PANSKY MARKLE HAM LLP

T 213.626.7300 F 213.626.7330
1010 Sycamore Avenue, Suite 308
South Pasadena, California 91030
panskymarkle.com

COMPETING CONSIDERATIONS IN MAINTAINING CLIENT CONFIDENTIALITY AS COUNSEL AND IN SERVING AS A TESTIFYING WITNESS

Ellen A. Pansky, Esq.
Pansky Markle Ham LLP
epansky@panskymarkle.com

Obviously, when serving in an attorney-client relationship, a lawyer is duty-bound to maintain strict confidentiality and to refrain from revealing privileged communications with the client. When a lawyer serves as a consulting expert, it is universally accepted that the consultant's communications with counsel for the party on whose behalf the consultant was hired, are also absolutely privileged. On the other hand, when a lawyer serves as a testifying expert, none of the information and communications conveyed to the testifying expert is confidential, and all facts communicated to the expert are discoverable by the opposing party. An interesting case out of the California appellate court explored the parameters of a testifying expert's efforts to maintain confidentiality of a former client's confidential information learned during a *representational* relationship, while subsequently serving as a testifying expert for the former's client's litigation adversary, in a subsequent unrelated civil action

In *American Airlines v. Sheppard, Mullin, Richter & Hampton* (2002) 96 Cal.App.4th 1017, Sheppard Mullin partner, Long, had previously represented American Airlines in a state court proceeding against an aircraft manufacturer, MDC. After that case had ended through a confidential settlement, another purchaser of the same model of aircraft, ADO, sued MDC. In that litigation, ADO sought documents related to AA's case against MDC in its discovery. AA then asked Long to review copies of the discovery requests in the ADO v. MDC action, and Long also provided advice to AA regarding the document production, in cooperation with ADO's counsel.

Thereafter, ADO indicated it wished to retain Long as a testifying expert witness in its litigation against MDC. Long advised AA, and prepared and sent a conflict of interest waiver letter to AA. AA declined to execute the waiver, citing a fear that it might need Long's services in the future if subpoenaed by ADO.

Notwithstanding AA's refusal to sign a consent agreement, Long concluded that no conflict was present, and he accepted the engagement to serve as ADO's expert witness, after consulting with the ethics committee of Shepard Mullin. AA then sued Sheppard Mullin and Long, alleging breach of fiduciary duty to AA on the basis that Long's acceptance of the expert witness engagement raised the specter that Long would be called upon to reveal American Airlines' confidential information relating to its allegations against MDC. Long was disqualified as an expert witness and the court of appeal also upheld the jury verdict of monetary damages based on the breach of fiduciary duty.

Sheppard Mullin argued that Long had not accepted representation of a client whose interests were adverse to AA; that Long would preserve all of AA's confidences and would

T 213.626.7300 F 213.626.7330
1010 Sycamore Avenue, Suite 308
South Pasadena, California 91030
panskymarkle.com

refuse to answer any questions which would require the revelation of any of AA's confidential information; and that an expert opinion is not based upon confidential information, and therefore, all of the facts relied upon by Long as the bases of his opinions would have to be revealed, so that none of AA's confidential information could possibly serve as the foundation of Long's opinions.

Additionally, Sheppard Mullin argued that the subject matter of the prior representation of AA was factually distinct, because the engine in the aircraft in the AA litigation was manufactured by a different manufacturer than the engine involved in the case in which Long had been designated a witness on behalf of ADO. Because the engines were made by different manufacturers, Sheppard argued that there was no substantial relationship between the two cases. The appellate court made short shrift of this argument, at fn. 12:

> Defendants argue that Long's representation of American involved MD-11's with General Electric (GE) engines while ADO's MD-11's had Pratt & Whitney engines, and therefore the subject matter of the representations was not substantially related. That is hardly a distinction of consequence in the context of ADO's discovery proceedings. ADO was interested in obtaining all the information from American that it could regarding American's knowledge of problems with its MD-11. Long represented American in curtailing that very discovery. Meanwhile, MDC had full knowledge that ADO was seeking to discover American's documents; it was MDC, after all, that originally informed American of that fact. Where the prior representation is in the same matter as the current representation, and the matters are factually and legally intertwined, there exists a substantial relationship between the former and current representation. "Absent the former client's informed written consent, an attorney may never switch sides in an ongoing legal matter." (*City National Bank v. Adams*, (2002) 96 Cal. App. 4th 315, at p. 330.)

