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Legal Representation of Conflicting Interests: A View towards Better Self-Regulation

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LEGAL REPRESENTATION OF CONFLICTING INTERESTS: A VIEW TOWARDS BETTER SELF-REGULATION

Integrity is the very breath of justice. Confidence in our law, our courts and in the administration of justice is our supreme interest. No practice must be permitted to prevail which invites towards the administration of justice a doubt or distrust of its integrity.¹

INTRODUCTION

The complex and intertwining relationships of modern society have spawned an increased demand for legal representation. With this heightened demand has come a corresponding increase in the number of situations where legal representation involves actual or potential conflicting interests.² Ideally, an attorney would be fully prepared for such situations, and thus could easily withdraw from a controversy presenting conflicts with the interests of present³ or former clients.⁴

This ideal, however, is not day-to-day reality. All too often, attorneys, unaware of their ethical obligations when conflicts arise, find themselves disqualified by the courts for attempted representation of adverse interests. An untimely disqualification may prove disastrous for a client who, well into the litigation, suddenly finds himself without an attorney.


2. For the purpose of this comment, the meaning of the term conflicts of interests shall be limited to representation of interests adverse to the interests of a present or former client. Excluded from the discussion are situations in which the attorney himself has an interest adverse to his client. For an annotation on this subject, see Annot., 20 A.L.R.2d 1280 (1961). Also see, e.g., Ames v. State Bar, 8 Cal. 3d. 910, 906 P.2d 625, 106 Cal. Rptr. 489 (1973). See also 7 AM. JUR.2d Attorneys at Law §§ 160-165 (1963).


4. For annotations on the propriety of an attorney representing interests adverse to those of a former client, see Annot., 31 A.L.R.3d 963 (1970) (prosecuting attorney's prior relation with the accused); Annot., 52 A.L.R.2d 1243 (1957) (representation of interests adverse to those of a former client); Annot., 51 A.L.R. 1307 (1927) (same). See also Note, Attorney's Conflict of Interest: Representation of Interest Adverse to that of Former Client, 65 B.U.L. Rev. 61 (1975).
Since the avoidance of conflicts is within the attorney's control, disqualification adversely affecting a current client presents potential malpractice liability.  

Representation of adverse interests is but one of a growing number of disciplinary violations that plague the State Bar of California. Attorneys, by engaging in minimal self-regulation, can avoid most of these problems. Representation of adverse interests can result in more than embarrassment to the individual attorney. It serves to further shake public confidence in the already tarnished legal community.

As a recurring problem, representation of adverse interests can be attributed to a number of factors. To begin with, many attorneys lack an adequate education in legal ethics. In addition, most attorneys give the readily available codes of ethical conduct little more than cursory attention. Finally, the very structure of the codes is at fault. As written, the ethical codes, couched in policy rather than practice, offer only minimum guidance to even the most responsible and diligent attorney.

How, then, can attorneys avoid representation of conflicting interests? What are the standards of conduct and how do they affect the daily practice of law? Can attorneys avoid judicial intervention by self-regulation? The answers to these questions rest in an analysis of the conflicts problem.

The purpose of this comment is to promote better self-regulation of adverse interests by providing attorneys with a more thorough understanding of the problem and its elements. It will accomplish this purpose by first reviewing the relevant


6. A recent poll measuring the levels of public confidence in professional fields asked the following question: "How would you rate the honesty and ethical standards of the people in the following fields: very high, high, average, low or very low?" Of those participating, 75% rated the honesty and ethical standards of attorneys as average or below. N.Y. Times, Aug. 22, 1976, § 1, at 32, col. 7. See generally Enright & Quigley, Public Awareness, 51 Cal. St. B.J. 299 (Supp. 1976).

7. Interest in the study of ethics is a recent phenomenon. Many attorneys have received little or no training in the legal profession. "The Directory of Law Teachers for 1950 shows 58 teaching Legal Ethics; the Directory for 1969 shows 239 teaching Legal Profession, 75% of these for less than 6 years." S. Thurman, E. Phillips, Jr., & E. Cheatham, Cases and Materials on the Legal Profession 1 (1970).

8. As an educational instrumentality the California Rules of Professional Conduct are singularly uninspiring. They intermix fundamental tenets of ethical obligation with a turgid mass of superficial do's and don'ts, comparable to strewing the Ten Commandments among the interstices of the Internal Revenue Code.

portions of both the American Bar Association's Code of Professional Responsibility and the California State Bar's Rules of Professional Conduct, which broadly outline the attorney's duties when conflicts arise. Following this review, the basic elements of problems involving adverse representation will be examined, revealing the steps an attorney must take in implementing a program of self-regulation. Finally, this comment will analyze several day-to-day examples of conflict situations, highlighting ways in which effective self-regulation can be accomplished.

The Standards of Propriety

The practice of law was far from professional during the latter part of the nineteenth century. Unethical activities within the legal community clearly called for a more definitive statement of the acceptable rules of conduct.

State bar associations were the first to respond. However, these initial codifications of legal ethics varied widely in both form and substance, failing to provide a uniform model of conduct upon which attorneys could pattern their actions. In 1908, the American Bar Association (ABA) responded to the problems caused by this lack of uniformity when it adopted its Canon of Ethics. This document became the foundation of virtually all state codes governing professional responsibility and conflicts of interests. Yet by the 1960's, the Canons had been the subject of widespread criticism for their failure to reflect the changing needs of the legal profession. In 1969, a new Code of Professional Responsibility was approved by the ABA, superseding the original Canons.

