MCLE Article:
What Transactional Lawyers Should Know About Conflicts of Interest

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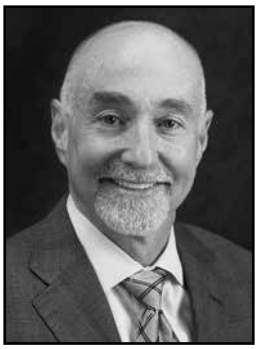

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This article is part of a series by the authors that focuses on ethical issues of particular interest to transactional attorneys in California.

Unlike litigators, those of us who are transactional lawyers work on friendly deals where the parties have common goals and interests. In litigation (as well as certain other practice areas, such as criminal law and family law), battle lines are obvious and there's usually a clear winner and clear loser in the fight. No such battle lines exist in business transactions, and, after a successful closing, everyone's a winner. In fact, we sometimes celebrate a successful engagement with closing dinners attended by people from both sides of the transaction. The notion of the parties celebrating together after a verdict, conviction or divorce is absurd.

So, because our clients and their business counterparts have common goals, there can be no ethical conflicts of interest that apply to transactional lawyers, right? The answer, of course, is a clear and resounding "NO!" One need not look any further than a simple M&A transaction–where a buyer is looking to buy a business and a seller is looking to sell that business–to see that conflicts of interest abound in a transactional practice as well. Even though buyers and sellers share the same fundamental goal–the transition of the business from seller to buyer–the interests of the buyer (e.g., paying the lowest possible price, with strong representations and indemnification coverage) are often diametrically opposed to those of the seller (e.g., selling at a premium, with minimal representations and indemnity exposure).

For perhaps too many transactional attorneys, focusing on the details of what may constitute a conflict of interest in a particular situation (and what to do about it) becomes overshadowed, or even completely eclipsed, by the initial self-congratulation and excitement of obtaining a new client representation. Further, in those first days of a new representation, an attorney may be pressured to move forward with the transaction, engaging in discussions with the client and its counterparties, participating in negotiations and drafting documents, perhaps after only having applied the proverbial "smell test" to evaluate whether any conflict of interest exists. However, taking an "I'll know it when I see it approach" to analyzing conflicts of interest, even in the transactional arena, is inadequate. Under many circumstances, recognizing possible conflicts may not be as intuitive as some attorneys may expect.

It is not uncommon for transactional attorneys to represent clients with conflicting interests. Under the ethical rules applicable to all attorneys in California, such

representations may also create a conflict of interest for the attorney representing such clients. To meet an attorney's ethical obligations under California law, a careful review of the facts, an application of California-specific rules, and the possible request of an appropriate waiver from one or more clients, are all necessary steps in properly addressing conflicts of interest. Most conflicts can be waived by the clients potentially affected, but only with their informed written consent. This article discusses how to identify, analyze, and address such conflicts of interest, paying particular attention to issues commonly faced by transactional attorneys.

What constitutes a conflict of interest and what do I do about it?

A conflict of interest exists where the interests of an attorney's clients actually or potentially conflict with each other, and the attorney's duty on behalf of one client requires the attorney to take (or omit to take) action which is or may be harmful to the interests of one or more other clients of the attorney.[1] An unaddressed conflict may result in situations where an attorney's zealousness may be diminished, or his or her judgment may be impaired or duty of loyalty divided. Generally, failure to resolve or otherwise address a conflict of interest in accordance with the rules regulating attorney conduct could result in disqualification of the attorney in one or both conflicted matters, and may also result in liability for malpractice or breach of fiduciary duties, fee disallowance or disgorgement, sanctions, or (for willful breaches) discipline by the State Bar of California.[2]

The rules regulating attorney conduct in the State of California are set forth in the California Rules of Professional Conduct (the "Rules"), which were promulgated by the State Bar of California and approved by the California Supreme Court and are binding on all members of the State Bar of California.[3] The Rules are disciplinary rules, not statutory laws, but courts often use the Rules to determine whether attorneys or law firms should be disqualified from a particular representation.

