imputed confidential information from leaking into and tainting a new firm:

Physical, geographic and/or departmental separation of the 'tainted' member;

Prohibitions against and sanctions for discussing confidential matters;

Established rules and procedures for preventing access to confidential information and files;

Procedures preventing a 'tainted' or disqualified attorney from sharing in profits from the representation; and

Continuing education in professional responsibility. (Henrikson v. Great American Savings & Loan Association (1992) 11 Cal.App.4th 109, 114.)

"California courts have repeatedly rejected use of an ethical wall to cure conflicts of interest where the 'tainted' lawyer possessed actual knowledge of confidential information. (Henrikson v. Great American Savings & Loan Association, supra, pp. 115-116; Rosenfeld Construction Co. Inc. v. Superior Court (Sivas) (1991) 235 Cal.App.3d 566.) These cases may be distinguished because screening had not been implemented until long after the 'tainted' member joined the firm and the 'tainted' possessed actual confidential information. We do not know whether the California courts, when faced squarely with a screening mechanism implemented prior to the entry of the 'tainted' member will approve an ethical wall as a remedy. Because of the uncertainty, merely employing the ethical wall without the affected client's consent poses a risk of disqualification and other risks mentioned previously.

"There are three exceptions where California courts have approved an ethical wall:

Former judge, who, when on the bench, presided over a case in which only public information was acquired, who was screened by an ethical wall erected prior to joining a firm, and who, upon retirement, joined a firm as 'of counsel' which was currently representing a party to the same litigation over which the judge previously presided. (Higdon v. Superior Court (1991) 227 Cal.App.3d 1667.)

Former government lawyer whose office handled a case in which the law firm he joined was counsel of record for the opposing party and who was properly screened upon joining the firm. (Chambers v. Superior Court (State of California) (1981) 121 Cal.App.3d 893, 902.)

A paralegal who worked on a case while at the opposing counsel's firm and is properly screened from the moment he or she is employed at the firm. (In re Complex Asbestos Litigation (1991) 232 Cal.App.3d 572.)

Having taken guidance from Professor Ethics and having read the cases he suggested, California Joan felt confident in attending her first meeting as a member of the hiring committee the following week. Chair Meryl Terpitute recommended that the law firm add Counsel as a partner. "Counsel's current and former clients have no conflicts with the law firm's current clients. Moreover, Counsel's book of business is extremely profitable and will boost our profits."

Feeling her heart sink, Cali voiced an objection. "There is a problem. Counsel's current firm is an opposing counsel to us, representing Acme Co. in a moderate piece of commercial litigation against our client XYZ Corp."

Meryl quickly interjected. "That's not a problem since Counsel never worked on that case, has no confidential information about it and does not have access to any confidential information."

"It still poses a substantial risk," Cali retorted. "A similar case like this is currently pending in the Second District Court of Appeal after a firm was disqualified at the trial level. Prior California case law has prohibited lawyers from side switching; representing client A against client B and then joining the law firm representing B. (Henrikson, supra, at pp. 117.) If the imputed knowledge rule is applied to Counsel, she will arrive at our firm with imputed confidential knowledge about Acme Co., notwithstanding that she claims to have no actual knowledge. Moreover, upon her arrival at this firm, her imputed knowledge will be imputed to this firm. California courts have not yet decided whether a law firm could be disqualified due to a double imputation of confidentiality. This could be a risk."

Meryl became almost apoplectic, stating sharply, "Counsel's book of business alone is worth far more than the fees we might earn in the Acme Co. v. XYZ litigation. It is worth the risk of disqualification." After Cali pointed out the firm's duty of loyalty to XYZ to not jeopardize their representation for a more lucrative client, the committee determined to investigate the risks further and to explore whether approaching the clients for informed consent was feasible.

In frustration, Meryl queried: "The next case involves hiring an associate whose firm prepared an underlying contract for Movie Co., which is now the subject of litigation in which our client, Producer, is suing Movie Co. for breach of contract. The associate never worked on any Movie Co. matter, has no access to any of Movie's confidential information, and the associate's current firm represented Movie Co. solely in transnational matters, never in this litigation. There is no question that the contract and the breach of contract action are substantially related. I suppose that he, too, is a great risk as well?"

"Actually, hiring the associate may be less of a risk," Cali said encouragingly. "California state courts have not yet decided whether the imputed knowledge rule should be applied where a lawyer who possessed no confidential information about a client while working at a former firm and thereafter joined a firm representing a client adverse to the former client in the same case or a substantially related case. (Klein v. Superior Court (1988) 198 Cal.App.3d 894, 910-911.) But the third prong of the substantial relationship test suggests that a lawyer who has little or no involvement in a case might not be disqualified. (H.F. Ahmanson & Co. v. Salomon Brothers Inc. (1991) 229 Cal.App.3d at pp. 1455-1459.)

"A recent federal case applying California law denied disqualification in exactly these circumstances. (Dieter v. Regents of the University of California (E.D. Cal. 1997) 963 F.Supp. 908.) Also, the Restatement of the Law Governing Lawyers §204, comment (c)(ii) provides that the imputed knowledge rule is terminated in most cases once a lawyer leaves a firm representing a client, provided that the lawyer does not have actual confidential information about the client or does not have continuing access to confidential information about the client.

"While there is still a risk that a California court will rule differently, hiring the associate in the absence of California authority and in reliance upon Dieter and the Restatement is less of a risk," Cali suggested.