10. Id. at 23.
11. Id. at 24-25.
ABA Code of Professional Responsibility

The ABA Code of Professional Responsibility (ABA Code) is designed for use by state bar associations as a code of ethical responsibility. It is divided into three interrelated parts: 1) Canons, 2) Ethical Considerations, and 3) Disciplinary Rules.

The Canons set forth axiomatic norms containing the general standards of conduct expected of all attorneys. Ethical Considerations are aspirational guidelines, presenting a set of principles to which attorneys should strive. The Disciplinary Rules provide standards of conduct which no attorney may fall below without being subject to disciplinary action. Specific provisions in the ABA Code deal with representation of adverse interests, setting forth the rules which control the relationship of the attorney with his present and former clients.

Canon Four. The special fiduciary relationship between the attorney and the client, which is violated when a conflict of interest arises, is contained in Canon Four, which requires that “A Lawyer Should Preserve the Confidence and Secrets of a Client.” Attorneys must actively protect this relationship. “Care should be exercised by a lawyer to prevent the disclosure of the confidences and secrets of one client to another, and no employment should be accepted that might require such disclosure.” The duty to protect the attorney-client relationship extends indefinitely beyond the term of employment.

Representation of adverse interests subjects attorneys to disciplinary action under the standards of Disciplinary Rule 4-101(B). At a minimum, “a lawyer shall not knowingly: 1) Reveal a confidence or secret of his client. 2) Use a confidence or secret of his client to the disadvantage of the client.”

14. ABA Code of Professional Responsibility, preamble (1977) [hereinafter cited as ABA Code]
15. In re Fahey, 8 Cal. 3d 842, 853, 505 P.2d 1369, 1375-76, 106 Cal. Rptr. 313, 320 (1973). Although the new ABA code differs from the original canons in both substance and structure (Compare the ABA Canons of Professional Ethics (1908) with the ABA Code), the change emphasizes format and clarity through a new organizational framework consisting of Canons, Ethical Considerations, and Disciplinary Rules. See Weddington, A Fresh Approach to Preserving Independent Judgment—Canon 6 of the Proposed Code of Professional Responsibility, 11 Ariz. L. Rev. 31-33 (1969).
16. For the complete text of Canon 4 concerning representation of adverse interests, see ABA Code, Ethical Considerations [hereinafter EC] 4-1, 4-5, 4-6 and Disciplinary Rule [hereinafter DR] 4-101.
17. Id. EC 4-5.
18. Id. EC 4-6.
19. Id. DR 4-101(B).
Canon Five. Canon Five establishes that "A Lawyer Should Exercise Independent Judgment on Behalf of a Client." In line with this principle the ABA Code suggests that an attorney should endeavor to avoid conflicting interests, as illustrated by Ethical Consideration 5-14:

Maintaining the independence of professional judgment required of a lawyer precludes his acceptance or continuance of employment that will adversely affect his judgment on behalf of or dilute his loyalty to a client. 21

With respect to the attempted representation of conflicting interests, Disciplinary Rule 5-105(A) provides the minimum obligation to be fulfilled. "A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve him in representing differing interests, except to the extent permitted under DR 5-105(C)." 22

Canon Nine. The axiomatic duty of every attorney is contained in Canon Nine which provides that "A Lawyer Should Avoid Even the Appearance of Impropriety." 23 This moral obligation is clearly spelled out in Ethical Consideration 9-6:

Every lawyer owes a solemn duty to uphold the integrity and honor of his profession . . . to conduct himself so as to reflect on the legal profession and to inspire confidence, respect, and trust of his clients and of the public; and to strive to avoid not only professional impropriety but also the appearance of impropriety. 24

This obligation is central to any conflicts problem, since both the client and the public are likely to doubt the loyalty of an attorney who continues to represent a party despite having an interest adverse to that party.

20. For the complete text of Canon 5 concerning representation of adverse interests, see id. EC 5-14-EC 5-20 and DR 5-105-DR 5-106.
21. Id. EC 5-14.
22. Id. DR 5-105(A). Id. DR 5-105(C) provides that:
[A] lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each.
23. For the complete text of Canon 9 relating to representation of adverse interests, see id. EC 9-1, EC 9-2 and EC 9-6.
24. Id. EC 9-6.
California Rules of Professional Conduct

Although a majority of states have chosen to adopt the ABA Code of Professional Responsibility in whole or in substance, California has formulated a distinct body of ethical standards governing the propriety of legal representation. These standards include sections of the State Bar Act of 1927, which regulate the operations of the State Bar, its organization, government, membership, powers, the practice of law, and the solicitation of legal business.

The fiduciary nature of the attorney-client relationship is established by a combination of the attorney's duty to perform to the best of his knowledge and ability with case law stating that the relationship is a fiduciary one of the highest character. Clearly, an attorney must "maintain inviolate the confidence and at every peril to himself to preserve the secrets of his clients."

In addition, the State Bar Act provides for the Rules of Professional Conduct (California Rules). These rules set forth the minimum standards of ethical conduct for attorneys and, like the ABA Code, contain a specific set of provisions regulating representation of adverse interests.

26. The Rules of Professional Conduct, when adopted by the Board and approved by the Supreme Court, are binding upon all members of the State Bar. For a wilful breach of any of these rules, the Board has the power to discipline members of the State Bar by reproof, public or private, or to recommend to the Supreme Court the suspension from practice for a period not exceeding three years of members of the State Bar.