An attorney's responsibilities with respect to conflicts of interest are governed by Rule 3-310, relevant sections of which are set forth below:

> (B) A member [of the State Bar of California] shall not *accept or continue representation* of a client without providing *written disclosure* to the client where:
>
> (1) The member has a legal, business [or] professional … relationship with a party … in the same matter; or
>
> (2) The member knows or reasonably should know that: (a) the member previously had a legal, business [or] professional … relationship with a party … in the same matter; and (b) the previous relationship would substantially affect the member's representation; or
>
> (3) The member has or had a legal, business [or] professional … relationship with another person or entity the member knows or reasonably should know would be affected substantially by resolution of the matter ….[4]
>
> ….
>
> (C) 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; or
>
> (3) Represent a client in a matter and at the same time in a separate matter accept as a client a person or entity whose interest in the first matter is adverse to the client in the first matter.5
>
> ….
>
> (E) A member shall not, without the *informed written consent* of the client or former client, accept employment adverse to the client or former client where, by reason of the representation of the client or former client, the member has obtained confidential information material to the employment.[6]

An obvious conflict of interest would exist in the simple M&A transaction mentioned above if an attorney (or that attorney's law firm) were engaged to represent both the buyer and the seller in the transaction. A conflict of interest would also exist if the attorney were to represent just one of the parties in the acquisition but the counterparty is also a client of the attorney (or that

attorney's law firm) in unrelated matters. Other potential or actual conflicts of interest arise for the transactional attorney when, for example, the attorney is engaged to form a business entity on behalf of multiple parties or to negotiate and document employment terms on behalf of both an executive and her corporate employer.[7]

It is important to note that the Rules do not refer to or require actual harm to a client for a conflict of interest to exist. A conflict of interest may exist even when there is just a risk that the attorney's duties may be compromised.[8]

Who *exactly* is my client?

Because attorneys owe fiduciary duties to their clients, it is essential to know who the client is–and is not–in any given matter. Occasionally for the transactional attorney, identifying the client may prove difficult or sensitive. Generally, when representing an organization or corporate entity, it is the organization that is the client–and not the officers, directors, shareholders, or other constituents associated with the organization. As a practice matter, engagement letters should always specifically and correctly identify the client, even if the letters are addressed to the attention of the officer with whom the attorney has a relationship or from whom the attorney takes direction.

Rule 3-600(A) provides that, in representing an organization, an attorney "shall conform his or her representation to the concept that the client is the organization itself, acting through [those of its authorized representatives that are] overseeing the particular engagement." Even though an authorized representative may be empowered on behalf of the organization to direct the attorney, absent other circumstances, the authorized representative is not a client. As an example, California courts have held that a former director was not allowed to disqualify corporate counsel from being adverse to him, because he himself was not the attorney's client.[9] However, note the "absent other circumstances" qualification. In California, it is much easier than most attorneys think for an implied attorney-client relationship to arise.[10]

When representing an organization, there are certain circumstances where the attorney may have a duty to advise employees and other constituents of the organization that he or she is not representing them. Such a duty is embodied in Rule 3-600(D), which states: "In dealing with an organization's directors, officers, employees, members, shareholders, or other constituents, a member shall explain the identity of the client for whom the member acts, whenever it is or becomes apparent that the organization's interests are or may become adverse to those of the constituent(s) with whom the member is dealing." Rule 3-600(D) further provides: "The member shall not mislead such a constituent into believing that the constituent may communicate confidential information to the member in a way that will not be used in the organization's interest if that is or becomes adverse to the constituent." It is advisable that, when representing an organization, the attorney should communicate in writing to the key constituents with whom he or she is working (e.g., the general counsel or other members of management) that it is the organization that is the client, and that such constituents are not clients of the attorney.[11] Moreover, the attorney should continue to monitor his or her interaction with such constituents during the course of the representation, as the obligation to explain the identity of the client may arise at any time. An individual officer or other representative of the organization may find the distinction unclear, and could easily believe that he or she is also a client, especially where such individual communicates with the attorney on a daily basis and may have developed a professional or personal relationship with the attorney. As a result, it may be necessary to explain and repeat the admonition more than once.

