Privileges and Conflicts in Practice Today

- OCPA Sept 17, 2016
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- Welcome Paralegals

Today’s Agenda

- Recent ethics cases update
- Confidentiality and Attorney Client Privilege
- Conflicts
- A little Competence and Advertising
- Your questions

Confidentiality Rules

- Maintain inviolate the confidences, and at every peril to self to preserve client secrets B & P Code Section 6068(e)
- No revealing protected information without the informed consent of the client CA Rules of Professional Conduct 3-100
- Broader than Attorney-Client privilege
Confidentiality

- **Practical rule:** Reveal nothing about a client’s case not required for preparation
- **Rationale:** To encourage a client to fully discuss the facts of the case
- Rule applies to attorneys, paralegals, secretaries and others. B&P Code 6453

Attorney-Client Privilege

- **Evidentiary Rule:** To protect communications which facilitate the provision of legal services E.C. Section 954
- Harsh rule—prevents truth in court
- Like spousal or psychotherapist privilege
  - Public policy
  - Communication is good

Attorney Client Privilege

- Holder is the client
- Requires the attorney to refuse to disclose these communications
**Anten v. Superior Court of L.A.**
*233 Cal. App. 4th 1254 (2015)*

- Two clients, A & B jointly retain Firm concerning former attorney
- Firm advises to sue as former lawyer committed malpractice
- B signs on; A wants to settle, declines
- Firm fires A; represents B in lawsuit
- A files this suit against Firm as well as former lawyer

**Problem Arises**
- During discovery client A wants the communications between client B and Firm in this lawsuit. Firm says no.
- Why?
  - Firm says privileged and B didn’t waive
  - Trial court agrees

**Appellate Court Reversed**
- E.C. 958: no privilege as to those communications relevant to a breach of duty by the lawyer
- Rationale: not fair
- Communications between joint clients and attorney are NOT confidential
  - "Communications made by parties united in a common interest to their joint or common counsel, while privileged against strangers, are not privileged as between such parties nor as between their counsel and any of them, when later they assume adverse positions." Croce v. Superior Court (1937) 21 Cal.App.2d 18, 20
What if: Paralegal is Fired by the Law Firm

- Job performance reviews were great
- Clients wrote thank you letters
- Paralegal has sued for wrongful termination
- He wants documentation for the trial
- Firm objects...

Chubb & Son v. Sup Ct of S.F.
228 Cal. App. 4th 1094 (2014)

- Atty Tracy Lemmon sued former firm and Chubb whose insured she represented
- She requests job performance docs
- Chubb withholds; confidential as to clients and asserts parties cannot even reveal privileged info to own attys

Background

- Atty client privilege around for 400 yrs
- Safeguards relationship to promote full and open discussion
- Client is holder; atty must claim privilege
- Absolute privilege w/o exception unless statutory
**Chubb Appellate Court’s View**

- Issue: whether allegedly privileged or confidential information may be disclosed by the parties to their own attorneys
- Not a public disclosure
- Confidential info only for the purpose of consulting with own counsel
- Fundamental fairness allows Lemmon to make a limited disclosure to her attys

**Court’s Ruling**

- Limited disclosure is appropriate and fair
- The disclosure ultimately helps to protect the privilege by allowing independent judgments about what is disclosable
- Both sides may (should) reveal confidential information to own counsel to determine what is actually privileged

**Conflicts of Interest**

- About serving more than one master
- Divided loyalty
- Potential for harm or disadvantage
- Our concern: the attorney’s professional judgment may be compromised
Simultaneous Representation

- Adverse interests are never appropriate
- Never allowed family law cases
- Civil cases?
- Criminal cases?

Successive Representation

- Current client’s interests may be adverse to a previous client
  - Absolutely prohibited if:
    - Truly adverse, and
    - Matters substantially related
  - Such an attorney/paralegal is “tainted”

Result or Effect?

- What can happen if a conflict is found by the court?
- What is usual underlying reason for conflict?
**Acacia Patent Acquisition v. Sup Ct of Orange County**


- Case 1 Firm A reps client X in patent case. Case settles.
- Case 2 Firm A hires Firm B in fee dispute case to sue client X. Case settles.
- Case 3 Expert from matter 1 hires Firm B in fee dispute to sue client X.
- Client X seeks to disqualify Firm B from reping Expert as B had access to Client’s privileged communications in handling Case 2.

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**How should the court rule on Client X’s motion to disqualify?**

- A. Deny since Firm B did not rep Client X but got info thru rep of adverse party.
- B. Deny as Firm B never had any type of confidential relationship with Client X.
- C. Grant as Firm B got X’s confidential info during rep of Firm A in Case 2.
- D. None of the above.

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**Answer: C**

The law firm was disqualified from being adverse to the client where the firm had obtained access to client’s confidential information through representation of client’s former counsel in a prior fee dispute.

Court’s test:

1. Did first rep result in broad disclosure of non-client’s privileged information; and
2. Does a substantial relationship exist between the two matters.
Caution From the Court

- This case (ruling) should **not** be interpreted as creating a broad duty of confidentiality owed to opposing parties
- "In the limited realm of cases featuring attorneys as parties opposed to their former clients, lawyers representing the attorney party must avoid participation in substantially related matters, whereby their access to privileged information in the former action would potentially serve as an advantage in the latter."