27. Id. §§ 6000-6190.6.
28. Every person on his admission shall take an oath to support the Constitution of the United States and the Constitution of the State of California, and faithfully to discharge the duties of any attorney at law to the best of his knowledge and ability. A certificate of the oath shall be indorsed upon his license.

Id. § 6067.
31. "With the approval of the Supreme Court, the Board of Governors may formulate and enforce rules of professional conduct for all members of the bar in the State." Id. § 6076.
32. It is well established that the California rules set minimum standards of conduct and are not expressions of aspirational goals. Each rule requires strict adherence to its principle. See, e.g., Abeles v. State Bar, 9 Cal. 3d 603, 510 P.2d 719, 108 Cal. Rptr. 359 (1973).
Rule 4-101 encompasses the acceptance of employment adverse to the interests of a client or former client. It provides that:

A member of the State Bar shall not accept employment adverse to a client or former client without the informed and written consent of the client or former client relating to a matter in reference to which he has obtained confidential information by reason of or in the course of his employment by such client or former client.33

Rule 5-102 sets forth the factors to be considered in avoiding conflicting interests. It provides that:

a) A member of the State Bar shall not accept professional employment without first disclosing his relation, if any, with the adverse party, and his interest, if any, in the substantive matter of the employment. A member of the State Bar who accepts employment under this rule shall first obtain the client's written consent to such employment;

b) A member of the State Bar shall not represent conflicting interests, except with the written consent of all parties concerned.34

Although there are variations in both the substance and the application of the California and ABA codes, it is quite clear that their purpose is singular. The attorney-client relationship imposes a duty of undivided loyalty upon attorneys, making it improper to assume a position inconsistent with the interests of a present or former client without complete disclosure and the informed consent of all parties involved.

In California, however, only the Rules of Professional Conduct have obtained legal status by approval of the California Supreme Court.35 The ABA Code, once noted by the California Rules in connection with conduct outside their scope, is no longer mentioned in their text.36 Nevertheless, the California

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34. Id. 5-102 (emphasis added).
36. The professional duties and responsibilities of attorneys have been governed by the California rules since 1928. See Cal. Rules of Professional Conduct, 204 Cal. xci (1928). The California Rules originally commended, then subsequently noted the ABA Code in connection with conduct not specifically mentioned in their text.
Noting the 1969 revision of the ABA Code, the Board of Governors of the State Bar decided to revise the California Rules of Professional Conduct. This revision incor-
While codifications of legal ethics define the parameters of adverse representation, no general statement of professional responsibility can hope to encompass the multitude of situations in which the problem can arise. A more thorough understanding of the standards of acceptable conduct requires a closer examination of the elements comprising adverse representation as expounded by the courts.

ADVERSE REPRESENTATION: THE JUDICIAL INTERPRETATION

The principles outlined in the foregoing ethical codes have provided the backdrop for judicial analysis of a conflicts problem. They provide a definite set of standards which establishes the propriety of the disputed representation. Thus, whether or not a conflict is present which will bar an attorney from representing a given client depends on the existence or nonexistence of the particular factors emphasized in the codes. Based on the factors focused on by the codes and applied by the courts, the analysis of a problem involving adverse representation is best divided into five parts: 1) fiduciary duty, 2) good faith, 3) attorney-client relationship, 4) adversity of interests and 5) consent. A working knowledge of these standards will aid attorneys in self-regulation of conflicting interests.

Fiduciary Duty

The fundamental ethical principle violated by a conflict of interest is the fiduciary duty that an attorney owes his client. This special relationship requires an attorney to protect the confidences of his present or former clients and avoid employment where he might be tempted to disclose them or use them to his advantage. An early California court described the relationship:

[O]ne of the principal obligations which bind an attorney is that of fidelity, the maintaining inviolate the confidence

reposed in him by those who employ him, and at every peril to himself to preserve the secrets of his client.38

Frequently, courts have relied on this fiduciary duty to disqualify attorneys for representation of interests adverse to the interests of a present client.39 In McClure v. Donovan,40 the marriage of D to C, an alleged incompetent, was annulled and a guardian appointed for C. On appeal, the attorneys representing D in the annulment suit were the same attorneys representing C on an appeal from the order appointing a guardian. The court held representation improper on the grounds of conflicting interests, since a reversal of the guardianship order would be to the benefit of D in her appeal of the annulment. Both actions were subsequently dismissed.

The termination of an attorney's employment does end the fiduciary responsibilities created by the previous attorney-client relationship.41 Attorneys are forever bound to protect the trust and confidence reposed in them by a client. Thus, counsel cannot undertake employment adverse to the interests of a former client.42

39. Disqualification for representation of interests adverse to the interests of a present client arise in many contexts including most commonly, husband and wife in matrimonial proceedings, different interests in the same property or estate, debtor and creditor, seller and purchaser, insurer and insured and the accused and prosecuting witness. See Annot., 17 A.L.R.3d 835 (1968).
In *Wutchumna Water Co. v. Bailey*., an attorney employed by Wutchumna for a number of years was disqualified from representing adverse claimants to a group of water rights claimed by that company. During the term of his employment with Wutchumna, the attorney had acquired free access to the water company's rights, titles, and confidential information. The court found a continuing fiduciary duty between attorney and client, making such representation improper.

