

**American Bar Association  
Forum on the Construction Industry**

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**Don't Tell Me What I Should Have Done – What Do I Do Now?  
Confronting the Unexpected**

**What Are The Recourses In Responding To A Motion To Disqualify  
Counsel?**

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## **I. Introduction**

Suppose an attorney follows all of the ethical rules and guidelines and opposing counsel has, nevertheless, moved for disqualification. What types of considerations must an attorney assess when responding to the motion? The first part of this paper discusses the risks should the attorney be disqualified as counsel, which may implicate disciplinary proceedings and/or sanctions by the applicable State Bar. Next, the paper examines the practicalities of law and motion should the attorney decide to oppose the disqualification motion.

## **II. Risk of Disciplinary Proceedings and Sanctions**

Before an attorney even entertains the merits of, and defenses to, a disqualification motion, he or she should first consider the implications and risks associated with a disqualification, which could result in an investigation and review by the State Bar Court. A court's ruling of disqualification based upon a finding that the attorney failed to avoid a conflict of interest pursuant to the Model Rules of Professional Conduct ("Model Rules"), may trigger disciplinary proceedings. As stated in Rule 8.4 of the Model Rules, "It is professional misconduct for a lawyer to violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another."<sup>1</sup>

The type of discipline imposed upon an attorney for professional misconduct for failing to avoid a conflict of interest, however, is not black and white. The ABA created a Joint Committee on Professional Sanctions ("Committee"), which, in 1979, published the Standards for Lawyer Discipline and Disability Proceedings ("Discipline Standards") as a frame of reference for jurisdictions to impose appropriate sanctions for attorney misconduct.<sup>2</sup> Approved in 1986 and later amended in 1992, the Discipline Standards were not created to recommend the type of discipline to be imposed in any particular case, but rather to develop a standard so that sanctions can be not only effective, but consistent.

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<sup>1</sup> Rule 8.4 of the ABA Model Rules of Professional Conduct.

<sup>2</sup> ABA Standards For Imposing Lawyer Sanctions (Approved February 1986; Amended February 1992).

In drafting the Discipline Standards, the Committee developed a model which requires a court imposing sanctions to evaluate the following questions:

- (1) What ethical duty did the lawyer violate? (A duty to a client, the public, the legal system, or the profession?);
- (2) What was the lawyer's mental state? (Did the lawyer act intentionally, knowingly, or negligently?);
- (3) What was the extent of the actual or potential injury caused by the lawyer's misconduct? (Was there a serious or potentially serious injury?); and
- (4) Are there any aggravating or mitigating circumstances?<sup>3</sup>

First and foremost, the Committee determined that the most important ethical duties are those obligations which a lawyer owes to clients, which includes the duty of loyalty and candor.

Section 4.3 of the Discipline Standards addresses the failure to avoid conflicts of interest, which states:<sup>4</sup>

Absent aggravating or mitigating circumstances, upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases involving conflicts of interest:

4.31 Disbarment is generally appropriate when a lawyer, without the informed consent of client(s):

- (a) engages in representation of a client knowing that the lawyer's interests are adverse to the client's with the intent to benefit the lawyer or another, and causes serious or potentially serious injury to the client; or
- (b) simultaneously represents clients that the lawyer knows have adverse interests with the intent to benefit the lawyer or another, and causes serious or potentially serious injury to a client; or
- (c) represents a client in a matter substantially related to a matter in which the interests of a present or former client are materially adverse, and knowingly uses

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<sup>3</sup> Section 3.0 of the ABA Standards For Imposing Lawyer Sanctions (Approved February 1986; Amended February 1992).

<sup>4</sup> Section 4.3 of the ABA Standards For Imposing Lawyer Sanctions (Approved February 1986; Amended February 1992).

information relating to the representation of a client with the intent to benefit the lawyer or another, and causes serious or potentially serious injury to a client.

4.32 Suspension is generally appropriate when a lawyer knows of a conflict of interest and does not fully disclose to a client the possible effect of that conflict, and causes injury or potential injury to a client.

4.33 Reprimand is generally appropriate when a lawyer is negligent in determining whether the representation of a client may be materially affected by the lawyer's own interests, or whether the representation will adversely affect another client, and causes injury or potential injury to a client.

