California Legal Malpractice Law

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THE RECORDER

INTRODUCTION

Legal malpractice cases usually consist of two cases in one—the malpractice case against the attorney and the underlying lawsuit or transaction that led to the malpractice case. That means that defending a malpractice case requires not only an understanding of legal malpractice law, but also an understanding of the substantive law from the underlying lawsuit or transaction. That underlying law can really be anything, but lately it has increasingly been in the specific areas of intellectual property law, real estate law, personal injury law, bankruptcy law, and securities law. In Los Angeles, those practice areas are also joined by entertainment law. Because of the case-within-the-case unique attribute of legal malpractice litigation, attorneys engaging in that practice have to essentially be both a jack of all practice areas and a master of all to adequately do their job.

While California legal malpractice law has evolved for over half a century and many nuances in the law and its application have developed over time, the general principles that guide and govern the responsibility of an attorney to the client have remained virtually the same. For example, the attorney owes the client the basic duties of care, loyalty, confidentiality, and so on. In that respect, ethics and malpractice law overlap. While in California, violating an ethical duty does not establish malpractice, ethical violations are given weight in determining whether malpractice has occurred. Thus, complying with ethical obligations is paramount for practicing attorneys to avoid malpractice and to maintain good client relations. That is why, although the focus is on California legal malpractice law, this book addresses ethics and the California Code of Professional Responsibility.

Although generally most states have similarities in their legal malpractice laws, there are some nuances unique to California law. For example, California has its own statute of limitations for a legal malpractice claim, found in Code of Civil Procedure section 340.6. That statute provides generally that a lawsuit must be filed within one year of discovery of the malpractice. While the rule seems straightforward, it has been subject to countless disputes, which has resulted in dozens of appellate court decisions on the application of the statute in California. Also, California has an anti-SLAPP statute which was created to provide a balance between First Amendment rights and abusive lawsuits intended to censor or silence critics by levying financial burdens on them via the expenses of defending against the lawsuit. While the anti-SLAPP statute is typically used by defendants to defeat lawsuits that are meritless, California attorneys have invoked the statute in attempts to eliminate legal malpractice lawsuits on the basis that their actions in defending clients are constitutionally-protected litigation activity. California courts have generally rejected such attempts to defeat malpractice claims. Another unique area involves punitive damages. California is a punitive damage state. Specifically, California allows for the recovery of punitive damages under California Civil Code section 3294. However, while a client can recover punitive damages against an attorney for malicious, fraudulent or oppressive conduct in a legal malpractice lawsuit, the California Supreme Court, in Ferguson v. Lieff, Cabraser, Heimann & Bernstein, articulated a rule of law that public policy prohibits a plaintiff from recovering punitive damages allegedly lost in an underlying action as compensatory damages in a subsequent legal malpractice action.

Even without the nuances of California law, legal malpractice law is complicated by things like the 'case within a case' analysis. With the overlay of the unique characteristics of California legal malpractice law, the Rule Against Perpetuities seems simple. Hence, the legal malpractice area was in need of a hornbook to address these complexities. The result was this book—California Legal Malpractice Law— addressing both the fabric of California legal malpractice law and the cases and issues confronting attorneys, including effective claim prevention and loss avoidance. This book addresses the issues in the context of these three parts:

Part One:	Legal Malpractice Law and Defenses
Part Two:	Legal Malpractice prevention
Part Three:	Insurance and Loss Avoidance

When Ed Bean, Editor in Chief of the Daily Report, heard about the book, he expressed an interest in making it a part of the ALM collection of books for lawyers. In so doing, it could be a readily available book for all California lawyers. This partnership to provide something helpful to California lawyers made good sense. There was another more important part, however.

The intent of this book is not to make money, but rather is to help and educate attorneys about the basics and nuances of California legal malpractice law. Consistent with that guiding principle, all royalties from California Legal Malpractice Law will go to a scholarship fund at the University of California Law School to help second and third year students facing hardships based on family obligations.

Of course, it should go without saying that this book is no substitute for legal advice by someone with expertise in the area of California legal malpractice law. Instead, this is intended only as a summary of the law, not actual legal advice. Anyone needing legal advice should hire a lawyer even if she or he is a lawyer.

Unfortunately, the threat of legal malpractice has become a part of the modern day law practice. This is especially true in this new era of technology, patent disputes, mega law firm mergers, and business globalization, combined with economic pressures lingering from the Great Recession and a steady trend of law school graduates going solo, legal malpractice claims against California attorneys are on the rise. Yet, there are answers to many of the questions lawyers and courts have about California legal malpractice law. This book is just a start—hopefully a good start—but a start nonetheless. From here, the complicated California legal malpractice law should be just a little less intimidating and the path toward effective claim prevention and loss avoidance a little more clear.

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TABLE OF CONTENTS

CHAPTER 7: IDENTIFYING AND RESOLVING CONFLICTS OF INTEREST

Chapter 7

Identifying and Resolving Conflicts of Interest

7-1 OVERVIEW OF CONFLICTS OF INTEREST

The attorney-client relationship evolves from the idea that the attorney is a neutral, disinterested party who can thoroughly and zealously advocate on behalf of their client. Indeed, the attorney must be impartial such that his or her own personal interests are subordinate to those of the client. Thus, issues related to multiple or successive representations call into question the attorney's thoroughness and impartiality. In addition, when an attorney's own interests conflict with those of the client, it threatens the attorney's duty of loyalty, the most basic of an attorney's duties to the client.[1] Therefore, any potential conflict of interest must be detected, timely evaluated, and properly handled at the earliest time to avoid potential malpractice liability. This chapter addresses the issues inherent in multiple representation, successive representation, and other areas that may lead to conflicts.

7-2 THE INTERSECTION OF ETHICS AND MALPRACTICE

Although ethical rules are not substantive law, the Rules of Professional Conduct are relevant both to an attorney's obligations regarding conflicts of interest and to a court's analysis of those obligations. Like a statutory violation, disciplinary rule violations

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1. *Flatt v. Super. Ct.*, 9 Cal. 4th 275, 284, 36 Cal. Rptr. 2d 537 (1994).

may result in malpractice liability. In California, ethical rule violations are not sufficient on their own to support a finding of legal malpractice.[2] Nevertheless, they may be admissible to establish violations of the standard of due care, such as conflicts of interest, where the ethical rule was designed to protect a person in the injured party's position.[3]

Accordingly, to avoid malpractice issues, California practitioners should be aware of the restrictions contained in the Rules of Professional Conduct. These issues can be quite complicated and are a constant subject of debate in the legal community. Indeed, the ABA Commission on Ethics 20/20 recently considered practitioners requests for a "separate regulatory regime that would address the concerns of large law firms about such issues as conflicts of interest, liability and lawyer mobility."[4] This chapter details several areas in which conflicts of interests may arise.

7-3 MULTIPLE REPRESENTATION

7-3:1 Multiple Representation in General

Under California law, an attorney is required to uphold the basic values of loyalty and confidentiality to the client. In multiple representation situations, those values can be compromised when conflicts of interest arise. Rule 3-310 of the California Rules of Professional Conduct addresses the obligations of attorneys in conflict situations. That Rule provides:

> (A) For purposes of this rule: (1) "Disclosure" means informing the client or former client of the relevant circumstances and of the actual and reasonably foreseeable adverse consequences to the client or former client; (2) "Informed written consent"

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2. *Fair v. Bakhtiari*, 195 Cal. App. 4th 1135, 1152, 125 Cal. Rptr. 3d 765, 778 (2011); *BGJ Assocs., LLC v. Wilson*, 113 Cal. App. 4th 1217, 1227, 7 Cal. Rptr. 3d 140 (2003); *Mirabito v. Liccardo*, 4 Cal. App. 4th 41, 45-46, 5 Cal. Rptr. 2d 571 (1992).

3. *Fair v. Bakhtiari*, 195 Cal. App. 4th 1135, 1152, 125 Cal. Rptr. 3d 765, 778 (2011); *BGJ Assocs., LLC v. Wilson*, 113 Cal. App. 4th 1217, 1227, 7 Cal. Rptr. 3d 140 (2003); *Mirabito v. Liccardo*, 4 Cal. App. 4th 41, 45–46, 5 Cal. Rptr. 2d 571 (1992).

4. *See* James Podgers, *Ethics 20/20 Pitch: Law Firms That Serve 'Sophisticated' Clients Need Own Regulatory System*, ABA Law Journal (Apr. 16, 2011 5:36 PM), http://www.abajournal.com/news/article/ethics_20_20_pitch_law_firms_that_serve_sophisticated_clients_need_own_regu/.

means the client's or former client's written agreement to the representation following written disclosure; (3) "Written" means any writing as defined in Evidence Code section 250.

(B) A member shall not accept or continue representation of a client without providing written disclosure to the client where: (1) The member has a legal, business, financial, professional, or personal relationship with a party or witness in the same matter; or (2) The member knows or reasonably should know that: (a) the member previously had a legal, business, financial, professional, or personal relationship with a party or witness in the same matter; and (b) the previous relationship would substantially affect the member's representation; or (3) The member has or had a legal, business, financial, professional, or personal relationship with another person or entity the member knows or reasonably should know would be affected substantially by resolution of the matter; or (4) The member has or had a legal, business, financial, or professional interest in the subject matter of the representation.

(C) A member shall not, without the informed written 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; or (3) Represent a client in a matter and at the same time in a separate matter accept as a client a person or entity whose interest in the first matter is adverse to the client in the first matter.

(D) A member who represents two or more clients shall not enter into an aggregate settlement of the claims of or against the clients without the informed written consent of each client.

> (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.
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> (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, provided that no disclosure or consent is required if: (a) such nondisclosure is otherwise authorized by law; or (b) the member is rendering legal services on behalf of any public agency which provides legal services to other public agencies or the public.