In summary, then it is the fiduciary nature of the attorney-client relationship that makes representation of adverse interests improper. Attorneys must preserve the confidential information entrusted in them. They are bound by an obligation of undivided loyalty to each client. Representation of conflicting interests would prevent fulfillment of this duty.

**Good Faith**

Representation of adverse interests is improper despite the honesty and good intentions of an attorney. Good faith, a valid defense in many areas of the law, is no defense to a breach of the attorney-client confidence. The rationale underlying this rule is a matter of public policy.^[44] 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 an attempt to reconcile conflicting interests, rather than to enforce to their full extent the rights of the interest which he should alone represent.^[45]

From the standpoint of convenience, honest but misguided attorneys commonly believe it not only feasible, but desirable to engage in dual representation. Any problem relating to the conflict of interest that exists or may potentially exist is simply viewed as one that the attorney can manage.

However, sentiments among clients change often rendering effective advocacy in these situations impossible. In response to this problem, the courts have ruled out any defense based on good faith. This effectively discourages any represen-

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43. 216 Cal. 564, 15 P.2d 505 (1932).
44. The fact that attorneys may be disqualified for representation of adverse interests, regardless of good faith, is well established in California. See Hammett v. McIntyre, 114 Cal. App. 2d 148, 249 P.2d 885 (1952); Sheffield v. State Bar of Cal., 22 Cal. 2d 627, 140 P.2d 376 (1943) (by implication); Wutchumna Water Co. v. Bailey, 216 Cal. 564, 15 P.2d 505 (1932).
CONFLICTING INTERESTS

tation of adverse interests in the absence of the informed consent of all parties who might be injured thereby.\(^4^6\) Strict construction of the rule prohibiting representation of adverse interests, however, would be too inflexible for the controversies confronting the courts today. As such, the courts have imposed several limitations on the general rule. Representation of conflicting interests is proper:

1. Where the attorney-client relationship was never truly created, or
2. Where the new representation is not in fact adverse to the interests of the present or former client, or
3. Where the parties consent to the adverse representation.\(^4^7\)

Each of these limitations warrant closer attention.

The Attorney-Client Relationship

The rule barring representation of adverse interests is applicable only where an attorney-client relationship was in fact created.\(^4^8\) Whether or not the relationship exists is a question of law.\(^4^9\) Moreover, a factual conflict about the evidence underlying the creation of the relationship, must be resolved by the trial court.\(^5^0\)

An attorney-client relationship is created by a certain threshold level of representation. For example, in *Hicks v. Drew*,\(^5^1\) the plaintiff held several conversations with attorney A concerning an injury to real property. A’s offer to litigate upon a contingency fee was rejected by the plaintiff, who subsequently hired another attorney. The defendants in the same action then hired A over the plaintiff’s objections. Representation was held to be proper. In explaining its decision, the court

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\(^{48}\) The rule prohibiting representation of adverse interests does not apply absent a true attorney-client relationship. Where there is no fiduciary obligation and no confidential information to protect, there is no duty to protect the complaining party. See, e.g., *Kraus v. Davis*, 6 Cal. App. 3d 484, 85 Cal. Rptr. 846 (1970).

\(^{49}\) The determination of [the existence of the attorney-client relationship] is one of law [citation omitted]. However, where there is a conflict in the evidence the factual basis for determination must first be determined, and it is for the trial court to evaluate the evidence. *Meehan v. Hopps*, 144 Cal. App. 2d 284, 287, 301 P.2d 10, 11 (1956).


\(^{51}\) 117 Cal. 305, 49 P. 189 (1897).
reasoned that since the conversations between the parties concerned the fee and not confidential information, no attorney-client relationship had been formed.

Other cases reflect a similar focus, requiring, at a minimum, circumstances under which information might have been exchanged in confidence. Thus, one court concluded that the relationship of attorney and client did not arise where the attorney acted only as a scrivener, absent more evidence of a confidential relationship. A later court held that an attorney-client relationship was not created by dealings between corporate counsel and a corporate officer, even though the officer's personal interests were coincident with the interests of the corporation. Similarly, no attorney-client relationship was found to exist between a county counsel and a county assessor.

Clearly, the attorney-client relationship cannot exist without a transfer of confidential information between the parties concerned. In addition, there must be some expectation of such a relationship by the client, although it seems evident that no express retainer need exist.

However, the precise level of representation that creates an attorney-client relationship remains uncertain. Determination of the issue must be made on a case by case basis. The prudent attorney is well advised to avoid any employment where adverse representation might become an issue. While the lack of an attorney-client relationship is a complete defense to an assertion of conflicting interests, it must be remembered that the establishment of this defense is not always successful.

Since the existence of an attorney-client relationship in situations involving only two parties is quite unclear, the addition of a third party renders the problem all the more difficult. Courts have remedied the situation by formulating what is best termed an "imputation of knowledge theory."

