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Focus

'Pound' Asserts a Strict Line in Successive Representations

By Catherine K. La Tempa

California courts have consistently held that the appearance of impropriety is not an independent basis for attorney disqualification under California law. See, e.g., *DCH Health Services Corp. v. Waite*, 95 Cal.App.4th 829 (2002); *Hetos Investments, Ltd. v. Kurtin*, 110 Cal.App.4th 36 (2003); and *Addam v. Superior Court*, 116 Cal.App.4th 368 (2004).

Nonetheless, the 5th District Court of Appeal has confirmed that former clients are entitled to broad protection under California law. On Dec. 21, 2005, the Court of Appeal held that an entire firm must be disqualified when it associates as counsel an attorney who previously obtained confidential information from the opposing party, even in the absence of any evidence that confidential information was shared between the firm and its associated counsel. *Pound v. DeMera*, 135 Cal.App.4th 70 (2005).

Pound arose out of plaintiffs' decision to terminate their employment with DeMera DeMera Cameron and form their own accounting firm. Because the DeMera DeMera Cameron dispute involved various employment agreements, the plaintiffs sued the company, Howard DeMera, and Mark Cameron for declaratory relief and other causes of action related to the agreements.

DeMera DeMera Cameron's counsel, Michael J. F. Smith, assisted Howard DeMera and Mark Cameron in their search for defense counsel. Smith met with several possible candidates, including Peter S. Bradley, whom he interviewed on Sept. 14, 2001. In his declaration, Smith stated that he interviewed Bradley for approximately one hour during which he discussed the case in specific terms, including issues, personalities, vulnerabilities and other topics described as attorney work product. Bradley was not retained by the defendants.

Andrew B. Jones represented the plaintiffs from the inception of the case. His declaration states that he consulted with Bradley in September 2004, three years after Bradley had been interviewed by DeMera DeMera Cameron's counsel. Jones states that he sought out Bradley because of his experience in corporate matters. Approximately one week later, when Jones approached Bradley about associating as counsel in the case, Bradley told Jones that years earlier he had met with Smith about a case in which Jones was the opposing attorney. Bradley could not recall whether the meeting involved this case nor could he recall Smith providing him with any specific information.

Bradley's declaration confirmed a meeting with Smith but denied his ability to confirm that they discussed this case. The only facts he could remember were that the case involved corporate law issues and that Jones was the adverse attorney. His discussions with Jones and the plaintiffs were based on information provided by Jones. Nothing Jones told Bradley sounded familiar to him, and he described the non-competition covenant in the case as a novelty and one with which he was not familiar.

When the defendants learned of Bradley's association in the case, they moved to disqualify both Bradley and Jones. The trial court disqualified Bradley, but denied the motion as to Jones.

On appeal, the defendants argued that the trial court abused its discretion in denying the motion because Smith provided confidential information to Bradley and the "possibility" exists that Bradley, either intentionally or unintentionally, disclosed privileged information to Jones. The defendants had no evidence to support this theory but argued that the "mere possibility" was sufficient to disqualify Jones.

The appellate court agreed. It held that, once the trial court determined that Bradley received confidential information from DeMera DeMera Cameron, it was required to disqualify Jones as well.

The court explained that this case involved successive representations. Bradley entered into an attorney-client relationship with Howard DeMera and Mark Cameron when he met with Smith and became privy to confidential information. When Bradley associated as counsel with Jones three years later to represent the plaintiffs, he entered into a representation adverse to his former clients. Thus, under the rule expounded in *Flatt v. Superior Court*, 9 Cal.4th 275 (1994), the trial court had no choice but to disqualify Bradley.

