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FLATT v. SUPERIOR COURT OF SONOMA COUNTY: ATTORNEY WITHDRAWAL FROM CONCURRENT REPRESENTATIONS

Michael Edelman

I. INTRODUCTION

Client A hires Attorney to file a lawsuit against B. Unbeknownst to A and the Attorney, Attorney's firm already represents B in an unrelated matter. Upon learning of the conflict of interest, Attorney withdraws from representation of A without giving A information regarding the impending statute of limitations deadline. After failing to file the lawsuit within the limitations period, A sues Attorney for malpractice for failing to give withdrawal information concerning the statute of limitations. Did Attorney have a duty to give A information about the limitations period upon withdrawal, despite the fact that the providing of such information would be contrary to the interests of B, the Attorney's pre-existing client?

In Flatt v. Superior Court of Sonoma County, the Supreme Court of California was confronted with just this factual situation. The Court consequently had to decide whether an attorney could be held liable for failing to give advice to a client upon withdrawal of representation, where the withdrawal was made in order to avoid a concurrent representation. The Court held that an attorney had no legal duty to provide advice in such a situation, and therefore could not be held liable for failing to give such advice.

This article will first review the conflicting ethical duties at issue in the Flatt case—the duty to avoid foreseeable prejudice to the client upon withdrawal and the duty of loyalty.

1. 885 P.2d 950 (Cal. 1994).
2. Id. at 959-60.
The article will then summarize the Flatt case itself, and describe how both the majority and dissenting opinions attempt to resolve the difficult legal and ethical dilemma posed in the case. The article will thereafter point out the numerous flaws contained within the majority and dissenting opinions in Flatt. Lastly, the article postulates that no conflict necessarily exists between the duty to avoid foreseeable prejudice upon withdrawal and the duty of loyalty, and explains why an attorney should be under a legal duty to give legal advice under the factual situation examined in Flatt.

II. BACKGROUND

A. The Duty of Loyalty

The principle that an attorney owes a duty of loyalty to a client is "a basic tenet of the Anglo-American conception of the lawyer-client relationship."\(^3\) The ABA Model Rules, in fact, specifically state that "loyalty is an essential element in the lawyer's relationship to a client."\(^4\) This duty of loyalty mandates that the attorney should be in a position to "vigorously assert" whatever objective the client may choose, without any impairment of the attorney's commitment as a result of conflicting interests.\(^5\) The attorney should "be able to be fully open and candid with the client and forceful and single-minded in asserting the client's position with all other persons."\(^6\)

The duty of loyalty is most particularly manifested in the numerous ethical rules which prohibit an attorney from undertaking concurrent, or simultaneous, representations—situations in which an attorney represents clients with conflicting interests. The ABA Model Code, for instance, mandates that an attorney "decline proffered employment" if the attorney's "independent professional judgment" on behalf of another client is likely to be adversely affected by the employment, or if the employment would be "likely to involve him in representing differing interests."\(^7\) The ABA Model Rules

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4. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 comment (1994).
5. WOLFRAM, supra note 3, at 317.
6. Id.
7. Model Code of Professional Conduct DR 5-105(A) (1994). Further, an attorney cannot continue such a dual representation if it has already been created. Id. at DR 5-105(B). An attorney can, however, undertake or continue the
state that a "lawyer shall not represent a client if the representation of that client will be directly adverse to another client." Similarly, the California Rules of Professional Conduct state that an attorney shall not "accept or continue representation of more than one client in a matter in which the interests of the clients actually conflict."9

Courts have made explicit that concurrent representations are prohibited by these rules because they violate the attorney's duty of loyalty. As succinctly stated in Grievance Comm. of the Bar of Hartford Cty. v. Rottner10:

When a client engages the services of a lawyer in a given piece of business he is entitled to feel that, until that business is finally disposed of in some manner, he has the undivided loyalty of the one upon whom he looks as his advocate and his champion. If, as in this case, he is sued and his home attached by his own attorney, who is representing him in another matter, all feeling of loyalty is necessarily destroyed, and the profession is exposed to the charge that it is interested only in money.

A client should, therefore, be able to rely upon the attorney's "undivided allegiance and faithful, devoted service", and has a right to expect that the attorney "would accept no retainer to do anything that might be adverse to his client's interests."11 As one legal scholar has stated:

Something seems radically out of place if a lawyer sues one of the lawyer's own present clients in behalf of another client. Even if the representations have nothing to do with each other, so that no confidential information is apparently jeopardized, the client who is sued can obviously claim that the lawyer's sense of loyalty is askew.12

Even where there is no relationship between the subject matter of the representations involved, courts have insisted

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8. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7(a) (1994). Representation is allowed, however, if the lawyer "reasonably believes the representation will not adversely affect the relationship with the other client", and "each client consents after consultation." Id., Rule 1.7(a)(1),(2).


10. 203 A.2d 82, 84 (1964).


that concurrent representations be heavily scrutinized.\textsuperscript{13} A lawyer who relies on the lack of substantial relationship between the litigation in which the lawyer is suing a client and the matter in which the lawyer is representing the client, is "leaning on a slender reed indeed . . . Putting it as mildly as we can, we think it would be questionable conduct for an attorney to participate in any lawsuit against his own client without the knowledge and consent of all concerned."\textsuperscript{14} Some courts have therefore concluded that a concurrent representation, even where the subject matter of the representations are unrelated, is prima facie improper, and that a heavy burden is imposed on an attorney who seeks to justify it.\textsuperscript{15}

California courts have similarly invoked the attorney's duty of loyalty to heavily scrutinize concurrent representations. The Supreme Court of California long ago stated that it is a violation of an attorney's duty "for him to assume a position adverse or antagonistic to his client without the latter's free and intelligent consent given after full knowledge of all the facts and circumstances."\textsuperscript{16} The Court made clear the rationale for this rule:

The rule is designed not alone to prevent the dishonest practitioner from fraudulent conduct, but as well to preclude the honest practitioner from putting himself in a position where he may be required to choose between conflicting duties, or be led to attempt to reconcile conflicting interests, rather than to enforce to their full extent the rights of the interest which he should alone represent.

