CALIFORNIA BAR JOURNAL
OFFICIAL PUBLICATION OF THE STATE BAR OF CALIFORNIA • FEBRUARY 1994

Knowing when to disqualify self from a case

Why lawyers should communicate with clients about possible reasons they should withdraw their representation

ETHICS

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No, this is not just another article about motions to disqualify opposing counsel and the so-called "substantial relationship" test. These motions continue to proliferate. They are now as much a litigation strategy as they remain an issue of client loyalty. Much has been written about these motions, and, by now, many of us can sing the tune:

When a law firm undertakes representation adverse to a former client, it will be disqualified if the current representation is substantially related to the former client's matter. This problem often arises when a lawyer moves from one firm to another, or when firms merge. The issue encompasses the question of whether a "shield wall" (courts have come to call these "ethical walls") can be created to shield the "tainted" attorneys from knowledge about the case. These shields are only narrowly accepted in California.

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The problem is not stating this rule, but its application. The test is by its very nature subjective. No matter how many factors a court articulates, the issue comes down to a particular judge's case-by-case analysis. And courts look not only to the substance of the former and current matters, but to other more subjective issues, such as:

- Substantial knowledge of the policies, attitudes and practices of a former client's management; and
- The time spent, the type of work performed and the attorney's possible exposure to formulation of policy or strategy.

A subjective nature

The point is this: Given the subjective, case-by-case nature of this rule, and given the realities of practice in the 1990s, when lawyers move from one firm to another like baseball free agents and law firms merge more often than freeway lanes, we all need to be highly sensitive to our own possible disqualification, for two important reasons.

First, of course, when we embark on any course which could create a conflict with a former client, we must evaluate whether our actions will be subject to legitimate objection by the former client. But this can be difficult to determine, and its determination may inevitably be colored by our own business interests.

Accordingly, we should also clearly communicate with both current and former clients at the earliest possible time to advise of the existence of any possibility of a conflict between them.

We should do this even if we believe that there is no relationship between the former and current matters, because given the subjective test, we might just possibly be wrong.

And if we are, our former client will be angry, our current client without a lawyer, and our law firm short a client. Indeed, if our new client has the misfortune to suffer our disqualification shortly before trial, so that finding an adequate successor is impossible, that client may seek compensation from us for failing to warn that this could happen.

Early notice

On the other hand, where we communicate with our clients at the earliest possible time, the chances increase dramatically that everything will resolve by consent. At worst, all parties get the earliest possible notice.

The duty of candid client communication is important enough that it appears in both the Rules of Professional Conduct (Rule 3-500) and the State Bar Act (Business & Professions Code §6068m). Both require us to "keep clients reasonably informed of significant developments." Clearly, a change in a firm's status which creates any adversity between a current and former client must be regarded as a significant development. Our communication does both clients an important service.

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