

**THE STATE BAR OF CALIFORNIA
STANDING COMMITTEE ON
PROFESSIONAL RESPONSIBILITY AND CONDUCT
FORMAL OPINION NO. 2011-182**

ISSUES:

1. When at the outset of representation it appears an attorney would need to serve a discovery subpoena for production of documents on another current client of the attorney or the attorney's law firm, may the attorney accept the representation of the new client and serve the discovery subpoena on the current client?
2. If doing so raises a conflict of interest, may the attorney seek informed written consent in order to accept the representation including possible service of the subpoena?
3. What obligations arise if an attorney seeks informed written consent?

DIGEST:

When an attorney discovers at the outset of representation that the attorney must serve a discovery subpoena for production of documents on another current client of the attorney or the attorney's law firm, serving the discovery subpoena is an adverse action such that a concurrent client conflict of interest arises. To represent a client who seeks to serve such a subpoena, the attorney must seek informed written consent from each client, disclosing the relevant circumstances and the actual and reasonably foreseeable adverse consequences to the client providing consent.

AUTHORITIES

INTERPRETED:

Rules 3-100 and 3-310 of the Rules of Professional Conduct of the State Bar of California^{1/}

Business and Professions Code section 6068, subdivision (e)

STATEMENT OF FACTS

Prospective Client requests Attorney to represent Prospective Client in litigation. Before agreeing to represent Prospective Client, Attorney runs a conflict check listing the adverse parties and all potential witnesses identified by Prospective Client and Attorney. The conflict check reveals that Witness Client, a potential witness who has documents critical to the litigation, is represented by Partner, another attorney at Attorney's law firm in an unrelated matter.

Is it a conflict of interest for Attorney to accept the representation of Prospective Client and serve a discovery subpoena for documents ("document subpoena") on Witness Client? If it is a conflict of interest, may Attorney do so with informed written consent of Prospective Client and Witness Client? What obligations arise if an attorney seeks informed written consent to such a representation?^{2/}

^{1/} Unless otherwise indicated, all rule references are to the Rules of Professional Conduct of the State Bar of California.

^{2/} This opinion does not address whether Attorney may ethically do anything other than decline the representation should Witness Client refuse to consent to the representation of Prospective Client. Further, this opinion does not address Attorney's obligation should a conflict arise after representation has been accepted. In *Cal West Nurseries, Inc. v. Superior Court* (2005) 129 Cal.App.4th 1170 [29 Cal.Rptr.3d 170], the court disqualified an entire law firm which had served discovery on a current client, to which the firm was adverse in ongoing litigation, even though the firm withdrew as to that party and associated other counsel for that party. Similarly, *UMG Recordings, Inc. v. MySpace* (C.D. Cal. 2007) 526 F.Supp.2d 1046 (applying California law), expressed reservations about the independence of a second firm associated in by a law firm to serve discovery on a party previously represented by

DISCUSSION

1. Conducting Third Party Discovery of a Current Client is Adverse

This opinion addresses the issue of whether an attorney may accept representation of a new client when at the outset of the representation it appears the attorney would need to serve a discovery subpoena for documents on another existing client of the attorney's law firm. The first question is whether serving a document subpoena on a witness/client is "adverse" to the interests of that client. California law has not expressly defined "adverse" for purposes of analysis of conflicts between an attorney's clients. Neither rule 3-310 nor California case law supply an explicit definition in that context. In *Flatt v. Superior Court* (1994) 9 Cal.4th 275 [36 Cal.Rptr.2d 537], the California Supreme Court held that it would be a breach of the duty of loyalty for an attorney to represent or provide advice to a client or person that is adverse to the interests of an existing client on any matter, whether related or unrelated. It is a violation of the duty of loyalty for an attorney to put himself in a position where he may have to choose between conflicting duties, or be led to attempt to reconcile conflicting interests, rather than to enforce to their full extent the rights of the interest which he should alone represent. *Flatt, supra*, 9 Cal.4th at p. 289, citing *Anderson v. Eaton* (1930) 211 Cal. 113, 116 [293 P. 788]; *People ex rel. Dept. of Corporations v. Speedee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135, 1146-47 [86 Cal.Rptr.2d 816]; see *Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 821 [124 Cal.Rptr.3d 256]. "By virtue of this rule an attorney is precluded from assuming any relation which would prevent him from devoting his entire energies to his client's interests." *Flatt, supra*, quoting *Anderson, supra* (emphasis added by court in *Flatt*). In such circumstances, "the rule of disqualification . . . is a *per se* or 'automatic' one." *Flatt, supra*, 9 Cal.4th at p. 284 (emphasis in original); *Anderson, supra*, 211 Cal. at p. 116. The purpose of this rule is to maintain the level of confidence and trust in counsel that is one of the foundations of the professional relationship. *Flatt, supra*, 9 Cal.4th at p. 285.