It is improper, in fact, to accept employment adverse to a client even where the proffered employment is "unrelated to the

\textsuperscript{13} Cinema Ltd., 528 F.2d at 1386-87.

\textsuperscript{14} Id. See also IBM v. Levin, 579 F.2d 271 (3d Cir. 1978) ("an attorney must be cautious in this area" and must "resolve all doubts in favor of full disclosure to a client of the facts of the attorney's concurrent representation"); Unified Sewerage Agency of Washington Cty. v. Jelco, Inc., 646 F.2d 1339 (9th Cir. 1981) (attorney should be disqualified where representation is undertaken adverse to present client unless there is client consent and it is "obvious" that attorney can adequately represent the interests of each client).

\textsuperscript{15} See, e.g., Glueck v. Jonathan Logan, Inc., 653 F.2d 746, 749 (2d Cir. 1981); United Nuclear Corp. v. General Atomic Co., 629 P.2d 231, 319-20 (N.M. 1980). This standard was described by the Glueck court as a strict one which "imposes upon counsel who seeks to avoid disqualification a burden so heavy that it will rarely be met." Glueck, 653 F.2d at 749.

\textsuperscript{16} Anderson v. Eaton, 293 P. 788, 789-90 (Cal. 1930).
existing representation."¹⁷ Even if the representations are unrelated, the employment is improper because of the "need to assure the attorney's undivided loyalty and commitment to the client."¹⁸ Absent effective consent, an attorney's duty under California case law is to put an end to the concurrent representation when such a situation develops.¹⁹

B. The Duty to Avoid Foreseeable Prejudice to the Client Upon Withdrawal

It is a well-recognized standard of professional conduct that an attorney effectuate a withdrawal of representation in such a manner as to avoid prejudice to the client. Both the ABA Model Code and the ABA Model Rules include provisions which mandate that any withdrawal of representation by an attorney be brought about by avoiding "foreseeable prejudice" to the client.²⁰ California has, as well, an ethical rule prohibiting an attorney from withdrawing from representation of a client unless the attorney has "taken reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client, including giving due notice to the client, allowing time for employment of other counsel, complying with rule 3-700(D), and complying with applicable laws and

¹⁷. Jeffry v. Pounds, 136 Cal.Rptr. 373, 376 (Cal. 1977) ("A lay client is likely to doubt the loyalty of a lawyer who undertakes to oppose him in an unrelated matter. Hence the decisions condemn acceptance of employment adverse to a client even though the employment is unrelated to the existing representation").
²⁰. ABA Model Code Disciplinary Rule 2-110(A)(2) provides:

In any event, a lawyer shall not withdraw from employment until he has taken reasonable steps to avoid foreseeable prejudice to the rights of his client, including giving due notice to this client, allowing time for employment of other counsel, delivering to the client all papers and property to which the client is entitled, and complying with applicable laws and rules.

ABA Model Rule 1.16(d) provides:

Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee that has not been earned. The lawyer may retain papers relating to the client to the extent permitted by other law.
rules.”21 The Discussion to this rule states that the “reasonable steps” an attorney must take upon withdrawal of representation will “vary according to the circumstances”.22

The Supreme Court of California has suggested that the duty to avoid foreseeable prejudice upon withdrawal includes, in appropriate instances, the duty to advise a client to seek other counsel. In Kirsch v. Duryea,23 the Court, in reversing a legal malpractice judgment against the defendant attorney for an improper withdrawal, referred approvingly to the fact that the attorney had “advised plaintiff of the need for quick action.”24 In the later Supreme Court case In re Hickey,25 the Court, in following the recommendation of the State Bar Court that the defendant attorney be disciplined for an improper withdrawal, pointed out that the attorney had failed to advise the client “in writing of his belief that her medical malpractice case lacked merit” and did not advise the client “in writing that she should promptly consult independent counsel to protect any potential legal rights she might have.”26

One California Court of Appeal has squarely held that the lack of withdrawal advice can, in appropriate instances, subject an attorney to malpractice liability. In Miller v. Metzinger,27 the court stated that a breach of duty could be found in the defendant attorney’s failure to “advise plaintiffs of the necessity to act promptly” in contacting successor counsel upon withdrawal.28 The Miller court further held that this duty may encompass informing the client of the limitations

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21. CAL. RULES OF PROFESSIONAL CONDUCT Rule 3-700(A)(1994). Rule 3-700(D) requires, inter alia, that the attorney release to the client upon withdrawal “client papers and property.”
22. Id., Discussion to Rule 3-700.
24. Id. at 940.
26. Id. at 689.
27. 154 Cal.Rptr. 22 (Cal. Ct. App. 1979). In Miller, the plaintiffs sued four different attorneys or law firms for malpractice, claiming that they were negligent in failing to file a wrongful death action within the relevant limitations period. Id. at 23. Defendant Metzinger was an attorney who withdrew from representation of the plaintiffs before the expiration of the limitations period. Id. at 23. One of the many issues in the case was whether Metzinger acted negligently in failing to advise the plaintiffs of the limitations period upon withdrawal. Id. at 28-29.
28. Id. at 29.
period governing the client's claims. The court stated that, if the defendant attorney knew upon withdrawal of representation that the relevant statute of limitations would expire shortly, a breach of duty to plaintiffs would exist because no advice was given as to the limitations period.