The California Supreme Court explained the reason for the conflict of interest rules:

> The rule is designed not alone to prevent the dishonest practitioner from fraudulent conduct, but as well to preclude the honest practitioner from putting himself in a position where he may be required to choose between conflicting duties, or be led to attempt to reconcile conflicting interests, rather than to enforce to their full extent the rights of the interest which he should alone represent.[5]

To protect the confidentiality of the attorney-client relationship, Rule 3–310 of the Rules of Professional Conduct prohibits attorneys from accepting, without the client's informed written consent, employment that is adverse to the client or former client "where,

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[5] *Flatt v. Super. Ct.*, 9 Cal. 4th 275, 289, 36 Cal. Rptr. 2d 537 (1994) (quoting *Anderson v. Eaton*, 211 Cal. 113, 116, 293 P. 788 (1930)); *see also Gilbert v. Nat'l Corp. for Housing P'ships*, 71 Cal. App. 4th 1240, 1253, 84 Cal. Rptr. 2d 204 (1999).

by reason of the representation of the client or former client, the [attorney] has obtained confidential information material to the employment."[6]

7-3:2 Conflicts of Interest

Conflicts of interest issues most frequently arise in the representation of multiple clients, where the interests of a current and former client or two current clients are in conflict or potential conflict. Two typical ways in which a multiple representation problem may present itself are where: (1) the new representation involves more than one client, or (2) a law firm already represents an existing client in the same or a substantially related matter. In either situation, the attorney or firm must identify any potential conflicts of interest in undertaking the representation.

As discussed herein, the case law and ethical rules addressing multiple representation frequently hold lawyers accountable for errors relating to such conflicts. A conflict stemming from multiple representation is a breach of the duty of loyalty owed by the attorney to the client, a most basic duty of the attorney.[7]

7-3:3 Application of Rule 3-310 in California

7-3:3.1 Introduction

As discussed herein, conflict evaluation standards depend on whether the conflict involves successive representation between a former and existing client, or concurrent representation of two or more existing clients.

7-3:3.2 Is the Conflict Waivable?

While conflicts are generally waivable under Rule 3-310 if the attorney obtains the clients' informed written consent, some conflicts are not waivable. In a concurrent representation for example, if there

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6. Cal. Rules of Professional Conduct 3–310(E); *People ex rel. Dept. of Corps. v. SpeeDee Oil Change Sys., Inc.*, 20 Cal. 4th 1135, 1146, 86 Cal. Rptr. 2d 816, 824 (1999); *Flatt v. Super. Ct.*, 9 Cal. 4th 275, 283–84, 36 Cal. Rptr. 2d 537 (1994); *W. Cont'l Operating Co. v. Natural Gas Corp.*, 212 Cal. App. 3d 752, 759, 261 Cal. Rptr. 100 (1989).

7. The primary value at stake in cases involving successive conflicts of interest is that of confidentiality, while in concurrent conflict cases, is client loyalty. *See In re Charlisse C.*, 45 Cal. 4th 145, 159–60, 84 Cal. Rptr. 3d 597 (2008); *see also Flatt v. Super. Ct.*, 9 Cal. 4th 275, 284, 36 Cal. Rptr. 2d 537 (1994).

is a conflict that would impair the attorney's ability to uphold his or her duty of loyalty to all impacted clients, waiver or consent will not insulate the attorney from exposure to ethical rule violations.

In evaluating waivability of conflicts, the courts focus on preservation of public trust in the administration of justice and the integrity of the bar. Thus, sometimes, a waiver will not be permissible.[8] Consent simply cannot cure a conflict where it is not reasonably likely that the attorney can provide adequate representation to one or more clients.[9]

7-3:3.3 Has the Attorney Fully Advised the Clients of the Risks Related to the Conflict?

The rules generally allow representation to continue where the attorney has fully disclosed the existence and risks of a conflict and obtained written informed client consent, subject to exceptions. Indeed, once an attorney determines that the conflict is not a direct conflict, he or she must then focus on the requirements of the ethical rule relating to client consent. Thus, if the conflict can be addressed with informed written consent under Rule 3-310, the attorney must consider the third level of inquiry: has the attorney (1) fully disclosed the facts and circumstances of the conflict or potential conflict, and (2) considered the possible effect of such representation on the exercise of her or his independent professional judgment on behalf of each client?

For the client's consent to be informed, the attorney must "make a full disclosure of all facts and circumstances" relevant to the conflict, "including the areas of potential conflict and the possibility and desirability of seeking independent legal advice."[10]

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8. *See People v. Baylis*, 139 Cal. App. 4th 1054, 1069, 43 Cal. Rptr. 3d 559 (2006) (where actual conflict may affect integrity of the proceedings, court can refuse conflict waiver); *In re A.C.*, 80 Cal. App. 4th 994, 1002, 96 Cal. Rptr. 2d 79 (2000) (conflict not waivable where attorney-father pled nolo contendere to molesting daughters who tried to waive conflict of interest and permit father to represent them in a juvenile records destruction petition); *Tsakos Shipping & Trading, S.A. v. Juniper Garden Town Homes, Ltd.*, 12 Cal. App. 4th 74, 97, 15 Cal. Rptr. 2d 585 (1993) (party may not consent to dual representation of conflicting interests at trial where actual conflict exists).

9. *See Sharp III v. Next Entm't, Inc.*, 163 Cal. App. 4th 410, 428-31, 78 Cal. Rptr. 3d 37, 51-53 (2008).

10. *Klemm v. Super. Ct.*, 75 Cal. App. 3d 893, 901, 142 Cal. Rptr. 509 (1977); *see also Anderson v. Eaton*, 211 Cal. 113, 116, 293 P. 788 (1930); *Ishmael v. Millington*, 241 Cal. App. 2d 520, 526–27 n.3, 50 Cal. Rptr. 592 (1966).

The written explanation should always include the implications of the multiple representation, placing emphasis on the specific risks and advantages that may be involved. At a minimum, this requires the attorney to disclose the types of things that the attorney would do differently or would possibly do differently if the attorney represented only one of the clients as opposed to both clients. This should specifically include a discussion of the advantages and disadvantages of separate attorneys for each client as opposed to a single attorney for both clients. Finally, the disclosure should note that the attorney is not representing the individual clients in regard to each other. For the purposes of this inquiry, it is not sufficient to simply advise clients that the attorney foresees no conflict of interests and then to ask the clients to consent to the multiple representation.

Courts consider these requirements very seriously. Indeed, California courts have found liability in legal malpractice cases where the attorney had impermissible conflicts of interest.[11] Attorneys have also been denied fees where an improper conflict of interest existed.[12] An attorney in the firm, other than the one involved in the multiple representation, should review the written disclosure that is provided to the client. Clients should also be advised to obtain independent counsel to advise them regarding the consent request.

7-3:3.4 Has the Client Adequately Consented to the Representation?

Assuming full disclosure, the final requirement for a multiple representation is consent to the representation. The consent must be in writing. This consent, or waiver, may be set forth in the engagement letter to be signed by the client, or in a separate conflict waiver letter signed by the client.[13] Additionally, if a material change occurs in the circumstances that were the basis for the client's informed consent to a conflict, the attorney must

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[11] *Klemm v. Super. Ct.*, 75 Cal. App. 3d 893, 901, 142 Cal. Rptr. 509, 514 (1977); *Ishmael v. Millington*, 241 Cal. App. 2d 520, 50 Cal. Rptr. 592 (1966).

[12] *Jeffry v. Pounds*, 67 Cal. App. 3d 6, 12, 136 Cal. Rptr. 373, 377 (1977).

[13] For more information regarding engagement letters, *see* Chapter 6: Internal Audit.

present those new circumstances to the client and obtain new informed consent.[14]

The courts respect the client's rights to consent to a conflicting representation, as such right is grounded in the freedom to contract or the personal autonomy of a client to select their attorney of choice.[15]

However, if the consent compromises an attorney's ability to uphold his or her ethical duties of loyalty to all clients, the courts may not give such consent deference. For example, in *Gilbert v. National Corp. for Housing Partnerships*,[16] which involved an employee's wrongful termination and discrimination lawsuit against her former employer, the trial court disqualified the plaintiff's attorney based on a conflict of interest created by his simultaneous representation of her and other clients in a different action against defendant. The other clients had signed a settlement agreement containing a confidentiality clause. The attorney had attempted to advance plaintiff's interests by calling one or more of the other clients as witnesses in plaintiff's case. The plaintiff appealed the ruling claiming that, by disqualifying her attorney, the trial court denied her due process and a fair hearing. In other words, she claimed she consented to the conflict and the court should not have interfered.

The Court of Appeal affirmed the disqualification on several grounds. The court explained that there was an inherent conflict of interest in the attorney's simultaneous representation of plaintiff and the other clients. In attempting to advance plaintiff's interests by calling one or more of the other clients as witnesses in plaintiff's case, the attorney risked harming his other clients' interests in violation of the terms of the confidentiality clause. The court further explained that, by their failure to acknowledge even the potential existence of any conflict of interest, it was clear that neither plaintiff nor the other clients had given the informed written consent necessary for plaintiff's continued simultaneous representation. The court also explained that the trial court

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14. Cal. Rules of Professional Conduct 3-310.

15. *See Zador Corp. v. Kwan*, 31 Cal. App. 4th 1285, 1295, 37 Cal. Rptr. 2d 754 (1995).

16. *Gilbert v. Nat'l Corp. for Housing P'ships*, 71 Cal. App. 4th 1240, 84 Cal. Rptr. 2d 204 (1999).

adequately balanced the competing interests of the parties and the judicial process.

Thus, while courts generally give deference to a client's informed consent, there are exceptions where an attorney's ethical obligations will be compromised by continued representation.[17]

7-4 CONCURRENT REPRESENTATION

7-4:1 The Ethical Rule Governing Concurrent Representation

Concurrent representation where a potential conflict or actual conflict exists must be appropriately addressed to avoid serious consequences. Typical conflict problems arise where an attorney is retained by multiple clients at the same time or where the attorney is representing multiple clients in different unrelated matters at the same time. The requirement of informed written consent applies (i) when an attorney concurrently represents more than one client in a matter in which there is a potential conflict,[18] (ii) when an attorney concurrently represents more than one client in a matter in which there is an actual conflict,[19] and (iii) when the attorney represents a client in one matter and simultaneously represents another client in a separate matter whose interests are adverse with those of the first client.[20] Additionally, the client must provide informed written consent to third party fee payment arrangements.[21]

If an attorney or law firm simultaneously represent clients who have conflicting interests, a per se rule of disqualification applies,

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17. In some cases, written consent cannot insulate the attorney from discipline. *See Woods v. Super. Ct.*, 149 Cal. App. 3d 931, 197 Cal. Rptr. 185 (1983); *Klemm v. Super. Ct.*, 75 Cal. App. 3d 893, 142 Cal. Rptr. 509 (1977); *Ishmael v. Millington*, 241 Cal. App. 2d 520, 50 Cal. Rptr. 592 (1966).