While *Flatt* arose out of one client potentially suing another client, or party adversity, other cases have applied the proscription against adverse representation in situations where the existing client is a third-party witness rather than an adverse party. For instance, in *Hernandez v. Paicius* (2003) 109 Cal.App.4th 452 [134 Cal.Rptr.2d 756], *disapproved on other grounds, People v. Freeman* (2010) 47 Cal.4th 993 [103 Cal.Rptr.3d 723], an attorney cross-examined her own current client during a trial in which he was an expert witness for the opposing party. The court stated the attorney's "representation . . . required her to create a record impeaching her other client's professional reputation and credibility. In pursuing her ends in this case, counsel demonstrated a dulled sensitivity to professional ethics and engaged in an egregious and shocking breach of her duty of loyalty to" the current client whom she cross-examined. *Hernandez, supra*, at p. 466. Adversity arises where the client is a potential third-party witness.

The California Supreme Court, in *Ames v. State Bar* (1973) 8 Cal.3d 910 [106 Cal.Rptr. 489], cited a definition of "adverse" drawn from a dictionary, albeit in connection with the construction of the predecessor of rule 3-300 prohibiting a lawyer from acquiring an interest "adverse" to a client. The Supreme Court relied upon the dictionary definition of "adverse" as entailing "acting against or in a contrary direction...g hostile, opposed, antagonistic," "in opposition to one's interests: detrimental, unfavorable," "having opposing interests: having interests for preservation of which opposition is essential." *Ames, supra*, 8 Cal.3d at p. 917 (internal quotation marks omitted). The *Ames* Court made clear that an interest acquired by a lawyer may be "adverse" to a client even if its acquisition does not actually cause the client "injury," so long as "injury" is "one of the foreseeable though not inevitable consequences." (*Ames, supra*, 8 Cal.3d at pp. 919-20.) Indeed, the *Ames* Court implied that, broadly speaking, "adverse" means "unfavorable" in the sense of something that generally could cause injury even if in any particular case it does not do so.

the first law firm. These cases suggest association of independent counsel to handle the document subpoena might not be permitted, but they did not involve the situation addressed in this opinion where the document subpoena would be served on a nonparty to the litigation. But see ABA Formal Opn. No. 92-367 suggesting, under the ABA Model Rules, independent counsel may be retained to pursue the discovery when the conflict arises after the representation is underway. The ABA Model Rules are not binding in California but may be used for guidance by lawyers where there is no direct California authority and the ABA Model Rules do no conflict with California policy. See *State Compensation Insurance Fund v. WPS, Inc.* (1999) 70 Cal.App.4th 644, 655-656 [82 Cal.Rptr.2d 799].

