CORE VALUES AND CONFLICTS OF INTEREST

Steven A. Lewis © 2002

I. INTRODUCTION

Conflicts of interest come in virtually every shape and size. From multiple clients seeking joint representation on a legal matter, to a client seeking representation that could adversely impact one of the attorney's former or current clients, to conflicts deriving from the attorney's own financial or personal considerations, each situation requires studied and careful consideration. A failure to comply with the law governing conflicts of interest can lead to a host of adverse consequences for the attorney including, discipline by the State Bar, disqualification, malpractice exposure, forfeiture or disgorgement of fees, loss of business, and damage to reputation. As a result, it is critical for every attorney to be able to recognize when an actual or potential conflict of interest exists, and then to be able to determine an appropriate course of action.

In this article, our objectives are to explore the relationship between the core values of the legal profession and the law governing conflicts of interest, to provide guidance with regard to recognizing some of the more common conflicts issues, and to add some practical advice on responding to different conflict scenarios. While many conflict issues are not addressed, we hope that the framework provided helps the reader effectively deal with scenarios we have not covered as well as those that we have.

II. CORE VALUES AND CONFLICTS OF INTEREST

Underlying the laws governing conflicts of interest are the basic core values of the legal profession and the system of justice. What are those core values and how do they tie into the law governing conflicts of interest?

One: *The duty to represent each and every client with undivided loyalty.* The integrity of the profession and of the entire system of justice rests on the notion that every client can have trust and confidence that their lawyer will advance their interests and further their legitimate goals, and will not compromise their interests in favor of the lawyer's own interests, or the interests of any other person. This core value is one of three at the heart of the law governing conflicts of interest.

Two: *The related duty to exercise independent judgment in advancing the client's objectives.* In this regard, independence of judgment is judgment not clouded by the interests of the lawyer or any other person. This is the second core value that represents a critical component of conflicts of interest law.

Three: *The duty to safeguard client confidences and secrets.* The value of confidentiality in the attorney-client relationship finds its roots in English common law, and is

nowhere more closely guarded than in California. It is the third key core value providing the basic structure of the law governing conflicts of interest.

Four: *The duty to deal honestly and fairly with clients, their money, and their property.* The need to ensure trust and confidence in the legal profession and to protect the public from dishonest lawyers is manifested in the State Bar's requirement for meticulous trust record keeping and the strict response to ethical breaches involving misuse of client funds held in trust. Breach of this trust usually involves a conflict between the interests of the lawyer, on the one hand, and the client, on the other.

Five: *The duty to represent all clients competently.* When conflicts of interest exist, either between lawyers and their clients, or between various clients, competence is often one of the first core values to be seriously impacted. In fact, conflicts are often discovered because of failures of competence.

Six: *The duty to communicate clearly, candidly and effectively.* This core value comes into play when the law permits a lawyer to proceed despite a potential or actual conflict of interest so long as their has been proper disclosure of the relevant circumstances and the actual and reasonably foreseeable adverse consequences of the conflict in terms the client can readily understand (and informed consent).

Seven: *The duty to promote access to justice.* This core value of the profession sometimes competes with others as multiple clients seek the economic efficiency of joint representation, or clients desire their choice of counsel even though adversaries may view that choice as conflicting with other core values.

Eight: *The duty to foster public confidence in and respect for the judicial system.* This core value often competes with desires of clients to have attorneys advance their interests and objectives, particularly where those interests and objectives compete with other core values of the profession. No client has a right to ask a lawyer to act unethically, and no lawyer ever should take an unethical position at the behest of a client.

With those core values in mind, we now turn more specifically to the issue at hand: Conflicts of interest. While different courts and commentators have used different terminology, one way to define the concept of a conflict of interest is as follows:

> **A conflict of interest exists whenever the interests of anyone with whom the lawyer has or has had an attorney-client, legal, professional, financial, business or personal relationship, or whenever the lawyer's own interests: (a) render the lawyer's representation of a client less effective; or (b) impair the lawyer's ability to exercise independent professional judgment on behalf of a client; or (c) interfere with the lawyer's ability to fulfill continuing duties owed to a client or former client.**

III. CALIFORNIA RULES PERTAINING TO CONFLICTS OF INTEREST

In California, an excellent framework for understanding conflicts of interest issues can be found in the Rules of Professional Conduct.[1] And, while many of the Rules relate either directly or indirectly to conflicts of interest, the key rules bearing upon conflicts of interest are:

Rule 3-300 governing:

> Business transactions between lawyers and clients; and
>
> Other situations in which lawyers acquire ownership, possessory, security or other pecuniary interests adverse to a client.

