PROFESSIONAL LIABILITY UPDATE

CONFLICTS
DISQUALIFICATON

By Jennifer Becker

M'Guinness v. Johnson (2015) 243 Cal.App.4th 602

The Sixth District holds a law firm's open-ended agreement, evergreen retainer, and control over corporate records indicated a concurrent attorney-client relationship with a corporate client, and disqualification in a shareholder dispute was proper.

James M'Guinness, Steven Johnson, and Scott Stuart each owned one-third of the outstanding stock of TLC, and each was an officer and director of the corporation. In a shareholder dispute, the operative pleadings were a complaint filed by M'Guinness against Johnson, Stuart, and TLC; a cross-complaint filed by Johnson against M'Guinness and Stuart; a cross-complaint filed by Stuart against Johnson and TLC; and a cross-complaint filed by TLC against M'Guinness, Johnson, and Stuart for declaratory relief.

M'Guinness, Stuart, and TLC moved to disqualify Johnson's attorneys, Casas, Riley & Simonian (Casas), because it concurrently represented TLC. Johnson asserted the representation terminated more than a year prior to the dispute, and was unrelated to the dispute.

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

There are two separate categories in which actual or potential conflicts of interest arise. One is the successive representation of multiple clients where the chief fiduciary value jeopardized is that of client confidentiality. Business and Professions Code § 6068(e) requires an attorney to preserve clients confidences and secrets. This obligation survives the termination of the attorney-client relationship. California Rules of Professional Conduct Rule 3-310(C) & (E) imputes one attorney's conflict to the entire law firm on the rationale attorneys working together share clients' confidential information.

In successive representation conflicts the former client must demonstrate a substantial relationship between the subjects of the prior and current representation. This exists where the attorney had a direct professional relationship with the former client and provided legal advice and services on a legal issue closely related to the legal issue in the present representation. If the attorney's contact with the prior client was not direct, the court examines both the attorney's relationship to the prior client and the relationship between the prior and the present representation. If the subjects of the prior representation make it likely the attorney acquired relevant, material confidential information the two representations are substantially related.

The other conflict scenario is the concurrent representation of multiple clients where the primary value at stake is the attorney's duty of loyalty. This is the most egregious kind of conflict, and a more stringent test is applied. Even if the dual representations have nothing in common and there is no risk that prior confidences have any relation to the new matter, disqualification may be required, and is often automatic.

When TLC retained Casas, Johnson signed and circulated the firm's standard client agreement to the other shareholders. The Law Firm handled specific legal matters for TLC over several years.

The Court of Appeal concluded TLC was a current client of Casas. Fee agreements are evaluated when they are made and must be fair, reasonable, and explained to the client. They are strictly construed against the attorney under traditional contract principles. Uncertainties are resolved in favor of a fair and reasonable interpretation, and ambiguities are resolved for the client and against the attorney.

The Casas agreement was broadly worded, and included general legal work as directed by TLC. The termination provision was open-ended, and evidenced the parties' intent to establish a continuous relationship terminable only by specific methods. The agreement was not reasonably susceptible to an interpretation it terminated upon completion of the last specific project.

Casas required an evergreen deposit in trust, which would be returned at the conclusion of the representation. The last invoice showed a trust balance, which Casas never returned. Casas' invoices showed six discrete matters, and did not end until after the time Johnson claimed the relationship terminated. Historically, Casas sent bills although no services were rendered, and showed the evergreen retainer in trust.

The Court of Appeal was not persuaded the modest number of hours Casas spent on TLC matters meant the relationship terminated. Even brief conversations between a lawyer and a client can cause the disclosure of confidences.

Other conduct also demonstrated continuous representation of TLC. When the TLC dispute erupted, Johnson barred M'Guinness and Stuart entry to the business premises, except to retrieve their personal possessions. An attorney from Casas followed M'Guinness and Stuart and instructed them not to take any TLC property. When M'Guinness's attorney asked Casas to identify who he represented, his equivocal response did not indicate the firm had ceased its representation of TLC. When M'Guinness attempted to gain access to TLC's corporate records, Casas controlled and limited access, suggesting it continued to act as TLC's counsel.

A corporate attorney's first duty is to the corporate entity. Corporate counsel may not simultaneously represent officers, directors or shareholders with whom the corporation has a conflict of interest. This includes situations where a shareholder makes claims against management or individual officers or directors, such as in a dissolution action. A corporate attorney must not take part in any controversies or factional differences among shareholders.

Casas's concurrent representation of TLC and Johnson as opposing parties in the litigation could not continue. Both M'Guinness and Stuart alleged breach of fiduciary duty against Johnson based on self-dealing, diversion of corporate opportunities, and wasting of corporate assets. Casas could not defend Johnson because his interests conflicted with the interests of the corporation. Nor could Casas assist Johnson in his claims to recover money from TLC.

Motions to disqualify may be misused for delay or to increase expense rather than to prevent an attorney from impermissibly representing an opposing litigant due to a conflict of interest. They may be scrutinized to determine if brought for improper tactical reasons. Yet, the California Supreme Court has clarified there is a *per se* rule requiring disqualification of an attorney or a law firm when there is a conflict of interest based upon concurrent representation of multiple clients, regardless of whether the representation of one client has anything to do with the representation of the other client. The California Supreme Court has never held that disqualification based upon a concurrent representation conflict is a disfavored measure. Cases expressing hesitation with the remedy were not based on concurrent, but successive representation.

Comment: Casas's wounds were self-inflicted. The firm sought to cement the attorney-client relationship with TLC through an open-ended agreement and an evergreen retainer. The result could have been avoided through careful client management, which includes timely termination of the relationship.