

PROFESSIONAL LIABILITY UPDATE

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DISQUALIFICATION

CALIFORNIA LAW

By Jennifer A. Becker

Fremont Indemnity Co. v. Fremont General Corp. (2006) 148 Cal.App.4th 97

The Second District holds that concurrent representation of clients with adverse interests in a separate matter is not a conflict of interest when the attorney has no connection with the matter in which the clients are adverse. In addition, an attorney's direct and personal relationship with a former client does not create a substantial relationship between a prior representation and a subsequent representation when the subsequent representation does not present similar issues.

Fremont Indemnity Company (Indemnity) is a wholly owned subsidiary of Fremont Compensation Insurance Group, Inc. (Insurance Group), which is a wholly owned subsidiary of Fremont General Corporation (Fremont General). Morgan, Lewis & Bockius (MLB) represented Fremont General and its subsidiaries for many years.

MLB represented Indemnity in a legal malpractice action known as the Seyfarth action but Fremont General was not a party. MLB represented Fremont General in the Gularte action, but Indemnity was not a party.

After the Insurance Commissioner took over Indemnity, the Commissioner's counsel proposed MLB continue to represent Indemnity in the Seyfarth action. MLB requested a retainer agreement that would allow it to represent new and existing clients in

unrelated actions even if the clients' interests were directly adverse to the California Department of Insurance. The Commissioner would not agree and selected other counsel for the Seyfarth matter.

Other counsel represented Fremont General when the Commissioner investigated its use of Indemnity's net operating losses, (NOL dispute). When Indemnity filed a complaint against Fremont General and Insurance Group, MLB appeared as their counsel. The trial court granted Indemnity's motion to disqualify MLB reasoning that once Indemnity was taken over by the Commissioner, MLB could not represent Fremont Indemnity and Fremont General simultaneously when their interests conflicted without the Commissioner's written consent.

The Court of Appeal noted that an attorney's concurrent representation of parties with conflicting interests implicates the duty of loyalty. The effective functioning of the fiduciary relationship between attorney and client depends on the client's trust and confidence in counsel. Rule 3-310(C) prohibits the concurrent representation of clients in certain circumstances without the informed written consent of each client.

A conflict of interest arises when an attorney represents a client in a matter in which the client's interests are adverse to those of another party and concurrently represents the other party in another matter even if the two matters are completely unrelated and there is no risk that confidences obtained in one matter could be used in the other.

These concerns are limited to circumstances where an attorney represents one or both of the clients in a matter in which the clients' interests are adverse. Rule 3-310(C)(3) precludes an attorney from representing a client in a matter and at the same time in a separate matter accepting a client whose interests in the first matter are adverse to the client in the first matter. The Rule does not prohibit the concurrent representation of clients whose interests are adverse only in a matter in which the attorney does not represent either client.

Thus, MLB's concurrent representation of Indemnity in the Seyfarth action and Fremont General in the Gularte action was not improper under rule 3-310(C)(3) because the clients' interests in those matters were not adverse. Their interests were adverse in the NOL dispute, but Indemnity failed to provide evidence that Fremont General or Insurance

Group consulted with MLB in connection with the NOL dispute before MLB was substituted out of the Seyfarth case. Since MLB did not represent either client in the NOL dispute the duty of loyalty was not implicated and disqualification based on the concurrent representation of parties with conflicting interests was not warranted.

An attorney's representation of a client in a matter against a former client also implicates the duty of confidentiality. A basic attorney obligation is to maintain inviolate the confidence and preserve the secrets of clients.

Rule 3-310(E) prohibits the successive representation of clients in certain circumstances without the informed written consent of the client and former client. If there is a substantial relationship between the subject of the current representation and the subject of the former representation, the attorney's access to privileged and confidential information in the former representation is presumed and disqualification of the attorney from the current representation is mandatory in order to preserve the former client's confidences. There is a substantial relationship when the current matter presents issues sufficiently similar such that the attorney was likely to have obtained confidential information material to the current representation.

The Court of Appeal rejected Indemnity's argument that an attorney's direct and personal relationship with a former client can establish a substantial relationship absent similarity between the issues in the two representations. An attorney's acquisition during the first representation of general information about the first client's overall structure

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and practices does require disqualification unless it is material, that is, directly in issue or of critical importance, in the subsequent representation. The same is true about information such as the first client's "litigation philosophy" or "key decision makers."

The Seyfarth action was a legal malpractice action unrelated to the NOL dispute. Indemnity did not establish a reasonable probability that MLB obtained confidential information material to the present actions. Indemnity did not show that information concerning the Commissioner's litigation philosophy and practices is material to any issue in the current actions. Indemnity failed to establish that MLB obtained material confidential information through contacts with Indemnity's officers and employees in prior representations. Disqualification was improper because the required substantial relationship was not present.

Comment: Disqualification precludes the subsequent client from proceeding with counsel of choice, with whom the client may have already made a substantial investment. Thus, the court will not order disqualification where the facts do not indicate an actual or potential violation of the attorney's ethical duties.