

PROFESSIONAL LIABILITY UPDATE

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DISQUALIFICATION

California Law

By Jennifer A. Becker

Goldberg v. Warner/Chappell Music, Inc. (2005) 125 Cal.App.4th 752

The Second District holds that a law firm is not disqualified because a former partner had a brief consultation with an adverse party.

Ilene Goldberg sued Warner/Chappell Music, Inc. (Warner) for employment related matters. Goldberg moved to disqualify Warner's counsel, Mitchell Silberberg & Knupp LLP (MS&K), because six years earlier Goldberg had an informal consultation about her Warner contract with J. Eugene Salomon, a partner who left the firm three years prior to the lawsuit. MS&K established that the consultation had been brief and informal, and that no one currently at MS&K had any knowledge concerning either the consultation or any confidential information imparted to Salomon. Despite the informality of the consultation, the trial court concluded that there was an attorney-client relationship between Goldberg and Salomon that would disqualify MS&K if Salomon still practiced there. However, since Salomon was no longer at MS&K, there was no need for vicarious disqualification.

The Court of Appeal agreed that an attorney's presumed possession of confidential information concerning a

former client should not automatically cause the attorney's former firm to be vicariously disqualified where the evidence establishes that no one other than the departed attorney had any dealings with the client or obtained confidential information.

Pursuant to Rule 3-310(E) of the Rules of Professional Conduct there is no question that an attorney is disqualified from representing a party adverse to a former client where the attorney possesses confidential information that could be helpful to the new client and hurtful to the old. When a substantial relationship has been shown to exist between the former and current representation, and when it appears that material confidential information would normally have been imparted to the attorney or staff, the attorney's knowledge of confidential information is presumed. Where the attorney is disqualified from representation due to an ethical conflict, the disqualification extends to the entire firm.

There is an exception to this presumption where the lawyer can show that there was no opportunity for confidential information to be divulged, such as where the attorney had no personal involvement in a prior matter handled by a former law firm. To burden an attorney with presumptive knowledge based solely on his or her former membership in a law firm that represented the former client would require a significant extension of the doctrine of imputed knowledge. This is in contrast to the situation where the attorney who seeks to undertake adverse representation is still working with the attorneys who had acquired the former client's confidential information. No assurances or screening procedures could ever convince the adverse client that the confidences would not be used to its disadvantage.

In modern law firm practice attorneys do not typically stay with one organization throughout their entire careers. It is possible in large law firms that individual attorneys may not even know, let alone have contact with, members of the same firm working in a different department. Thus a rule which disqualifies an attorney based on imputed knowledge derived solely from membership in the former firm without inquiry into actual exposure to the former client's secrets is too broad and is inconsistent with the language and core purpose of rule 3-310(E). It unnecessarily restricts both the client's right to chosen counsel and the attorney's freedom of association. Applying the remedy of disqualification when there is no realistic chance that confidences were disclosed goes far beyond the purpose of the substantial relationship test.

Since Salomon is no longer with MS&K the Court was not concerned that he would inadvertently pass on confidential information to his colleagues. It was appropriate for the trial court to make an assessment of whether Salomon had actually passed on confidential information and, since he had not, there was no basis for disqualification.

The court disagreed with a federal case that held California law applies a "conclusive presumption" that shared confidences have passed between a firm and its former attorneys. In that case the representation of the former client was extensive and broad ranging, involving the work of 29 different partners and employees, several of whom were still with the firm. Other current firm attorneys, although they billed no time themselves, were mentioned in timesheets as having discussed client-related matters with the billing attorneys. Thus there was no need for the court in that case to rely on a conclusive presumption since attorneys presumed to hold confidential information were still working at the law firm.

In summarizing California law, the court noted that if an attorney worked on a matter "substantially related" to the matter in which he or she seeks to represent a party adverse to the former client, the presumption is conclusive that the attorney is possessed of confidential information that would impact the present matter. Where tainted attorneys and nontainted attorneys are working together at the same firm, there is not a conclusive presumption that confidential information has passed but there is a pragmatic recognition that the confidential information will work its way to the nontainted attorneys at some point. By contrast, when the relationship

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between the tainted attorneys and nontainted attorneys is in the past, there is no need to rely on a conclusive presumption and the court may assess whether confidential information was actually exchanged.

California courts may consult the ABA Model Rules of Professional Conduct when a matter is not addressed by the California Rules. The Model Rules allow a firm to engage in representation adverse to a former client when the lawyer who represented the former client has terminated his or her association with the firm unless the matter is the same or substantially related to the prior representation and other attorneys still in the firm have protected information material to the matter.

The Court was disturbed that Goldberg's attorneys did not articulate a basis for MS&K's disqualification until many months had passed and substantial attorney's fees had been incurred.

Comment: Conflict of interest concerns should be addressed early in a matter. As this case illustrates, courts will be more forgiving of imputed conflict issues if significant time has passed and fees have been incurred by an adverse party. This case also is also a reminder to take care in conflict checks. Should a firm find itself disqualified due to a conflict caused by imputed knowledge, it can expect to find itself in a fee dispute with its current client.