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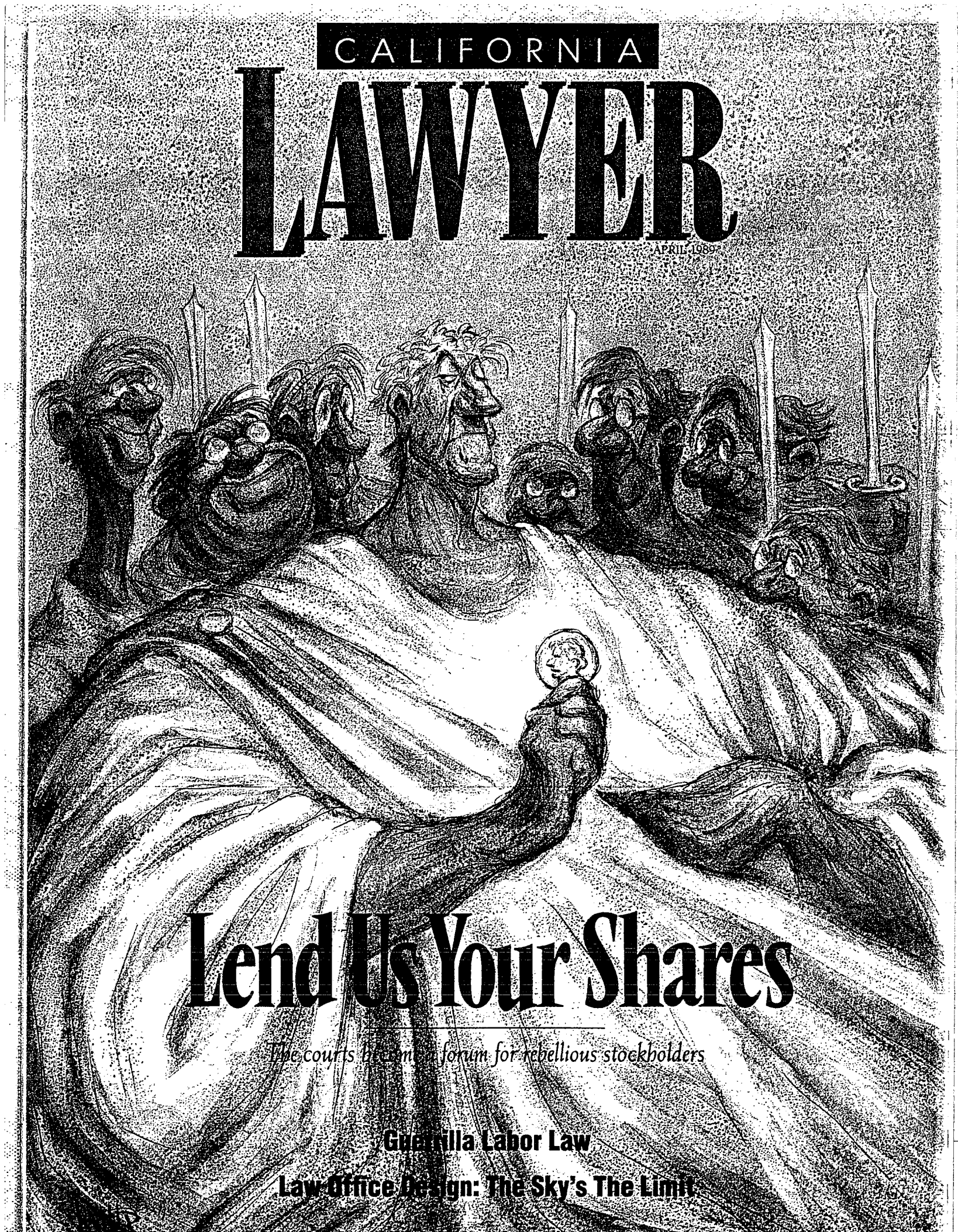

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Gambling With Multiple Interests

BY RICHARD A. ZITRIN

A SAN FRANCISCO attorney is representing the driver-husband and passenger-wife in an auto accident. Now the couple is divorcing, and it's not amicable.

A small Los Angeles law firm has represented an international union and several of its Southern California locals for years. Now a dispute between the international and one of the locals may lead to litigation.

A Riverside lawyer negotiates a contract between two of his biggest clients for the sale of a business. A year later, they're accusing each other of negotiating in bad faith.