Defining “adverse” as “potential injury” in the sense of at least threatening injury is also consistent with other authority that addresses the term in a conflicts context. See *American Airlines, Inc. v. Sheppard, Mullin, Richter & Hampton* (2002) 96 Cal.App.4th 1017, 1043 [117 Cal.Rptr.2d 685] (holding that the interest of one of a lawyer’s clients is “adverse” to another if it causes the lawyer to “put himself in the position” of choosing a course of action that might be injurious to one of the clients). California State Bar Formal Opn. No. 1993-133 states that rule 3-310 “is designed to prevent lawyers from putting themselves *in a position* where they *may* be required to choose between conflicting duties or have to attempt to reconcile conflicting interests rather than to enforce to the fullest extent the right of the client they should alone represent.” (Italics added.) Thus, “adverse” requires that the attorney has placed himself in a position of potential injury to the client. See, e.g., *People v. Rhodes* (1974) 12 Cal.3d 180, 184 [115 Cal.Rptr. 235] (city attorney with prosecutorial authority may not represent criminal defendant because of the inevitable “struggle” the lawyer would face between the specific duty to the client and the broader interests of the prosecutorial function); *Anderson v. Eaton, supra*, 211 Cal. at p. 117 (“Conscience and good morals dictate that an attorney should not so conduct himself as to be open to the temptation of violating his obligation of fidelity and confidence.”); *Goldstein v. Lees* (1975) 46 Cal.App.3d 614, 620 [120 Cal.Rptr. 253] (discussing difficulty of attorney providing client with undivided loyalty while seeking to avoid revelation of confidences of a different former client).

Having defined “adverse” as “potential injury,” we are led to the conclusion that serving any type of third-party discovery on a current client is adverse and would violate an attorney’s duty of loyalty. First, as noted in *O’Mary v. Mitsubishi Electronics America, Inc.* (1997) 59 Cal.App.4th 563, 577 [69 Cal.Rptr.2d 389], “discovery *is coercion*” since it entails bringing “[t]he force of law...upon a person to turn over certain documents.” (Emphasis in original.) Second, propounding discovery on an existing client may affect the quality of an attorney’s services to the client seeking the discovery, resulting in a diminution in the vigor of the attorney’s discovery demands or enforcement effort. In addition, it is possible the documents sought could expose the client from whom discovery is being sought to claims from the client serving the discovery. Therefore, we conclude that Attorney’s service of a document subpoena on Witness Client would be an action adverse to Witness Client’s interests, and as a result such service would be prohibited absent proper consent.

2. Availability of Informed Written Consent from Each Client

Assuming Prospective Client wants to retain Attorney despite the firm’s concurrent representation of Witness Client, the question arises whether Attorney may accept the representation and proceed with serving a document subpoena on Witness Client. We conclude that Attorney may do so, as long as Attorney believes that Attorney can properly fulfill his professional duties^{3/} and obtains informed written consent from each client before accepting the representation of Prospective Client. The rules allow representation adverse to a current client with the client’s informed written consent where the attorney has obtained confidential information material to the employment. See rule 3-310(E).^{4/} Since an attorney may represent one current client adverse to another current client with informed written consent when the attorney possesses material confidential information of the consenting client, it follows that such consent may be allowed in some but not all cases where the duty of loyalty is the duty that is implicated.^{5/} This conclusion is further supported by rule 3-310(C)(1)-(3), which allow informed written consent in connection with other sorts of concurrent client conflicts.

Case law also confirms that a conflict of interest may generally be waived by the persons who are personally interested in the matter. See *Flatt, supra*, 9 Cal.4th at p. 286 fn. 4 (“The principle of loyalty is for the *client’s* benefit; most courts thus permit an attorney to continue the simultaneous representation of clients whose interests are

^{3/} See, e.g., rules 3-110 and 3-310.

^{4/} Rule 3-310(E) is not applicable here because under these facts Partner and the law firm received no confidential information from Witness Client that is material to the representation of Prospective Client.

^{5/} Some conflicts arising out of a concurrent representation cannot be cured with informed client consent. See *Flatt, supra*, 9 Cal.4th at 284 fn. 3 (“The paradigmatic instance of such prohibited dual representation...occurs where the attorney represents clients whose interests are directly adverse in the same litigation.”); *Klemm v. Superior Court* (1977) 75 Cal.App.3d 893, 898 [142 Cal.Rptr. 509] (“...consent to dual representation of litigants with adverse interests at a contested hearing would be neither intelligent nor informed.”).

adverse as to unrelated matters provided full disclosure is made and *both agree in writing to waive the conflict.*" (first emphasis in original, second emphasis added); *Anderson, supra*, 211 Cal. at p. 116 ("It is also an attorney's duty to protect his client in every possible way, and it is a violation of that duty for him to assume a position adverse or antagonistic to his client *without the latter's free and intelligent consent given after full knowledge of all the facts and circumstances.*" (emphasis added)); *In re Marriage of Friedman* (2002) 100 Cal.App.4th 65, 70-71 [122 Cal.Rptr.2d 412]. Thus, in many circumstances interested persons may consent to representation even though an attorney has a conflict of interest.