The requirement that, in certain instances, an attorney give advice to a client upon withdrawal is not unique to California jurisprudence. Many state's ethical rules, for instance, are derived from the ABA Model Code, which expressly states that an attorney should "protect the welfare of his client" by, inter alia, "suggesting employment of other counsel." In addition, at least one other state Supreme Court has expressly indicated that a duty to give advice to clients upon withdrawal may exist. In Van Horn Lodge, Inc. v. White, the Supreme Court of Alaska suggested that a duty to advise the plaintiff of "the pending deadline and the need to take timely action to protect its interests" might have existed, but did not decide the question because the plaintiff had not alleged that the defendant attorney had breached this duty.

C. The Conflict Between the Duty of Loyalty and the Duty to Avoid Foreseeable Prejudice Upon Withdrawal

As has been shown, an attorney has a duty to avoid handling matters adverse to a client's interests as a result of the attorney's duty of loyalty towards that client. If an attorney faced with a conflict between two clients subsequently withdraws from representation of one of the clients in order to escape the concurrent representation, however, the attorney may be under an obligation to give withdrawal advice if needed to avoid foreseeable prejudice to the former client's case. However, any advice the attorney gives to the former client (for example, regarding the relevant limitations period) would run counter to the interests of the client whom the lawyer still represents.

29. Id. at 28-29.
30. Id. Since the Miller court was dealing with a motion for summary judgment, the case was remanded to the trial court to ascertain whether in fact the plaintiffs were not advised of the statute of limitations. Id. at 29.
33. Id. at 644.
34. See supra notes 2-19 and accompanying text.
35. See supra notes 19-33 and accompanying text.
It appears, therefore, that the giving of withdrawal advice when an attorney is terminating a concurrent representation constitutes a violation of the attorney's duty of loyalty towards the remaining client, yet the failure to give such advice may constitute a failure of the attorney's duty to withdraw from representation so as to avoid foreseeable prejudice. It is this conflict of duties that is addressed by the California Supreme Court in *Flatt v. Superior Court of Sonoma County*.36

D. Flatt v. Superior Court of Sonoma County

1. Factual and Procedural Background

Attorney Donald Hinkle structured a transaction for William Daniel, in which Daniel received a two-thirds interest in a steel business.37 On June 20, 1989, during Daniel's marital dissolution proceeding, a trial court judge entered an interlocutory order to the effect that Daniel's wife had a community interest in the business.38 Daniel believed this outcome was a result of Hinkle's faulty lawyering, and he telephoned attorney Gail Flatt a month after the filing of the order to discuss his grievance with her.39

On July 27, 1989, Daniel and Flatt had an hour-long meeting, during which Daniel disclosed confidential information to Flatt regarding the structuring of the 1980 transaction, and turned over several documents to her.40 According to Daniel, Flatt told him during the meeting that he “definitely” had a claim for legal malpractice against Hinkle.41 In a August 3, 1989 letter, however, Flatt informed Daniel that she could not represent him in his dispute with Hinkle because her firm had a conflict—it represented Hinkle in an unrelated matter.42 Daniel put off his search for another lawyer for a year and a half.43

On June 3, 1991, nearly two years after the meeting with Flatt, Daniel filed suit against Flatt and the other partners in

36. 885 P.2d 950 (Cal. 1994).
37. Id. at 952.
38. Id.
39. Id.
40. Id.
41. Flatt v. Superior Court of Sonoma County, 885 P.2d 950, 952 (Cal. 1994).
42. Id.
43. Id.
her firm. Daniel alleged that Flatt had breached a duty to Daniel in failing to advise him regarding the statute of limitations which governed his claims against Hinkle, and in failing to advise him to seek other counsel to avoid having the claim time-barred. Flatt moved for summary judgment on the ground that she owed no duty to advise Daniel, because such advice would have been contrary to the interests of her client Hinkle.

The trial court denied Flatt’s motion for summary judgment, stating that there remained triable issues of fact on the question of whether an attorney-client relationship ever existed between Daniel and Flatt. The Court of Appeal affirmed the ruling of the trial court, holding that an attorney-client relationship could have been formed under Daniel’s version of the July 27 meeting. One justice dissented from the ruling, reasoning that the dispositive issue in the case was really whether, even assuming Daniel had become a client of Flatt’s, Flatt owed a duty to Daniel to inform him of the statute of limitations. The Supreme Court thereafter granted Daniel’s petition for review.

2. The Majority Opinion

The majority opinion assumed, for the purposes of its analysis, that Daniel had in fact become a client of Flatt’s during their brief meeting together. Nevertheless, the

44. Id. Daniel also brought suit against the Hinkle firm for legal malpractice regarding matters arising out of the structuring of the 1980 transaction and 1987 interlocutory decree. Id.

45. Id. Daniel sought damages for legal malpractice against Flatt in the event that it was determined that his claims against Hinkle were barred by the statute of limitations. Id.


47. Id. The Court of Appeal initially refused to intervene in response to a writ of mandate brought by Daniel. Id. The Supreme Court, however, granted Daniel’s petition for review and transferred the cause back to the Court of Appeal for issuance of an alternative writ. Id.

48. Id. In concluding that an attorney-client could have been formed, the Court of Appeal relied upon Daniel’s assertion that Flatt had given him “a little bit of an opinion” regarding whether he had a valid claim. Id. This assertion was in contradiction of Daniel’s prior deposition testimony. Id.