Family Law Disqualification Cited

- Lawyer disqualified from representing his own son (father of child) in custody dispute
- Lawyer never rep'd mother but did rep mother’s father in a divorce case
- Potential misuse of mother’s confidential info which ‘may have been acquired’
- Substantial relationship test applied

Other Cause of Conflicts?

- Change of law firms by attorney
- Change of law firms by paralegal
- How can one ever promote or move to another firm then?
Chinese Wall

To protect the **client**

- "Screens" or keeps tainted employee away from the case
- Quarantine must be
  - Immediate
  - Complete

**Western Sugar Coop. v. Archer-Daniels-Midland Co.**

98 F. Supp.3d 1074 (C.D. Cal., 2015)

- Disqualification motion of newly formed law firm (created by merger) by defendant clients
- Concurrent representation issue

**Facts of the Case**

- Law Firm X merges with law firm Y
- At the time of merger Firm X reps plaintiffs in suit alleging false advertising claims relating to the marketing of high fructose corn syrup
- Post merger, Firm X discovers Firm Y has served as counsel to several of the defendants in the suit, but neglected to include them in pre-merger conflict check
- New firm asks defendants to agree to a waiver...but no!
- New firm tells clients they had executed, in engagement letter, an open-ended advance waiver when the representation began about a decade earlier
- New firm finally withdraws, as to one defendant
Withdrawal Effective?
- 'Hot potato rule'
- Bars attorney and firm from “curing” the dual representation of current clients by expediently severing the relationship with one of them
- Rule applies regardless of atty’s reason
- Grounded in atty's undivided duty of loyalty

Western Sugar Court’s Ruling
- The engagement letter waiver not sufficient
- It purported to waive any conflict not substantially related indefinitely
- Not specific (and ten years old)
- Not a "full and reasonable disclosure of the potential conflict"

You Are Fired! (Disqualified)
- Simultaneous representation of one defendant and plaintiffs as a result of the merger, and advance waiver not sufficient
- CRPC 3-310 disqualification
- Possession of confidential information presumed; need not be proven
- Disqualification extends vicariously and is imputed to all
Lesson to be Learned

- Huge price paid here
- Plaintiffs lost long term investment in their chosen attorneys
- Firm lost clients (and $$)
- If conflict checks had revealed problem, walls and negotiations may have cured the problem

Another Money Issue

- Can an attorney be ordered to disgorge all fees where, as part of a motion to recover fees owed, attorney takes a position adverse to client’s interest and inconsistent with position advanced on client’s behalf during representation?
- Yes or No?

In re McIntosh,

- Atty reps debtor in BK
- During BK atty argues a specific lien was not preserved and gets order eliminating it
- After discharge from matter atty argues, in fee dispute, that lien had been preserved and should help pay his fee
Good Bye All Fees

- Truly offended, court found a “flagrant” breach of Rule 3-310; denied fees motion
- Further ordered disgorgement of fees already paid due to “stark” violation of atty’s duty to former client
- May be technical or confusing to some, but a BK atty would understand what he did

Competence Factors

- Legal knowledge
- Skill
- Thoroughness
- Preparation
- Diligence
- Promptness
- Communication with client
- Can paralegals assist?

Competency

- Concerning new areas of the law and new court policies or procedures
- Competence may require higher level of technological knowledge and ability that even a very highly trained trial attorney may not have
- Cure for this?
Facts
- Handling discovery of electronically stored information (ESI)
- Big case where opposing counsel demanded ediscovery and court rules have ediscovery case management
- Opposing counsel offers joint search of client network with her vendor and clawback agreement. Atty agrees...

What Could Go Wrong?
- Court issues order based on stipulation
- Atty's set search terms based on litigation experience
- Client has large IT department and atty gives search terms to IT to permit vendor access; takes no other action
- Atty later hires ediscovery expert and learns...

What Did Go Wrong
- Proprietary information was turned over
- Client routinely had deleted responsive information from server based on normal document retention policy
- Note: Clients or witnesses may use digital information even if dinosaur attorney does not
Cal State Bar Formal Opinion 2015-193

- On case by case basis, firms may need help, especially with technology
  - Depends on type of case and issues presented
  - Nature of ESI
- Cure for lack of individual competence
  - Help from staff, associate in, client, or decline
- Obligation/Duty to supervise
  - Staff, vendors, clients

Advertising Case

- Yes, we can advertise
- Paralegals may be asked to help prepare ads or ad copy
- What, if any, limitations exist?

Question

- Attorney ads must not contain any untrue statements, but there is no prohibition on the use of images to promote one’s practice
  - True
  - False
- E.g., “I’m great in court”
False

- Rule 1-400 (D)(2) states that a communication shall not “contain any matter, or present or arrange any matter in a manner or format which is false, deceptive, or which tends to confuse, deceive, or mislead the public”


- Photos on LA atty website that appeared to show her with celebrities including both Clintons, Al Gore, Arnold Schwarzenegger...

Remember...

- Stay ethical
- You are not an island
- Stay aware and speak up