The representation of affiliated entities in transactional matters creates additional issues in identifying the client and analyzing conflicts. Such facts raise "corporate family" issues. Generally, affiliated entities are distinct legal persons, and representing one entity does not necessarily preclude an attorney from representing another client in a matter adverse to an affiliate of that entity. However, facts and circumstances may dictate otherwise (and often do). The leading California case in this area held that a client and an affiliated entity (in this case, a subsidiary of the entity client) should be treated as one client where the "unity of interests" test is met.[12] The court considered the following factors in determining whether the unity of interests test had been met: (1) whether there is a substantial relationship between the representation of the current client and the proposed representation against its subsidiary; (2) whether the client controls the legal affairs of its subsidiary; and (3) whether the client and

its subsidiary have integrated or shared operations, management, and personnel. If affiliated entities meet the unity of interest test, the attorney should consider them to be one entity for purposes of conflicts and maintenance of confidential information, and the attorney may be disqualified from representing interests that are adverse to the non-client affiliate of the entity client.

A potential for a conflict of interest may also arise where payment for the attorney's services is made by a third party and not by the client. Even though the third party is not a client, accepting a payment from a third party could compromise the duty of loyalty owed by the attorney to the client. As a result, the Rules impose certain requirements whenever an attorney accepts compensation for representing a client from someone other than the client, namely: (1) that there is no interference with the attorney's independent professional judgment or attorney-client relationship; (2) confidential information relating to the client is protected; and (3) the client must give informed written consent.[13]

Representing the organization *and* its constituents

Even though an employee or other constituent of an organization client, if handled appropriately, should not be considered to be a client, the Rules nevertheless permit the attorney for the organization to also represent any of its constituents.[14] In such an event, an attorney would have multiple clients whose interests might potentially conflict. The attorney must then determine whether a conflict of interest exists, whether the conflict can be waived, and, if so, obtain appropriate informed consent to the conflict. It is important to note that in obtaining the organization's consent, the attorney must ensure that the consent be given by an appropriate constituent other than the constituent who is to be represented.[15] For example, where an attorney is being called upon to represent both a corporation and its chief financial officer (whether in related or unrelated matters), an officer other than the CFO (or, alternatively, the shareholders) should be the one to provide the consent on behalf of the corporate client.

Relationships and representations with constituents may cause conflicts of interest when an attorney seeks to simultaneously or subsequently represent the entity. For example, in the case of a partnership and its individual partners, a California court evaluated whether the totality of the circumstances, including the parties' conduct, implied an agreement not to accept other representations adverse to an individual partner's interest. Relevant factors courts have considered include: (1) the type and size of the partnership; (2) the nature and scope of the attorney's representation; (3) the amount of contact between the attorney and the individual partner; and (4) the attorney's access to information regarding the individual partner's business.[16]

Can the conflict be waived?

The existence of a conflict of interest does not necessarily prevent an attorney from proceeding with a representation. The Rules and case law contemplate that, despite a conflict of interest, an attorney may accept or continue a representation provided certain prescribed disclosures are made and consents given. The Rules require that disclosures of potential or actual conflicts of interest be provided by the attorney in writing to the client, and that consents to such conflicts be provided by the client in writing to the attorney.[17]

> Absent disclosure and consent, the attorney should neither represent a claim inconsistent with his client's interest nor represent two clients with conflicting interests. It is … a violation of [an attorney's] 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 …. [T]he decisions condemn acceptance of employment adverse to a client even though the employment is unrelated to the existing representation.[18]

The attorney must examine each client's interests at the outset of an engagement and request informed written consent of each client if it appears that a conflict, whether potential or actual, exists. Rule 3-310(C) provides that once an attorney has identified a potential conflict of interest between a current client and a prospective one, he or she may proceed with the new representation only with the informed prior written consent of both the current and the prospective clients. The Rule further provides that, if circumstances or conditions change–such that an actual or different conflict develops during the representation or the original consents become insufficiently specific–new written informed consents may also be necessary.