Rule 3-310 governing:

> The lawyer's relationships with parties, witnesses, or other persons affected by resolution of the client's matter [Rule 3-310(B)];
>
> The lawyer's own interest in the client's matter [Rule 3-310(B)];
>
> Simultaneous representation of multiple clients [Rule 3-310(C/D)];
>
> Representation of one client adverse to another current client [Rule 3-310(C)];
>
> Representation of one client adverse to a former client [Rule 3-310(E)];
>
> The interests of a third party paying for the client's representation [Rule 3-310(F)].

Rule 3-320 governing:

> Relationships between the lawyer and another party's lawyer.

Rule 3-400 governing:

> A lawyer's liability to a client.

---

[1] A complete copy of the Rules of Professional Conduct currently in effect can be found starting at page – of the materials. All references to Rule or Rules are to the Rules of Professional Conduct unless stated otherwise.

Rule 3-600 governing:

> Representing organizations, such as corporations, partnerships, etc., and their constituent members.

Rule 5-210 governing:

> A lawyer acting as both an advocate and a witness.

IV. COMMON CONFLICT OF INTEREST SITUATIONS

In this article we will focus on four of the most common conflict of interest situations: (1) A lawyer simultaneously representing more than one client in a matter [Rule 3-310(C) and (D)]; (2) A lawyer representing a client in one matter while simultaneously representing the client's adversary in a different matter [Rule 3-310(C)]; (3) A lawyer representing a client in a matter adverse to a former client [Rule 3-310(E)]; (4) A lawyer taking payment from one other than the client [Rule 3-310(F)]; and (5) A lawyer entering into a business relationship with a client [Rule 3-300]. While these are by no means all of the conflict of interest issues that lawyers face, they are among the most common.

A. Simultaneously Representing Multiple Clients in a Single Matter [Rule 3-310(C)(1), (C)(2) and (D)]

The most common "conflicts" scenario involves a lawyer representing more than one client in a single matter. The primary reason why clients seek, and lawyers provide, joint representation is that it promotes access to the legal system. There are many situations where efficiency, economy and effective strategy all militate in favor of a joint representation. However, it is up to the attorney to evaluate whether the long term goals and objectives of the clients are best served by joint or separate representation. And, assuming joint representation is appropriate, it is up to the attorney, guided by Rule 3-310, case law, the core values of the profession, to set the terms and conditions of that joint representation, including the disclosures that should be made and the consents that should be obtained.

Because of the economic and strategic advantages, simultaneous representation of multiple clients in a single matter occurs in nearly every context – from civil litigation to business transactions to estate planning to family law. For example, it is common for litigation attorneys to represent multiple plaintiffs **or** defendants such as an employer and employee, two people injured in the same accident, neighboring property owners damaged by the same incident, etc. Estate planning attorneys often prepare joint or reciprocal wills, and family law attorneys are frequently asked to resolve an

uncontested marital dissolution, and transactional attorneys often represent more than one person in a business or real estate deal, or in forming a business entity.[2]

It is also common for corporate/business attorneys (handling transactions and/or litigation) to represent both a business organization and its constituents. Attorneys representing business organizations should be mindful of Rule 3-600. Under that Rule, the attorney representing an organization must recognize the organization itself as the client, acting through the highest authorized person overseeing the engagement. And, while a lawyer representing an organization may also represent the entity's constituents, the joint representation is subject to the conflict of interest provisions of Rule 3-310.[3]

Rules 3-310(C)(1) and (2) specifically address representation of more than one client in a single matter. Those Rules expressly provide that whenever there is a *potential conflict of interest* [Rule 3-310(C)(1)] or an *actual conflict of interest* [Rule 3-310(C)(2)], the lawyer may not proceed with the joint representation without making *disclosure* to the clients and obtaining their *informed written consent*.

