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## Ethics Year in Review

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## ETHICS YEAR IN REVIEW

### I. INTRODUCTION

Each year, the Standing Committee on Ethics and Professional Responsibility of the State Bar of California releases formal opinions regarding current ethical issues. These opinions are advisory only and are not binding on the courts, the State Bar of California, its Board of Governors, its members, or any person or tribunal charged with regulatory responsibility. During 1998, the Committee released only one opinion. The following is a summary of the opinion.

### II. FORMAL OPINION NO. 1998-152<sup>1</sup>

This opinion addresses the ethical obligations of an attorney who undertakes a representation of a client in a matter adverse to a former client of the attorney's firm. In such a situation, is the attorney required to obtain the former client's written consent before accepting the new client? The opinion concludes that, under the facts summarized below, while an attorney would not be subject to discipline for failing to obtain the former client's informed written consent,<sup>2</sup> it is consistent with his or her "broader professional responsibility" to do so.<sup>3</sup>

#### A. *Facts*

Lawyer A of Law Firm One consults with Client regarding the merits of litigation Client is considering. Lawyer A and Client discuss the case in detail, including its

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1. State Bar of California, Standing Committee on Professional Responsibility, *Ethics Opinions, Formal Opinion No. 1998-152* (visited April 22, 1999) <<http://www.calbar.org/2pub/3eth/ca98-152.htm>> (interpreting CAL. RULES OF PROFESSIONAL CONDUCT 1-100, 3-310 & 3-500 and BUS. AND PROF. CODE §§ 6068(e) and 6068(m) (West 1997) [hereinafter *Ethics Opinion*]).

2. See CAL. RULES OF PROFESSIONAL CONDUCT 3-310(E) (attorney is disqualified if lawfirm has received material confidential information).

3. See *Ethics Opinion, supra* note 1, at 1, 5.

weaknesses and the case strategy. After several weeks of consultation, Client terminates the attorney-client relationship with Lawyer A and Law Firm One, and retains another firm to pursue the lawsuit. After Client files his suit, a defendant in the suit retains Lawyer B of Law Firm One to defend it.

### B. Discussion

The Committee discusses two issues implicated by this fact pattern. The first is the imputed knowledge rule that is followed by California courts in the context of lawyer disqualification.<sup>4</sup> The second is a lawyer's obligation under Rule 3-310(E) of the California Rules of Professional Conduct.<sup>5</sup>

Under the imputed knowledge rule, confidential client information obtained by one attorney in a firm is deemed to be possessed by all members of the firm. Thus, Lawyer B and Law Firm One may be subject to disqualification or other civil penalties under this rule if they accept the representation.

By contrast, Lawyer B would not be subject to State Bar discipline for accepting the representation under Rule 3-310(E), which provides:

A member shall not, without the informed written consent of the client or former client, accept employment adverse to the client or former client, where, by reason of the representation of the client or former client, the member has obtained *confidential information material* to the employment.<sup>6</sup>

The opinion notes that, by its terms, the rule does not apply to the member's law firm, only the member. Thus, Lawyer B would not be subject to discipline for representing the defendant without obtaining Client's consent, because neither Lawyer B nor Law Firm One is the "member" who represented Client and obtained confidential information.

Nonetheless, the opinion states that an attorney's professional responsibility is broader than the standards established for lawyer discipline under the California Rules of

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4. See, e.g., *Rosenfeld Constr. Co. v. Superior Court*, 286 Cal. Rptr. 609 (Ct. App. 1991).

5. CAL. RULES OF PROFESSIONAL CONDUCT 3-310(E).

6. *Id.* (emphasis added).

Professional Conduct.<sup>7</sup> Based on this broader duty, the Committee concludes that Lawyer B should obtain Client's informed written consent before agreeing to represent the defendant in the action, even though failure to do so would not subject the attorney to discipline.

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7. *Ethics Opinion, supra* note 1, at 4. "Beyond the basic mechanics of the conflict of interest the rule is intended to address, there is also a broader policy consideration. The California Rules of Professional Conduct exist 'to protect the public and to promote respect and confidence in the legal profession.'" *Id.*

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