3. Disclosure to Each Client

To obtain informed written consent, Attorney must disclose to each client the relevant facts and circumstances and the reasonably foreseeable adverse consequences of waiving any conflicts arising out of Attorney's representation of Prospective Client and service of a document subpoena on Witness Client. Rule 3-310(A)(1).^{6/} "California law does not require that every possible consequence of a conflict be disclosed for a consent to be valid." *Zador Corp. v. Kwan* (1995) 31 Cal.App.4th 1285, 1301 [37 Cal.Rptr.2d 754]. A conflict waiver may be valid even though it does not undertake "the impossible burden of explaining separately every conceivable ramification." *Maxwell v. Superior Court* (1982) 30 Cal.3d 606, 622 [180 Cal.Rptr. 177].

Initially, Attorney must determine whether his duties to Witness Client preclude him from disclosing information to Prospective Client necessary to obtain informed written consent. Specifically, Attorney cannot disclose any confidential information obtained in the representation of Witness Client without Witness Client's informed consent. See Business and Professions Code section 6068(e)(1) and rule 3-100(A). In most situations, the identity of a client is not considered confidential and in such circumstances Attorney may disclose the fact of the representation to Prospective Client without Witness Client's consent. Los Angeles County Bar Association Formal Opn. Nos. 456, 374.^{7/}

In preparing the disclosure to Prospective Client, Attorney must identify the relevant facts and circumstances (i.e., the fact that the firm represents Witness Client in an unrelated matter). Necessary disclosure includes explaining the nature of the conflict of interest, the purpose of the disclosure, the legal and other benefits and detriments resulting from consenting to representation despite the conflict, and any other facts that could have an important bearing on the client's decision. See Los Angeles County Bar Association Formal Opn. No. 456. In the circumstances addressed here, Attorney may need to make further disclosures to Prospective Client, such as the nature and extent of Partner's relationship with Witness Client. Depending on the facts and circumstances, Attorney may need to make additional disclosures to provide appropriate information on which Prospective Client can base a decision.

Attorney must also disclose to Prospective Client the reasonably foreseeable adverse consequences of the firm's ongoing relationship with Witness Client, such as issues that might arise if discovery is opposed. In this regard, the primary adverse consequence is that, because serving third-party discovery on a current client would violate the duty of loyalty of Attorney's firm to that client,^{8/} Attorney cannot serve Witness Client with the proposed discovery

^{6/} Upon learning that Partner represents Witness Client, if Attorney still wishes to seek to represent Prospective Client, Attorney has an independent duty to disclose Partner's representation of Witness Client to Prospective Client. Rule 3-310(B)(1) and the Discussion to the rule require Attorney to disclose in writing to Prospective Client that Partner has a legal, business, financial, professional, or personal relationship with a witness in the same matter. However, in the circumstances considered here, such disclosure will of necessity occur when Attorney seeks informed written consent from Prospective Client.

^{7/} In certain limited circumstances, a client's identity would be confidential and could not be disclosed without the client's consent. See *Rosso, Johnson, Rosso & Ebersold v. Superior Court* (1987) 191 Cal.App.3d 1514, 1518-1519 [237 Cal.Rptr. 242] (client's name is privileged if disclosure would betray confidential communication); *Baird v. Koerner* (9th Cir. 1990) 279 F.2d 623, 632 (client's identity is confidential if revealing it would constitute the "last link" in chain of evidence likely to lead to the client's conviction).