Because the concepts of what constitutes a potential or actual conflict of interest can be elusive, neither of those terms is defined in the Rules. However, one court has defined a conflict of interest in this context as follows: "Conflict of interest between jointly represented clients occurs whenever their common lawyer's representation of the one is rendered less effective by reason of his representation of the other."[4] Providing more depth and insight, the State Bar Standing Committee on Professional Responsibility and Conduct ("COPRAC") has provided the following checklist for attorneys to consider in evaluating the existence of an actual or potential conflict of interest in the joint representation scenario:[5]

1. What is the likelihood of the attorney receiving conflicting instructions from the clients in which the lawyer cannot follow one client's instructions without violating those of another client?

---

[2] See *Discussion* pertaining to Rule 3-310(C)(1) and (C)(2). However, one area of the law where representation of multiple clients in a single matter is almost never appropriate is criminal law because of the likelihood and seriousness of the conflicts issues presented.

[3] Rule 3-600 covers a myriad of conflict situations including, the attorney's duties when: (i) a member of the organization acts in a manner that may be improper and imputable to the organization [Rule 3-600(B) and (C)]; (ii) dealing with members of the organization whose interests may be adverse to the interests of the organization [Rule 3-600(D)]; and (iii) seeking informed written consent to represent both the organization and a constituent [Rule 3-600(E)].

[4] *Spindle v. Chubb/Pacific Indemnity Group* (1979) 89 Cal.App.3d 706, 713.

[5] State Bar Formal Ethics Opinion 1999-153.

2. What is the likelihood of the clients having conflicting objectives such that the lawyer cannot effectively advance one client's objectives without detrimentally affecting the objectives of another client? In this regard, reference to conflicting objectives relating to settlement or resolution of the joint clients' legal matter is of significant relevance.[6]

3. What is the likelihood the lawyer will be called upon to advocate antagonistic positions of the clients when advocating both sides of a negotiation or legal position?

4. What is the likelihood the clients will desire to maintain confidentiality of attorney-client communications vis-a-vis other jointly represented clients? In this regard, the attorney must be mindful of California Evidence Code §962 which states that there is no attorney-client privilege as between two or more clients who retain the same lawyer for a matter of common interest.

5. Is there a pre-existing relationship with one client that would adversely affect the lawyer's exercise of independent judgment on behalf of the other client?

6. What is the likelihood there will be conflicting demands by the clients for the original file once the representation has ended?

It is up to the lawyer to evaluate these issues in each and every situation in which joint representation of multiple clients is considered. To the extent that any of these conflict of interest scenarios have arisen – for example, the lawyer knows that the clients have conflicting objectives such that one cannot be advanced without detrimentally affecting the other – then the conflict is *actual* rather than potential. Where none of the scenarios has arisen, but at least one is reasonably possible, the conflict of interest is *potential* rather than actual. However, in either situation, the lawyer is required to: (1) make disclosure in writing to the clients; and (2) to obtain the joint clients' informed written consent. Those two terms are expressly defined in the Rules as follows:

> *Disclosure* means: "[I]nforming the client . . . of the relevant circumstances and of the actual and reasonably foreseeable adverse consequences [of the joint representation] to the client[s] . . .." [Rule 3-310(A)(1)]; and
>
> *Informed written consent* means: "[T]he client's . . . written agreement to the [joint] representation following written disclosure." [Rule 3-310(A)(2).]

Thus, the first step in the process is to determine whether the joint representation gives rise to a potential or actual conflict of interest. In this regard, while there are situations in which there

---

[6] See Rule 3-310(D) pertaining to the need for separate disclosure and consent as a condition to an aggregate settlement.

are no actual or reasonably foreseeable potential conflicts[7], *it is prudent to assume there is at least a potential conflict of interest in nearly every joint representation*. In most joint representation situations it is therefore wise to make a proper written disclosure and to obtain each client's informed written consent.