49. Id. at 953. The Supreme Court opinion does not reveal the manner by which the dissenting justice resolved this question.

50. Id. at 951.

51. Flatt v. Superior Court of Sonoma County, 885 P.2d 950, 951 (Cal. 1994). The majority did not feel the need to resolve the question of whether an
Court examined conflict of interest principles to determine whether Flatt had an obligation to give advice to the newer client Daniel upon the severance of representation.52

The Court begins its analysis by stating that "[n]either the parties' research nor our own has unearthed case authority squarely in point."53 The Court cites, however, to California Rule of Professional Conduct 3-31054 for the proposition that an attorney is prohibited from accepting or continuing representation of more than one client in a matter if the interests of the clients conflict.55

The Court then makes a sharp distinction between "successive representation" conflicts, where a conflict arises between a former client and a present client, and "simultaneous representation" conflicts, where a conflict arises between two present clients.56 In the former type of conflicts, a "substantial relationship" test is utilized to determine whether or not an attorney must be disqualified from representation.57 If a substantial relationship can be shown between "the subjects of the antecedent and current representations", disqualification of the attorney and the attorney's firm is mandatory because it is presumed that the attorney is in possession of confidential information obtained during the first representation.58

Where the representations are simultaneous or concurrent, however, the Court emphasizes that the important attorney-client relationship between Daniel and Flatt was formed because, as will be seen, it felt that no duty was owed in any event. Id. Therefore, the question of Daniel's "client status" was not "itself material to the dispositive legal issue." Id.

The majority's reasoning in this regard may well be seriously questioned. It is true that the client status of Daniel is irrelevant if no duty is owed him regardless of whether or not he was a client. The converse, however, is also true. The question of whether Flatt owed a duty to Daniel is only relevant if it is first determined that, in fact, an attorney-client relationship had been formed. Therefore, it appears that the Court might have been able to resolve the case summarily if it felt that no attorney-client relationship had been formed, without ever tackling the thornier issue of whether a duty existed given such a relationship.

52. Id. at 953-60.
53. Id. at 953.
55. Flatt, 885 P.2d at 954.
56. Flatt v. Superior Court of Sonoma County, 885 P.2d 950, 954 (Cal. 1994).
57. Id.
58. Id.
question is not whether the two representations have a substantial relationship, but whether the attorney's duty of loyalty is affected. In most cases, the "rule of disqualification in simultaneous representation cases is a per se or 'automatic' one" even if the representations have nothing in common. The reason for this automatic disqualification rule is "evident"—a client cannot be expected to continue placing trust and confidence in a attorney who is also representing an adverse party.

Thus, "it ought to follow that Flatt had no duty to give Daniel advice that would, incrementally at least, have aided in advancing his contemplated lawsuit against Hinkle, the firm's existing client." The giving of any advice to Daniel in order to advance his lawsuit would constitute an act that would harm Flatt's existing client Hinkle. The Court had "no difficulty", therefore, in concluding that "any advice to Daniel regarding the statute of limitations governing his claim against Hinkle would have run counter to the interests of an existing client of Flatt and her firm and of their obligation of undivided loyalty to him." Consequently, Flatt had no duty to give Daniel such advice.

The Court also points out that, not only would the imposition of a duty to give Daniel advice run contrary to Flatt's duty of loyalty to Hinkle, but it would have practically operated to place the relationship between Hinkle and Flatt in an

59. Id. at 955.
60. Id.
61. Flatt v. Superior Court of Sonoma County, 885 P.2d 950, 955 (Cal. 1994). The Court notes that exceptions to this automatic disqualification rule do exist. Id. at 956 n.4. In particular, most courts permit an attorney to continue simultaneous representation of clients "provided full disclosure is made and both clients agree in writing to waive the conflict." Id. at 956 n.4. However, the Court points out that these type of cases are rare, since "overcoming the presumption of 'prima facie impropriety' is not easily accomplished." Id. at 956 n.4. The Court states that this exception is not relevant to the instant case in any event, because Flatt understandably decided not to represent Daniel. Id. at 956 n.4.
62. Id. at 958.
63. Id. at 958-59.
64. Id. at 959.
65. Id. at 959. The Court did indicate that its approach might change if different factual circumstances exist—most particularly, if there is a "lapse of considerable time and the expenditure of substantial resources" on the client's case "before discovery of the conflicting dual representation." Id. at 959 n.6.
"insupportably awkward position."66 Any client in Hinkle's position "would be entitled to wonder whether the law's sense of casuistry had gone seriously wrong" once the client found out that advice had been given to a "would-be adversary."67

In addition, Flatt had no duty to advise Daniel to promptly seek other counsel, for Daniel "obviously knew" that he had to keep looking for an attorney if he wished to bring his claim.68 Though it is ordinarily "prudent" for an attorney to provide such withdrawal advice, the ethical dilemma which would be raised by imposing upon Flatt the duty to provide advice which was against the interests of her existing client Hinkle mandates that no such duty be imposed under the circumstances.69

3. The Dissenting Opinion

Justice Kennard's dissenting opinion disagreed with the majority's reasoning because she believed the majority had misstated the issue.70 The real issue was whether Flatt satisfied her "duty to use the skill, prudence, and diligence commonly possessed by other attorneys."71 Since presumably Daniel had become a client of Flatt's, Flatt assumed a duty of care towards him.72 Flatt owed, in fact, the same duty of care towards Daniel as she owed towards "Hinkle and every other client."73 The majority, however, solely focused on the duty of loyalty owed Hinkle, without seriously considering the duty of care owed to Daniel.74

The dissent argued that because a duty of care is owed Daniel, the relevant question is how broad the scope of this duty is.75 Thus, the pertinent inquiry is whether, under the