While most conflicts encountered by transactional attorneys are waivable, the discussion following Rule 3-310 makes clear that there are situations where consent would not necessarily cure a conflict: "There are some matters in which the conflicts are such that written consent may not suffice for nondisciplinary purposes." For example, a purported consent to dual representation of litigants with adverse interests at a contested hearing was rejected, as such representation would be inconsistent with the adversary position of an attorney in litigation.[19] Similarly, although the Rules might allow the attorney in the example above to represent both the buyer and the seller in the same M&A transaction with the consent of both parties, the attorney would be ill-advised to do so, because their diametrically opposing interests make it difficult for the attorney to be both zealous and loyal to each client at the same time. Additionally, in certain transactional matters, the practical obstacle to gaining effective informed consent may be the attorney's duty of confidentiality (as described below).

How do I know the affected clients have given effective consent?

A prerequisite to an effective informed written consent by a client is full disclosure by the attorney to the client. Rule 3-310 requires that such disclosure include "the relevant circumstances and … the actual and reasonably foreseeable adverse consequences" pertaining to the conflict.[20] It is good practice to provide the client with the kind of information that an impartial attorney (one without any conflict) would give to the client and to be clear and explicit about any potential risks to the representation and harm to the client that might arise as a result of the conflict. The attorney's interests in this regard may be best served if the potential risks were explained in plain English, using terms such as "if … then …," "because," and "for example."[21]

A common obstacle to getting informed consent is the attorney's duty of confidentiality. Attorneys are duty bound to "maintain inviolate the confidence, and … to preserve the secrets of his or her client …."[22] The duty of confidentiality to one client might preclude the disclosure of the information necessary to secure the informed consent of another current or potential client.[23] For example, where a client considers the representation itself to be confidential, the attorney may be precluded from disclosing any meaningful information about that representation. As a result, the attorney will not be able to make sufficient disclosure to obtain *informed* written consent by the other client, and the attorney cannot accept or continue the conflicted representation. Even where the representation itself is not confidential, but certain of the relevant circumstances pertaining to the representation are confidential, the attorney may be unable to proceed.

Attorneys often include in their form engagement letters an advance or prospective conflict waiver, essentially asking that the client agree in advance to consent to a conflict of interest that might arise in the future with another client. Such advance waivers are enforceable only if the client is fully informed of the potential conflict. Any determination of the validity of such informed written consent will be based on the facts and circumstances of the particular situation, but should not necessarily require the disclosure of every possible conflict and/or the adverse consequence of each such conflict.[24]

Historically, the need for consent cannot be obviated by the use of a "screen" or "ethical wall" to prevent sharing of certain information among attorneys within a law firm.[25] Of course, and as is often the case, a client can condition its consent on the use of a screen, and if the client does so, the firm must ensure that its screen is effective. More recently, courts have been divided on whether or not consent is needed to make an effective ethical wall.[26] With this in mind, it is important to remember that obtaining client consent is generally preferable,[27] and that while ethical screens may be effective in cases of successive representation, they normally cannot cure conflicts arising from concurrent adverse client relationships.[28]

The disclosure requirement of Rule 3-310(B) is consistent with Rule 3-500, which requires attorneys to keep each client "reasonably informed about significant developments" relating to the representation. When representing more than one client in a single matter, it is also worth considering whether to secure an express written waiver of confidentiality from each client, which would enable the attorney to make the requisite disclosures and keep the clients informed.

Do I have to worry about *former* clients?