Moreover, where the issues affecting the parties create an actual rather than potential conflict of interest, the attorney must evaluate the seriousness of the actual conflict, i.e., the extent to which the representation of both clients renders the representation of any one client less effective or otherwise impairs the lawyer's ability to exercise independent professional judgment on behalf of all clients. If the actual conflict is likely to have a material adverse effect on the attorney's ability to properly represent the interests of the joint clients, the attorney should explain that he or she will not agree to represent all of the potential clients. In fact, there are some situations where joint representation is not allowed (e.g. representation of adversaries in contested litigation),[8] notwithstanding disclosure and consent. However, even where disclosure and consent may be allowed (e.g., representation of both spouses in resolving an "uncontested" dissolution) it may nevertheless be imprudent.[9]

If the actual or potential conflict permits joint representation with disclosure and informed written consent, the attorney must evaluate the situation to determine what issues are properly disclosed – in other words; What are the relevant circumstances? What are the actual adverse consequences of the joint representation? What are the reasonably foreseeable adverse consequences of the joint representation? While each situation presents its own unique facts and circumstances, there are certain provisions that should be considered for inclusion in the vast majority of

disclosure/consent documents. In this regard, an attorney should seriously consider including reference to each of the six potential conflict scenarios described above. Moreover, there are sources available for attorneys to consult in formulating effective conflict disclosures.[10]

---

[7] One example that comes to mind is representing a husband and wife who jointly own property in an action affecting that property.

[8] See, e.g., *Woods v. Superior Court* (1983) 149 Cal.App.3d 931; *Klemm v. Superior Court* (1977) 75 Cal.App. 3d 893; *Ishmael v. Millington* (1966) 241 Cal.App.2d 520.

[9] See, *In re Marriage of Egedi* (2001) 88 Cal.App.4th 17, where one spouse attempted to invalidate a marital settlement agreement where one attorney represented both spouses. The court found the attorney's disclosure and consent satisfactory and refused to overturn the agreement. However, the court also gratuitously added that it was making no comment on whether the attorney nevertheless committed malpractice in representing both spouses.

[10] For a sample Disclosure Letter for Joint Representation of Multiple Clients see Vapnek, et al., *California Practice Guide Professional Responsibility* (2001) Form 4:C.

B. Representation Adverse to A Current Client [Rule 3-310(C)]

With very rare exception, attorneys are absolutely and automatically prohibited from taking on representation of a client adverse to the interests of an existing client. This automatic bar is based upon the attorney's duty of undivided loyalty, a fundamental core value of the judicial system that lies at the heart of maintaining public confidence in that system.[11] Thus, the bar applies whether the new representation adverse to the existing client is related or unrelated to the lawyer's representation of the existing client. It also does not matter whether or not the attorney has obtained confidential information from the existing client that could be material to the new representation against that client.

Furthermore, the bar extends not only to the particular lawyer involved in the representation of the existing client, but also to every member of that lawyer's firm. Thus, if a law firm with 800 lawyers and 20 offices represents Corporation A in a personal injury case out of its Tampa, Florida office, no other lawyer in any of the firm's offices can undertake representation adverse to Corporation A in any matter so long as Corporation A is a client of the firm.[12]

The duty of undivided loyalty and the concomitant prohibition against taking on a matter adverse to the interests of an existing client are so strong that the California Supreme Court has held that a lawyer has no duty to advise, and should not advise, a new client to seek other counsel to pursue a matter against an existing client or of the need to bring an action against the existing client prior to the lapse of the statute of limitations.[13] Thus, in *Flatt v. Superior Court, supra,* the Supreme Court held that the lawyer could not be held liable when she did not tell the new client about the statute of limitations or the need to promptly retain new counsel, and the new client's claim against the existing client became barred by the statute of limitations.

However, the *Flatt* court also put all California lawyers on notice: The lawyer who *waits too long* before discovering the conflict of interest could end up in a no-win situation: Facing exposure to the existing client for giving advice to anyone against the existing client; or facing exposure to the

---

However, note that all disclosure letters must be expressly tailored to the facts and circumstances of the particular situation. See also, *Zador Corp. v. Kwan* (1995) 31 Cal.App.4th 1285.

[11] See, *People ex rel. Department of Corporations v. Speedee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135, 1146.

[12] See, *Henriksen v. Great American Savings & Loan* (1992) 11 Cal.App.4th 109, 114.