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67. Id.
68. Id. In fact, the Court pointed out that Daniel "admitted as much at his deposition." Id.
69. Id. at 959-60.
70. Id. at 961.
71. Flatt v. Superior Court of Sonoma County, 885 P.2d 950, 961 (Cal. 1994).
72. Id. at 961-62. Though Justice Kennard assumes, as does the majority, that Daniel was Flatt's client, she does point out that it is "unclear" whether Hinkle was in fact a client of Flatt's firm when the representation of Daniel began. Id. at 960 n.2.
73. Id. at 962.
74. Id. at 964.
75. Id. at 962.
facts of the case, Flatt was “obligated to advise Daniel of the statute of limitations, or of the need to promptly retain new counsel.” This is a question of fact, which could only be resolved on a motion for summary judgment if Flatt established, through uncontroverted expert evidence, that an “reasonably prudent lawyer” would not have advised Daniel of the statute of limitations or of the need to obtain other counsel.

Since no evidence was presented to demonstrate what the proper standard of care required, Flatt was not entitled to summary judgment. Flatt only sought summary judgment on the ground that Daniel was never her client, and that she did not therefore owe him any duty of advice. Neither party submitted any evidence at all regarding the action a reasonably prudent lawyer would have taken in Flatt’s situation, assuming that an attorney-client relationship did exist. Therefore, Flatt failed to establish, as a matter of law, that her actions satisfied the duty of care owed to Daniel.

III. ANALYSIS

A. The Flaws in the Majority Approach

The majority approach has the advantage of simplicity—the attorney, as a result of the duty of loyalty to the pre-existing client, simply does not have a duty to give withdrawal advice to the newer client. As will be shown below, however, this approach is not adequately supported by California ethical rules or case law, will result in extreme and undue harm to clients in Daniel’s position, and will provide a disincentive for firms to maintain more efficient conflict-checking mechanisms.

76. Flatt v. Superior Court of Sonoma County, 885 P.2d 950, 962 (Cal. 1994).
77. Id. at 963-64.
78. Id. at 964.
79. Id.
80. Id.
81. Flatt v. Superior Court of Sonoma County, 885 P.2d 950, 964 (Cal. 1994). The dissenting opinion notes that a denial of Flatt’s summary judgment motion would not inevitably lead to Daniel prevailing in his malpractice action. Id. Daniel would still have to show that an attorney-client relationship arose between him and Flatt, that the standard of care applicable to Flatt required her to give Daniel advice, and that Flatt’s failure to give advice caused Daniel to lose his action against Hinkle. Id. at 964-65.
1. Majority Fails to Expressly Recognize the Existence of a Duty to Avoid Foreseeable Prejudice Upon Withdrawal

Instead of frankly grappling with the conflict between the duty to avoid foreseeable prejudice upon withdrawal and the duty of loyalty, the majority opinion solely focuses on the latter, and never expressly recognizes that Flatt had a ethical duty to withdraw in such a manner as to avoid foreseeable prejudice to Daniel. The majority does not even acknowledge, much less grapple with, California case law which indicates that the duty to avoid foreseeable prejudice upon withdrawal may, in appropriate instances, include the duty to give withdrawal advice to a client.\(^8\) Indeed, since the majority assumes that Daniel had already become a client of Flatt’s,\(^8\) California Rule of Professional Conduct 3-700 indicates that Flatt had a duty to give withdrawal advice so long as the failure to do would cause foreseeable prejudice.\(^8\) Yet, the majority does not even mention Rule 3-700, explain why the duty imposed under this rule should be subordinated to the attorney’s duty of loyalty, or explain why the rule should be rendered a nullity where there is a withdrawal from a concurrent representation.\(^8\)

2. Lack of Support for Majority Approach in California Rules of Professional Conduct

There is no language anywhere in the California Code of Professional Responsibility which would indicate that the duty to avoid foreseeable prejudice upon withdrawal is in any way subordinate to the attorney’s duty to avoid concurrent representations or its concomitant duty of loyalty. Indeed, Rule 3-700 itself is phrased in mandatory terms: “A member shall not withdraw from employment until the member has taken reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client” (emphasis added).\(^8\) No ex-

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82. See supra notes 19-33 and accompanying text.
83. See supra notes 51-52 and accompanying text.
85. The dissent, indeed, points out that the majority omitted any discussion of Rule 3-700. Flatt, 885 P.2d at 963. Justice Kennard recognizes that Flatt’s conduct during withdrawal of representation was governed by Rule 3-700, but states that “[o]ddly, the majority does not discuss this rule.” Id.
press or implied exception to this requirement can be located anywhere in the California Rules of Professional Conduct.\textsuperscript{87}

In addition, there is no indication in the California Rules that Rule 3-310,\textsuperscript{88} which prohibits concurrent representations absent consent, is of any greater importance than any other of the ethical rules. There is, in particular, no indication that Rule 3-310 "trumps" the withdrawal duties imposed by Rule 3-700. Consequently, nothing in the California Rules lends credence to the idea that the withdrawal duties imposed by Rule 3-700 should, at least as an ethical matter, be subordinated to the duty imposed by Rule 3-310 to avoid conflicting interests.

3. Lack of Support for Majority Approach in California Case Law

It is acknowledged by the majority that no judicial precedent exists which squarely addresses the ethical dilemma presented in \textit{Flatt}.\textsuperscript{89} The only cases cited by the majority deal solely with the duty of loyalty, and never mention the duty to avoid foreseeable prejudice upon withdrawal.\textsuperscript{90} The fact, however, that the duty of loyalty has been recognized by courts as important is no support for the conclusion that the duty is relatively more important than a duty which conflicts with it. The majority cites no precedent for the proposition that there exists a hierarchy of ethical duties in which a "higher" duty (the duty of loyalty) can automatically supersede a "lower" one (the duty to avoid foreseeable prejudice upon withdrawal), at least without detailed analysis of the client interests involved.

