

## RESOLUTION 01-06-2008

### DIGEST

#### Attorney Disqualification: Effect on Firm or Associate

Adds Rule 3-310(G) to the California Rules of Professional Conduct to clarify the effect of the disqualification of an attorney on an associated firm or individual.

### RESOLUTIONS COMMITTEE RECOMMENDATION

#### DISAPPROVE

#### History:

No similar resolutions found.

#### Reasons:

This resolution adds Rule 3-310(G) to the California Rules of Professional Conduct to clarify the effect of the disqualification of an attorney on an associated firm or individual. This resolution should be disapproved because a bright-line rule of automatic disqualification is unnecessary and would limit the rights of clients to be represented by attorneys of their choice. In addition, the use of the phrase “clients whose interests are affected by the representation” is too vague.

Gone are the days when attorneys work for one firm their entire career. The reality of practice today is that lawyers and clients are free to change associations at will. A rule of automatic disqualification is subject to abuse where parties use it for strategic rather than proper reasons. In this environment, the court must have the flexibility not only to use its equitable powers to protect clients, but also to ensure the efficient administration of justice.

In California, the vicarious disqualification rules are derived from decisional law. Courts must retain the ability to examine each motion for disqualification to ensure that a client’s right to choose counsel and an attorney’s interest in representing clients are not unnecessarily compromised. In its evaluation, the court must be free to assess whether steps taken by attorneys to protect confidences and fulfill their duty of loyalty are effective. The Ninth Circuit noted in *In re County of Los Angeles* [9<sup>th</sup> Cir. (2000) 23 F.3d 990], that when implemented in a timely and effective way, an ethical wall can rebut the presumption that a lawyer has contaminated the entire firm. (Id. at 996.)

This resolution would unnecessarily limit the court’s power to ensure equity in court proceedings and the flexibility needed to practice in today’s legal environment.

### TEXT OF RESOLUTION

RESOLVED, that the Conference of Delegates of California Bar Associations recommends that the Board of Governors of the State Bar of California and the California Supreme Court add a new Rule, Rule 3-310(G), to the California Rules of Professional Conduct, to read as follows:

- 1 Rule 3-310(G)

2           A law firm, employing or otherwise associating with a member who is disqualified  
3 under this Rule 3-310 or by order of any court or tribunal from representing a client, shall  
4 also be disqualified from representation of the client. The law firm shall not avoid  
5 disqualification under this rule by the use of an ethical screen where a member employed  
6 by or associated with that law firm is disqualified from such representation, unless  
7 informed written consent is obtained from all present and former clients of the member or  
8 law firm whose interests are affected by the representation.

(Proposed new language underlined; language to be deleted stricken.)

**PROPONENT:** Orange County Bar Association

**STATEMENT OF REASONS:**

Existing Law: California Rules of Professional Conduct are silent on whether ethical screens can be erected to shield the conflicts of interest of one member of a law firm from another. The Ninth Circuit and the California Supreme Court appear to be developing conflicting views. Because of these conflicting rulings, attorneys and clients cannot predict how to avoid conflicts of interest and whether law firms will be disqualified from representations.

Resolution: Proposed Rule of Professional Conduct 3-310(G) adds an affirmative statement that ethical screens are not effective to shield the conflicts of interest of one member of a law firm from another.

The Problem: Rule of Professional Conduct 3-310(E) governs conflicts of interest as to former clients:

A member shall not, without the informed consent of the client or former client, accept employment adverse to the client or former client where, by reason of the representation of the client or former client, the member has obtained confidential information material to the employment.

The purpose of Rule 3-310(E) is to protect confidences shared between the client and attorney, both during the active attorney-client relationship and after the termination of the attorney's representation. *City and County of San Francisco v. Cobra Solutions, Inc.*, 38 Cal.4<sup>th</sup> 839(2006); *People ex rel. Department of Corporations v. Speedee Oil Change Systems, Inc.*, 20 Cal.4<sup>th</sup> 1135, 1146 (1999).

If an attorney violates Rule 3-310(E), the former client may disqualify the attorney. Moreover, "when a conflict of interest requires an attorney's disqualification from a matter, the disqualification normally extends vicariously to the attorney's entire law firm." *Lucent Tech., Inc. v. Gateway, Inc.*, 2007 U.S. Dist. LEXIS 35502 at \*21 (S.D.Cal. May 15, 2007); see also *Pound v. DeMara DeMara Cameron*, 135 Cal.App.4<sup>th</sup> 70, 78 (2005); *Henriksen v. Great America Savings & Loan et al.*, 11 Cal.App.4<sup>th</sup> 109, 114 (1992) ("As a general rule in California, where an attorney is disqualified from representation, the entire law firm is vicariously disqualified as well.").