[13] See *Flatt v. Superior Court* (1994) 9 Cal.4th 275, in which a divided Supreme Court held the lawyer not liable to the new client for failing to provide advice about a statute of limitations applicable to the claim against an existing client during the brief period before the attorney recognized the conflict of interest and terminated the relationship with the new client.

new client for blowing the statute of limitations on a claim against the existing client.[14] Thus, prudence requires lawyers to act promptly in discovering conflicts of interest and in terminating relationships with new clients whose interests are adverse to those of existing clients.

In order to take on a very lucrative new matter that is adverse to an existing client, some lawyers have attempted to clear the decks by terminating their relationship with the existing client. When faced with the question – Can a lawyer withdraw from representing an existing client and refund all fees paid by the existing client, thereby turning the existing client into a former client, and then take on a new and unrelated matter against that client? – the courts' response has been a strong and unequivocal: No. The duty of undivided loyalty prohibits a lawyer from affirmatively acting to turn an existing client into a "hot potato" former client for purposes of taking on a new client/matter.[15]

There is, however, one way in which an attorney can turn an existing client into a former client, and that is by leaving the law firm that represents the existing client. In that scenario, the rules applicable are those relating to representation against former clients (see, section 4, *infra)*, rather than those relating to representation against existing clients (discussed in this section 3).

While representation against existing clients is prohibited in almost all contexts, it is permitted where the attorney makes disclosure of the circumstances as well as the actual and reasonably foreseeable adverse consequences to both parties, and obtains their informed written consent.[16] However, obtaining informed written consent in this context has its own set of pitfalls, and it is almost unheard of for existing clients of a lawyer or law firm to authorize their own attorney to take a matter against them. As such, and because even seeking informed written consent from both sides in such matters has its own potential pitfalls such efforts should generally be avoided.

C. Representation Adverse to a Former Client [Rule 3-310(E)]

Pursuant to Rule 3-310(E), a lawyer may not, without disclosure and informed written consent, represent a client in a matter adverse to a former client when the lawyer has obtained confidential information material to the employment. Thus, while the core value primarily at stake when an attorney seeks to take on a matter adverse to a current client is the duty of undivided loyalty, the core value primarily at stake when an attorney seeks to take on a matter adverse to a former client

---

[14] *Id.* fn 6.

[15] *Truck Insurance Exchange v. Fireman's Fund Insurance Co.* (1992) 6 Cal.App.4th 1050.

[16] Rule 3-310

is the duty of protect client confidences.[17] Because the main core value at issue in this scenario is the duty to protect confidentiality rather than the duty of loyalty, the prohibition is not generally absolute or automatic. Instead the courts focus on the confidentiality issue: Was the attorney in a position to learn of the former client's confidences, policies or strategy in matters relevant to the current dispute?[18] If so, the attorney is barred from taking on the matter adverse to the former client without disclosure and informed written consent. If not, the attorney may proceed with the current representation even over the protests of the former client.

In order to conduct this evaluation, the courts generally apply the "substantial relationship" test: If there is a "substantial relationship" between the former representation and the current representation, the attorney is *conclusively presumed* to have had access to confidential information from the former client that is material to the current representation, unless the lawyer can show there was no *opportunity* for confidential information to be divulged.[19]

In determining what constitutes a "substantial relationship" the courts have focused on the practical consequences of the attorney's representation of the former client and the protection of client confidences.[20] Hence, the courts have defined the term " substantial relationship" by reference to:

(1) Factual similarities between the two representations;

(2) Similarities in legal issues; and

(3) The nature and extent of the attorney's involvement with the former representation.[21]

If a substantial relationship is found, not only the attorney who represented the former client, but all attorneys in the same firm, are barred from taking the matter against the former client. In

---

[17] This duty is found not only in the Rules, but also in Business & Professions Code §6068(e) -- an attorney shall "maintain inviolate" the confidence of the client, and at every peril to himself or herself "preserve the secrets"of the client, as well as in the Evidence Code provisions (sections 950-962) creating and defining the attorney-client privilege.

[18] See, *Adams v. Aerojet General Corp.* (2001) 86 Cal.App.4th 1324.

[19] See, *Adams v. Aerojet General Corp., supra,* 86 Cal.App.4th 1324; *City National Bank v. Adams* (2002) 96 Cal.App.4th 315.