56. See, e.g. Emile Indus., Inc. v. Patentex, Inc., 478 F.2d 562 (2d Cir. 1973).
57. See Schloetter v. Railoc of Indiana, Inc., 546 F.2d 706 (7th Cir. 1976); NCK Org'n Ltd. v. Bregman, 542 F.2d 128 (2d Cir. 1976); In re Yarn Processing Patent Validity Litigation, 530 F.2d 83 (5th Cir. 1976); Cinerama 5, Ltd. v. Cinerama, Inc., 528 F.2d 1384 (2d Cir. 1976).
The imputation of knowledge theory operates on the presumption that confidential information is freely exchanged within law firms. Thus, knowledge and information acquired by one attorney in representing a client is imputed to every other attorney in that firm. This "artificial" attorney-client relationship between the firm's attorneys and the client precludes any such attorney from assuming a position adverse to that client.58

This principle is illustrated in Schloetter v. Railoc of Indiana, Inc.59 There, plaintiff moved to disqualify defendant's counsel in an action for patent infringement. It was contended that attorney A, who had once represented plaintiff in a related matter, had passed relevant confidential information to firm X, now representing the defendant, before leaving that employment. The court held representation improper under the imputation of knowledge theory. The court felt it was irrelevant that attorney A no longer worked for firm X, because the mere appearance of impropriety must be avoided. The court stated: "[a] client should not fear that confidences conveyed to his attorney in one action will return to haunt him in a later one."60

However, the imputation of knowledge theory could result in broad disqualifications, many of them beyond the ethical code's original purpose. The courts have dealt with this threat by limiting the scope of the ethical commands.

For example, attorneys often begin their careers as associates or clerks in large law firms. The courts have generally concluded that such employment does not preclude associates from undertaking subsequent representation adverse to clients of their former firm as long as "no substantial relationship existed between the pending litigation and the matters upon which he [the attorney] had worked for the client during his prior association."61

Similarly, the courts have rejected the notion that confidential information imputed to one firm by an entering asso-

59. 546 F.2d 706 (7th Cir. 1976).
60. Id. at 711, quoting Richardson v. Hamilton Int'l Corp., 469 F.2d 1382, 1384 (3d Cir. 1972).
ciate or partner can be imputed to another firm by a separate attorney in that firm. Suppose that attorney A of firm X represents client C. Attorney J of firm X, who did not participate in the representation of C, leaves firm X and goes to firm Y. Under the imputation of knowledge theory discussed above, J cannot represent an interest adverse to C even though he has left firm X.

This imputation theory could be extended to impute the receipt of confidential information, already imputed to J, to attorney D of firm Y. If this rule were followed, neither D nor any attorney in firm Y could represent interests adverse to C. This so called “double imputation” theory is clearly beyond public policy since it would invent conflicts where none exist and would seriously hinder the mobility of attorneys between firms.

Under the imputation of knowledge rule, then, courts presume that confidential information has been transferred between parties. The cases limiting the application of this rule shift the burden of proof back to the plaintiff, who must show that such a transfer actually took place, thus balancing the individual’s right to his own freely chosen counsel with the need to maintain high ethical standards of professional responsibility.

Adverse Interests

As previously discussed, the sanctity of the attorney-client relationship precludes the representation of adverse interests. Two principles underlie this proposition:

1). The client’s secrets and confidences must be maintained, and
2). The attorney cannot act adversely to a client in a controversy in which he has worked.

Legal representation violating these principles is improper. Consequently, the question arises: When is representation truly adverse?

Clearly, in the absence of informed consent, an attorney

62. NCK Org’n Ltd. v. Bregman, 542 F.2d 128 (2d Cir. 1976); American Can Co. v. Citrus Feed Co., 436 F.2d 1125, 1129 (5th Cir. 1971).
63. See cases cited note 62 supra. However, under these facts if J and D exchanged any confidential information concerning C, D should withdraw from any subsequent representation adverse to C. Id.
CONFLICTING INTERESTS

may not represent the simultaneously conflicting claims of two or more clients in the same controversy where the confidential information of one is or may be used against the other. \(^{65}\)

However, a grey area exists where counsel undertakes the simultaneous representation of two clients in different controversies, who have antagonistic but not directly adverse interests. In this situation, the confidential information obtained from one client is generally not directly related to the action involving the other party. In at least one case, the view has been taken that such representation is improper.

In *Jeffrey v. Pounds*, an action was brought by a law firm to recover compensation for services performed in a personal injury suit instituted by P. In defense, P maintained that his liability to pay terminated when the same firm undertook representation of P's wife in a dissolution of marriage action. On the consent issue, the court held representation improper under California Rule 5-102(B). In broad dicta, the court found that rule 5-102(B) extends not only to representation of adverse interests in a single controversy but also "to situations where antagonism pervades the client's relationship, stimulating the first client to doubt his attorney's loyalty when the latter accepts unrelated but antagonistic employment." \(^{67}\)

Despite its appearance in dicta, the rule in *Jeffrey* should not be overlooked since it is firmly grounded in the ethical codes. Both the California Rules and the ABA Code require that an attorney maintain undivided loyalty to his client until their relationship is terminated, and in some cases beyond termination. \(^{68}\) The ethical pronouncements logically dictate that an attorney should not accept employment that will compromise his judgment and divide his loyalties with respect to several clients. Thus, *Jeffrey* should be read to erect a flat bar to suing or entertaining to sue a current client even on a matter unrelated to the subject of that client's representation, in the absence of consent from all parties concerned. The policy un-


\(^{66}\) Cal. App. 3d 6, 136 Cal. Rptr. 373 (1977); see also Cinerama 5, Ltd. v. Cinerama, Inc., 528 F.2d 1384 (2d Cir. 1976).

\(^{67}\) Cal. App. 3d at 10, 136 Cal. Rptr. at 376.

