

PROFESSIONAL LIABILITY UPDATE

November 15, 2004

Issue No. 198

Juan C. Araneda

Jennifer A. Becker

David P. Borovsky

Robert J. Buccieri

Chip B. Cox

Kim O. Dincel

Edward F. Donohue, III

Kathleen M. Ewins

Howard M. Garfield

Jason A. Geller

J. Michael Higginbotham

John B. Hook

Joseph P. McMonigle

Douglas J. Melton

Jessica B. Rudin

Steven Sharafian

Ann L. Strayer

Jennifer W. Suzuki

Jeanette Traverso

Karen L. Uno

Seth E. Watkins

Gerald G. Weisbach

Kevin Whittaker

Irene K. Yesowitch

DISQUALIFICATION

California Law

By Jennifer A. Becker

*Derivi Const. & Architecture, Inc. v. Wong* (2004) 118 Cal.App.4th 1268

*The Third District holds that a marital relationship between a disqualified attorney and replacement counsel does not result in automatic disqualification of replacement counsel.*

Derivi Construction & Architecture, Inc. (“DCA”) brought suit against Phillip Wong who filed a cross-complaint. The law firm Herum Crabtree Brown represented Wong until it was disqualified because one of its attorneys, James Brown, had represented DCA’s owners and predecessors in prior matters. When Wong substituted Peter Whipple DCA again objected because Whipple is married to Jennifer Doherty, the Herum Crabtree Brown attorney who had handled the representation of the Wongs. DCA claimed that the substitution was to circumvent the disqualification order. Whipple declared that neither Doherty nor any other member of Herum Crabtree Brown had transmitted confidential information pertaining to DCA to him and he had not seen or reviewed their file.

Rule 3-310(E) of the Rules of Professional Conduct precludes employment adverse to the client where the attorney has obtained confidential information material to the employment. In successive representation of clients with potentially adverse interests the

chief fiduciary value jeopardized is client confidentiality.

A former client may show there is a substantial relationship between the former representation and the current representation. When material confidential information would normally have been imparted to the attorney, knowledge of confidential information is presumed and the attorney is disqualified. In applying the substantial relationship test courts should focus on the similarities between the two factual situations, the legal questions posed, and the nature and extent of the attorney’s involvement with the cases. The substantial relationship test balances the freedom of the subsequent client to counsel of choice and the interest of the former client in confidentiality. Knowledge by any member of a law firm is imputed to all attorneys in the firm and disqualification of an attorney extends vicariously to the entire firm.

There is no rule of automatic disqualification where an attorney, not involved in a matter, moves to a firm

representing an adversary. Disqualification should not be ordered where there is no reasonable probability the firm-switching lawyer had access to confidential information. In such a situation the trial court applies a modified version of the substantial relationship test and determines whether confidential information material to the current representation would normally have been imparted to the attorney during his tenure at the old firm. The attorney whose qualification is sought has the burden of proving he had no exposure to confidential information relevant to the current dispute.

taken to honor the spirit of rules designed to protect client confidences.

DCA's theory of disqualification requires two stages of imputation of possession of confidential information and imputation based solely on a marital relationship. DCA would impute Brown's presumed confidential knowledge of DCA to the entire Herum Crabtree Brown firm, including Doherty. Then, Doherty's vicarious disqualification would extend to Whipple based on their marital relationship.

The court rejected DCA's theory of double imputation to find vicarious disqualification. No case had gone so far and other jurisdictions had erected barriers to stop the spread of the penumbra of disqualification. The primary concern is the attorney's possession of confidential information. Imputing Brown's access to DCA's confidential information to Doherty and then to Whipple carries the concept of vicarious disqualification too far.

*Comment:* While the court will not presume receipt of confidential information due to marital or other personal relationships, care should be