[20] *Adams v. Aeroject General Corp., supra,* 86 Cal.App.4th 1324.

[21] *H.F. Ahmanson & Co. v. Salomon Bros., Inc.,* (1991) 229 Cal.App.3d 1445, 1455.

other words, the confidential information known to the attorney who represented the former client is imputed to that attorney's entire law firm.[22]

Recently, courts have started addressing the issue of what happens when lawyers change law firms. Here the question usually presented is: Can a lawyer who leaves one firm take on representation of a client in a matter adverse to the old law firm's clients?

The initial step in this analysis has been to classify the old firm's clients as "former clients" of the attorney who has left, therefore making preservation of client confidences the key core value to be considered. Then, taking into consideration the competing value of allowing for attorney mobility (as well as the competing value of client choice in the retention of counsel that is applicable in nearly all of these conflict settings), the courts have adopted a modified substantial relationship test. Under that modified test, the focus is less on the relationship between the former and current representations, and more on whether the attorney who left the law firm really had an opportunity to obtain confidential information related to the present legal dispute while at the old firm.

The attorney will therefore be able to take a case adverse to one of the old firm's clients if the attorney can prove that he or she had no such opportunity based upon an analysis of the following factors:

(1) The nature of the relationship between the attorney who left the firm and the former client's representation;
(2) Time spent by the attorney working for the former client while at the old firm;

(3) The attorney's possible exposure to formulation of policy or strategy in matters relating to the current dispute while at the old firm;

(4) Whether the attorney worked out of the same branch office of the law firm which represented the former client; and

(5) Whether the attorney may have been exposed through administrative duties at the old firm to matters relevant to the current dispute.[23]

There is, however, one context in which representing a client adverse to a client of a former law firm calls the duty of undivided loyalty into play. When lawyers switch sides on a *pending matter*, the courts have recognized that the fiduciary values at risk include not only the duty to maintain confidences, but the duty of undivided loyalty as well. As such, in those situations, the

---

[22] See, *Cho v. Superior Court* (1995) 39 Cal.App.4th 113, 125.

[23] *Id.*

automatic bar (absent disclosure and consent) applies even if the lawyer switching sides had no access to the old firm's client's confidences, policies or strategies.[24]

While present clients almost never consent to an attorney taking a matter against their interests, former clients often agree to provide consent. Thus, in this conflict scenario, the first step is to evaluate whether there is a substantial relationship between the current and former representations, and to approach the situation based upon that analysis.

If there is a reasonable likelihood of a finding of a substantial relationship, one reasonable approach is to immediately: (a) inform the client that you cannot proceed with the representation absent disclosure to, and informed written consent of, the former client; (b) contact the former client (or counsel if represented); (c) provide the former client (through counsel if represented) with a written disclosure describing the relevant circumstances as well as the actual and reasonably foreseeable adverse consequences, and seeking informed written consent;[25] (d) provide the current client with written disclosure of the relevant circumstances, and the actual and reasonably foreseeable adverse consequences of the conflict from that client's perspective.[26] Thereafter, and so long as the lawyer has ensured that the current client is not damaged by any delay in resolving these issues, the course will be determined by whether the former client provides informed written consent.

If, based on the attorney's evaluation there is not a reasonable likelihood that the former and present matters are substantially related, one viable approach is to immediately: (a) inform the former client (through counsel if represented) that while informed written consent is not required because the matters are not substantially related, such consent is nevertheless requested; (b) provide the former client (or counsel) with a disclosure/consent form; and/or (c) send the former client (or counsel) a letter expressing the belief that the former and current matters are not substantially related, and that if the former client (or counsel) believes otherwise, he/she should provide immediate notification and act promptly to seek disqualification so that the current client is not put in a position of incurring substantial legal expenses prior to a hearing on a motion for disqualification; and/or (d) depending on the circumstances, take affirmative action to seek a court order establishing the right to proceed with the representation.

---

[24] *City National Bank v. Adams, supra,* 96 Cal.App.4th 315.