\(^{68}\) See ABA Code EC 4-5, EC 4-6, DR 4-101(B), EC 5-1, EC 5-14 and Cal. Rules of Profssional Conduct, Rule 4-101.
derlying this rule extends beyond contemplated litigation to the assumption of any relation adverse to a current client.\footnote{By virtue of this rule [undivided loyalty] an attorney is precluded from assuming any relation which would prevent him from devoting his entire energies to his client's interests. Nor does it matter that the intention and motives of the attorney are honest. 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 reconcile conflicting interests, rather than to enforce to their full extent the rights of the interest which he should alone represent. Anderson v. Eaton, 211 Cal. 113, 116, 193 P. 788, 789 (1930).}

Representation of interests adverse to the interests of a former client is proper if the representation is not, in fact, adverse.\footnote{See note 42 supra.} The requisite degree of adversity is found "not merely when the attorney will be called upon to use confidential information obtained in the course of the former employment, but in every case when, by reason of such subsequent employment, he may be called upon to use such confidential information."\footnote{Galbraith v. State Bar, 218 Cal. 329, 332-33, 23 P.2d 291, 292 (1933). Also, see Sheffield v. State Bar, 22 Cal. 2d 627, 140 P.2d 376 (1943); Wutchuma Water Co. v. Bailey, 216 Cal. 564, 15 P.2d 505 (1932); Big Bear Mun. Water Dist. v. Superior Court, 269 Cal. App. 2d 919, 75 Cal. Rptr. 580 (1969); Jacuzzi v. Jacuzzi Bros., Inc., 218 Cal. App. 2d 24, 32 Cal. Rptr. 188 (1963).} Quite clearly, injury to the complainant is not an essential element of adversity.

In \textit{Pepper v. Superior Court},\footnote{72. See note 42 supra.} counsel bringing suit as executor following the death of the original plaintiff was both a member of the defendant country club and a person who would benefit if his suit against the club was successful. The country club moved to disqualify the attorney for representation of adverse interests. The court held the representation proper. No evidence was presented indicating the attorney acquired confidential information from the country club in a previous attorney-client relationship. In fact, there was no evidence that any such relationship ever existed.

It is clear then that attorneys may not represent interests adverse to either present or former clients when confidential information concerning that controversy has been acquired in the prior relationship. Use of that information or injury to the complaining party is unnecessary. The mere possession of confidential information raises a presumption that such relationships are both improper and adverse.\footnote{The rules protect the confidences reposed in the attorney for two basic rea-}
Consent

As a general rule, representation of adverse interests is permissible when there is full disclosure and informed consent of all parties to the controversy. Absent such consent, "the duty of loyalty to different clients renders it impossible for an attorney, consistent with ethics and the fidelity owed to clients, to advise one client as to the disputed claim against the other." Prior to the revision of the Rules of Professional Conduct in 1975, a number of cases held representation of adverse interests proper upon oral consent. Some courts went so far as to approve a tacit waiver of the right to object to such representation.

The revision, however, changed the pattern of common law significantly. At present, consent to representation of adverse interests can be effectuated only by the written consent of all parties to the controversy. Similarly, it seems apparent that a party, who has not consented to the adverse representation, cannot inadvertently waive his right to object to such representation.

In addition, consent must be both informed and intelligent and given upon full disclosure of the facts and circumstances surrounding the subject matter of litigation. Some threshold

sources: (1) to insure fundamental fairness in litigation, and (2) to foster an atmosphere of openness to encourage a client to freely disclose information, knowing it will not come back to haunt him. See NCK Org'n Ltd. v. Bregman, 542 F.2d 128 (2d Cir. 1976); Emile Indus. v. Patentex, Inc., 478 F.2d 562 (2d Cir. 1973); Richardson v. Hamilton Int'l. Corp., 469 F.2d 1382 (3rd Cir. 1972).

76. See note 36 supra.
80. Since the courts seek to avoid even the appearance of impropriety in the administration of justice, undue delay even with full knowledge of the conflicts will not bar a party's right to bring a motion of action to disqualify an attorney representing conflicting interests. See, e.g., Emile Indus., Inc. v. Patentex, Inc., 478 F.2d 562 (2d Cir. 1973); Koehring Co. v. Manitowoc Co., 418 F. Supp. 1133 (E.D. Wisc. 1976).

Alternatively, the party is not deemed to have waived the right to move to disqualify an attorney merely because the tasks performed by the attorney could have been accomplished by a layman or the information reposed in the attorney has become a matter of public knowledge. The rationale for this view is that the lawyer has an ethical obligation, which is broader than the attorney-client privilege, to guard the confidences of his client, without regard to the type of services performed, or the nature and source of information obtained. See NCK Org'n Ltd. v. Bregman, 542 F.2d 128 (2d Cir. 1976); Government of India v. Cook Indus., Inc., 422 F. Supp. 1057 (S.D.N.Y. 1976).

81. In either the current or former client setting, an attorney who undertakes to
level of consent must be met. Determination of this issue is left to the individual attorney, although the matter is clearly subject to judicial approval.