4.34 Admonition is generally appropriate when a lawyer engages in an isolated instance of negligence in determining whether the representation of a client may be materially affected by the lawyer's own interests, or whether the representation will adversely affect another client, and causes little or no actual or potential injury to a client.

Although not expressly enumerated in Section 4.3, other sanctions and remedies are available to a court imposing sanctions for failing to avoid a conflict of interests.

These include:

- (a) restitution;
- (b) assessment of costs;
- (c) limitation upon practice;
- (d) appointment of a receiver;
- (e) requirement that the lawyer take the bar examination or professional responsibility examination;
- (f) requirement that the lawyer attend continuing education courses; and
- (g) other requirements that the state's highest court or disciplinary board deems consistent with the purpose of lawyer sanctions.<sup>5</sup>

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<sup>5</sup> Section 2.8 of the ABA Standards For Imposing Lawyer Sanctions (Approved February 1986; Amended February 1992).

Thus, based on the framework provided by the Discipline Standards, an attorney responding to a disqualification motion must look at the big picture. Before the merits of a disqualification motion are assessed, the attorney responding to the motion should first evaluate the disciplinary risks associated with the possibility of being disqualified. To a certain degree, this involves a significant amount of introspection, because the attorney's mental state in avoiding, or failing to avoid, a conflict of interest is pertinent to any imposition of discipline and/or sanctions. An attorney who practices in a jurisdiction that still recognizes the "appearance of impropriety" standard for disqualification should be especially careful here due to the subjectivity of this standard.<sup>6</sup>

### **III. Law and Motion**

Now, suppose an attorney has assessed the risks of disciplinary proceedings and sanctions and decides to oppose the disqualification motion. When evaluating a motion for disqualification of counsel, an attorney must first evaluate the defenses that are available in filing an opposition. As we all remember and love from law school, and probably would like to forget from the bar exam, there is no better way to illustrate the practicalities than through a fact pattern.

Client B, a corporation, has sued Client A, an individual, in federal court for copyright infringement. In the dispute, Client A is represented by Law Firm X and Client B is represented by Law Firm Y. Approximately ten years prior to the initiation of this lawsuit, however, Law Firm X represented a subsidiary of Client B on various real estate transactions. Law Firm Y moves to disqualify Law Firm X on the basis that there is a conflict of interest as Law Firm X is attempting to represent Client A against a former client, Client B.

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<sup>6</sup> See, e.g., *First Am. Carriers, Inc. v. Kroger Co.*, 787 S.W. 2d 669 (Ark. 1990); *Lovell v. Winchester*, 941 S.W. 2d 466, 468 (Ky. 1997); *In re Carey*, 89 S.W.3d 477, 496 (Mo. 2002).

a. Legal Standard and Burden of Proof

The ability for the courts to disqualify counsel stems from the inherent supervisory power and the authority to oversee the professional conduct of lawyers who appear before them. This includes the authority to disqualify an attorney appearing in a case, if necessary to maintain public confidence in the legal profession and to protect the integrity of the judicial proceeding.<sup>7</sup> As previously noted, while motions to disqualify are decided under state law, ultimately, however, the decision to disqualify counsel for conflict of interest rests within the trial court's discretion.<sup>8</sup> Generally, a trial court's decision on a disqualification motion is reviewed for abuse of its discretion, and the underlying determinations would be reversed if findings of fact are clearly erroneous, but the ethical standards applied would be carefully examined.<sup>9</sup> Thus, there can be a type of "hybrid" abuse-of-discretion standard of review by the appellate court where reviewing courts will review fact-findings for clear error, and perform a "careful examination," or *de novo* review, of the trial court's application of the relevant rules of attorney conduct.<sup>10</sup>

When entertaining a motion to disqualify counsel, courts must weigh several important factors:

- (a) The combined effect of a party's right to counsel of choice;
- (b) An attorney's interest in representing a client;
- (c) The financial burden on a client of replacing disqualified counsel; and
- (d) Any tactical abuse underlying a disqualification proceeding against the fundamental principle that the fair resolution of disputes within our adversary system requires vigorous representation of parties by independent counsel unencumbered by conflicts of interest.<sup>11</sup>