Though recognizing the lack of authority on the precise issue before it, the majority nevertheless decides to stake its analysis on the "principle of loyalty" as enunciated in prior

\begin{itemize}
\item \textsuperscript{87} The California Rules of Professional Responsibility do, however, indicate that the duty to avoid foreseeable prejudice to the client upon withdrawal will "vary according to the circumstances". \textit{Id.}, Discussion, Rule 3-700(D). The duty of loyalty owed to a remaining client upon withdrawal could be considered a "circumstance" such that Rule 3-700 need not be complied with fully. However, this language is more plausibly interpreted to mean that the duty should vary according to the amount of prejudice which would be foreseeably suffered—not that the "circumstance" of a conflicting ethical duty could "vary" the duty out of existence.
\item \textsuperscript{88} Cal. Rules of Professional Conduct Rule 3-310(1994).
\item \textsuperscript{89} \textit{Flatt v. Superior Ct. of Sonoma Cty.}, 885 P.2d 950, 953 (Cal. 1994).
\item \textsuperscript{90} \textit{Id.} at 953-58.
\end{itemize}
Despite the majority’s assertions to the contrary, however, this principle simply does not provide an adequate foundation for the majority’s holding. There are simply no cases which utilize the duty of loyalty to regulate attorney conduct after a concurrent representation has already developed. Rather, all the seminal cases explicating the attorney’s duty of loyalty involved its application to determine whether the concurrent representation itself is improper and therefore mandates disqualification.

More importantly, however, the majority overlooks cases dealing with a closely analogous situation to the one considered in Flatt. Where an attorney has been disqualified, and therefore forced to withdraw from a concurrent representation, trial courts have issued orders which force attorneys to protect the interests of the former client. In McCourt Co. v. FPC Properties, Inc., for example, the Supreme Judicial Court of Massachusetts approved of a trial court order disqualifying a law firm because of a concurrent representation. The court approved of the portion of the trial court order which mandated the law firm’s “cooperation over a limited transitional period with successor counsel” for the former client. The court stated that the disengagement of the law firm from the case “should be carried out with fair consideration of the interests” of both of the clients involved. The court approved, therefore, of a situation in which a law firm was ordered to aid its former client’s substitute counsel in taking over the case, even though such aid would undoubtedly run contrary to the interests of its remaining client.

Likewise, in Kabi Pharmacia AB v. Alcon Surgical, Inc., the District Court disqualified a law firm due to a concurrent conflict. In response to the argument that the disqualification of the firm would severely impair the client’s “ability to defend itself”, the court noted that the disqualifica-

91. Id. at 958.
92. See, e.g., Anderson v. Eaton, 293 P. 788 (Ca. 1930) (involving an evaluation of a concurrent representation in worker’s compensation proceedings); Jeffry v. Pounds, 136 Cal.Rptr. 373 (Cal. 1977) (suit for attorney fees hinging on whether a concurrent representation was proper).
93. 434 N.E.2d 1234 (Mass. 1982).
94. Id. at 1238.
95. Id.
96. Id.
tion order could be fashioned to permit the firm “to assist in bringing replacement counsel up to speed.” Even though, therefore, the firm was representing the remaining client in unrelated matters, it still could be ordered to assist the former client’s successor counsel.

These cases suggest that an attorney should, while in the process of disentangling him or herself from a concurrent representation, act in a manner which is fair to both clients involved, even though only one of them technically remains a present client. The majority, therefore, could have focused on such cases to hold that Flatt had a duty, even though she still represented Hinkle after her withdrawal from Daniel, to carry out the withdrawal with fair consideration of the interests of both Hinkle and Daniel.

Not only, therefore, does there not exist any case law which supports the majority’s utilization of the duty of loyalty to a withdrawal from a concurrent representation, but case law does exist which demonstrate that such withdrawals should be handled with the former client’s interests in mind. If there is any conclusion possible from existing case law, therefore, it is that a withdrawal from a concurrent representation should be performed in a manner which considers the interests of both the remaining client and the former client.

4. The Majority Approach Will Result in Extreme Harm to Clients in Daniel’s Position

Because the case law does not support the majority’s utilization of the duty of loyalty, and because both of the conflicting ethical duties at issue in Flatt exist for the benefit of the client, the resolution of the ethical dilemma should turn on a more practical evaluation of the potential harm to clients. It is important, therefore, to evaluate the majority approach and determine whether it properly balances the interests of both of the clients involved.

There can be little doubt, first of all, that the majority approach might cause extreme harm to a client who unwittingly hires an attorney representing the client’s potential adversary. This is because the majority’s myopic focus on the interests of the pre-existing client would seem to foreclose
any inquiry into the harm suffered by the newer client upon withdrawal, no matter how significant the harm may be.

Take, for example, a situation in which a client has placed substantial reliance upon the attorney, and in which significant amounts of time and money have been expended during the representation. The attorney could withdraw from representation of such a client immediately upon the development of a simultaneous conflict, and would not have to give the client needed information even though the client had placed trust and confidence in the attorney.

Consider, in addition, the situation in which the limitations period on a client's claim would expire within an extremely short amount of time. If a concurrent representation develops or is discovered at such a moment, the attorney could withdraw from representation without informing the client of the impending deadline, thereby ensuring as a practical matter that the client will not hire successor counsel until it is too late to bring the claim.