The appellate court had no difficulty in determining that Jones must be disqualified because it viewed the case as essentially identical to those involving attorneys changing law firms, from one side to the other, during the pendency of a case. Thus, it concluded that *Henricksen v. Great American Savings & Loan*, 11 Cal.App.4th 109 (1992), was directly on point. In *Henricksen*, attorney Peter J. Brock, who represented the defendants in an

action, was later hired by counsel for the plaintiffs in that same action and was isolated from the case by an ethical wall. Nonetheless, the court disqualified Brock's entire firm as counsel for the plaintiffs. It explained: "[W]e believe the rule to be quite clear-cut in California: [W]here an attorney is disqualified because he formerly represented and therefore possesses confidential information regarding the adverse party in the current litigation, vicarious disqualification of the entire firm is compelled as a matter of law."

The *Henricksen* court rejected the ethical wall concept, finding that it has not found judicial acceptance in California and that the entire firm must be vicariously disqualified even if Brock had been ethically screened from day one.

The appellate court found that the only possible distinction between *Pound* and *Henricksen* was the fact that Bradley was not a member of either Smith's firm or Jones' firm. He was independent counsel who had been approached by both firms to represent one of the parties. The court concluded that the *Pound* case could not be substantially distinguished because each situation implicated the attorney's duties of loyalty and confidentiality to his client. It reasoned that, where an attorney successively represents clients with adverse interests, and where the subjects of the two representations are substantially related, the need to protect the firm clients' confidential information requires that the attorney be disqualified from the second representation.

For the same reason, a presumption that an attorney had access to privileged and confidential matters relevant to subsequent representations extends the attorney disqualification vicariously to the attorney's entire firm.

The court concluded that, if disqualification of the firm is required even if the firm erects an ethical wall around the attorney, it is impossible to conceive any justification for not disqualifying Jones when he consulted with Bradley, an attorney who obtained the opponent's confidences, even if Bradley never associated into the case.

The result in *Pound* seems harsh since Bradley was never actually retained by DeMera DeMera Cameron and did not recall the information provided to him during the brief one-hour consultation. In addition, it appears that the appellate court too quickly concluded that *Henricksen* is on point when the facts differ greatly from those in *Pound*.

For example, in *Henricksen* Brock spent in excess of 200 hours learning the case, attending and taking depositions, appearing in court and retaining and preparing expert witnesses; he was hired to work for the other party's counsel within one year after his firm was replaced as counsel in the matter; and, Brock's second firm wanted to withdraw as counsel but its client would not agree. In contrast, Bradley spent only one brief hour consulting with Smith and he recalled that the focus seemed to be on his qualifications rather than the facts and issues of the case; three years passed between the one-hour meeting with Smith and his subsequent retention by Jones; and it appears that Jones did not want to withdraw as counsel, unlike Brock's firm.

Generally, in determining whether to disqualify counsel for subsequent representation, the courts consider the similarities between the two factual situations and the legal questions posed, and the nature and extent of the attorney's involvement with the two cases. *Morrison Knudsen Corp. v. Hancock, Rothert & Bunshoft*, 69 Cal.App.4th 223 (1999); *see also Jessen v. Hartford Casualty Insurance Co.*, 111 Cal.App.4th 698 (2003).

However, where the representation involves the same subject matter, the length of time since the former represen-tation is irrelevant. *Brand v. 20th Century Insurance Co.*, 124 Cal.App.4th 594 (2004), (neither attorney's professed inability to recall any confidential information nor the passage of 12 years since the former representation could overcome conclusive presumption).

The holding in *Pound* seems consistent with the court's determined protection of the confidential relationship afforded attorneys and their clients, especially where the former and subsequent representations of different clients involve the same subject matter. Additionally, although the *Pound* court does not so state, it seems likely that the court's decision was partially influenced by the fact that Jones had some culpability in the matter. When Bradley told Jones that he previously had met with Smith about a case in which Jones was the opposing attorney, unless Jones had many cases against Smith, it is likely that Jones knew or suspected that the meeting involved the current case. If he had any doubt, Jones simply could have asked Smith to confirm whether or not he had consulted with Bradley about the case.

Either way, the *Pound* holding serves as an important reminder to attorneys of the dire consequences posed by successive representation.

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