^{8/} In *Flatt, supra*, the court imputed an attorney's duty of loyalty to the attorney's law firm. See also *Streit v. Covington & Crowe* (2000) 82 Cal.App.4th 441, 445 [98 Cal.Rptr.2d 193] (in discussing attorney's duty of care, court stated when a client retains a single attorney, the client retains all attorneys who are partners or employees of that attorney).

absent informed written consent from Witness Client, which will require disclosure to Witness Client of the relevant facts and circumstances involved in Prospective Client's litigation. Other reasonably foreseeable adverse consequences include the risk that, because of the firm's ongoing relationship with Witness Client, the duty of loyalty to Prospective Client may conflict with the duty of loyalty to Witness Client, and Prospective Client may be concerned that, because of the ongoing relationship with Witness Client, Attorney could be hesitant to seek documents that Witness Client might consider confidential or sensitive. In addition, Attorney should disclose to Prospective Client the risk that Witness Client will contest the subpoena, and without the consent of Witness Client, Attorney will not be able to pursue enforcement of the subpoena against Witness Client.

In preparing the disclosure to Witness Client, similar considerations concerning client identity, confidential information of Prospective Client, and potential favoritism toward Prospective Client may apply. Specifically, in this circumstance Prospective Client's consent may be required for Attorney to disclose to Witness Client the relevant facts and circumstances involved in Prospective Client's litigation. Attorney also may be required to disclose to Witness Client that the subpoena served on behalf of Prospective Client may request documents that Witness Client might consider confidential or sensitive. In addition, Attorney should disclose to Witness Client the risk that Attorney might be required to pursue enforcement of the subpoena against Witness Client and should seek consent to do so.

4. Attorneys Should Check for Conflicts before Accepting Representation of a Client in any Matter

The California Rules of Professional Conduct prohibit attorneys from accepting or continuing representation of a client without providing written disclosure of certain types of conflicts to a client. Rules 3-310(B), (C) and (E). Unlike the ABA Model Rules of Professional Conduct,^{9/} the California Rules of Professional Conduct do not address conflict checks by attorneys as part of client representation. The Committee believes that, absent exigent circumstances which require immediate action by the attorney on behalf of the client or the applicability of rule 1-650,^{10/} the attorney should check for any potential conflicts with those who are adverse and potentially adverse, including reasonably foreseeable parties and witnesses, before accepting representation of a client. See rule 3-310(A)(1). If exigent circumstances prevent performing a conflict check, the attorney should accept representation contingent upon a subsequent conflict check revealing no conflicts, run a conflict check as soon as it is possible to do so and inform the attorney's new client that if such a conflict arises, the attorney may be required to withdraw unless appropriate informed written consent is obtained.^{11/} In such a circumstance, the attorney must realize that accepting representation, however exigent the circumstances may be, remains subject to the requirements of the Rules of Professional Conduct, the State Bar Act, and applicable case law. The attorney should also refresh conflict checks upon the appearance of new parties and witnesses during the pendency of a representation.^{12/}

CONCLUSION

Without informed written consent, an attorney may not serve third-party discovery on a current client of the attorney or the attorney's law firm, because doing so is adverse to the interests of the client. To accept the representation, an

^{9/} ABA Model Rule 1.7, Comment [3] states in part: "To determine whether a conflict of interest exists, a lawyer should adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and non-litigation matters the persons and issues involved.... Ignorance caused by a failure to institute such procedures will not excuse a lawyer's violation of this Rule."

^{10/} Rule 1-650 essentially dispenses with the need for conflicts checks in certain attorney pro bono limited legal services representations not applicable to this opinion.

^{11/} While the facts here concern litigation, conflict checks regarding known persons or entities involved in other matters, such as transactional and administrative matters, should also be conducted initially and refreshed as the attorney becomes aware of new persons or entities who will be involved in the matter.

^{12/} Rules 3-310(B) and (C)(2) prohibit an attorney from continuing representation in the presence of the conflicts discussed in those rules.

attorney must seek informed written consent from both clients, disclosing the relevant circumstances and the actual and reasonably foreseeable adverse consequences to the client providing consent.

This opinion is issued by the Standing Committee on Professional Responsibility and Conduct of the State Bar of California. It is advisory only. It is not binding upon the courts, the State Bar of California, its Board of Governors, any persons, or tribunals charged with regulatory responsibilities, or any member of the State Bar.