In both of the above scenarios, the client would suffer extreme harm as a result of the withdrawal. Yet, since any withdrawal advice would, according to the majority, "run counter to the interests" of the pre-existing client, the attorney would be under no obligation to give the advice. Subordinating the duty to avoid foreseeable prejudice upon withdrawal, therefore, would enable an attorney to withdraw in such a manner as to completely destroy any chance a client may have to bring a claim, even if the client has not acted wrongfully.

It is true that the majority indicates in a footnote that its approach could change if different factual circumstances exist. In certain factual circumstances where there would be "substantial prejudice" to a client's interests, the Court indicates that "an attorney's mere withdrawal from the second representation may not be sufficient in itself to resolve all ethical responsibilities." By requiring, however, a consideration of the "prejudice" suffered by a client as a result of a withdrawal, the exception completely undercuts the entire rationale of the majority's holding. After all, regardless of the amount of "prejudice" which would be suffered by the former client, withdrawal advice would still "run counter to the in-

100. Id. at 959 n.6.
terests” of the pre-existing client. Surely Hinkle would not, if Daniel had suffered a greater amount of prejudice, be any less “entitled to wonder whether the law’s sense of casuistry had gone seriously wrong.”101 In fact, the more prejudice suffered by Daniel as a result of the withdrawal, the more satisfied Hinkle would have been.

The majority opinion, therefore, is internally inconsistent. If the duty of loyalty is as absolute as the opinion represents, the attorney should not be under a duty to give withdrawal advice no matter how much prejudice the newer client would suffer without the advice. If the duty of loyalty is not so absolute, however, as to foreclose an inquiry into the amount of such prejudice, then no reason appears why the Court did not allow such an factual inquiry in Flatt.

5. Majority Approach Places Undue Burden on the Newer Client

Not only does the majority approach impose extreme harm to clients in Daniel’s position, but it also legitimizes attorney action which places the entire burden for the development of a conflict of interest on an innocent client. Daniel, for example, did not act in any manner negligently or wrongfully in hiring Flatt, but merely attempted in good faith to hire a legal representative in order to bring his lawsuit against Hinkle. Yet, Daniel suffered all the negative consequences once it was determined that his choice of attorneys inadvertently created a conflict of interest.

Placing this burden on the innocent client makes even less sense once it is recognized that there is practically nothing a potential client can do to prevent such a situation from arising. Daniel was obviously not in a realistic position to know whether Flatt’s firm already represented Hinkle. The only way Daniel could have prevented the conflict from arising was to refuse to hire Flatt until her firm represented to him that it did not already represent Hinkle. It is both unfair to place this burden on the potential client, and unrealistic to expect that potential clients would ever require such assurances.

101. Id. at 959.
6. *Majority Approach Places Inordinate Weight on the Interests of the Pre-existing Client*

In addition to the fact that the majority approach will inevitably result in severe consequences for clients in Daniel's position, the approach cannot be justified by the benefits it provides to the pre-existing client.

It must be remembered that withdrawal advice to the newer client would not put the pre-existing client's case in a worse position than it would have been in had the conflict never arisen. If Daniel had originally hired any attorney other than Flatt to represent him, this other attorney would presumably have filed Daniel's lawsuit before the expiration of the limitations period. Consequently, informing Daniel of the limitations period upon withdrawal would merely give Daniel a chance to hire successor counsel, and therefore give him an opportunity to place himself in the same position he would have been in had he hired another attorney in the first place.

In other words, withdrawal advice to the newer client would not operate to advance such a client's case beyond the point where the case should have been absent the conflict. The advice would only serve to prevent the withdrawal from permanently damaging the newer client's lawsuit. The pre-existing client is simply prevented from reaping the benefits of a conflict which was innocently and inadvertently created. Put simply, Hinkle had roughly the same chances of succeeding in the lawsuit if withdrawal advice had been given to Daniel as would have existed if the conflict had never been created.

7. *The Majority Approach Provides A Disincentive for Firms to Develop More Efficient Conflict-Checking Mechanisms*

The majority approach, by absolving the attorney from any liability for failing to give withdrawal advice, actually provides a disincentive for firms to develop more efficient methods of checking for conflicts of interest. Because all of the negative consequences which would flow from the development of a concurrent conflict fall on the shoulders of the innocent, newer client, a firm has no economic motivation to ensure that such a situation does not occur. An attorney can simply hire clients without worrying about possible conflicts,
knowing that if a conflict develops the newer client can simply be “dumped” without any liability flowing from the withdrawal.

B. The Flaws in the Dissent’s Approach

The dissenting opinion, unlike the majority, does expressly recognize that a duty may exist to avoid foreseeable prejudice to a client by giving withdrawal advice.102 The opinion concludes, however, that it is for the trier of fact to determine, under the facts of each individual case, whether the attorney has acted correctly.103 Despite the appearance of added flexibility which this approach provides, the dissent’s resolution of the matter is nearly as unsatisfactory as the majority’s approach.

1. The Dissent’s Approach Fails to Provide Adequate Guidance to the Jury

The dissent’s approach would allow the jury to find liability in the conventional manner, i.e. where the attorney has not acted with the “skill, prudence, and diligence commonly possessed by other attorneys.”104 The problem with this approach is that the jury would be placed in the unenviable position of having to find that a “reasonably prudent” attorney would have knowingly violated an ethical rule. For instance, in order to find Flatt liable, the jury would have had to find that a “reasonably prudent” attorney would, in her situation, have purposely violated the duty of loyalty to Hinkle. Conversely, to absolve Flatt of liability, the jury would have had to find that a “reasonably prudent” attorney would have purposely violated any withdrawal duties owed to Daniel. The jury would be, consequently, placed in the position of an legal ethics committee by being forced to make judgments on which ethical duty should be subordinated to the other.

