

PROFESSIONAL LIABILITY UPDATE

CONFLICTS

By Jennifer A. Becker

***Shen v. Miller* (2012) 2012 WL 6619025**

The Second District holds representation of a shareholder in a derivative action does not create an attorney-client relationship between the shareholder's attorney and the corporation.

Randall Miller and Chih Teh Shen established Arnon Development Group, Inc. (Arnon) to develop real estate. When the relationship floundered, Shen retained John R. Walton to represent his interests. The parties filed a number of actions and counter-actions to resolve their dispute. Among the lawsuits filed, Walton represented Shen in a derivative action filed on behalf of Arnon. This prompted Miller to file a motion to disqualify Walton in the related lawsuits on the premise that Walton represented the interests of the corporation in the derivative action, and could not simultaneously prosecute claims against Arnon in the other proceedings.

The Court of Appeal upheld the trial court's denial of the disqualification motion. A motion to disqualify implicates a client's right to chosen counsel, an attorney's interest in representing a client, the financial burden on the client to replace counsel, and the specter of tactical abuse. The court's paramount concern must be to preserve public trust in the scrupulous administration of justice and the integrity of the bar.

Where an attorney's conflict is the simultaneous representation of opposing parties the primary value at stake is the attorney's duty, and the

client's legitimate expectation, of loyalty. Disqualification is automatic.

Although a derivative claim is a property right that belongs to the corporation, no case holds that the shareholder's attorney enters an attorney-client relationship with the corporation simply by filing the derivative action. A predicate to a derivative action is the corporation's refusal to pursue the claim. Thus, the shareholder's attorney is acting against the corporation's wishes.

Because the corporation is the ultimate beneficiary it must be joined in the action, typically as a nominal defendant. If the shareholder's attorney represented the corporation, there would be no need for the derivative action, as the corporation itself would be pursuing the shareholder's claims.

The court was not persuaded by Miller's argument that because a shareholder in a derivative action substantively acts as guardian *ad litem* for the corporation, Walton's representation of Shen rendered him attorney for the corporation. Even if the analogy is apt, there is no case law that holds an attorney for a guardian is also attorney for the ward. A

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guardian *ad litem*'s role is merely to oversee the attorney's work to ensure the child's legal interests are protected. Thus, the guardian oversees an independent attorney for the child, not the attorney representing the guardian himself. Because Walton has no attorney-client relationship with Arnon, Shen cannot be charged with overseeing a Walton-Arnon relationship.

The court distinguished other cases in which a close examination of the facts revealed an attorney actually engaged in simultaneous representation of conflicting interests. For example, attorneys who represent shareholders in a derivative action cannot also represent members of a class action against the corporation since the interests of the corporation and the class members directly conflict.

Walton's duty of fidelity and confidentiality did not create a conflict absent an attorney-client relationship between Walton and Arnon. Although there are circumstances where an attorney is in a position of trust and confidence with a non-client, Walton did not have such obligations to Arnon. Walton was not a director of Arnon nor did he have access to Arnon's confidential information.

Comment: Courts watch carefully for disqualification motions filed for tactical reasons. Where there is no substantive conflict, disqualification is not warranted.