18. Cal. Rules of Professional Conduct 3–310(C)(1) ("[a] member shall not, without the informed written consent of each client: (1) Accept representation of more than one client in a matter in which the interests of the clients potentially conflict").

19. Cal. Rules of Professional Conduct 3–310(C)(2) ("[a] member shall not, without the informed written consent of each client … [a]ccept or continue representation of more than one client in a matter in which the interests of the clients actually conflict").

20. Cal. Rules of Professional Conduct 3–310(C)(3) ([a] member shall not, without the informed written consent of each client … [r]epresent a client in a matter and at the same time in a separate matter accept as a client a person or entity whose interest in the first matter is adverse to the client in the first matter"); *see Zador Corp. v. Kwan*, 31 Cal. App. 4th 1285, 1295, 37 Cal. Rptr. 2d 754 (1995).

21. Cal. Rules of Professional Conduct 3–310(F).

making disqualification generally automatic.[22] This rule applies regardless of whether the simultaneous representations are related or not or present a risk that confidences obtained in one matter would be used in the other.[23] Indeed, the courts have found that the "most egregious conflict of interest" is when an attorney or firm represents clients whose interests are adverse in the same litigation.[24] With regard to such direct and actual conflicts, the California Supreme Court stated:

> Such patently improper dual representation suggests to the clients—and to the public at large—that the attorney is completely indifferent to the duty of loyalty and the duty to preserve confidences. However, the attorney's actual intention and motives are immaterial, and the rule of automatic disqualification applies. The rule is designed not alone to prevent the dishonest practitioner from fraudulent conduct, but also to keep honest attorneys from having to choose between conflicting duties, or being tempted to reconcile conflicting interests, rather than fully pursuing their clients' rights. The loyalty the attorney owes one client cannot be allowed to compromise the duty owed another.[25]

In a concurrent representation case, the paramount value at stake is the duty of loyalty, necessitating a per se disqualification standard. Thus, when considering purported conflicts of interests arising from concurrent representations, courts focus on the

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22. *See People ex rel. Dep't of Corps. v. SpeeDee Oil Change Sys., Inc.*, 20 Cal. 4th 1135, 1146, 86 Cal. Rptr. 2d 816, 824 (1999); *Flatt v. Super. Ct.*, 9 Cal. 4th 275, 283, 36 Cal. Rptr. 2d 537 (1994).

23. *See People ex rel. Dep't of Corps. v. SpeeDee Oil Change Sys., Inc.*, 20 Cal. 4th 1135, 1146, 86 Cal. Rptr. 2d 816, 824 (1999); *Flatt v. Super. Ct.*, 9 Cal. 4th 275, 283, 36 Cal. Rptr. 2d 537 (1994).

24. *People ex rel. Dep't of Corps. v. SpeeDee Oil Change Sys., Inc.*, 20 Cal. 4th 1135, 1147, 86 Cal. Rptr. 2d 816, 824 (1999) (citing *Flatt v. Super. Ct.*, 9 Cal. 4th 275, 284 n.3, 36 Cal. Rptr. 2d 537 (1994)).

25. *People ex rel. Dep't of Corps. v. SpeeDee Oil Change Sys., Inc.*, 20 Cal. 4th 1135, 1147, 86 Cal. Rptr. 2d 816, 825 (1999); *see also William H. Raley Co., v. Super. Ct.*, 149 Cal. App. 3d 1042, 1049–50, 197 Cal. Rptr. 232, 238 (1983); *City & County of San Francisco v. Cobra Solutions, Inc.*, 38 Cal. 4th 839, 847, 43 Cal. Rptr. 3d 771, 776–77 (2006).

attorney's duty of loyalty.[26] Attorneys who concurrently represent more than one client should not have to choose which client's interests are paramount or make a choice between conflicting duties.[27]

7-4:2 Automatic Per Se Disqualification

When an attorney concurrently represents clients with directly adverse interests in the same or unrelated matters, the attorney will be disqualified in most cases because the duty of loyalty will be deemed compromised.[28] Thus, an attorney cannot represent a client in one matter while suing the same client in another.[29]

Because the attorney's duty of loyalty is the primary value at stake in dual representation, even if the simultaneous representations have nothing in common, and there is no risk that confidences will be compromised, disqualification may nevertheless be required if the attorney has not complied with the requirement of obtaining informed written consent by all clients involved.[30]

Moreover, lawyers may not "avoid the automatic disqualification rule applicable to concurrent representation of conflicting interests by unilaterally converting a present client into a former client."[31] In *American Airlines v. Sheppard, Mullin, Richter & Hampton*, the attorney terminated an existing client to undertake a relationship

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[26] *Sharp v. Next Entm't, Inc.*, 163 Cal. App. 4th 410, 428-31, 78 Cal. Rptr. 3d 37, 51-53 (2008).

[27] *See Sharp v. Next Entm't, Inc.*, 163 Cal. App. 4th 410, 428-31, 78 Cal. Rptr. 3d 37, 51-53 (2008); *see also Flatt v. Super. Ct.*, 9 Cal. 4th 275, 284, 36 Cal. Rptr. 2d 537 (1994); *SpeeDee Oil Change Sys. Inc.*, 20 Cal. 4th 1135, 1147, 86 Cal. Rptr. 2d 816 (1999); *Santa Clara Cnty. Counsel Attys. Ass'n v. Woodside*, 7 Cal. 4th 525, 548, 28 Cal. Rptr. 2d 617 (1994), *abrogated by statute on other grounds as recognized in Coachella Valley Mosquito & Vector Control Dist. v. California Pub. Emp't Relations Bd.*, 35 Cal. 4th 1072, 1077, 29 Cal. Rptr. 3d 234 (2005).

[28] *Flatt v. Super. Ct.*, 9 Cal. 4th 275, 284–85 & n.3, 36 Cal. Rptr. 2d 537 (1994); *Metro Goldwyn Mayer, Inc. v. Tracinda Corp.*, 36 Cal. App. 4th 1832, 1840, 43 Cal. Rptr. 2d 327 (1995).

[29] *Flatt v. Super. Ct.*, 9 Cal. 4th 275, 286–90, 36 Cal. Rptr. 2d 537 (1994).

[30] *See Flatt v. Super. Ct.*, 9 Cal. 4th 275, 285, 36 Cal. Rptr. 2d 537, 542–43 (1994); *Banning Ranch Conservancy v. Super. Ct.*, 193 Cal. App. 4th 903, 911, 123 Cal. Rptr. 3d 348, 353–54 (2011); *Morrison Knudsen Corp. v. Hancock, Rothert & Bunshoft LLP*, 69 Cal. App. 4th 223, 230, 81 Cal. Rptr. 2d 425 (1999).

[31] *See American Airlines, Inc. v. Sheppard, Mullin, Richter & Hampton*, 96 Cal. App. 4th 1017, 1037, 117 Cal. Rptr. 2d 685 (2002); *Truck Ins. Exch. v. Fireman's Fund Ins. Co.*, 6 Cal. App. 4th 1050, 1059, 8 Cal. Rptr. 2d 228, 233 (1992); *Flatt v. Super. Ct.*, 9 Cal. 4th 275, 288, 36 Cal. Rptr. 2d 537, 544–45 (1994); *State Farm Mut. Auto. Ins. Co. v. Fed. Ins. Co.*, 72 Cal. App. 4th 1422, 1431, 86 Cal. Rptr. 2d 20, 26 (1999).

with an entity that was pursuing the client's documents. In that case, the court held that a unilateral conversion designed to avoid a concurrent representation of adverse interests may itself be a breach of loyalty, finding that the attorney and his firm showed an absence of loyalty in their conduct.[32]

7-4:3 Addressing Disqualification in the Fee Agreement

There are many concurrent representation situations in which potential conflicts will not prevent an attorney from proceeding with proper informed written consent of all affected clients and minimal risks of disqualification. These cases generally involve non-litigation matters, which are discussed below. Examples of such potential conflicts include representing multiple partners or shareholders in the formation of a partnership or corporation, the preparation of an ante-nuptial agreement or joint or reciprocal wills for a husband and wife, or the resolution of an uncontested marital dissolution.[33] In such situations, the attorney must disclose the potential adverse aspects of multiple representation and obtain the informed written consent of the clients. If the potential adversity materializes, the member must obtain the further informed written consent of the clients pursuant to subparagraph (C)(2).[34]

Where an attorney takes on concurrent representation of clients whose interests are aligned and non-adverse, the attorney should ensure that the fee agreement not only includes informed consent as to the potential conflict of interest involved in such representation, but also addresses what will happen should an actual conflict arise between the clients during the representation. For example, the contract should discuss whether the attorney can withdraw from representation of one party and still represent the other, the confidentiality of communications as between the parties, and whether the clients can pursue disqualification or not. Having addressed all these issues in the fee agreement, the attorney will be more likely to be able to extricate himself or herself from an unexpected conflict situation unscathed, and the clients will be less

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32. *American Airlines, Inc. v. Sheppard, Mullin, Richter & Hampton*, 96 Cal. App. 4th 1017, 1044, 117 Cal. Rptr. 2d 685 (2002).

33. *See* Cal. Rules of Professional Conduct 3-310 (Discussion).

34. Cal. Rules of Professional Conduct 3-310 (Discussion).

likely to take actions to remedy the situation that are outside the contract. If all parties agree in advance to what will happen down the road if a conflict arises, it will make it easier on everyone in dealing with a conflict when and if it does arise.

7-5 SUCCESSIVE REPRESENTATION: THE FORMER CLIENT RULE

Rule 3-310(E) governs successive representations, which arise when a potential client's interests are adverse to a former client's interests. When a potential adverse party or former client was represented, then the attorney or firm must determine whether the interests of the potential client are adverse to the interests of the former client. If so, the attorney or firm must determine whether the matter for the potential client is "substantially related" to the matter in which the attorney or firm represented the former client.

If the new matter and the old matter are "substantially related," the attorney must decline the representation, unless he or she has obtained written consent of the former client. Prior to obtaining the written consent, the attorney must provide full disclosure to the former client under the terms of Rule 3-310(E), which provides:

> 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.

In a successive representation conflict case, the paramount value at stake is confidentiality and disqualification is evaluated using a substantial relationship test. Because the attorney is no longer representing the former client, it is possible that the attorney will use confidences from that client to benefit the new client whose interests are adverse to the former client. That would violate the attorney's obligation to keep the former client's confidences, even if the information used would not harm the former client. The impropriety is not dependent on the attorney's actual use of divulged confidences.