The established rule in California is that once an attorney is disqualified, "that attorney's entire firm must be disqualified as well, regardless of efforts to erect an ethical wall." *Hitachi*,

Ltd. v. Tatung Co., 419 F.Supp.2d 1158, 1161 (N.D.Cal. 2006) (emphasis added). “California courts generally have not allowed a law firm to avoid vicarious disqualification by implementing a screening procedure.” Lucent, 2007 U.S. Dist. LEXIS at \* 22; Hitachi, 419 F.Supp.2d at 1161.

Nonetheless, the Ninth Circuit noted in *In re County of Los Angeles*, 223 F.3d 990, 995-996 (9<sup>th</sup> Cir. 2000) that the California Supreme Court has signaled it “may well adopt a more flexible approach to vicarious disqualification.” The Ninth Circuit permitted an ethical wall to prevent disqualification in that case.

No California state court has adopted the Ninth Circuit’s approach, leaving unclear whether ethical screens are effective in California. This resolution would clarify the California Rules of Professional Conduct, in a manner consistent with existing case law, so that unnecessary litigation over the propriety of ethical walls in private law firms can be avoided.

#### **IMPACT STATEMENT:**

This proposed Resolution does not affect any other law, statute or rule.

**AUTHOR AND/OR PERMANENT CONTACT:** Joel S. Miliband, Rus, Miliband & Smith, A Professional Corporation, 2600 Michelson Drive, 7<sup>th</sup> Floor, Irvine, California 92612, voice (949) 752-7100, fax (949) 252-1514, e-mail: [jmiliband@rusmiliband.com](mailto:jmiliband@rusmiliband.com)

**RESPONSIBLE FLOOR DELEGATE:** Joel S. Miliband

#### **COUNTERARGUMENTS**

##### **THE BAR ASSOCIATION OF SAN FRANCISCO**

In principle, Resolution 01-06 seeks to achieve a useful purpose, which is to clarify the law regarding conflicts of interest arising when one member of a law firm has a potential conflict with an existing or former client of the law firm, and whether that conflict can be resolved by creating an ethical wall. As the size of law firms increases, the use of ethical walls is a virtual necessity to prevent many firms from being perpetually conflicted out of engagements. The solution of permitting ethical walls with the consent of the clients and former clients affected by the conflict is appropriate, and certainly the trend in the case law. However, this proposal is flawed by the use of the term clients “whose interests are affected” by the representation. This introduces an entirely new concept into the Rule of Professional Conduct and will lead to even more confusion. The Bar Association of San Francisco would be inclined to support this proposal if it were amended to state that the law firm must obtain the consent of any clients or former clients “whose interests are in conflict with the current representation.” This language is consistent with the rest of Rule 3-310.

##### **SAN DIEGO COUNTY BAR ASSOCIATION**

The San Diego County Bar Association opposes Resolution 1-6-2008 because disqualification of an entire law firm based on its employment of a single attorney would work harsh and unjust results. The consequences of the proposed policy would be harmful to attorneys, law firms and clients.

In today's legal world, attorneys change associations frequently. If law firms are required to disqualify themselves in every case when a mid-career attorney represented an adverse party prior to joining that firm, they will be less likely to associate experienced attorneys. Clients would find their options to retain law firms much more limited simply because an attorney in another practice group of a firm they wish to utilize once represented their opponent in an unrelated case prior to working for this firm.

The restriction on the clients' right to retain their counsel of choice could become an out and out prohibition of the right to counsel in specialized areas of law. It would likely become a litigation tactic to prevent parties from being represented by highly-qualified law firms. The current Rules does not compel such vicarious exclusion of law firms. Judicial interpretations which apply a case-by-case determination have worked well. The proponent is seeking to obtain absolute purity in a messy world without consideration of what this ideal will cost the public, attorneys and the administration of justice.

## **THE BOARD OF GOVERNORS**

This resolution seeks an amendment to the Rules of Professional Conduct, specifically rule 3-310 [re avoiding the representation of adverse interests]. The desired amendment would add a new paragraph (G) addressing the issue of imputed conflicts and ethical screens.

At this time, the State Bar is considering amendments to the Rules of Professional Conduct through the work of its Special Commission for the Revision of the Rules of Professional Conduct (Commission). The Commission is charged with conducting a cover-to-cover review of the California rules and proposing comprehensive amendments for consideration by the Board of Governors. This comprehensive review includes consideration of amendments to rule 3-310. In addition, the Commission's charge also instructs the Commission to consider the American Bar Association's Model Rules of Professional Conduct, including Model Rule 1.10 [re imputation of conflicts of interest].

Accordingly, the general subject matter of the proponent's desired initiative is being considered by the State Bar through its Commission and any action to approve Resolution 01-06-2008 would prejudice controversial substantive and policy issues that are already in process. Rather than pursuing Conference action, the resolution proponents should participate in the Commission's work by sending representatives to the open session meetings of the Commission and by providing input on draft rules that are distributed for public comment. Other stakeholders have participated in this manner, greatly enhancing the Commission's deliberative process and clarifying complex issues that will be ultimately decided by the Board of Governors and the Supreme Court.