

PROFESSIONAL LIABILITY UPDATE

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DISQUALIFICATION

California Law

By Ann L. Strayer

Farris v. Fireman's Fund Ins. Co. (2004) 119 Cal.App.4th 671

The Fifth Appellate District has affirmed an insurance company's motion to disqualify an attorney who had previously represented the insurance company in matters related to the current litigation.

When Renee Magee, Julie O'Keefe and Katherine O'Brien sued Jason Farris (dba Creative Fun and Fitness) his carrier Fireman's Fund Insurance Company (FFIC) refused to defend. Farris assigned Plaintiffs his claims against FFIC and consented to judgments.

James H. Wilkins and his law firm (Wilkins) represented plaintiffs in the action against FFIC. FFIC moved to disqualify Wilkins under Rules of Professional Conduct, rule 3-310(E) because Wilkins had represented FFIC while a member of the law firm of McCormick, Barstow, Sheppard, Wayte & Carruth, LLP (McCormick) and had access to confidential information material to the action.

Wilkins was hired as an associate at McCormick in 1984 and became a partner in 1990. McCormick represented FFIC for thirteen years in coverage matters. As FFIC's coverage counsel, the law firm issued formal coverage opinions, rendered informal

advice, consulted on coverage matters, and handled coverage litigation and bad faith cases. While representing FFIC, Wilkins discussed settlement, litigation, and claims handling strategies in connection with coverage matters, and participated in confidential communications with top-level FFIC employees. He oversaw 27 % of all FFIC files handled by the McCormick firm between 1987 and 1997, 226 files. He had a thorough knowledge of FFIC policies and procedures with respect to policy interpretation and coverage positions. Wilkins also made educational presentations to FFIC employees on issues related to coverage disputes and bad faith actions. FFIC representatives testified that attempting to avoid exposure to bad faith claims was always a paramount concern.

Wilkins did not contradict FFIC's evidence but asserted that most of his work was issuing coverage opinions, which required "very factual and legally specific" analyses relating solely to the

facts and policies involved in each claim. Wilkins claimed he had no knowledge of FFIC litigation or discovery strategies or procedures for defending bad faith claims, nor any knowledge about FFIC that would be useful to him in handling the Farris case.

The Farris parties had already been before the Fifth District. In an unpublished opinion, the appellate court reversed an earlier denial of a motion to disqualify Wilkins finding the trial court had misapplied the law when it found no substantial relationship between the former and current representation. On remand, the trial court again denied FFIC's motion to disqualify, finding that Wilkins' representation of plaintiffs in the bad faith action was not substantially related to his work as a coverage attorney for FFIC.

The Court of Appeal relied on precedent holding that a trial court must first identify if the former representation placed the attorney in direct and personal contact with the client. If so then the court should determine if there is a connection between the two successive representations, which does not include inquiry into the attorneys' actual knowledge of the client gained during the former representation. Successive representations will be substantially related if information material to the evaluation, prosecution, settlement or resolution of the current representation is also material to the evaluation, prosecution, settlement or resolution of the current representation. This is also the test articulated in § 132 of the Restatement (3rd) of the Law Governing Lawyers (2002), which provides that the present representation is "substantially related" to the prior representation if the present representation involves work the

lawyer performed during the prior representation, or if there is a substantial risk that the present representation will involve the use of information, not generally known, acquired in the course of the prior representation.

Rather than focus on the services to be performed by Wilkins, the trial court should have examined the similarities between the legal problem involved in the former representation and the legal problem involved in the current representation. The question is whether the subjects of the prior and current relationship are substantially the same. The subjects were substantially related because they both centered on an assessment of FFIC's internal claims and coverage policies and practices, in general and with respect to all comparably placed insureds.

The Court noted that Wilkins had worked closely with and even advised some of the FFIC representatives who would likely be called as witnesses. It was possible Wilkins could cross-examine an individual on a policy or procedure he had recommended.

The Court asserted there was not a blanket rule precluding attorneys who have served as coverage counsel from representing plaintiffs in bad faith actions arising anywhere in the country. The passage of time or changes in corporate structure could eliminate a prior substantial relationship. However, Wilkins submitted no evidence that such events had occurred.

Finally, the Court emphasized that its ruling was not premised on Wilkin's prior acquisition of general information about FFIC. The decision was primarily based on the overwhelming evidence

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that Wilkins played a major personal role in shaping FFIC's practices and procedures in handling California coverage claims which were likely to be at issue given the brief time between Wilkins's departure from McCormick and Farris's tender to FFIC.

Comment: While there is no rule of thumb when a prior representation will be deemed “substantially related” to a current representation, this case illustrates that where the prior representation was lengthy and significant, trial courts are more willing to find a violation of the Professional Rule.