Thus, in a successive representation involving disclosure of confidential information by an attorney's former client and subsequent representation of another client in a substantially related a matter, courts evaluate disqualification based on whether confidences have been comprised.[35] The former client's expectation of confidentiality must be preserved. Because the main fiduciary value potentially comprised is confidentiality, a former client seeking attorney disqualification in an adverse successive litigation must demonstrate a substantial relationship between the subjects of the former and current representations.[36]

To this end, California courts' substantial relationship test is one part of a two-prong analysis of successive representation involving a conflict of interest.[37] As the California Supreme Court explained in *Wutchumna Water Co. v. Bailey*,[38]

> [A]n attorney is forbidden to do either of two things after severing his relationship with a former client. He may not do anything which will injuriously affect his former client in any manner in which he formerly represented him, nor may he at any time use against his former client knowledge or information acquired by virtue of the previous relationship.[39]

In evaluating whether a substantial relationship exists, the courts generally consider many factors including: (1) the practical consequences of the attorney's representation of the former client, (2) whether confidential information material to the current dispute would normally have been imparted to the attorney by virtue of the nature of the former representation, (3) the similarities between the two factual situations, (4) the legal questions posed, (5) the nature and extent of the attorney's involvement with the cases, (6) the time spent by the attorney on the earlier cases, (7) the type

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35. *See Flatt v. Super. Ct.*, 9 Cal. 4th 275, 283, 36 Cal. Rptr. 2d 537 (1994); *SpeeDee Oil Change, Sys. Inc.*, 20 Cal. 4th 1135, 1146, 86 Cal. Rptr. 2d 816 (1999).

36. *Sharp v. Next Entm't, Inc.*, 163 Cal. App. 4th 410, 428, 78 Cal. Rptr. 3d 37, 51 (2008) (citing *Flatt v. Super. Ct.*, 9 Cal. 4th 275, 283, 36 Cal. Rptr. 2d 537 (1994)).

37. *Civil Serv. Comm'n v. Super. Ct.*, 163 Cal. App. 3d 70, 80, 209 Cal. Rptr. 159, 166 (1984).

38. *Wutchumna Water Co. v. Bailey*, 216 Cal. 564, 573–74, 15 P.2d 505 (1932).

39. *People ex rel. Deukmejian v. Brown*, 29 Cal. 3d 150, 155, 172 Cal. Rptr. 478 (1981).

of work performed, and (8) the attorney's possible exposure to formulation of policy or strategy.[40]

Once a substantial relationship is established, access to confidential information by the attorney in the course of the first representation is presumed and disqualification in the matter of the second client is mandatory.[41] Thus, "actual possession of confidential information is not required for an order of disqualification" where there is a "substantial relationship" between the current and former representations.[42]

In addressing the confidentiality value in the context of successive representation, the California Supreme Court explained:

> Where an attorney successively represents clients with adverse interests, and where the subjects of the two representations are substantially related, the need to protect the first client's confidential information requires that the attorney be disqualified from the second representation. For the same reason, a presumption that an attorney has access to privileged and confidential matters relevant to a subsequent representation extends the attorney's disqualification vicariously to the attorney's entire firm.[43]

In *Benasra v. Mitchell Silberberg & Knupp LLP*,[44] former clients alleged that that their attorneys breached their fiduciary duties by later representing clients with adverse interests. The lawyers filed an anti-SLAPP motion arguing that the former client's suit arose from protected activity, namely statements made by the attorneys

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40. *See H. F. Ahmanson & Co. v. Salomon Bros., Inc*., 229 Cal. App. 3d 1445, 1457, 280 Cal. Rptr. 614, 621 (1991); *see also Pour Le Bebe, Inc. v. Guess? Inc*., 112 Cal. App. 4th 810, 5 Cal. Rptr. 3d 442 (2003).

41. *Flatt v. Super. Ct.*, 9 Cal. 4th 275, 283-84, 36 Cal. Rptr. 2d 537 (1994); *see also Rosenfeld Constr. Co. v. Super. Ct.*, 235 Cal. App. 3d 566, 575, 286 Cal. Rptr. 609 (1991); *Henriksen v. Great Am. Savings & Loan*, 11 Cal. App. 4th 109, 117, 14 Cal. Rptr. 2d 184 (1992).

42. *Dill v. Super. Ct.*, 158 Cal. App. 3d 301, 304, 205 Cal. Rptr. 671 (1984); *Pound v. DeMera Cameron*, 135 Cal. App. 4th 70, 78, 36 Cal. Rptr. 3d 922, 928 (2005).

43. *People ex rel. Dep't of Corps. v. SpeeDee Oil Change Sys., Inc*., 20 Cal. 4th 1135, 1146, 86 Cal. Rptr. 2d 816 (1999) (citing *Flatt v. Super. Ct.*, 9 Cal. 4th 275, 283, 36 Cal. Rptr. 2d 537 (1994)).

44. *Benasra v. Mitchell Silberberg & Knupp LLP*, 123 Cal. App. 4th 1179, 20 Cal. Rptr. 3d 621 (2004).

during the course of the subsequent representation. The appellate court disagreed, noting that the claim was based on violation of Rules 3–310(C) and 3–310(E), which did not turn on whether any confidences of the former client were actually revealed by the attorneys during the subsequent, adverse representation.[45] The court explained that regardless of whether confidences were actually revealed in the adverse action, a breach of loyalty has occurred as soon as an attorney violates professional responsibility conflict of interest rules.[46]

In *United States Fire Insurance Co. v. Sheppard, Mullin, Richter & Hampton*,[47] an insurer sought to prevent a firm that represented it in a related matter from representing an asbestos creditors committee in a pending action to which the insurer was a party. The firm filed an anti-SLAPP motion pursuant to Code of Civil Procedure section 425.16 contending that its legal representation in the current case was protected activity, and that the insurer could not show a probability that it would succeed on the merits of its claim. The Court of Appeal affirmed the denial of the anti-SLAPP motion, but on different grounds. Specifically, the Court of Appeal held that the former client's (insurer) allegation that firm breached a duty of loyalty through successive representation of an adverse party in a matter substantially related to the former representation did not arise out of activity protected by the SLAPP statute, and thus was not subject to being stricken as SLAPP.

In *Jessen v. Hartford Casualty Insurance Co.*,[48] an insured who was denied coverage sued the insurer that issued a commercial general liability policy. The insurer moved to disqualify the insured's attorney. The Court of Appeal held that successive representations would be "substantially related" warranting disqualification when evidence established that information material to the evaluation, prosecution, settlement, or accomplishment of the former representation given its factual and legal issues was also material

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45. *Benasra v. Mitchell Silberberg & Knupp LLP*, 123 Cal. App. 4th 1179, 1187, 20 Cal. Rptr. 3d 621 (2004).

46. *Benasra v. Mitchell Silberberg & Knupp LLP*, 123 Cal. App. 4th 1179, 1187, 20 Cal. Rptr. 3d 621 (2004).

47. *United States Fire Ins. Co. v. Sheppard, Mullin, Richter & Hampton*, 171 Cal. App. 4th 1617, 1627, 90 Cal. Rptr. 3d 669, 676 (2009).

48. *Jessen v. Hartford Cas. Ins. Co.*, 111 Cal. App. 4th 698, 3 Cal. Rptr. 3d 877 (2003).

to the evaluation, prosecution, settlement, or accomplishment of the current representation given its factual and legal issues.

The courts have even applied the substantial relationship test to cases where the attorney never represented a party but acquired confidential information about that party through its representation of a third party. Specifically, in *Morrison Knudsen Corp. v. Hancock, Rothert & Bunshoft*, the court explained that confidential information obtained through the representation of a third party could lead to attorney disqualification. In *Morrison*, the law firm sought to represent a water district in a construction claim against Morrison Knudson Corp. The firm had an ongoing relationship with Morrison's insurance underwriters and had been retained in the past to monitor the defense attorneys that represented Morrison in errors and omissions claims. In that capacity, it had received confidential communications from Morrison's defense counsel concerning Morrison's potential liability. The evidence indicated that the firm was privy to confidential information of the assigned defense counsel related to Morrison. Although the firm had never directly represented Morrison, the court explained that the situation was "analogous to one of successive representation" and that the proper standard for assessing disqualification was the substantial relationship test ordinarily applied in successive representation cases.[49]

To avoid successive representation problems, prior to accepting a representation and receiving confidences or secrets, an attorney should complete a threshold inquiry to determine whether the potential new client's interests are adverse to any former client's interests. As discussed in Chapter 6: Internal Audit, lawyers should utilize searches and checks to identify these conflicts before opening a new client representation. An effective procedure for avoiding impermissible successive representation problems involves the following steps:

(1) Obtain the names of all interested parties;

(2) Compare the names to a list of all former clients;

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[49] *Morrison Knudsen Corp. v. Hancock, Rothert & Bunshoft LLP*, 69 Cal. App. 4th 223, 233–34, 81 Cal. Rptr. 2d 425 (1999).

(3) If any former client is involved, determine whether the proffered representation is substantially related to the former representation;

(4) If substantially related, determine if the interests of the potential new client are materially adverse to the former client;

(5) If substantially related, advise the new client to determine if the new client desires to continue;

(6) If so, provide full disclosure to the former client and obtain the written consent of the former client.

7-6 JOINT REPRESENTATION ON NON-LITIGATION MATTERS

It is very common for an attorney to represent multiple clients in non-litigation matters where litigation is not contemplated. Such joint representation is governed by Rule 3-310(B) of the Rules of Professional Conduct. Examples of such matters include drafting a joint will, preparing a partnership agreement, and handling an uncontested divorce, among others. Since multiple clients seek one attorney to handle the matter for all parties, there is potential for conflict despite the apparent initial alignment of parties, which necessitates compliance with Rule 3-310(C)(1) and (2). This means the attorney must obtain informed written consent before taking on such representation where there is a potential conflict of interest among clients.

However, whether an attorney is an intermediary, actively attempting to accommodate a client's competing interest, or merely an advisor, explaining to the client his or her legal options, if an actual conflict arises between the clients where there is no informed written consent, the attorney is generally precluded from representing either client.[50]

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[50] *See Klemm v. Super. Ct.*, 75 Cal. App. 3d 893, 900, 142 Cal. Rptr. 509 (1977); *Indus. Indem. Co. v. Great Am. Ins. Co.*, 73 Cal. App. 3d 529, 537, 140 Cal. Rptr. 806 (1977).