Initially, the trial court is entitled to accept properly executed written consents to joint representation at their face value. The judge is entitled to presume the attorney is familiar with the law and code of professional ethics and has complied with the proper standards. However, if the judge has any question regarding whether the proper standards have been observed, it is his duty to either require counsel to inquire further or inquire himself regarding the circumstances of the execution of the written consents and the state of mind of the clients for the purpose of making the necessary factual determination in this regard.\footnote{Klemm v. Superior Court, 75 Cal. App. 893, 901, 142 Cal. Rptr. 509, 514 (1977).}

Several aspects of the consent issue remain unresolved despite the standards set forth in the codes. First, consent may not be adequate in every case, though it is informed and obtained after full disclosure. At present, no cases sanction representation of adverse interests in conjunction with a trial or hearing despite consent of the concerned parties. It is doubtful that "true" informed consent could be procured under such circumstances. The court addressed this problem in \textit{Klemm v. Superior Court:}\footnote{Id. at 898, 142 Cal. Rptr. at 512 (emphasis added).}

\textit{As a matter of law a purported consent to dual representation of litigants with adverse interests at a contested hearing would neither be intelligent nor informed. Such representation would be \textit{per se} inconsistent with the adversary position of an attorney in litigation, and common sense dictates that it would be unthinkable to permit an attorney to assume a position at a trial or hearing where he could not advocate the interest of one client without adversely injuring those of the other.\footnote{21 Cal. App. 2d 18, 68 P.2d 369 (1937).}}

Secondly, there exists an unusual application of consent in \textit{Croce v. Superior Court.}\footnote{21 Cal. App. 2d 18, 68 P.2d 369 (1937).} There, an attorney who had represented several clients in an action involving a common interest...
CONFLICTING INTERESTS

subsequently undertook representation of one of those clients against the others in a related matter. The court held representation proper, reasoning that there had been a waiver of the attorney-client evidentiary privilege by employing a joint attorney, making the subsequent representation proper by implied consent. The holding in Croce has been widely criticized. The evidentiary privilege relied upon is much narrower than the obligation to avoid representation of adverse interests set forth in the relationship between attorney and client. The court addressed this problem again in Industrial Indemity Co. v. Great American Insurance Co., reasoning that "even if Croce is still good law, it does not apply to a situation where the joint representation of two or more clients with conflicting interests was undertaken or continued without disclosure and written consent." In so holding, the court brought Croce in conformity with the present standards that consent be both written and informed.

Finally, the propriety of representing adverse interests in the area of family law despite consent remains unsettled. In Arden v. State Bar, an attorney undertook representation of both an unmarried woman seeking adoption of her child and a couple who actually adopted the child. In connection with the consent issue, the court commented:

It is suggested that the mere representation of both parties to an adoption, even with consent, may constitute a violation of the rules of professional conduct. On this issue the members of the Bar have expressed opposite views. In a handbook published in 1956 by the Continuing Education of the Bar entitled "Family Law for California Lawyers" it was urged that dual representation was permissible. In the State Bar Journal of July-August 1957 (32 State Bar Journal 343) opinions to the contrary were published. The issue is a highly debatable one. No clear-cut rule on the subject has been announced. It is not proper to discipline

85. See text accompanying note 78 supra.
89. 52 Cal. 2d 310, 341 P.2d 6 (1959).
an attorney for a violation of a claimed principle that was
and is so highly debatable.\footnote{Id. at 319, 341 P.2d at 11.}

Despite the language in \textit{Arden}, the issue remains unresolved. The highly volatile nature of family law and the tendency of the courts to favor disqualification in cases involving even the appearance of impropriety have kept the controversy alive.\footnote{But see Klemm v. Superior Court, 75 Cal. App. 3d 893, 142 Cal. Rptr. 509 (1977) (sanctioning representation with consent in a family setting outside of litigation).}

The foregoing elemental approach to the conflict of interest problem makes clear that as a fiduciary, an attorney owes a duty of undivided loyalty to his client, a duty jealously guarded by the courts. Thus, the courts have firmly established that it is improper for an attorney to act contrary to or assume a position inconsistent with the interests of his present or former clients.

As noted earlier, the burden of avoiding conflicts falls squarely on the attorney, who must discover if they exist and disclose them to the parties involved in the representation. Once the actual conflicts are disclosed, the attorney must generally obtain the informed, written consent of his client and frequently his opponent in order to continue with the representation.\footnote{Compare Cal. Rules of Professional Conduct, Rule 4-101, \textit{with id.}, Rule 5-102.} Without disclosure to and the consent of all parties, an attorney may later be disqualified when the conflicts are discovered. This comment now turns to an examination of how an attorney might best confront common conflict situations, avoiding the unpleasant consequences attendant upon disqualification.

\textbf{PREPARATION FOR AND PREVENTION OF ADVERSE REPRESENTATION}

\textit{Before the Agreement to Represent}

Conflicting interests are most effectively eliminated at the initial stage of the attorney-client relationship. Early discovery of adverse interests will help accommodate the interests of all parties. In connection with this end, the attorney's most effective tool is the initial interview and preliminary investigation prior to the agreement to represent.\footnote{CAL. C.E.B., \textit{California Civil Procedure Before Trial} §§ 1.3-1.4 (1977).}
The initial interview provides an attorney with basic information about the client and his claim. Beyond the legal matters at issue, the attorney should devote a portion of this interview to an investigation of potential conflicting interests. The attorney should probe for any possible connection he might have with the client's adversary that could present the appearance of impropriety. These connections might cover existing transactions with or prior to current representation of the adverse party. Similarly, collateral relationships should not be ignored, as they often reveal potential adverse interests. Basically, an attorney should feel free to express concern about adverse representation. In so doing, he can inspire client confidence in the fairness of the legal system.

Frequently the initial interview will be insufficient for discerning conflicting interests. Additional investigation, in advance of an agreement to represent, may be required to clarify issues or confirm suspicions raised at the initial interview.