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<sup>7</sup> *Truck Ins. Exchange v. Fireman's Fund*, 6 Cal. App. 4th 1050, 1055 (Cal. Ct. App. 1992); see also *Freeman v. Chicago Musical Instrument Co.*, 689 F.2d 715, 721 (7<sup>th</sup> Cir. 1982)

<sup>8</sup> *Hitachi, Ltd. v. Tatung Co.*, 419 F. Supp. 2d 1158, 1160. (D. Cal. 2006)

<sup>9</sup> *FDIC v. United States Fire Ins. Co.*, 50 F.3d 1304, 1310-1311 (5<sup>th</sup> Cir. 1995)

<sup>10</sup> *Id.*

<sup>11</sup> *Allen v. Academic Games League of America, Inc.*, 831 F. Supp. 785, 789 (D. Cal. 1993)

Because motions to disqualify counsel can be used as tactical weapons, techniques of harassment and tend to deprive a party of representation of its choice, they are viewed with extreme caution as drastic measures.<sup>12</sup>

Accordingly, due to a disqualification motion's potential for abuse, the moving party carries a heavy burden of proof to establish the required facts.<sup>13</sup> As the court stated in *United States v. Smith*, the reasons for disqualification cannot be “fanciful, unrealistic or purely subjective suspicion;” they must be “real.”<sup>14</sup>

#### b. Defenses

Since it is ultimately the client’s decision as to who will represent it in a matter, and if a motion to disqualify has been filed against the attorney that improperly demonstrates the existence of a conflict or is simply unmeritorious, the attorney needs to ascertain the applicable defenses when responding to the motion. These defenses can be now examined with the fact pattern, above, as illustrated through Law Firm X, the responding party to Law Firm Y’s disqualification motion.

##### 1. Lack of Attorney-Client Relationship

As previously discussed, special circumstances may exist when representing business entities, such as Client B of our fact pattern. This is where Model Rule 1.13, or the “entity” approach, comes into play where the “entity,” and not the organization’s individual constituents, is the client. The cases already discussed, *Fassihi* and *Woods*, dealt with closely held or small corporations. But, what exactly is a “constituent” when a client, such as Client B, is a large corporation?

Formal Opinion No. 95-390 of the American Bar Association (“ABA”) Committee on Ethics (1995) addresses this issue by utilizing a “qualitative” test, which includes the following relevant factors to determine whether an attorney-client relationship existed:

- (1) Has the lawyer acquired confidential information from the subsidiary of the corporation;

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<sup>12</sup> *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 436 (U.S. 1985)

<sup>13</sup> *Evans v. Artek Sys. Corp.*, 715 F.2d 788, 794 (2<sup>nd</sup> Cir. 1983)

<sup>14</sup> *United States v. Smith*, 653 F.2d 126, 128 (4<sup>th</sup> Cir. 1981)

- (2) Do the corporation and the subsidiary share from a common legal department that supervises and manages litigation for both;
- (3) Is the subsidiary an alter ego of the corporation?<sup>15</sup>

Thus, based on these factors, the crucial inquiry is whether the subsidiary is or was sufficiently separate and independent from the corporation (Client B) so as to avoid any transfer of confidential information. If Law Firm X can answer “no” to all of these questions, then it can probably demonstrate the lack of an attorney-client relationship and utilize this defense.

## 2. Representation Not “Substantially Related”

Another defense that is specifically applicable to a former client, such as the subsidiary of Client B, is the argument that the previous representation is not substantially related to the present representation of Client A. This determination of whether the previous representation is “substantially related” to the present one involves a three-step inquiry:

- (1) The scope of the prior representation;
- (2) Whether there is a reasonable inference that the alleged confidential information was transferred to the attorney in the prior representation;
- (3) Whether the confidential information is relevant to the pending dispute.<sup>16</sup>

The Seventh Circuit has noted that “the determination of whether there is a substantial relationship turns on the possibility, or appearance thereof, that confidential information might have been given to the attorney in relation to the subsequent matter in which disqualification is sought.”<sup>17</sup> If there is no substantial relationship, then no ethical problem exists.<sup>18</sup>

Applying these rules to the fact pattern, if Law Firm X can demonstrate that its previous representation of the subsidiary has no substantial relationship to its present representation of Client A, then there is the chance that it can continue as counsel. For

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<sup>15</sup> American Bar Association Committee on Ethics and Professional Responsibility, Formal Opinion No. 95-390 (1995).