Each of these attorneys has a problem. At best, one of them may have to withdraw from representing valued clients. At worst, another may be sued for malpractice and even subject to discipline under the new California Rule of Professional Conduct 3-310, which takes effect on May 27. Yet these and other common situations occur all the time in the everyday practice of most firms, large and small. Spotting these situations, anticipating potential problems and communicating clearly with all clients can go a long way toward avoiding trouble later on.

Any time a lawyer or firm acts on behalf of more than one individual in a transaction—be it litigation, negotiation, drafting of documents or giving advice—the danger of a conflict of interest exists. In most situations this conflict will not manifest itself. But when representation begins, it is impossible to predict which cases will go smoothly and which will not. The careful practitioner will take steps to protect the interests of all clients—and the law firm itself—when representation begins.

Until now, the California Rules of Professional Conduct had not come close to addressing this problem. Rule 5-102(B) merely says that an attorney "shall not represent conflicting interests" without their consent. Nothing is said about differing interests that have only the potential to conflict.

The American Bar Association's Model Rules of Professional Conduct go considerably further. Rule 1.7(a) roughly parallels the California rule, but Rule 1.7(b) requires client consent any time the lawyer's ability to represent a client "may be materially limited" by the lawyer's responsibilities to another client.

Moreover, lawyers representing "multiple clients in a single matter" are admonished to consult with their clients concerning "the implications of the common representation" and to obtain their consent after consultation. ABA Model Rule 1.7(b)(2).

New California Rule of Professional Conduct 3-310(A) substantially increases the responsibilities of California practitioners in a range of multiple client situations. This rule requires "all affected clients' informed written consent" whenever the lawyer "has or had a relationship with another party interested in the representation." This includes former clients and even nonclient parties.

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Communication prevents problems when clients have differing interests

Karen Betzner of the State Bar's Office of Professional Standards says Rule 3-310 evolved from rules that focused on the representation of "overtly adverse" interests. Betzner is on the staff of both the bar's standing Committee on Professional Responsibility and Conduct (COPRAC) and the specially appointed commission that drafted the new State Bar rules. The commission, she says, wanted to create a broader, more dynamic rule recognizing that multiple representations are more varied and more frequent than they used to be. The rule's expanded notice and disclosure requirements are largely preventive. "The idea was to avoid problems before they occur," Betzner says.

Despite these new rules, there are many situations in which multiple clients not only can but should have the same lawyer, "for the sake of convenience or economy" (Rule 3-310, Discussion), or simply because the lawyer is known and trusted by all parties.

The three situations described at the beginning of this article may all be appropriate for a single lawyer to handle; so may uncontested dissolutions, partnership and corporation formations, and husband-wife "mirror" wills, among many others. See Rule 3-310, Discussion.

But lawyers will have to develop careful techniques for representing multiple clients if they want to avoid the pitfalls of such representation.

Any situation in which a lawyer has two clients whose interests are intertwined requires a full disclosure and explanation to the clients. This is true where there is more than one client in the same litigation (adverse or not), more than one client in the same negotiation or enterprise, or more than one client simply seeks the attorney's advice.

There is another important instance in which the lawyer owes the client a clear explanation of the situation. "Impaired loyalty" exists whenever a conflict caused by "the lawyer's other responsibilities and interests" forecloses "alternatives that would otherwise be available to the client." ABA Model Rule 1.7, Comment.

For example, a lawyer may realize that the confidence learned from a past client in a matter now completed and closed could, if revealed, affect a new client's otherwise unrelated case. Suppose a new corporate client of a law firm is interested in buying a small, closely held corporation and seeks the firm's advice. This small corporation had been owned by a former domestic-relations client of the firm and was sold by

this client shortly after his marriage dissolution. The corporate lawyer would like to learn as much as possible about this company. But reviewing the domestic-relations file would violate the confidences of the former client. Assuming the law firm protects those confidences, it has two choices: disclose the problem to the new client; or do nothing, since the information is not essential to the new representation.

Disclosing the situation will be inconvenient. There also may be some risk that the new client will not want to continue the representation. But that is unlikely when the law firm, on its own initiative, makes clear that its client confidences are always protected. In this instance the corporate client loses nothing by staying with the firm and may gain information if the past client is willing to consent to disclosure.

On the other hand, if the disclosure is not made, representation simply continues as before. However, the lawyer must consider not only the admonition of new Rule 3-310(A), but also the possibility that the corporate client will learn of the existence of important information that was available to the law firm and not revealed.