California courts have addressed joint representation in a number of different scenarios.[51] In *Lessing v. Gibbons*,[52] an attorney negotiated and drafted agreements with a movie studio on behalf of both an actor and a movie director. In that case, the objectives of the jointly represented parties were the same. The attorney obtained informed consent to the dual representation. Subsequently, one of the clients terminated the attorney and failed to pay him fees. The attorney sued for attorney's fees. The court held that the attorney was entitled to payment for services rendered based on a quantum meruit recovery. In the course of its ruling, the court explained that it is not improper for an attorney to represent more than one party in a matter where the interests are aligned and not adverse with the written informed consent of all affected parties. The court provided examples of such joint representation including representation of partners in drafting a partnership agreement, representing the grantor and grantee in a real estate sale, representing a landlord and tenant in a lease agreement, and representing a lender and borrower in a loan agreement.[53] Sometimes the attorneys' role is merely drafting an already agreed to contract or agreement. In such cases, when an attorney is acting as a scrivener without providing legal advice to the parties to the contract, he or she will likely be able to engage in joint representation without being deemed to have violated a duty of loyalty or confidentiality to either party.[54]

However, even when taking on representation of joint clients in non-litigation matters, attorneys need to beware of conflict rules and compliance. For example, in *Klemm v. Superior Court*,[55] an attorney represented both the husband and wife in an uncontested divorce proceeding that involved essentially the filing of documents with the court to complete the divorce. The parties had already agreed to the terms of the dissolution and there was no anticipated

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51. *See Gregory v. Gregory*, 92 Cal. App. 2d 343, 349, 206 P.2d 1122 (1949); *Buehler v. Sbardellati*, 34 Cal. App. 4th 1527, 41 Cal. Rptr. 2d 104 (1995); *In re Mader's Estate*, 11 Cal. App. 3d 409, 89 Cal. Rptr. 787 (1970).

52. *Lessing v. Gibbons*, 6 Cal. App. 2d 598, 45 P.2d 258 (1935).

53. *Lessing v. Gibbons*, 6 Cal. App. 2d 598, 606, 45 P.2d 258 (1935).

54. *See Blevin v. Mayfield*, 189 Cal. App. 2d 649, 11 Cal. Rptr. 882 (1961).

55. *Klemm v. Super. Ct.*, 75 Cal. App. 3d 893, 142 Cal. Rptr. 509 (1977).

dispute. The court required full and informed disclosure of all pertinent issues and consent to take on such representation.

In *Ishmael v. Millington*,[56] the attorney acted improperly by appearing to provide greater loyalty to one client over the other. Specifically, the husband's attorney represented both the husband and wife in a divorce proceeding, drafting documents for the wife to sign without advising her about their terms. The wife later filed a lawsuit claiming that the attorney violated his duty of loyalty, harming her through her loss of community property rights to assets. The court held that the attorney was required to obtain informed written consent from the wife with regard to the potential conflict.

7-6:1 Privilege Issues in Joint Representation

When an attorney represents two or more clients in a particular transaction, the clients' communications to the attorney in the presence of each other are privileged as to strangers to the transaction, but are not privileged as between either of them.[57] Consequently, if a conflict arises, an attorney must maintain the confidentiality of the communications as to third parties, but if the parties sue each other, their communications to the attorney can be used against each other.

7-7 DISQUALIFICATION DUE TO MULTIPLE REPRESENTATION

If an attorney does not comply with the informed written consent requirement applicable to representation in a conflict or potential conflict situation, the outcome of such failure can include a multitude of consequences, including disqualification, malpractice, and discipline by the State Bar. Although not always articulated, certain policy considerations may impact whether a court chooses to disqualify an attorney in a multiple representation case where the attorney has not obtained a conflict waiver, as discussed herein.

An appearance of impropriety by itself does not support a lawyer's disqualification.[58] Speculative contentions or allegations

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56. *Ishmael v. Millington*, 241 Cal. App. 2d 520, 50 Cal. Rptr. 592 (1966).

57. *See Petty v. Super. Ct.*, 116 Cal. App. 2d 20, 29, 253 P.2d 28 (1953).

58. *Gregori v. Bank of America*, 207 Cal. App. 3d 291, 305–08, 254 Cal. Rptr. 853 (1989); *DCH Health Servs. Corp. v. Waite*, 95 Cal. App. 4th 829, 833, 115 Cal. Rptr. 2d 847, 850 (2002).

of a conflict of interest cannot justify disqualification of an attorney.[59]

Although most of the time, a client or former client files a disqualification motion based on conflict of interest, a non-client may have standing to file such motion based on the duty of confidentiality the attorney may owe the non-client despite the absence of an attorney-client relationship.[60] However, even if a non-client is deemed to have standing to move for disqualification, it does not mean the non-client will prevail, as a lawyer owes no general duty of confidentiality to non-clients.[61]

Disqualification is addressed in more detail above under the concurrent representation and successive representation sections.

7-7:1 Imputed or Vicarious Disqualification

Multiple representation involving firms with more than one attorney creates the danger of imputed or vicarious disqualification. That is, even where a particular attorney is eligible for representation, that attorney may be precluded because another attorney in the firm is unable to accept the employment. This Rule often comes up in the context of attorneys switching law firms, as discussed herein.

If an attorney is disqualified because he or she formerly represented an adverse party in current litigation and acquired confidential information during the representation, vicarious disqualification of the entire firm is generally compelled as a matter of law.[62] However, in deciding whether to disqualify the entire firm, the court should determine whether the subject attorney's activities at the current firm actually resulted in the improper transmission, directly or indirectly, of confidential

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[59] *Smith, Smith & Kring v. Super. Ct.*, 60 Cal. App. 4th 573, 582, 70 Cal. Rptr. 2d 507 (1997).

[60] *See DCH Health Servs. Corp. v. Waite*, 95 Cal. App. 4th 829, 832, 115 Cal. Rptr. 2d 847, 849-50 (2002).

[61] *Maruman Integrated Circuits, Inc. v. Consortium Co.*, 166 Cal. App. 3d 443, 448–49, 212 Cal. Rptr. 497 (1985); *Cooke v. Super. Ct.*, 83 Cal. App. 3d 582, 592, 147 Cal. Rptr. 915 (1978).

[62] *See City & County of San Francisco v. Cobra Solutions, Inc.*, 38 Cal. 4th 839, 847, 43 Cal. Rptr. 3d 771, 777 (2006); *H. F. Ahmanson & Co. v. Salomon Bros., Inc.*, 229 Cal. App. 3d 1445, 1454, 280 Cal. Rptr. 614 (1991); *People ex rel. Deukmejian v. Brown*, 29 Cal. 3d 150, 155-56, 172 Cal. Rptr. 478 (1981); *Henriksen v. Great Am. Sav. & Loan*, 11 Cal. App. 4th 109, 114, 14 Cal. Rptr. 2d 184, 187 (1992).

information to other attorneys representing the adverse client.[63] If the firm can overcome the rebuttable presumption that confidential information was transmitted and the trial court concludes that policy considerations favor allowing the firm to remain as counsel, the trial court should deny the motion for disqualification.[64] If, however, the trial court concludes that the firm has not sufficiently rebutted the presumption that confidential information was transmitted, or if the competing policy considerations mandate disqualification of the entire firm, the trial court should grant the motion for disqualification.[65]

The disqualification rule applies equally to firms with highly specialized, non-diverse practices that render them more vulnerable to conflicts.[66] The rule also applies to a firm where the attorney who has the conflict is an associate, of counsel, or a partner.[67] However, because vicarious disqualification of an entire firm can be draconian, courts typically make the decision on a case-by-case basis and there is no bright line rule.[68]

In *Kirk v. First American Title Insurance Co.*,[69] it was established that vicarious disqualification of a law firm is not always automatic and may be subject to a rebuttable presumption that the attorney with the actual conflict was not adequately screened from the rest of the law firm. In this case, an attorney had conversations with plaintiffs' counsel in four large related class action suits in his capacity as the Deputy Commissioner and General Counsel of the California Department of Insurance during which he received

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63. *Kirk v. First Am. Title Ins. Co.*, 183 Cal. App. 4th 776, 793, 108 Cal. Rptr. 3d 620, 631 (2010).

64. *Kirk v. First Am. Title Ins. Co.*, 183 Cal. App. 4th 776, 793, 108 Cal. Rptr. 3d 620, 631 (2010).

65. *Kirk v. First Am. Title Ins. Co.*, 183 Cal. App. 4th 776, 793, 108 Cal. Rptr. 3d 620, 631 (2010).

66. *See Truck Ins. Exch. v. Fireman's Fund Ins. Co.*, 6 Cal. App. 4th 1050, 1059–60, 8 Cal. Rptr. 2d 228, 234 (1992).

67. *People ex rel. Dep't of Corps. v. SpeeDee Oil Change Sys., Inc.*, 20 Cal. 4th 1135, 1154, 86 Cal. Rptr. 2d 816, 830 (1999). Vicarious disqualification applies to "of counsel" conflict situations. *See Sands & Assocs. v. Juknavorian*, 209 Cal. App. 4th 1269, 1294-95, 147 Cal. Rptr. 3d 725, 743-44 (2012); *People ex rel. Dep't of Corps. v. SpeeDee Oil Change Sys. Inc.*, 20 Cal. 4th 1135, 1143, 86 Cal. Rptr. 2d 816 (1999).

68. *See William H. Raley Co., v. Super. Ct.*, 149 Cal. App. 3d 1042, 1048–49, 197 Cal. Rptr. 232, 237 (1983); *Kirk v. First Am. Title Ins. Co.*, 183 Cal. App. 4th 776, 800, 108 Cal. Rptr. 3d 629, 637 (2010).

69. *Kirk v. First Am. Title Ins. Co.*, 183 Cal. App. 4th 776, 108 Cal. Rptr. 3d 629 (2010).

confidential client information. The attorney later went into private practice. Around the same time, the defense counsel for the same related body of class action suits also moved to the former Deputy Commissioner's new firm, but to different offices. The defense team did not come into contact with the former Deputy Commissioner and did not know of his previous communications with plaintiffs' counsel. The firm's general counsel immediately sent out a memorandum of screening processes stating that the former Deputy Commissioner was not to be privy to any confidential client communications from defense counsel nor receive any fees related to the defense of the matter.