While the focus of this article is on conflicts among current and potential clients, certain of the disclosure and consent requirements of the Rules apply to former clients

as well.[29] Returning to our original M&A example, the attorney may be disqualified from representing the buyer if he or she has previously represented the seller in matters relating to the business being sold (especially if, through that prior engagement, the attorney obtained confidential information that the buyer would find material), unless the seller consents.[30] On the other hand, unlike situations involving current and potential clients, the attorney may proceed with a new engagement adverse to a former client (with no consent required from the former client) where that engagement does not bear a "substantial relationship" to the prior engagement and the former client has no reasonable expectation of confidentiality.[31]

The need for consent cannot be obviated by terminating the representation of a current client (to turn that client into a former client) to avoid the application of certain requirements of the Rules (e.g., Rule 3-310(B)(1) and Rule 3-310(C)) and trigger the less onerous "substantial relationship" rules applicable to conflicts involving former clients.[32] Further, dumping a client to avoid a conflict with a new, more attractive, representation may itself be a breach of the attorney's duty of loyalty to that client.[33]

I work in a law firm–am I my partner's keeper?

The provisions of Rule 3-310 set forth above speak in terms of prohibitions on members of the State Bar (i.e., individual attorneys), rather than on law firms. Attorneys at law firms are well advised, however, to analyze conflicts of interest on the basis that the Rules apply to current, prospective, and former clients of the attorney's law firm.[34] As a general rule, the attorney's duty of loyalty extends to all clients of his or her firm, and the client's attorney-client relationship extends to all members of the firm, regardless of which attorney performs services on behalf of such client.[35]

Although not mandated by the Rules themselves, conflict checks are an essential part of the client intake process for all attorneys in private practice. And, if practicing at a law firm, attorneys should maintain a database (or similar system for tracking) of current and former clients to facilitate the conduct of adequate conflict checks. Attorneys "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."[36]

Finally, we offer as a cautionary note (without detailed discussion) that, for attorneys at law firms, the identification of conflicts of interest with respect to current and former clients becomes much more complicated (and no less important) as law firms merge with each other (combining conflicted clients within one firm) or attorneys move from firm to firm (perhaps tainting the new firm with conflicts attributable to the prior firm). For further information on this topic, see Jan Christensen, *Law Firm Divorces: Departing Partners: Economics & Ethics*, 2 BUS. L. NEWS 8 (2008).[37]

Conclusion

All attorneys in the State of California, including transactional attorneys, are ethically obligated to address or avoid conflicts of interest. Except in certain limited circumstances, an attorney may proceed with a conflicted representation, but only with the informed written consent of each affected client. Should an attorney fail to comply with the ethical rules governing conflicts of interest, consequences can include disqualification, liability for malpractice or breach of fiduciary duty, fee disallowance or disgorgement, sanctions, and (for willful breaches) discipline by the State Bar of California. However, attorneys can prevent such outcomes by simply being mindful of the foregoing issues and taking the time to analyze and recognize any potential or actual conflicts of interest in connection with each new representation.

Endnotes

* The views expressed herein are the views of Mr. Wertlieb and Ms. Avedissian individually, and are not attributable to their employers or other affiliated organizations.

1 *Flatt v. Super. Ct.*, 36 Cal. Rptr. 2d 537, 541 n. 2 (Cal. 1994) ("[O]n behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose."); *Havasu Lakeshore Invs., LLC v. Fleming*, 217 Cal. App. 4th 770, 778 (Cal. Ct. App. 2013). Conflicts of interest may also arise as a result of other factors, including the attorney's personal relationships or interests. CAL. RULES OF PROF'L CONDUCT r. 3-310(B)–(C) (2015). *See also Sharp v. Next Entm't, Inc.*, 78 Cal. Rptr. 3d 37, 50-53 (Cal. Ct. App. 2008).

2 *See, e.g.*, *Klemm v. Super. Ct. of Fresno County*, 142 Cal. Rptr. 509, 514 (Cal. Ct. App. 1977); *Yanez v. Plummer*, 221 Cal. App. 4th 180, 189 (Cal. Ct. App. 2013); Matter of Kroff, 3 Cal. Bar Ct. Rep. 838, 857 (1998); In re Guzman, 5 Cal. Bar Ct. Rep. 308, 315 (2014); *Image Tech. Serv., Inc. v. Eastman Kodak Co*., 136 F.3d 1354, 1358-59 (9th Cir. 1998); In re *Fountain*, 141 Ca. Rptr. 654, 656-65774 Cal. App. 3d 715, 719 (Cal. Ct. App. 1977); *In re McIntosh*, Case No. 13–11774 AJ, 2015 WL 241130 at *6 (Bankr. N.D. Cal. January 16, 2015).