[25] For a sample Disclosure Letter for Joint Representation of Multiple Clients see Vapnek, et al., *California Practice Guide Professional Responsibility* (2001) Form 4:D. However, note that all disclosure letters must be expressly tailored to the facts and circumstances of the particular situation.

[26] See Rule 3-310(B)(2) or (3).

However, every attorney must remember that even if the former client pursues a motion for disqualification and is unsuccessful, the former client can still pursue a subsequent action for breach of fiduciary duty against the attorney.[27]

D. Payment of Fees by One Other Than The Client [Rule 3-310(F)]

Very often, clients cannot afford to pay for legal services or have a business relationship with a third party that provides for that party to pay the attorney's fees. Two common scenarios are where an employee is individually named in a lawsuit and is defended by the employer, or where a young person has legal problems and a parent agrees to pay the fee. The core values that can be at risk in these situations are: (1) the duty of loyalty; (2) the duty to exercise independent professional judgment on behalf of the client; and (3) the duty of the lawyer to maintain client confidences. Thus, with certain exceptions such as the insurer-insured relationship, in any situation in which a lawyer accepts compensation for representing a client from one other than the client, the lawyer must obtain the client's informed written consent following written disclosure of the relevant circumstances and of the actual and reasonably foreseeable adverse consequences.[28]

The lawyer must also ensure that: (1) the person paying the bills does not interfere with the lawyer's exercise of independent professional judgment on behalf of the client; and (2) client confidences are protected from the payor.[29] Thus, both of these core value issues must be addressed in the written disclosure and consent obtained from the client.[30] Furthermore, because it is important to have clear ground rules for everyone involved, providing disclosure to, and obtaining acknowledgment from, the payor is also advisable.

E. Business Relationships Between Lawyers and Clients [Rule 3-300]

Rule 3-300 prohibits business transactions between attorneys and clients or transactions in which an attorney acquires an ownership, possessory, security or other pecuniary interest adverse to a client unless:

1. The transaction is fair and reasonable to the client;

---

[27] See, *Benasra v. Mitchell, Silberberg & Knupp* (2002) 96 Cal.App.4th 96.

[28] Rule 3-310(F)(3)

[29] Rule 3-310(F)(1) and (2)

[30] For a sample Disclosure Letter for a Third Party Payor situation, see Vapnek, et al., *California Practice Guide Professional Responsibility* (2001) Form 4:B. However, note that all disclosure letters must be expressly tailored to the facts and circumstances of the particular situation.

2. The terms are fully disclosed to the client in understandable terms and in writing;

3. The client is advised in writing to seek the advice of an independent lawyer, and is given a reasonable opportunity to do so; and

4. The client consents in writing.

The Comments to Rule 3-300 carve out some important exceptions, the most significant of which is that the Rule does not apply to the agreement by which the lawyer is retained by the client, *unless* that agreement confers on the lawyer an ownership, possessory, security or other pecuniary interest adverse to the client, such as a security interest in client property[31] or ownership in a client business[32].

The restrictions on transactions between attorneys are long standing, and can be found in statutes and case law as well as in the Rules. In fact, the basic principles of the law were well articulated by the California Supreme Court in the 19th Century:

> "While an attorney is not prohibited from having business transactions with his client, yet, inasmuch as the relation of attorney and client is one wherein the attorney is apt to have very great influence over the client, especially in transactions which are a part of or intimately connected with the very business in reference to which the relation exists, such transactions are always scrutinized by courts with jealous care, and are set aside at the mere instance of the client, unless the attorney can show by extrinsic evidence that his client acted with full knowledge of all the facts connected with such transaction, and fully understood their effect; and in any attempt by the attorney to enforce an agreement on the part of the client growing out of such transaction, the burden of proof is always upon the attorney to show that the dealing was fair and just, and that the client was fully advised. (Citations omitted.) In the words of Lord Eldon, he must make it manifest that he gave to his client 'all that reasonable advice against himself that he would have given him against a third person.' (Citation omitted.)" [*Felton v. LaBreton* (1891) 92 Cal. 457, 469.]

In a similar vein, Probate Code §16004 governing the duty of trustees to avoid conflicts of interest [33] creates a presumption that any transaction between an attorney and client, other than one for compensation, that occurs during the existence of the fiduciary relationship, or while the

---

[31] See *Hawk v. State Bar* (1988) 45 Cal.3d 589.