She also reminded the hiring committee that damaging conflicts can arise from other members or employees of the firm, reciting the following instances:

Former judges or judicial officers who obtained confidential information in settlement conferences or other judicial duties. (Cho v. Superior Court (1995) 39 Cal.App. 4th 113).

"Of counsel" attorneys' conflicts can infect the entire firm even though the firm never represented the former client. (Cho v. Superior Court (1995) 39 Cal.App.4th 113 [former judge became of counsel to the firm]; In re Mortgage & Realty Trust, Debtor) 195 B.R. 740 (Bankr. C.D. Cal. 1996); but note that disqualification of a firm because of "of counsel" conflicts is pending before the California Supreme Court in People ex rel. Dept. of Corporations v. Speedie Oil Change Systems Inc., Cal. Supreme Ct. Docket No. SO58639.)

Secretaries. (See Gregori v. Bank of America (1989) 207 Cal.App.3d 291.)

Paralegals. (In re Complex Asbestos Litigation (1991) 232 Cal.App.3d 572.)

Law students. (Allen v. Academic Games Leagues of America Inc. (C.D.Cal. 1993) 831 F.Supp. 785.)

Attorney formerly employed by client's competitor in a non-attorney capacity. (Alchemy II Inc. v. Yes! Entertainment Corp. (C.D. Cal. 1994) 844 F.Supp. 560.)

While California Joan and Professor Ethics have not yet found any foolproof solutions to conflict management, at least Cali's firm is able to weigh the relative risks in maintaining the ark of confidentiality of former and current clients in adding new partners and associates to the firm.

Ellen R. Peck, a former trial judge of the State Bar Court now practicing law in Malibu, is a member of the State Bar Committee on Professional Responsibility & Conduct, chair of the Los Angeles County Bar Association's Professional Responsibility & Ethics Committee and co-author of Vapnek, Tuft, Peck & Weiner (1997) "The Rutter Group California Practice Guide - Professional Responsibility" and Lewis & Peck (1998) "Lawyer's Handbook on Fees and Fee Agreements."

Test — Legal Ethics

1 Hour MCLE Credit

This test will earn 1 hour of MCLE credit in Legal Ethics.

1. True/False. Prospective lawyer members of firms should be asked for a list of all matters on and clients for which the lawyer is working; the list should be checked against the firm's current clients and matters for direct and potential adversity; and if any of the potential new clients are adverse to any of the firm's current clients, the firm cannot accept representation of the new clients unless both clients' informed written consent is obtained.
2. True/False. It is not necessary to ask each potential partner or associate for a list of every matter on and client for which that lawyer ever worked.
3. True/False. Rule 3-310(E)'s purpose is to protect current and former client confidentiality and the confidential relationship between attorney and client.
4. True/False. Client confidentiality is limited to the duty to maintain the attorney-client privilege.
5. True/False. Confidentiality does not include an attorney's revelation of embarrassing information about a client.
6. True/False. An attorney must maintain confidentiality of client secrets until the end of the attorney-client relationship or the client's death, whichever comes first.
7. True/False. Accepting resignation of new clients concerning matters adverse to former clients in which material confidential information has been acquired by the lawyer creates risks including disqualification, ineligibility to receive fees, or malpractice or discipline claim, complaint, damages or sanction.
8. True/False. After the termination of a lawyer-client relationship, the duty of loyalty precludes the lawyer from ever taking an adverse action against that client.
9. True/False. The "substantial relationship" test is used by California courts to determine whether a law firm should be disqualified when a former or current client claims that there is a substantial relationship between the subjects of the prior and the current representations.
10. True/False. In applying the substantial relationship test, California courts only analyze whether there are similarities between the two factual situations in the former and the current representations.

11. True/False. If a substantial relationship between the former representation and the current representation is demonstrated, confidential information is presumed to have been imparted to the lawyers.
12. True/False. If a court finds that there is a substantial relationship between an attorney's former and current employment, disqualification must be ordered to protect the integrity of the attorney-client relationship and resolve the possible conflict of interest.
13. True/False. If one lawyer in a firm is disqualified due to potential breach of confidentiality, disqualification does not extend automatically to the entire firm.
14. True/False. The imputed knowledge or vicarious disqualification rule is in the Rules of Professional Conduct and permits courts to recuse entire firms to protect the confidentiality of current or former clients.
15. True/False. If one lawyer or member of a law firm possesses confidential information, knowledge of that confidential information is not deemed to be possessed by other members of the firm in other branch offices in other states or counties.
16. True/False. When a new lawyer joins a firm, his or her knowledge from past cases is never imputed to all the other members of the firm upon joining the firm.
17. True/False. Where a new lawyer joins a firm with confidential information substantially related to an adverse party of the firm's current client, the law firm will not be disqualified if the affected lawyer is screened at the time of the filing of the disqualification motion.
18. True/False. There are three types of situations in which California courts have approved an ethical wall.
19. True/False. In California federal courts, a law firm will not be disqualified because lawyers formerly worked at a firm which provided substantially related services to the new firm's current adversary if the lawyers never worked on any of the former firm's client matters and otherwise acquired no confidential information.
20. True/False. Confidence possessed by law firm associates and partners are the only risk of disqualification.

Certification

- This activity has been approved for Minimum Continuing Legal Education credit by the State Bar of California in the amount of 1 hour, of which one hour will apply to 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.

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TEST #9

1 HOUR CREDIT

LEGAL ETHICS (Part 2)

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