<sup>16</sup> *Jones & Henry, Eng'rs v. Town of Orland*, 942 F. Supp. 1202, 1206 (D. Ind. 1996)

<sup>17</sup> *Freeman v. Chicago Musical Instrument Co.*, 689 F.2d 715, 722, fn.10 (7<sup>th</sup> Cir. 1982)

<sup>18</sup> *Id.*

example, Law Firm X can point out that (1) the scope of the prior representation was real estate transactions, (2) there is no reasonable inference that any confidential information pertaining to Client B's intellectual property rights was transferred, and (3) even if there is a reasonable inference that some confidential information was transferred from handling the subsidiary's real estate transactions, it has nothing to do or is completely irrelevant to the pending dispute concerning Client B's alleged copyrights. Thus, the crux of the argument here is that Client B can suffer no prejudice, and Client A can gain no advantage, as the previous real estate transactions handled by Law Firm X for the subsidiary of Client B are neither pertinent nor relevant to the copyright dispute.

### 3. Prospective Waiver and Consent

The easiest and most prudent way to avoid the repercussions of disqualification, and therefore more likely than not the best defense to a motion, is an advanced or prospective waiver of future conflicts executed by the client upon informed consent. Clients and their attorneys are best served by this approach because it is based upon open and frank discussion of future conflicts of interest that could arise, well in advance. The ABA Formal Opinion No. 95-390 embraces this approach, and states that the "best solution to the problems that may arise by reason of clients' corporate affiliations is to have a clear understanding between lawyer and client, at the very start of the representation, as to which entity or entities in the corporate family are to be the lawyer's clients, or are to be so treated for conflicts purposes."<sup>19</sup>

The evaluation of whether full disclosures were made to perfect a proper waiver of conflict from the client(s) is a fact-specific inquiry and necessarily falls on the following factors:

- (1) The breadth of the waiver;
- (2) The quality of the conflicts discussions between the attorney and clients;
- (3) The specificity of the waiver;
- (4) The nature of the actual conflict;
- (5) The sophistication of the clients; and

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<sup>19</sup> American Bar Association Committee on Ethics and Professional Responsibility, Formal Opinion No. 95-390 (1995); *see also* Association of the Bar of the City of N.Y. Comm. on Professional and Judicial Ethics, Formal Op. 2006-1.

(6) The interests of justice.<sup>20</sup>

Thus, under the sample scenario, suppose ten years earlier, Law Firm X had conferred with the subsidiary and Client B, its parent corporation, explained the possibility of future conflicts that may arise, defined which exact entity or entities were the firm's client(s), and obtained a waiver of any future conflicts from the parent corporation following the discussion. This waiver would be a valuable agreement Law Firm X could use now in responding to Law Firm Y's disqualification motion. But, again, it all depends on the various factors listed above in determining the effectiveness of the prospective waiver. If the prospective waiver is overbroad, is based upon a cursory discussion of the potential and future conflicts that may arise, is vague, is facing an outright and actual conflict, was executed by unsophisticated clients, or is unjust, then it may not be valid to defeat disqualification. Attorneys should also be wary of the passing of time, which can serve to make a prospective waiver "stale." As held by a district court in Georgia, the lapse of time after the execution of the advanced waiver can make it difficult to establish informed consent of the present conflict.<sup>21</sup> In *Worldspan, L.P. v. Sabre Group Holdings*, the court found that a six-year-old prospective waiver was ineffective to constitute informed consent to the current representation and conflict.<sup>22</sup>

#### 4. Ethical Screen or Wall

Although the moving party has the burden of proof to establish the facts to warrant disqualification, there is also a presumption in its favor when the party seeks to disqualify a law firm. "The knowledge possessed by one attorney in a firm is presumed to be shared with the other attorneys at that firm."<sup>23</sup> The law firm, however, can rebut this presumption by demonstrating that "ethical screens" or "walls" have been employed to prevent any flow of confidential information from the "tainted" lawyer to any other members of his present firm, in order to allow the firm to continue with representation.<sup>24</sup>

To illustrate the use of this defense, suppose it was only a single attorney, Partner X, at Law Firm X that handled the previous real estate transactions for the subsidiary.