2. The Dissent’s Approach Fails to Provide Adequate Guidance for Attorneys

More importantly, the dissent’s approach would make it practically impossible for an attorney caught in Flatt’s situa-

102. Id. at 963.
103. Id. at 963-65.
tion to know what action should be taken to avoid being subject to malpractice liability or disciplinary sanctions.

Suppose, for example, an attorney in Flatt's situation refuses to give withdrawal advice. Under the dissent's approach, a jury would be entitled to find that a reasonably prudent attorney would have given such advice. Such an attorney, therefore, would risk being subject to malpractice liability. In addition, it is always possible that the attorney would be disciplined for violating Rule 3-700, because no steps were taken upon withdrawal to avoid foreseeable prejudice to the client.

On the other hand, suppose that an attorney in Flatt's situation chooses to give the withdrawal advice. The dissent's approach would also allow the jury to find that the giving of the advice constituted a breach of the attorney's duty of loyalty. Consequently, the attorney would risk being subject to malpractice liability as a result of such a jury finding. In addition, because the duty of loyalty was found to be breached, the attorney may also be subject to discipline.

It is clear, therefore, that an attorney caught in Flatt's situation could not feel secure in either available option. Potential malpractice liability would exist for the attorney regardless of whether the withdrawal advice is given or not, because a jury would be entitled to find that either choice was unreasonable.

**IV. PROPOSAL**

It is clear that neither the approach offered by the majority nor the approach offered by the dissent represents a satisfactory resolution to the ethical dilemma presented in Flatt. The majority approach involves an overly confining view of the duty of loyalty and fails to even take into account the interests of the newer client. The dissent's approach injects too much flexibility into the analysis to provide appropriate guidance for attorneys. What is needed is a rule which minimizes the harm to the newer client, takes into account

105. *Id.*
106. *See supra* notes 9-32 and accompanying text.
107. *See supra* notes 2-19 and accompanying text.
108. *See supra* pt. III.A.
109. *See supra* pt. III.B.
both ethical duties involved, and provides adequate guidance for attorney conduct.

This paper, therefore, proposes that an attorney should be under a duty to give withdrawal advice when withdrawing from a concurrent representation, if the failure to give such advice would cause reasonably foreseeable prejudice because it could not be effectively provided by successor counsel. The duty to avoid foreseeable prejudice upon withdrawal under Rule 3-700 should not, in other words, be subordinated to the duty of loyalty. However, the withdrawal advice which must be given would only be such as would give the client a reasonable opportunity to effectively retain another attorney.

The advantages of imposing such a duty upon the attorney in Flatt’s situation are many. First of all, providing the newer client with withdrawal advice would minimize the harm to such a client caused by the withdrawal. The newer client would at least receive the information needed to hire successor counsel before the expiration of the limitations period. Secondly, providing such advice would not allow the attorney to unduly harm the client simply because the latter made an unfortunate choice of attorneys. Third, forcing the attorney to give the client information regarding the limitations period would prevent Rule 3-700 from becoming a nullity when concurrent representation situations arise. Fourth, the fear of malpractice liability would provide motivation for firms to develop more efficient conflict-checking mechanisms.

In addition, holding that a duty to provide advice exists would be far preferable to the uncertainties inherent in the dissent’s approach. An attorney would not be forced to guess as to the proper course of action when withdrawing from a concurrent representation. The rule would be simple—if the failure to provide withdrawal advice would cause foreseeable prejudice to the client because the client would not have an effective opportunity to receive the advice from successor counsel, then the information must be given upon withdrawal.

There should, however, be a few caveats to this general rule. First, giving the client information regarding the statute of limitations must be treated separately from other sorts of withdrawal advice, such as litigation strategy. The former is information which the client needs to know in order to obtain substitute counsel in the required time. The latter, how-
ever, is not information needed to "avoid foreseeable prejudice" to the client, because presumably successor counsel will be able to provide the client such advice.

Secondly, the duty to give information upon withdrawal must only encompass that information which is necessary in order for the client to effectively obtain successor counsel before the running of the limitations period. The attorney must consider the exigency of the client's situation, and give only that information which is narrowly tailored to fit the exigent circumstances. Once the attorney gives information which the client does not need in order to avoid foreseeable prejudice, the protection of Rule 3-700 does not apply and the attorney has violated the duty of loyalty.

Lastly, the duty to give withdrawal advice should not be considered to arise at all except in the proper factual context. Such a duty should, according to the dictates of Rule 3-700, only arise when a failure to give such advice would foreseeably cause prejudice to the client's case. If the statute of limitations still has many more months to run, the attorney might not be obligated to inform the client of the limitations period in any event.

V. Conclusion

Both the majority and the dissent in the Flatt case thoughtfully examine the conflict between the duty of loyalty and the duty to give withdrawal advice. Neither analysis, however, is ultimately persuasive. The majority's approach would unduly penalize a client who inadvertently selects for representation the attorney who already represents an adverse party. The dissent's approach would not provide any guidance to attorneys should future conflicts arise. Only by enforcing the attorney's duty to provide withdrawal advice to the newer client can the interests of the pre-existing client, the newer client, the attorney, and the legal profession in general be adequately reconciled.

110. See supra pt. II.B.

111. The Flatt court did not specify how soon the limitations period on Daniel's malpractice claim expired after the withdrawal. If it did not expire until many months after the withdrawal, it might be argued that Flatt should have succeeded in her summary judgment motion solely because of this fact.