

## SDCBA Legal Ethics Opinion 2013-1

(Adopted by the San Diego County Bar Legal Ethics Committee April 16, 2013.)

### I. QUESTIONS PRESENTED

What are an attorney's ethical duties to joint clients when settlement discussions give rise to an actual and irreconcilable conflict of interest?

Does a general conflict waiver in an engagement agreement allow an attorney to continue a representation after an actual and irreconcilable conflict of interest arises?

### II. ANSWER

An attorney may not continue to represent both clients unless both provide informed, written consent to the actual conflict and must withdraw from representing the clients in any proceedings where their interests conflict.

### III. FACTS

Attorney represents two clients – Client 1 and Client 2 – who are defendants in the same litigation. A parcel of land was recently subdivided into three parts. Client 1 owns land that borders Plaintiff's property to the east. Client 2 owns property that borders both Plaintiff's and Client 1's property to the north. Plaintiff claims both that Client 1 erected a fence west of the boundary line and that Client 2 erected a fence south of the boundary line.

The engagement agreement between Attorney and both clients has a general conflict waiver provision, but does not specifically address potential conflicts during settlement discussions. During the course of settlement discussions, the plaintiff's counsel proposes a settlement that would benefit Client 1 to the detriment of Client 2 in that the claims against Client 1 would be dismissed in exchange for Client 1 joining with the plaintiff and jointly pursuing Client 2 to have the fence moved north, which would, incidentally also benefit Client 1. Client 1 asks Attorney not to disclose the terms of the proposed settlement to Client 2.

In response to the conflict, Attorney does not disclose the settlement offer to Client 2 and, instead, tells both Client 1 and Client 2 that she cannot represent them with respect to further settlement negotiations, but will continue to represent them in the litigation with respect to defending Plaintiff's claims. May Attorney properly limit her representation thusly and continue to represent Client 1 and Client 2 after settlement discussions conclude?

### IV. AUTHORITIES ADDRESSED

California Rules of Professional Conduct 3-110; 3-310; 3-500; Business & Professions Code section 6068(e); *Flatt v. Super. Ct.* (1994) 9 Cal.4th 275; *Klemm v. Superior Court* (1977) 75 Cal.App.3d 893; *Burum v. State Compensation Ins. Fund* (1947) 30 Cal.2d 575; *Lysick v. Walcom* (1968) 258 Cal.App.2d 136; *Nichols v. Keller* (1993) 15 Cal. App. 4th 1672.

## V. DISCUSSION

Rule 3-310(C) of the Rules of Professional Conduct states, “A member shall not, without the informed written consent of each client: (1) accept representation of more than one client in a matter in which the interests of the clients potentially conflict; or (2) accept or continue representation of more than one client in a matter in which the interests of the clients actually conflict.” “Informed written consent” means the client’s or former client’s written agreement to the representation following written disclosure. (Rules Prof. Conduct, rule 3-310(A).) Thus, in some instances, an attorney may undertake joint representation of clients—even those with actual conflicts—so long as proper disclosure and consent is present.

But, an attorney’s duty of loyalty to a client is not one that is capable of being divided, at least under circumstances where the ethical obligation to withdraw from further representation of one of the parties is mandatory, rather than subject to disclosure and client consent. (*Flatt v. Superior Ct.* (1994) 9 Cal.4th 275, 282-283.) And, even though Rule 3-310 does not contain any limitations of circumstances where clients may provide informed written consent to a conflict waiver, California courts have provided some. Perhaps the most significant of these is that an attorney may not properly represent a client in conjunction with a trial or hearing where there is an actual, present, existing conflict and the discharge of duty to one client conflicts with the duty to another.

In *Klemm v. Superior Court* (1977) 75 Cal.App.3d 893, 898-899, the court concluded:

As a matter of law, a purported consent to dual representation of litigants with adverse interests at a contested hearing would be neither intelligent nor informed. Such representation would be per se inconsistent with the adversary position of an attorney in litigation, and common sense dictates that it would be unthinkable to permit an attorney to assume a position at a trial or hearing where he could not advocate the interests of one client without adversely injuring those of the other.

That conclusion is compelled by both an attorney's duty of loyalty and the highly probable damage done to the clients’ sense of trust and security, features essential to the effective functioning of the fiduciary relationship. However, if the conflict is merely potential, there being no existing dispute or contest between the parties represented as to any point in litigation, then with full disclosure to and informed consent of both clients there may be dual representation at a hearing or trial. (*Burum v. State Compensation Ins. Fund* (1947) 30 Cal.2d 575; *Lysick v. Walcom* (1968) 258 Cal.App.2d 136, 146-147.)

Here, assuming that the initial conflict waiver provided a sufficiently specific identification of the potential conflict that actualized, then Client 1 and Client 2 likely provided informed written consent such that Attorney could properly represent them both until the time of the settlement offer. But the extent to which Attorney may continue to represent either is likely to be extremely limited.

As a preliminary matter, Attorney cannot keep the settlement offer secret from Client 2. Rather, she would have to disclose the settlement offer not only to Client 1, but also to Client 2. Rule 3-

500 of the Rules of Professional Conduct mandates that a “member shall keep a client reasonably informed about significant developments relating to the employment or representation.” The potential changed position of an ally (or at least another party whose interests were aligned) to an adversary is presumptively “significant.” And, in such an instance, Client 2 presumptively have a strong preference that Client 1 reject such settlement terms and remain its ally rather than becoming an adverse party.

One of an attorney’s basic functions is to advise. An attorney may violate his ethical duties if the attorney fails to provide appropriate and timely advice to clients. Not only should an attorney furnish advice when requested, but he or she should also volunteer opinions when necessary to further clients’ objectives. The attorney need not advise and caution of every possible alternative, but only of those that may result in adverse consequences if not considered. (*Nichols v. Keller* (1993) 15 Cal. App. 4th 1672, 1683-1684.)

Attorney’s duty of loyalty to both clients is jeopardized by Plaintiff’s offer. Attorney owes a duty to both clients to advise them of significant developments in the case under Rule 3-500 or 3-510. But advising Client 2 of the offer could be against Client 1’s interests for various reasons. Those could include Client 2 exerting significant pressure that prevents Client 1 from obtaining a beneficial settlement or taking actions to cause Plaintiff to withdraw the offer or to otherwise block the deal. Conversely, not advising Client 2 could put Client 2 at a disadvantage in the litigation going forward because Client 2 may have less notice and, consequently, less opportunity to prevent such an agreement from being reached.

And Attorney must also counsel Client 1 regarding the offer, including analyzing whether it should be accepted. By extension then, Attorney would have to counsel Client 1 on the propriety and potential for success of bringing claims against Client 2. Thus, an actual conflict has developed and the risk of Client 1 and Client 2 losing confidence in Attorney’s loyalty is likely significant.

For that reason, comments to Rule 3-310 provide that Attorney must obtain the further informed written consent of the clients pursuant to subparagraph (C)(2) before providing advice that would be detrimental to the other’s interests. Otherwise, Attorney must withdraw from both representations. And, if Client 1 accepts the offer, or a similar deal that would reposition Client 1 as a litigation adversary of Client 2, Attorney would have to withdraw from both representations because Rule 3-700 requires an attorney to withdraw if the attorney knows or should know that continued employment will result in a violation of the Rules of Professional Conduct. Under *Klemm v. Superior Court*, no informed consent would be possible under such circumstances.

## VI. CONCLUSION

For the reasons discussed, Attorney may not continue to represent both clients unless both provide informed, written consent to the actual conflict, and Attorney must withdraw from representing them in any proceedings where their interests conflict.