The court further explained that, under California Rule of Professional Conduct 3-310(E) an attorney who has obtained confidential client information cannot represent an adverse party in a matter directly related to that information without clients' informed written consent.[70] However, the court noted that unlike the American Bar Association's Model Rules for Professional Conduct, the California Rules of Professional Conduct do not discuss the idea of vicarious disqualification for law firms.[71] The court's unclear history on vicarious disqualification was retracted, with an ultimate holding that the possession of confidential client information by an attorney in a law firm does not always automatically disqualify the rest of the law firm.[72] Instead, the possession of the confidential client information creates a presumption that the individual attorney's knowledge is imputed to the rest of the law firm.[73] This presumption may be rebutted if the law firm can show that the attorney with the conflict has been appropriately screened from the rest of the firm that is representing an adverse party, which is determined on a case-by-case basis.[74]

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[70] *Kirk v. First Am. Title Ins. Co.*, 183 Cal. App. 4th 776, 792-93, 108 Cal. Rptr. 3d 629 (2010) (citing Cal. Rules of Professional Conduct 3-310(E)).

[71] *Kirk v. First Am. Title Ins. Co.*, 183 Cal. App. 4th 776, 792-93, 108 Cal. Rptr. 3d 629 (2010) (citing Cal. Rules of Professional Conduct 3-310(E)).

[72] *Kirk v. First Am. Title Ins. Co.*, 183 Cal. App. 4th 776, 800, 108 Cal. Rptr. 3d 629 (2010) (citing *People v. Speedee Oil Change Sys., Inc.*, 20 Cal. 4th 1135, 86 Cal. Rptr. 2d 816 (1999)); *Flatt v. Super. Ct.*, 9 Cal. 4th 275, 36 Cal. Rptr. 2d 537 (1994); *Henriksen v. Great Am. Savs. & Loan*, 11 Cal. App. 4th 109, 14 Cal. Rptr. 2d 184 (1992).

[73] *Kirk v. First Am. Title Ins. Co.*, 183 Cal. App. 4th 776, 814, 108 Cal. Rptr. 3d 629 (2010).

[74] *Kirk v. First Am. Title Ins. Co.*, 183 Cal. App. 4th 776, 809-10, 108 Cal. Rptr. 3d 629 (2010) (citing *In Re Complex Asbestos Litig.*, 232 Cal. App. 3d 572, 283 Cal. Rptr. 732 (1991)).

While the requirements for an ethical screen to rebut this presumption vary, every effective screen requires at least two things: (i) the screen must be established when the conflict first arises; and (ii) the ethical wall must include proactive measures to ensure the attorney with confidential information will not obtain any information from the law firm pertaining to the adverse party.[75] Other traits of typical ethical walls include:

> (1) physical, geographic, and departmental separation of attorneys; (2) prohibitions against and sanctions for discussing confidential matters; (3) established rules and procedures preventing access to confidential information and files; (4) procedures preventing a disqualified attorney from sharing in the profits from the representation; and (5) continuing education in professional responsibility.[76]

The California Court of Appeal held that the trial court erred in automatically disqualifying the law firm and remanded the case to the trial court for a fact-based analysis.[77] The court stated that this analysis should take into account the fact that the former Deputy Commissioner no longer worked at the law firm during this stage of the litigation because disqualification of the law firm is "prophylactic, not punitive."[78] In sum, in the event that an attorney obtains confidential information from a client, the attorney's law firm must rebut the presumption of imputed knowledge by showing an adequate ethical wall to prevent communication of confidential information to the rest of the firm.

Henriksen v. Great American Savings & Loan[79] stands for the proposition that a law firm is automatically disqualified when it hires an attorney who represented an adverse party in the same

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75. *Kirk v. First Am. Title Ins. Co.*, 183 Cal. App. 4th 776, 809-10, 108 Cal. Rptr. 3d 629 (2010).

76. *Kirk v. First Am. Title Ins. Co.*, 183 Cal. App. 4th 776, 810-11, 108 Cal. Rptr. 3d 629 (2010) (citing *Henriksen v. Great Am. Sav. & Loan*, 11 Cal. App. 4th 109, 116, 14 Cal. Rptr. 2d 184 (1992)).

77. *Kirk v. First Am. Title Ins. Co.*, 183 Cal. App. 4th 776, 814, 108 Cal. Rptr. 3d 629 (2010).

78. *Kirk v. First Am. Title Ins. Co.*, 183 Cal. App. 4th 776, 815, 108 Cal. Rptr. 3d 629 (2010) (citing *Gregori v. Bank of Am.*, 207 Cal. App. 3d 291, 308-09, 254 Cal. Rptr. 853 (1989)).

79. *Henriksen v. Great Am. Sav. & Loan*, 11 Cal. App. 4th 109, 14 Cal. Rptr. 2d 184 (1992).

matter. In this case, an attorney in a lawsuit moved to the opposing counsel's law firm after his law firm was replaced as counsel, but while the matter at issue was ongoing. Upon motion of opposing counsel, the trial court disqualified the attorney's new law firm despite its attempt to create an ethical wall around the attorney.

The California Court of Appeal stated that judicial opinions generally govern vicarious disqualification for law firms as the California Rules of Professional Conduct do not address the issue.[80] While ethical walls may prevent vicarious disqualification in some instances, they are not sufficient "where the attorney's disqualification is due to his prior representation of the opposing side during the same lawsuit."[81]

In *City and County of San Francisco v. Cobra Solutions, Inc.*,[82] an attorney at private practice advised a technology company in its efforts to obtain service contracts with the city. Subsequently, the attorney was elected to the position of city attorney and his office named the former client as a defendant in a suit for fraud and breach of contract. The company moved to have the entire city attorney's office vicariously disqualified due to the attorney's possession of confidential information about the former client. The trial court disqualified the city attorney's office. The Court of Appeal affirmed. The Supreme Court of California examined whether a government office can be vicariously disqualified due to the office head's actual conflict based on his prior representation in private practice.[83] The court discussed the ethical duties of loyalty and confidentiality that attorneys owe to both former and current clients and how these duties shape its analysis of the issue.[84] The Court noted that while ethical walls may be sufficient to counteract a conflict when an ordinary staff attorney moves from private practice to the government, ethical screening is not sufficient

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80. *Henriksen v. Great Am. Sav. & Loan*, 11 Cal. App. 4th 109, 114-15, 14 Cal. Rptr. 2d 184 (1992).

81. *Henriksen v. Great Am. Sav. & Loan*, 11 Cal. App. 4th 109, 115-16, 14 Cal. Rptr. 2d 184 (1992) (citing *Dill v. Super. Ct.*, 158 Cal. App. 3d 301, 205 Cal. Rptr. 671 (1984)).

82. *City and County of San Francisco v. Cobra Solutions, Inc.*, 38 Cal. 4th 839, 43 Cal. Rptr. 3d 771 (2006).

83. *City and County of San Francisco v. Cobra Solutions, Inc.*, 38 Cal. 4th 839, 848, 43 Cal. Rptr. 3d 771 (2006).

84. *City and County of San Francisco v. Cobra Solutions, Inc.*, 38 Cal. 4th 839, 851, 43 Cal. Rptr. 3d 771 (2006).

when the attorney transitions from private practice to head of a government legal office.[85] The court reasoned that the head of a government office can never truly be screened from the rest of the office because he makes all ultimate decisions in the office and must be apprised of the office's decisions. Additionally, the court stated that public perception of the office's independence requires vicarious disqualification of the entire government office.[86]

Imputed or vicarious disqualification is a common issue in an era of frequent moves between law firms within the same geographical location. When lateral attorneys (whether partners, associates, contract attorneys, or summer associates) or paralegals move from one law firm to another, a complete conflicts analysis must be conducted, and, if required, written waivers obtained. This must occur before the lateral begins work at the new firm, lest conflicts be imputed to the entire firm along with the attendant adverse consequences, including disqualification.

7-8 CONFLICTS ISSUES UNIQUE TO SPECIFIC REPRESENTATIONS

7-8:1 Issues Unique to Corporate Representation

The conflicts involved in corporate representation are entirely unique to the practice of corporate and transactional law. Rule 3-600 of the California Rules of Professional Conduct provides:

> (A) In representing an organization, a member shall conform his or her representation to the concept that the client is the organization itself, acting through its highest authorized officer, employee, body, or constituent overseeing the particular engagement.
>
> (B) If a member acting on behalf of an organization knows that an actual or apparent agent of the organization acts or intends or refuses to act in

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85. *City and County of San Francisco v. Cobra Solutions, Inc.*, 38 Cal. 4th 839, 853-54, 43 Cal. Rptr. 3d 771 (2006) (*citing City of Santa Barbara v. Super. Ct.*, 122 Cal. App. 4th 17, 18 Cal. Rptr. 3d 403 (2004)).

86. *City and County of San Francisco v. Cobra Solutions, Inc.*, 38 Cal. 4th 839, 853-54, 43 Cal. Rptr. 3d 771 (2006) (*citing City of Santa Barbara v. Super. Ct.*, 122 Cal. App. 4th 17, 18 Cal. Rptr. 3d 403 (2004)).

a manner that is or may be a violation of law reasonably imputable to the organization, or in a manner which is likely to result in substantial injury to the organization, the member shall not violate his or her duty of protecting all confidential information as provided in Business and Professions Code section 6068, subdivision (e). Subject to Business and Professions Code section 6068, subdivision (e), the member may take such actions as appear to the member to be in the best lawful interest of the organization. Such actions may include among others: (1) Urging reconsideration of the matter while explaining its likely consequences to the organization; or (2) Referring the matter to the next higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest internal authority that can act on behalf of the organization.

(C) If, despite the member's actions in accordance with paragraph (B), the highest authority that can act on behalf of the organization insists upon action or a refusal to act that is a violation of law and is likely to result in substantial injury to the organization, the member's response is limited to the member's right, and, where appropriate, duty to resign in accordance with rule 3-700.

(D) In dealing with an organization's directors, officers, employees, members, shareholders, or other constituents, a member shall explain the identity of the client for whom the member acts, whenever it is or becomes apparent that the organization's interests are or may become adverse to those of the constituent(s) with whom the member is dealing. The member shall not mislead such a constituent into believing that the constituent may communicate confidential information to the member in a way that will not be used in the

organization's interest if that is or becomes adverse to the constituent.

(E) A member representing an organization may also represent any of its directors, officers, employees, members, shareholders, or other constituents, subject to the provisions of rule 3-310. If the organization's consent to the dual representation is required by rule 3-310, the consent shall be given by an appropriate constituent of the organization other than the individual or constituent who is to be represented, or by the shareholder(s) or organization members.