An attorney's disclosure of divided loyalties will rarely, if ever, be meaningful if the lawyer merely recites the existence of the problem. At a minimum, he must also advise the client of "any actual or reasonably foreseeable adverse effects." New Rule 3-310(F). But for the best protection of the clients and the law firm, the lawyer should consider a more complete approach:

- Memorialize all communications, not just the clients' consents.
- Specifically address what happens to attorney-client confidences in multiple representations.
- Spell out specific ramifications of multiple representation in an "if-then" format.
- Have a contingency plan in the event a conflict arises.

If these matters are fully addressed when representation begins, not only will the interests of all parties be protected, but so will the lawyer's own. By putting in writing not just the client's informed consent but the information on which it is based, a record is made that reduces the chances of a later dispute.

Clients have come to expect their lawyers to protect every confidence, and they will expect this even if they are co-plaintiffs in a personal injury case, on both sides in a contract negotiation or the parties to an uncontested dissolution. But allowing such parties to tell their mutual lawyer anything to be held in confidence from the other party is asking for trouble. Each party may feel that the other is holding something back, and that the lawyer knows what that something is. This may doom cooperative efforts before they've begun.

The Evidence Code has long recognized that clients with a common lawyer acting on a question of common interest have no attorney-client privilege in litigation among themselves. Evid C §962. The Discussion under new Rule 3-310 recognizes the need to advise multiple clients of this. Moreover, responsible counsel will explain to multiple clients the consequences of waiving confidences. Issues of waiver of privilege will only occur in the event of litigation among the multiple clients, but the waiver of confidences will fundamentally affect each ongoing representation or negotiation while it is taking place.

The more the lawyer can anticipate at the beginning of the representation, the better he can continue to serve the needs of all parties. Explaining the effect of an attenuated confidential relationship from an "if this happens, then here's what happens next" point of view should make the ramifications clearer to the clients.

It is extremely important to develop ground rules for dealing with a possible conflict. Not all potential conflicts have to be resolved the same way. Some may be little more than strategic differences, such as those between amicable plaintiffs in an injury case. These can be resolved by ground rules that, for example, predetermine the apportionment of damages.

Other conflicts may be more substantial without being overtly adverse. For example, almost any issue of contention during the negotiation of a business contract—price, method of payment, timing, substantial performance, warranties—will have advantages for one party and disadvantages for another. Establishing ground rules for treating these matters can preserve an effective, efficient and amicable negotiation. Failure to do so can lead to acrimony, loss of clients, even action against the lawyer.

Among the most important ground rules are those that delineate when the lawyer will withdraw from representation. With careful explanation and consent in advance, the lawyer stands a much better chance of remaining involved with multiple clients right through completion of the case.

When conflicts are more serious, such as a difference of opinion that could ripen into litigation, or the initiation of litigation itself, it is almost always necessary for the lawyer to withdraw from representing at least one party.

While consent of the clients to continuing representation can cure some conflicts, the lawyer should make sure that the clients' consent is reasonable and is not

based on the lawyer's inability to make full disclosure. See ABA Model Rule 1.7, Comment.

Yet even when litigation is imminent, the law firm may be able to remain as general counsel for some parties on matters not related to the litigation—if such a contingency had been discussed and provided for in ground rules. If none have been developed, it may be too late: Client consent may be inappropriate or may not be forthcoming, and the firm may lose not one but several valuable clients.

The labor firm mentioned in the second paragraph had created a set of guidelines for future conflicts. When the dispute between two clients erupted, the firm was able to resort to those agreed-upon ground rules and continue to represent the international union. The other lawyers were not so lucky.

The San Francisco personal injury lawyer never discussed with her clients how confidential relationships change where two clients are represented, or what happens in the event of a disagreement. When the husband told the lawyer in confidence about divorce-related matters, the wife—who had sustained greater injury in the car accident—became uncertain of the lawyer's loyalty and decided to seek other counsel. The attorney was left with a de minimus property claim.

The Riverside lawyer fared even worse. He undertook representation of both sides to a contract without discussing the ramifications with either, and without ever dealing with the question of confidences. When the lawyer learned "in strictest confidence" that certain of the seller's real property had unrecorded encumbrances, he felt he could not breach the confidence to tell the buyer. After the sale was complete and the buyer learned of the encumbrances, the buyer-client sued not only the seller, but also the lawyer—for malpractice and breach of fiduciary duty. The lawsuit is pending; a substantial judgment appears likely.

These suggestions for preventive, anticipatory communications are not difficult to carry out. But the dangers of ignoring such discussions can be severe. And the rewards of having them are ample. Clients are more efficiently and less expensively served with quality legal help, and lawyers are able to serve the needs of their clients without reservation or fear of the consequences. □

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