In rejecting Sheppard Mullin's arguments, the appellate court pointed out at 1032:

> Application of Rule 3-310(C) does not require representation of both clients *as an attorney*. The discussion section which follows Rule 3-310 states: "Subparagraphs (C)(1) and (C)(2) are intended to apply to all types of legal employment, including the concurrent representation of multiple parties in litigation or in a single transaction or in some other common enterprise or legal relationship." [Emphasis in original.]
>
> * * *
>
> It is anathema to the State Bar Rules of Professional Conduct to

T 213.626.7300 F 213.626.7330
1010 Sycamore Avenue, Suite 308
South Pasadena, California 91030
panskymarkle.com

> suggest that an attorney can place himself in a situation in which he undertakes adverse representation of a third party, and the client cannot object because the attorney has promised not to disclose the client's confidential information even though the information may be decidedly helpful to the new client. It is precisely this compromised situation, when the burden of deciding which client to favor is placed solely on the attorney's shoulders and within the attorney's sole power to decide, that Rule 3-310 is designed to avoid. **In other words, Long's promise to maintain the confidences of American is entirely dependent on his self-assumed position as arbiter of his own fidelity and what is and is not a privileged communication. That is not a permissible avoidance of his fiduciary duty.** [Emphasis added.]
>
> It is inconsequential that American was not a party to the ADO lawsuit. The proscription against adverse representation exists whenever counsel's employment is adverse to the client or former client, and can exist even though a prior client is not a party to the litigation. (*Metro-Goldwyn-Mayer, Inc. v. Tracinda Corp.* (1995) 36 Cal. App. 4th 1832, 1843.) Conflicts of interest may arise in a variety of circumstances where an attorney assumes a role other than as an attorney at law adverse to an existing client. (*Manfredi & Levine v. Superior Court* (1998) 66 Cal. App. 4th 1128, 1132-1133. *Id.* at 1039.
>
> * * *
>
> **Everything Long learned about the MD-11 while representing American was placed beyond American's control and its confidential status depended on Long's promise to safeguard that information. Clients always have to trust attorneys to maintain confidences imparted during the course of the attorney-client relationship, but they are not compelled to accept the attorney's invitation to "trust me" when he undertakes to align himself with a new client whose interests pose a conflict of interest. A client is simply not required to forfeit the right to control the disclosure of its confidential information to the unfettered determination of its attorney regardless of his vow to protect the client's confidences.** [Emphasis added.] 1040.

The *AA v. Sheppard Mullin* decision conflated the duty of confidentiality with the duty to refrain from representing conflicting interests. Among other things, the appellate court extrapolated from a comment to the California conflict rule, 3-310, to the effect that conflicts can

T 213.626.7300 F 213.626.7330
1010 Sycamore Avenue, Suite 308
South Pasadena, California 91030
panskymarkle.com

appear in various types of legal *representation*, and applied the comment to *non-representational* services a lawyer may perform, such as testifying as to a professional opinion. The appellate court also concluded that the AA case against MDC was substantially related to ADO's case against MDC, despite the fact that the engines of the aircrafts were completely different in the equipment at issue in the two cases. The appellate court relied on the fact that Long had assisted AA in restricting ADO's access to AA's confidential information in drawing the thread between the former representation and the subsequent expert witness designation, in order the find a substantial relationship between the two matters. To this writer, it seems a questionable proposition that a lawyer is always presented with a conflict simply because he/she successively represents separate plaintiffs against the same defendant, on similar, but not identical claims. Even the representation of multiple clients with near identical claims in their respective separate, independent actions is permissible, so long as the defendant has sufficient assets to satisfy each of the claims. If a lawyer serving in a representational capacity is free to represent successive clients with similar claims against the same defendant, how can it be that a different rule applies to the lawyer who seeks to serve as an expert witness in the second case, after the first case is fully completed?

Further, the appellate court seems to have accepted the speculative argument that Long would not have upheld his promise to refrain from revealing any of the confidences learned during his prior representation of AA when he served as a testifying expert in the ADO case. This smacks of the "appearance of impropriety" argument rejected in situations such as where spouses are opposing counsel in a case. (See, e.g., ABA Formal Ethics Opinion 340 (1975) and *DCH Health Services Corp. v. Waite* (2002) 95 Cal. App. 4th 829.

Finally, perhaps one answer relates to whether the lawyer or law firm has previously unsuccessfully requested a conflict waiver from the prior client. In California, similar facts were at issue in the seminal case of *Truck Ins. Exchange v. Fireman's Fund Ins. Co*. (1992) 6 Cal.App.4th 1050, 1057, giving rise to the famous "hot potato rule:" the lawyer cannot convert a current client to a former client by dropping the client like a hot potato. However, in *Truck Insurance*, at issue was a *current* client, not a *former* client. Still, the appellate court noted that the disqualified firm had first requested a waiver of the client, and when the client refused, the firm then terminated the attorney-client relationship. This may raise an inference that where the firm has not requested, and has not been refused a conflict waiver by a former client, and the firm relies in a good faith analysis that no disqualifying conflict had arisen, the firm will have more success in defending a subsequent motion for disqualification than in seeking the consent in the first instance.