Based on the Rule, the client is the corporation itself, acting through its highest authorized officer, employee, body, or constituent overseeing the particular engagement. The client is not the managing members, i.e., officers or directors, although the attorney can also represent them subject to compliance with Rule 3-310.[87] The same rule applies with respect to a partnership, i.e., the client is the partnership itself and not the individual partners.[88]

An attorney who represents a corporation has a duty to the corporation. The corporation speaks through its highest authorized managing members. In closely held corporations, where the attorney for the corporation gets conflicting instructions from the highest authorized managers with equal authority, the attorney may be obligated to withdraw.[89] This is because the attorney is getting conflicting instructions from those who speak for the corporation. Corporate counsel should make sure that all officers, directors, and shareholders, understand that the client is the corporation and not the individuals.

In closely held corporations, confidential communications between the attorney and shareholders are almost inevitable, which imposes obligations on the attorney to maintain the confidences of

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87. *Meehan v. Hopps*, 144 Cal. App. 2d 284, 290, 301 P.2d 10 (1956).

88. *See Responsible Citizens v. Super. Ct.*, 16 Cal. App. 4th 1717, 1729–30, 20 Cal. Rptr. 2d 756, 763–64 (1993); *Wortham & Van Liew v. Super. Ct.*, 188 Cal. App. 3d 927, 932, 233 Cal. Rptr. 725, 728 (1987).

89. *See generally* California State Bar Committee on Professional Responsibility and Conduct (COPRAC) Formal Op. 1994–137.

the individuals, as well as the corporation.[90] However, a corporate officer who discloses confidential communications to corporate counsel representing the corporation does not create an attorney-client relationship between the officer and attorney as long as the attorney did not create the impression he or she represents the officer.[91] If there is a conflict or potential conflict between the officer/director and the corporation, the attorney should inform the individual in writing that the client is the corporation and not the individual and advise the individual to seek independent legal advice with respect to the matter.

An attorney representing a corporation may simultaneously represent the corporation's managing members or shareholders subject to the conflict of interest rules. However, the attorney may not concurrently represent the corporation and an individual officer, director, or shareholder in a matter in which there is an actual conflict between the corporation's interests and those of the individual, even if the corporation and the individual consent to the concurrent representation.[92] However, if the matter involves only a potential conflict, the attorney may engage in such concurrent representation subject to the conflict of interest rules.[93]

7-8:2 Issues Unique to Criminal Representations

Representation of multiple defendants in criminal issues may not only constitute an ethical problem, as discussed above, it may also violate the defendants' Sixth Amendment rights. Indeed, "[i]ncluded in the right to the effective assistance of counsel is a correlative right to representation that is free from conflicts of interest."[94]

In the criminal context, conflicts arise in a variety of factual settings. For example, conflicts may when one attorney represents

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90. *See Skarbrevik v. Cohen, England & Whitfield*, 231 Cal. App. 3d 692, 705, 282 Cal. Rptr. 627, 635–36 (1991).

91. *See Meehan v. Hopps*, 144 Cal. App. 2d 284, 292–293, 301 P.2d 10 (1956); *La Jolla Cove Motel & Hotel Apartments, Inc. v. Super. Ct.*, 121 Cal. App. 4th 773, 788, 17 Cal. Rptr. 3d 467, 478 (2004).

92. *Gong v. RFG Oil, Inc.*, 166 Cal. App. 4th 209, 216, 82 Cal. Rptr. 3d 416, 422 (2008).

93. *Klemm v. Super. Ct.*, 75 Cal. App. 3d 893, 899, 142 Cal. Rptr. 509, 512 (1977).

94. *People v. Bonin*, 47 Cal. 3d 808, 834, 254 Cal. Rptr. 298, 312 (1989) (citations omitted).

more than one defendant in the same proceeding.[95] In such cases, there is at least the possibility that the interests of the defendants may diverge at some point and thereby undermine the attorney's loyalty to one or all clients. Such a conflict can result in the denial of the defendant's constitutional right to the effective assistance of counsel.

Conflicts may arise where an attorney represents a defendant in a criminal matter and currently has or formerly had an attorney-client relationship with a witness in that matter.[96] Here, the attorney's duty to provide effective assistance to the criminal defendant conflicts with his fiduciary duty to the witness with whom he has or had a professional relationship.[97]

Conflicts also arise where an attorney represents a defendant in exchange for creative rights related to events pertaining to the representation.[98] Indeed when an accused gives a lawyer the right to publish books, plays, articles, interviews, pictures, or related literary rights concerning the case, a serious conflict of interest can arise.[99]

A defendant may choose to waive his right to the assistance of an attorney without a conflict of interests.[100] To be valid, however, waiver of a constitutional right must consist of knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences.[101] Before it accepts such waiver, the court must ascertain that (i) the defendant discussed with counsel the potential drawbacks of the potentially conflicted representation, (ii) that the defendant has been made aware of the consequences of

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95. *See, e.g., Holloway v. Arkansas*, 435 U.S. 475, 481–91 (1978).

96. *See, e.g., Leversen v. Super. Ct.*, 34 Cal. 3d 530, 536–40, 194 Cal. Rptr. 448 (1983).

97. *Leversen v. Super. Ct.*, 34 Cal. 3d 530, 538, 194 Cal. Rptr. 448 (1983).

98. *See, e.g., Maxwell v. Super. Ct.*, 30 Cal. 3d 606, 616–17, 180 Cal. Rptr. 177 (1982), *disapproved on other grounds in People v. Doolin*, 45 Cal. 4th 390, 87 Cal. Rptr. 3d 209 (2009); *United States v. Hearst*, 466 F. Supp. 1068, 1082–83 (N.D. Cal.1978), *aff'd. in part and vacated and remanded in part on other grounds*, 638 F.2d 1190 (9th Cir.1980); *People v. Corona*, 80 Cal. App. 3d 684, 720, 145 Cal. Rptr. 894 (1978).

99. *See Maxwell v. Super. Ct.*, 30 Cal. 3d 606, 616, 180 Cal. Rptr. 177 (1982), *disapproved on other grounds in People v. Doolin*, 45 Cal. 4th 390, 87 Cal. Rptr. 3d 209 (2009).

100. *Holloway v. Arkansas*, 435 U.S. 475, 483 n.5; *accord, Glasser v. United States*, 315 U.S. 60, 70 (1942).

101. *See People v. Mroczko*, 35 Cal. 3d 86, 110, 197 Cal. Rptr. 52 (1983), *disapproved on other grounds in People v. Doolin*, 45 Cal. 4th 390, 87 Cal. Rptr. 3d 209 (2009) (quoting *Brady v. United States*, 397 U.S. 742, 748 (1970)), and *United States v. Dolan*, 570 F.2d 1177, 1181 n.7 (3d Cir.1978).

such representation, (iii) that the defendant knows of his right to conflict-free representation, and (iv) that the defendant voluntarily waives that right.[102]

7-8:3 Issues Unique to Corporate Internal Investigations

When a corporate client retains an attorney to conduct an internal, independent investigation to determine whether the company, through its employees, has committed any crimes, violated any statutes, or committed any tortious acts, there may be a host of conflicts. Such investigations are commonplace, especially in a post-Sarbanes Oxley world. In internal investigations, attorneys most often represent the corporate entity and interview or gather information from corporate employees. Rule 3-600(D) provides that:

> [i]n dealing with an organization's directors, officers, employees, members, shareholders, or other constituents, a member shall explain the identity of the client for whom the member acts, whenever it is or becomes apparent that the organization's interests are or may become adverse to those of the constituent(s) with whom the member is dealing. The member shall not mislead such a constituent into believing that the constituent may communicate confidential information to the member in a way that will not be used in the organization's interest if that is or becomes adverse to the constituent.

The communications between a corporation's attorney and its employees are privileged to the extent such communications are within the scope of the employee's employment or where the employee is a co-party with the corporation in a lawsuit.[103] Likewise, if corporate counsel communicates with a former employee, the

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[102] *See People v. Mroczko*, 35 Cal. 3d 86, 110, 197 Cal. Rptr. 52 (1983), *disapproved on other grounds in People v. Doolin*, 45 Cal. 4th 390, 87 Cal. Rptr. 3d 209 (2009); *see Glasser v. United States*, 315 U.S. 60, 71 (1942) (to similar effect).

[103] *See D. I. Chadbourne, Inc. v. Super. Ct.*, 60 Cal. 2d 723, 736-38, 36 Cal. Rptr. 468 (1964); *Costco Wholesale Corp. v. Super. Ct.*, 47 Cal. 4th 725, 734–35, 101 Cal. Rptr. 3d 758, 765 (2009); *Triple A Mach. Shop, Inc. v. State of Cal.*, 213 Cal. App. 3d 131, 141–42, 261 Cal. Rptr. 493, 499-500 (1989); *Zurich Am. Ins. Co. v. Super. Ct.*, 155 Cal. App. 4th 1485, 1495, 1499-1504, 66 Cal. Rptr. 3d 833, 839, 842–46 (2007) (privilege applies to low level employees who reasonably need to know of the confidential communication).

privilege applies.[104] However, if corporate counsel obtains information from a former employee, that information does not become privileged by the mere transmission of the information to the attorney if it was not privileged in the first place.[105] Likewise, the mere transmission of information, even by a current employee, to a corporate attorney does not make the communication privileged, particularly if the employee is acting in a capacity solely as a witness and not in the course of employment.[106] Moreover, the privilege can be waived by disclosing the communication to a third party.[107]

7-8:4 Issues Unique to In-House Counsel

In-house attorneys in California are required to abide by the ethical rules set forth in the California Rules of Professional Conduct. Recently, a California Court of Appeals addressed a situation where an in-house counsel who was operating under a conflict of interest allegedly got his client fired. Specifically, in *Yanez v. Plummer*,[108] an employee who was terminated for dishonesty sued his former employer (Union Pacific) for wrongful discharge, and his former employer's in-house counsel for legal malpractice, breach of fiduciary duty, and fraud. In that case, the employee of Union Pacific witnessed an accident where another employee was injured. The injured employee sued Union Pacific and the employee who witnessed the accident was called upon to testify in deposition. In-house counsel was called upon to represent the employee. He met with the employee and explained that as long as the employee told the truth, his job would not be affected. The attorney never told the client about any conflict of interest involving the attorney representing both Union Pacific and the employee at the deposition.