In particular, attorneys should search their list of present or former clients for potential conflicts before entering the agreement to represent. Such an investigation is crucial, especially in large law firms where disqualification is often premised upon the imputation of knowledge theory. Attorneys in large firms rarely know the identities and subject matter of all the firm's litigation. Obviously, they know even less about the firm's prior representation. Thus, it is recommended that these firms maintain a system of reference allowing attorneys access to the identities of former clients, while circulating lists of present representation among associates at regular intervals.

It cannot be over emphasized that in seeking to avoid conflicts problems, there is no substitute for careful pre-representation investigation based on a command of the applicable ethical rules. Only after such an investigation can a sound agreement to represent be formed.

The Agreement to Represent

The attorney-client fiduciary relationship officially begins with an agreement to represent. Attorneys must deal with conflicts of interests at this stage of representation if the prob-

94. See notes 57 through 63 and accompanying text supra.
95. A formal contract or retainer is not a prerequisite to an attorney-client relationship. Often an association is formed on much less. See Farnham v. State Bar, 17 Cal. 3d 605, 131 Cal. Rptr. 661 (1976); Abeles v. State Bar, 9 Cal 3d 603, 103 Cal. Rptr. 359 (1973); Arden v. State Bar, 52 Cal. 2d 310, 341 P.2d 6 (1959).
The problem of disqualification is to be avoided. Before trial, adverse representation takes two forms: (1) potential conflicts of interests and (2) actual conflicts of interests. For either, preparation must be made.

Potential conflicting interests before trial commonly arise in dual representation situations, where attorneys agree to represent, for example, a guardian and a minor, an executor and an heir, a corporation and its stockholders or all the parties to a partnership. Attorneys must be made aware that interests presently consistent may later diverge. As a result, it will often be wise to decline such employment and encourage the parties to seek separate representation.

However, a decision to undertake such representation is proper, provided that it is preceded by full disclosure of the facts to the parties affected, so they might give effective informed consent to the representation. Such consent should be written and attached to the contract of employment.

In addition, the retainer or contract of employment should contain an attorney's right to withdraw without prejudice upon the manifestation of adverse interests. The provision places a client on notice of the right to withdraw should continued employment violate the Rules of Professional Conduct. This would facilitate withdrawal, although an attorney still would be required to give notice to his client and file a notice of motion for an order to withdraw.

Actual conflicts before trial require greater caution on the part of attorneys. Without consent, such representation is improper. Attorneys must procure an informed consent, upon full disclosure with a right to withdraw, from all parties to such a controversy. It would be prudent, however, to decline such representation when actual conflicts of interests involve matters of family law.

The Consequences of Adverse Representation

Failure to perform the obligations required by the codes exposes an attorney to severe consequences. Willfull violation of the Rules of Professional Conduct can subject the offending party to the State Bar disciplinary process. This process may

96. See notes 74 through 91 and accompanying text supra.
98. See notes 94 through 99 and accompanying text supra.
99. See notes 89 through 91 and accompanying text supra.
100. A new disciplinary process was adopted by the State Bar in 1976. While the
CONFLICTING INTERESTS

lead to admonition, reproof, suspension, or in the case of a State Bar Act violation, even disbarment.

A more immediate consequence, however, often occurs in the courts. A party can continue to object to adverse representation at any time prior to the final judgment. Thus an attorney may be removed from a controversy by a motion to disqualify or an independent action enjoining such representation up to the time of final judgment.

In addition, attorneys may find it difficult to recover fees withheld by a client who objects to adverse representation. Violation of the attorney-client confidence justifies nonpayment of legal fees, even though the client has not been harmed.

Representation of adverse interests is also grounds for an appeal from an unfavorable judgment on the basis that the conflicting interests denied the appellant a fair trial.

Finally, a controversy involving adverse interests raises a number of legal malpractice issues. A client, unsatisfied with the quality of representation due to a conflict of interests, could claim negligence in both the attorney's failure to recognize the improper arrangement and his failure to obtain the parties' informed consent. While representation of adverse interests is to the disadvantage of all parties involved, current trends in the judiciary clearly indicate it is the attorneys who are to bear the burden of the consequences.

CONCLUSION

Conflicting interests can be eliminated. The goal is within the power of attorneys, requiring little more than a competent understanding of the codes and careful scrutiny of potential clients. Judicial intervention is unnecessary. It is a system of

old "State Bar Procedure" was highly regarded as one of the best in the country, many believed the procedures could be substantially streamlined. For an analysis of the new program, see generally Ginder, The "New" Disciplinary Machinery of the State Bar, 51 Cal. St. B.J. 193 (1976).

101. Clearly, a complainant may move for an attorney's disqualification "at any time while the action is pending." Earl Scheib, Inc. v. Superior Court, 253 Cal. App. 2d 703, 709, 61 Cal. Rptr. 386, 390 (1967).


self-regulation, and the burden to make this system work, in the final analysis, rests upon the individual attorney.

Adherence to a simple rule will go a long way in achieving this goal: representation should end with any indication of adversity among clients. It must be remembered that attorneys who undertake representation of conflicting interests tread the thin ice of disciplinary action, and such conduct sorely reflects upon the integrity of the legal profession. As a California Court of Appeal once noted:

[A]ny gentleman going into business for himself should be cautioned that Justice, like Caesar's wife, must be above suspicion. She is better served by strict adherence to her canons, but also by the avoidance of any conduct which may be interpreted as reflecting on the integrity of the administration of justice.\(^\text{107}\)

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