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Viewpoint: 'Playbook' Theory of Disqualification Isn't New

Richard Zitrin, The Recorder

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The lead story in last week's Recorder highlighted two cases in which IP lawyers and their firms were disqualified from representing current clients against their former clients, based on the so-called "playbook" theory of disqualification.

The article, paraphrasing ethics expert John Steele, described the theory as "another philosophy" of disqualification that is "gaining traction" in our local federal courts. However, this philosophy has been around since the very first case to apply California law to the modern standard of disqualification. Its re-emergence is a welcome sign that courts are paying more attention to the actual harm that can be done to former clients when their old lawyers appear on the other side of a case.

The standard for disqualification was established in the 1950s: Disqualification of counsel is to be determined by whether there is a "substantial relationship" between a lawyer's representation of a current client and that lawyer's previous representation of a former client.

In its simplest form, if a court finds there is such a relationship, then it's presumed the lawyer and the lawyer's firm received confidential information from the former client that is material to the current case against that former client.

The "substantial relationship test," as it's universally called, is one of those rare common-law doctrines whose origins are known. It dates from a 1953 Southern District of New York case,

T.C. Theatre v. Warner Bros. Pictures, 113 F. Supp. 265, 268–69 (S.D.N.Y. 1953), and has been used in countless cases since.

A line of Second Circuit cases in the 1960s and '70s refined the test, which were later embodied in ABA Model Rule 1.9. The doctrine is not part of the California rules, though it's been adopted in a great number of published California decisions.

While the "playbook" moniker is a poor one, in California this test is as old as the substantial relationship doctrine itself. That first case decided under California law, *Trone v. Smith*, 621 F.2d 994 (9th Cir. 1980), concluded that among the determining factors in finding a substantial relationship was the knowledge the lawyer had gained of the "policies, practices and procedures" of the former client. "The ethical obligations inherent in the professional relationship between attorney and client require us to protect against any possibility that [confidential] information, if acquired, might be used against the former client," concluded the *Trone* court.

To many, this made a lot of sense. After all, shouldn't a court's inquiry focus on whether the attorney has learned anything that could be used against the former client? What could be more useful than "inside" knowledge about how the former client thinks, how litigation decisions are made or settlement postures are taken?

Nevertheless, *Trone* came in for a lot of criticism, both inside and outside California, from law firms that complained the *Trone* test opened the door too wide for touchy-feely "relationship" disqualifications. A 1999 ABA ethics opinion, for example, argued that a lawyer's general knowledge of strategies, policies or personnel of the former client was not enough to establish a substantial relationship. And yet, the original test has always been about relationships, thus its name, and not merely the facts of the present and former matters.

Limiting disqualifications to only those cases that bear distinct factual similarity to each other has never become the uniform rule in California. While a 1991 case, *H. F. Ahmanson & Co. v. Salomon Bros.*, 229 Cal. App. 3d. 1445 (1991), developed an oft-cited three-part test directly emphasizing the underlying facts of the two cases, other more recent cases have made it clear that the disqualifying relationship is often more than a mere factual issue.

In *Jessen v. Hartford Casualty Insurance*, 111 Cal. App. 4th 698 (2003), the court held that if the former representation "placed the attorney with respect to the prior client" in a "direct and personal" relationship, then "the only remaining question is whether there is a connection between the two successive representations. …" (Note the absence of the word "facts" and the word "matters." The word used is representations.) Then, in *Farris v. Fireman's Fund Insurance*, 119 Cal. App. 4th 671 (2004), an insurance company sought to disqualify a law firm prosecuting a bad faith case against it because former coverage counsel for the insurer now worked for the plaintiff's firm. *Farris* discussed *Jessen* and *Ahmanson* at length, cited *Trone v. Smith* with approval and disqualified the lawyer despite acknowledging that "the services [in the two cases] are distinct."

This is as it should be. As a trial lawyer—now, ostensibly, in "recovery"—I long ago learned the importance of my interpersonal relationships with clients. The closer our relationships, the more

personal observation I have, and the more I will know about what I call their "poker tells"—the personal idiosyncrasies of human behavior—such as what it means when a client scowls or giggles in deposition; how to "push the client's buttons"; or perhaps most important, how the client rubs her nose or straightens his tie when telling less than the whole truth. That knowledge is invaluable.

If the idea behind the substantial relationship test is truly to avoid harm to the former client, these factors are crucial ones. That is part of the lesson of *Trone*, *Jessen* and *Farris*, as well as the two disqualification cases earlier this month.

Interestingly, *Trone v. Smith* centered on the trials and tribulations of former client C. Arnholt Smith. Smith, once known as "Mr. San Diego," was the original owner of the San Diego Padres and a close friend and advisor of Richard Nixon, with whom he spent election eve in 1968. In 1973, Smith's businesses suffered several reversals. He lost his bid to move the Padres to Washington, D.C., and a bank that he had owned since the depression failed, partially as a result of its bad deals with other companies that Smith owned, including Westgate-California Corp.

The *Trone* case pitted Smith against the Westgate trustee appointed after the company went into bankruptcy reorganization. The bank failure led not only to an important disqualification opinion, but to Smith's conviction for embezzlement and fraud.

According to his New York Times obituary, Smith convinced a judge to reduce his sentence from three years to one by presenting a medical report saying he had no more than five years to live. He "served about seven months at the county honor camp, tending roses," according to the Times. After his release he lived peacefully until 1996, passing away in Del Mar at the age of 97.

His case still lives on, having helped keep the "relationship" part of the substantial relationship test alive and well.

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