At the deposition, the attorney questioned the employee thereby showing inconsistencies in the employee's testimony. The employee

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104. *See Bobele v. Super. Ct.*, 199 Cal. App. 3d 708, 713–15, 245 Cal. Rptr. 144, 147–48 (1988).

105. *See State Farm Fire & Cas. Co. v. Super. Ct.*, 54 Cal. App. 4th 625, 638, 62 Cal. Rptr. 2d 834, 843 (1997).

106. *D. I. Chadbourne, Inc. v. Super. Ct.*, 60 Cal. 2d 723, 737, 36 Cal. Rptr. 468, 477 (1964).

107. *D. I. Chadbourne, Inc. v. Super. Ct.*, 60 Cal. 2d 723, 735, 36 Cal. Rptr. 468, 476 (1964); *Zurich Am. Ins. Co. v. Super. Ct.*, 155 Cal. App. 4th 1485, 1496, 66 Cal. Rptr. 3d 833, 840 (2007).

108. *Yanez v. Plummer*, 221 Cal. App. 4th 180, 164 Cal. Rptr. 3d 309 (2013).

was ultimately terminated for dishonesty related to his deposition testimony. The employee sued the attorney for, among other things, breach of fiduciary duty. The court, in evaluating whether the in-house attorney's conduct was actionable, explained that if there was evidence that showed that the attorney caused the termination, then the legal malpractice, breach of fiduciary duty, and fraud claims could proceed past summary judgment.[109] The Court found that there was evidence of a conflict and nondisclosure in violation of Rule 3-310. Specifically, the fact that the attorney did not inform the employee-client about the conflict and did not obtain his written consent and the fact that the attorney essentially impeached his own client in the deposition, which ended up providing the basis for the termination. While the attorney's violation of Rule 3-310 constituted evidence of malpractice and breach of fiduciary duty, it did not prove malpractice or breach of fiduciary duty standing by itself.[110] However, the Court concluded that, in addition to the violation of Rule 3-310, the evidence showed that the attorney's conduct as a whole played a substantial role in bringing about the termination. This was based on a conclusion that the termination would not have occurred but for the attorney's conduct.

7-8:4.1 Staff Counsel for Insurer

Staff counsel for an insurance company can represent policyholders in litigation subject to a few requirements.[111] First, the attorneys must make sure that the insurance company does not control or interfere with their exercise of professional judgment in representing insureds. Second, the attorneys' fees cannot be split with the insurance companies. Third, if there is a conflict of interest (usually triggered by a reservation of rights), the case must be handled by an independent outside attorney. Finally, the firm

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109. *Yanez v. Plummer*, 221 Cal. App. 4th 180, 164 Cal. Rptr. 3d 309 (2013) (citing *Stanley v. Richmond*, 35 Cal. App. 4th 1070, 1086, 41 Cal. Rptr. 2d 768 (1995)) (breach of fiduciary duty is a tort distinct from legal malpractice); *Salahutdin v. Valley of Cal., Inc.*, 24 Cal. App. 4th 555, 562, 29 Cal. Rptr. 2d 463 (1994).

110. *GAFCON, Inc. v. Ponsor & Assocs.*, 98 Cal. App. 4th 1388, 120 Cal. Rptr. 2d 392 (2002) (citing *BGJ Assocs., LLC, v. Wilson*, 113 Cal. App. 4th 1217, 1227, 7 Cal. Rptr. 3d 140 (2003)); *see Ishmael v. Millington*, 241 Cal. App. 2d 520, 526–27, 50 Cal. Rptr. 592 (1966); *Mirabito v. Liccardo*, 4 Cal. App. 4th 41, 44-45, 5 Cal. Rptr. 2d 571 (1992).

111. COPRAC Formal Op. 1987-91.

name used by the staff counsel should not be false, deceptive, or misleading.

In *GAFCON, Inc. v. Ponsor & Associates*,[112] the Court of Appeal held that the insurer's use of staff counsel to represent an insured against a third party in a liability case under an insurance policy did not amount to the unauthorized practice of law. The court explained that an insurer does not engage in the practice of law due to the mere employment relationship between the insurer and the attorneys defending its insured against third party claims. In sum, as long as the insurer has a pecuniary interest in the outcome of the case, there is no conflict of interest between the insurer and insured. Accordingly, the insurer does not interfere or control the attorney's exercise of judgment and the use of staff counsel should be allowed.

7-8:4.2 In-House Counsel Wrongful Termination Suits

A former in-house counsel suing an employer for wrongful termination may disclose to her or his attorney all facts relevant to the termination including employer confidences and privileged communications.[113] Former in-house counsel's disclosure of client confidences to her or his own attorney for the purpose of determining whether those communications were admissible evidence under an exception to the attorney-client privilege is not prohibited.[114]

7-8:5 Cumis Counsel

An insurer is required to defend its insured under a liability policy where the claim is covered or potentially covered subject to policy terms, conditions, and exclusions. When an insurer agrees to assume the defense of its insured in a claim or lawsuit involving a third party, the insurer usually retains counsel of its choice to represent and defend the insured. However, under some circumstances, defense counsel's ability to represent the insured is impaired by a disqualifying

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112. *GAFCON, Inc. v. Ponsor & Assocs.*, 98 Cal. App. 4th 1388, 120 Cal. Rptr. 2d 392 (2002).

113. *Fox Searchlight Pictures, Inc. v. Paladino*, 89 Cal. App. 4th 294, 106 Cal. Rptr. 2d 906 (2001); *Gen. Dynamics Corp. v. Super. Ct.*, 7 Cal. 4th 1164, 32 Cal. Rptr. 2d 1 (1994).

114. Cal. Bus. & Prof. Code, § 6068(e); *Fox Searchlight Pictures, Inc. v. Paladino*, 89 Cal. App. 4th 294, 106 Cal. Rptr. 2d 906 (2001); *Gen. Dynamics Corp. v. Super. Ct.*, 7 Cal. 4th 1164, 32 Cal. Rptr. 2d 1 (1994).

conflict of interest. For example, a disqualifying conflict of interest exists when the insurer defends the case under a reservation of rights involving a coverage issue the outcome of which would render the insured's claim uncovered.[115] For example, where both the coverage issue and the resolution of the lawsuit hinge on whether the conduct of the insured was intentional, and the insurer has reserved its right to deny coverage under an intentional acts exclusion, the interests of the insurer and insured conflict.[116]

Generally, in such cases, the insured has the right to hire independent counsel at the insurer's expense.[117] The counsel that the insured independently retains under the *San Diego Navy Federal Credit Union v. Cumis Insurance Society, Inc.* case is known in California as "Cumis counsel."

A more detailed discussion of Cumis counsel, including cases where such counsel is not required, is discussed in Part III.

7-9 PROHIBITED TRANSACTIONS BETWEEN ATTORNEY AND CLIENT

As a general principle, all transactions between client and lawyer should be fair and reasonable to the client. Rule 3-300 delineates the prohibitions against certain transactions between the attorney and the client and provides:

> A member shall not enter into a business transaction with a client; or knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client, unless each of the following requirements has been satisfied: (A) The transaction or acquisition and its terms are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which should

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115. *See San Diego Navy Fed. Credit Union v. Cumis Ins. Soc'y, Inc.*, 162 Cal. App. 3d 358, 364, 208 Cal. Rptr. 494, 498 (1984) (superseded by statute as stated in *United Enterprises, Inc. v. Superior Court*, 183 Cal. App. 4th 1004 (2010)).

116. *Golden Eagle Ins. Co. v. Foremost Ins. Co.*, 20 Cal. App. 4th 1372, 1395, 25 Cal. Rptr. 2d 242, 257 (1993); *Foremost Ins. Co. v. Wilks*, 206 Cal. App. 3d 251, 261, 253 Cal. Rptr. 596, 602 (1988); *Long v. Century Indem. Co.*, 163 Cal. App. 4th 1460, 1471, 78 Cal. Rptr. 3d 483, 491 (2008).

117. *See* Cal. Civ. Code § 2860(a); *San Diego Navy Fed. Credit Union v. Cumis Ins. Soc'y, Inc.*, 162 Cal. App. 3d 358, 364, 208 Cal. Rptr. 494, 498 (1984) (superseded by statute as stated in *United Enterprises, Inc. v. Superior Court*, 183 Cal. App. 4th 1004 (2010)).

> reasonably have been understood by the client; and (B) The client is advised in writing that the client may seek the advice of an independent lawyer of the client's choice and is given a reasonable opportunity to seek that advice; and (C) The client thereafter consents in writing to the terms of the transaction or the terms of the acquisition.

Rule 3-300 is not intended to apply to the retainer or fee agreement, unless the agreement confers on the attorney an ownership, possessory, security, or other pecuniary interest adverse to the client. However, Rule 3-300 is intended to apply where the attorney wants to obtain an interest in the client's property to secure the amount of the attorney's fee past due or future fees.

Based on Rule 3-300, all dealings between an attorney and his client that are beneficial to the attorney will be closely scrutinized for unfairness.[118] In *Ritter v. State Bar*, an attorney did not advise the client to seek independent legal advice regarding a financial transaction into which they had entered. The court held that the terms of the transaction entered were fair, but the attorney was nonetheless subject to discipline for failing to provide his clients with a reasonable opportunity to discuss the transaction with independent counsel.

In examining an attorney's obligations under this rule, the California Supreme Court in *Fletcher v. Davis*[119] explained that an attorney generally "must avoid circumstances where it is reasonably foreseeable that his acquisition may be detrimental, i.e., adverse, to the interests of his client."[120]

Additionally, if the transaction subject to the Rule is not fair and reasonable or the attorney has not advised the client to seek independent legal advice, the transaction will be deemed improper.[121]

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118. *See Ritter v. State Bar*, 40 Cal. 3d 595, 602, 221 Cal. Rptr. 134 (1985).

119. *Fletcher v. Davis*, 33 Cal. 4th 61, 67, 14 Cal. Rptr. 3d 58, 62-63 (2004).

120. *Ames v. State Bar*, 8 Cal. 3d 910, 920, 106 Cal. Rptr. 489 (1973).

121. *See Ames v. State Bar*, 8 Cal. 3d 910, 918-20, 106 Cal. Rptr. 489; *Hawk v. State Bar*, 45 Cal. 3d 589, 593-594, 247 Cal. Rptr. 599 (1988); *Silver v. State Bar*, 13 Cal. 3d 134, 139–40, 117 Cal. Rptr. 821 (1974).

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