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<sup>20</sup> *Visa U.S.A. v. First Data Corporation*, 241 F.Supp.2d 1100, 1105 (D. Cal. 2003)

<sup>21</sup> *Worldspan, L.P. v. Sabre Group Holdings*, 5 F. Supp. 2d 1356 (D. Ga. 1998)

<sup>22</sup> *See id.*

<sup>23</sup> *LaSalle Nat'l Bank v. County of Lake*, 703 F.2d 252, 257 (7<sup>th</sup> Cir. 1983)

<sup>24</sup> *Van Jackson v. Check 'N Go of Ill., Inc.*, 114 F. Supp. 2d 731, 733 (D. Ill. 2000)

Suppose, as well, that once Law Firm X began representation of Client A, upon learning of the potential conflict, it implemented measures to segregate Partner X from any of the attorneys working on the copyright dispute or the case files pertaining thereto, so as to prevent any flow of confidential information. If established early and stringently, Law Firm X may have an effective defense to disqualification of the entire firm where it was only one attorney who previously represented the subsidiary.

Note, however, that not all jurisdictions accept the use of the “ethical wall” as a defense when dealing with disqualification motions aimed at private law firms. *Hitachi Ltd. v. Tatung Co.* reinforces California’s established rule, holding that, where an attorney is disqualified from representing a client because that attorney had previously represented a party with adverse interests in a substantially related matter, the attorney’s entire firm must also be disqualified, regardless of efforts to erect an ethical wall.<sup>25</sup>

#### 5. Waiver/Estoppel Due to Prejudicial Delay

What if Law Firm Y waited until the close of fact-witness discovery proceedings to move for disqualification? The ability to disqualify counsel can be waived where the delay in moving for disqualification is for an extended period of time, or on the eve of trial.<sup>26</sup> In *Trust Corp. of Montana v. Piper Aircraft Co.*, the party seeking disqualification waited two and one-half years after notice of representation before filing a motion. The court found that such a delay constituted a de facto consent by the party seeking disqualification to the representation and a waiver of the right to object.<sup>27</sup>

Law Firm Y, therefore, in waiting until the close of witness discovery to file its motion may have waived its right thereto because of prejudicial delay. Law Firm X would have a fairly strong case against disqualification on this basis.

#### 6. The Best Defense is a Good Offense

What is clear from looking at the various defenses to a disqualification motion is that the most useful ones are so because they are prophylactic in nature. Being proactive

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<sup>25</sup> See *Hitachi Ltd. v. Tatung Co.*, 419 F.Supp.2d 1158 (D. Cal. 2006), 1164; see also *Klein v. Superior Court*, 198 Cal.App.3d 894 (Cal. Ct. App. 1988); see also *Henriksen v. Great American Savings & Loan*, 11 Cal.App.4<sup>th</sup> 109 (Cal. Ct. App. 1992); see also *Flatt v. Superior Court*, 9 Cal.4<sup>th</sup> 275 (Cal. 1994).

<sup>26</sup> *Trust Corp. of Montana v. Piper Aircraft Co.*, 701 F.2d 85, 87-88 (9<sup>th</sup> Cir. 1983)

<sup>27</sup> See *id.*

and implementing measures early on in the representation of any client, particularly the corporate client, such as the execution of a prospective waiver based upon an open discussion of the attorney-client relationship, may go a long way to avoid the issue altogether. Similarly, when taking on a new case, diligent effort should be taken to check for conflicts and implement stringent and appropriate screening tools if certain attorneys pose a former or current conflict of interest. Thus, although utilizing any one of these defenses can serve to keep an attorney or law firm on a particular case and continuing in the representation of a client, the lesson to be learned here is to take proactive steps ahead of time. This also, and more importantly, creates a strong attorney-client relationship at the outset, through an open and frank discussion on the issue, so as to avoid conflict later. Such discussion not only keeps clients happy and keeps lines of communication open, it certainly also ensures that the attorney is keeping to his or her ultimate duty: the duty of loyalty.

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