3 Cal. Bus. & Prof. Code §§ 6076–6077 (2015). Readers should note that the Rules are currently being reviewed by the State Bar of California's Commission for the Revision of the Rules of Professional Conduct, which Commission is expected to recommend revisions to the Rules to the State Bar Board of Trustees in 2017. If approved by the Board of Trustees, the proposed revisions would then be submitted to the California Supreme Court for approval.

4 Cal. Rules of Prof'l Conduct r. 3-310(B) (emphasis added).

5 *Id.* at r. 3-310(C) (emphasis added).

6 *Id.* at r. 3-310(E) (emphasis added).

7 Such dual representations are the subject of clauses (1) and (2) of Rule 3-310(C).

8 *See Santa Clara Cty. Counsel Attorneys Ass'n v. Woodside*, 869 P.2d 1142, 1155 (Cal. 1994) ("[A]n attorney is precluded from assuming any relation which would prevent him from devoting his entire energies to his client's interests."); *Oasis W. Realty, LLC v. Goldman*, 106 Cal. Rptr. 3d 539 (Cal. Ct. App. 2010).

9 *Meehan v. Hopps,* 301 P.2d 10, 16 (Cal. Ct. App. 1956).

10 *See, e.g.*, *Hecht v. Super. Ct.,* 237 Cal. Rptr. 528, 531 (Cal. Ct. App. 1987)

11 *See Upjohn Co. v. U.S.*, 449 U.S. 383 (1981); United States v. Ruehle, 583 F.3d 600 (9th CIr. 2009)..

12 *Morrison Knudsen Corp. v. Hancock, Rothert & Bunshoft, LLP,* 81 Cal. Rptr. 2d 425 (Cal. Ct. App. 1999).*See also Lennar Mare Island, LLC v. Steadfast Ins. Co.*, 105 F. Supp. 3d 1100, 1112 (E.D. Cal. 2015); *GSI Commerce Sols., Inc. v. BabyCenter, L.L.C.,* 618 F3d 204, 210 (2d Cir. 2010).. Some courts alternatively apply an "alter ego" test. *See, e.g.*, *Brooklyn Navy Yard Cogeneration Partners, L.P. v. Super. Ct.*, 70 Cal. Rptr. 2d 419, 424-426 (Cal. Ct. App. 1997)

13 Cal. Rules of Prof'l Conduct r. 3-310(F).

14 *Id*. at r. 3-600(E). *See also* Havasu Lakeshore Invs., LLC v. Fleming, 217 Cal. App. 4th 770 (Cal. Ct. App. 2013); *Yanez*, 164 Cal. Rptr. 3d 221 Cal. at 3145-15; Cal. Bar Form. Op. 2003-13.

15 *Id.*

16 *Responsible Citizens v. Super. Ct*., 20 Cal. Rptr. 2d 756, 761-764 (Cal. Ct. App. 1993) (discussing whether an attorney for a partnership represents one or more of the individual partners can turn on the existence of an implied attorney-client relationship). *See also Coldren v. Hart, King & Coldren, Inc.,* 190 Cal. Rpter. 3d 644 (Cal. Ct. App. 2015); Cal. Bar Form. Op. 1999-153 (suggesting that the same factors apply in determining whether an implied attorney-client relationship arises between an entity's attorney and its constituent).

17 Cal. Rules of Prof'l Conduct r. 3-310(B)-(C).

18 *Jeffry v. Pounds,* 136 Cal. Rptr. 373, 377 (Cal. Ct. App. 1977) (citing Anderson v. Eaton, 211 Cal. 113 (1930)).