[32] See ABA Formal Ethics Opinion 00-418 (July 2000)

[33] See *Ramirez v. Sturdevant* (1994) 21 Cal.App.4th 904, 917, acknowledging the application of these provisions to the attorney-client relationship.

attorney's influence remains, and by which the attorney obtains an advantage from the client constitutes a breach of fiduciary duty.

Taking Rule 3-300, Probate Code section 16004 and the case law into consideration the obligation of the lawyer doing business with a client requires the lawyer:

(1) To ensure that the deal is fair and reasonable to the client;

(2) To explain fully the terms of the transaction to the client (in writing);

(3) To give the client all the advice (in writing) against the deal that the lawyer would give to a client being asked to make the deal with a third party;

(4) To give the client advice (in writing) to consult with independent counsel and an opportunity to do so; and

(5) To obtain the client's informed written consent.[34]

Even then, there is no guarantee that a court will not void the deal, that the State Bar will not discipline the lawyer, or that the lawyer will not be forced to forego all gains and guarantee all losses. So, the moral of the story is – don't do a deal with a client unless you have complied with the law and you would honestly be willing to do both sides of the deal yourself!

V. CONFLICTS SCREENING

At all times, attorneys should be carefully focused on recognizing and avoiding conflicts of interest. The key to recognizing conflicts and potential conflicts is an effective office system, which generally means a system that combines both a computer data base and personal notice to every person in the law firm regarding potential new matters. Items to keep in the computer data base include:

1. Client identification:

    a. For individuals: name, address, telephone, fax, e-mail, business affiliation;

    b. For entities: the same as above, plus type of entity (e.g., corporation), principals, related entities (e.g., parent/subsidiary, general partner, etc.)

---

[34] For a sample Disclosure Letter Re Business Transactions between Lawyers and Clients see Vapnek, et al., *California Practice Guide Professional Responsibility* (2001) Form 4:E. However, note that all disclosure letters must be expressly tailored to the facts and circumstances of the particular situation.

2. Adversary identification: name, address, business affiliation, related entities, etc.

3. Other party (e.g., non-adverse co-defendants, etc.) identification;

4. Identification of the transaction or litigation;

5. Third party payors identification;

6. Other attorneys identification;

7. Key witness identification if practicable.

In addition, because computers do not keep track of people who may be friends or relatives of everyone in the office, attorneys should avoid relying solely on computer checks, and should submit information regarding new matters to every employee in the firm for conflict of interest purposes.

In an effort to avoid being in the "no-win" position of having conflicting obligations, care is required in developing a protocol for client intakes. One approach to take when contacted about a new matter is to:

(1) Begin by obtaining only the general nature of the new matter and the identity of all potential clients and all potential adversaries;

(2) Conduct the conflicts check (using both electronic and personal means if possible); and

(3) In the presence of an actual or potential conflict where the new matter should not be pursued, advise the potential new client in writing that due to a conflict of interest, you can neither take on the representation nor provide any advice whatsoever; or

(4) In the presence of a conflict situation where the new matter can be pursued, immediately determine the nature of the conflict situation as well as the disclosure and/or consent that is required to protect everyone involved – clients and attorneys, alike, and then act accordingly.

VI. CONCLUSION

More than 100 years ago, the Supreme Court addressed the importance of keeping the legal profession and the justice system on the *high plane*:

> "Its character depends upon the conduct of its members. They are officers of the law, as well as the agents of those by whom they are employed. Their fidelity is guaranteed by the highest considerations of honor and good faith . . .. None are more honored or more deserving than those of the . . . [legal profession] who, uniting ability with integrity, prove faithful to their trusts and worthy of the confidence reposed in them."[35]

Whenever we, as lawyers, are faced with actual or potential conflicts of interest, our duties to our clients, to our profession, to our system of justice, and to the public at large, require us to foster and to honor the core values of the legal profession. When we are knowledgeable about, and act in accordance with, the rules and ethical precepts applicable in the conflict of interest arena, we prove faithful to our charge and upbuild both our profession and our society.

---

[35] *Baker v. Humphrey* (1879) 101 U.S. 494, 502.