19 *Tsakos Shipping & Trading, S.A. v. Juniper Garden Town Homes, Ltd.*, 15 Cal. Rptr. 2d 585, 598 (1993).. *See also Klemm v. Super. Ct.*, 75 Cal. App. 3d 893, 893 (1977); *Gong v. RFG Oil, Inc*., 82 Cal. Rptr. 3d 416 (Cal. Ct. App. 2008).

20 Cal. Rules of Prof'l Conduct r. 3-310(A)(1) (definition of "Disclosure"). *See People v. Baylis,* 43 Cal. Rptr. 3d 559 (Cal. Ct. App. 2006).

21 *See Zador Corp., N.V. v. Kwan,* 37 Cal. Rptr. 2d 754, 763-64 (Cal. Ct. App. 1995)

22 Cal. Bus. & Prof. Code § 6068(e) (2015).

23 Cal. Bar Form. Op. 1993-133 ("B's attorney may not accept employment on behalf of A which involves the use of confidential information obtained as a result of his or her representation of B where B does not consent to complete disclosure.").

24 *Visa U.S.A., Inc. v. First Data Corp*., 241 F. Supp. 2d 1100, 1105 (N.D. Cal. 2003). *See also Lennar Mare Island*, 105 F. Supp. 3d at 1112..

25 There were narrow exceptions to this rule (e.g., a law firm employing former government attorney). *See City of Santa Barbara v. Super. Ct.,* 118 Cal. Rptr. 3d 403, 409 (Cal. Ct. App. 2004).

26 *Kirk v. First American Title Ins. Co.*, 108 Cal. Rptr. 3d 620, 649 (Cal. App. 2010)..

27 *Lennar Mare Island*, 105 F. Supp. 3d at 1121.

28 *Id.* at *7.

29 *See, e.g.*, Cal. Rules of Prof'l Conduct r. 3-310(B)(3) ("the member has or *had*"), r. 3-310(E) (requiring, when applicable, consent from a "former client"). Note, however, that Rule 3-310(C) does not, by its express language, extend to former clients.

30 Cal. Rules of Prof'l Conduct r. at 3-310(E).

31 *See Flatt v. Super. Ct.,* 36 Cal. Rptr. Ptr. 2d 537 (Cal. 1994); *Cornish v. Super. Ct*., 209 Cal. App. 3d 467, 475-77 (1989); *City & County of San Francisco v. Cobra Sols., Inc*., 153 P.3d 20, 25-26 (Cal. 2006); *Blue Water Sunset, LLC v. Markowitz*, 192 Cal App. 4th 477, 486 (Cal. Ct. App. 2011).

32 *Flatt*, 9 Cal. 4th at 288; *Truck Ins. Exchange v. Fireman's Fund Ins. Co*., 6 Cal. App. 4th 1050, 1059 (Cal. Ct. App. 1992).

33 *Am. Airlines, Inc. v. Sheppard, Mullin, Richter & Hampton*, 96 Cal. App. 4th 1017, 1037 (Cal. Ct. App. 2002).

34 *See Kirk v. First American Title Ins. Co*.,108 Cal. Rptr. 3d 620, 631 (Cal. Ct. App. 2010); *William H. Raley v. Super. Ct*., 1197 Cal. Rptr. 232, 237 (Cal. Ct. App. 1983). However, see the discussion following Rule 3-310, which suggests that Paragraph (B) is intended to apply only to a member's direct relationships or interests, unless the member has knowledge that another attorney in the same firm has or had a relevant relationship or interest.

35 *See Cobra Sols.*, 38 Cal. App. 4th at 847; *Blackmon v. Hale,* 463 P.2d 418, 423-24 (Cal. 1970). *See also* Cal. Bar Form. Op. 1981-64 (stating that attorneys of a private law firm share responsibilities with their firm for representation of their clients).

36 Cal. Bar Form. Op. 2011-182. *See also* ABA Model Rule 5.1(a), Comment (2); Restatement (third) Law Governing Lawyers § 121 cmt. g.

37 *See also W. Sugar Corp. v. Archer-Daniels-Midland Co*., 98 F.Supp.3d 1074, 1080-1093 (C.D. Cal. 2015).