



**CITY OF LODI
COUNCIL COMMUNICATION**

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AGENDA TITLE: Update regarding audit (agreed-upon services) of Envision Law Group's billings.

MEETING DATE: January 7, 2004

PREPARED BY: Deputy City Manager

RECOMMENDED ACTION: That the City Council receive an update regarding the audit of agreed-upon procedures of Envision Law Group's billings.

BACKGROUND INFORMATION: At the request of Mayor Hansen, this item is placed on the agenda to allow for a verbal update regarding the status of the audit of the Envision Law Group's billings.

FUNDING: Not applicable

A handwritten signature in cursive script, appearing to read "Janet S. Keeter".

Janet S. Keeter
Deputy City Manager

JSK/sl

APPROVED:

A handwritten signature in cursive script, appearing to read "H. Dixon Flynn".

H. Dixon Flynn, City Manager

filed 1-7-04
 J. Beckman
 Item I-1

WHEN CONFLICTS OF INTEREST CANNOT BE WAIVED

1.01
 I-01

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I. Introduction

The following discussion addresses the question of when a conflict of interest is not waiveable by a client. In general, Rule 3-310 of the California Rules of Professional Conduct allows a client to give informed consent to a lawyer's continued representation in a matter when written disclosure of the relevant circumstances and the reasonably foreseeable adverse consequences has been made to the client. Rule 3-310(A)(1)&(2). Except in the case of disclosure under Rule 3-310(B), the client's written agreement to the representation is required after the written disclosure has been made.

The rule itself does not identify any situation in which a client may not consent to a conflict disclosed in accordance with rule 3-310. Nevertheless, there are certain situations in which obtaining a client's informed consent is not possible.

II. Non-Waiveable Conflicts

A. Representation of Opposing Sides in A Contested Hearing Lawsuit - As a matter of law consent to dual representation of litigants with adverse interests at a contested hearing is neither intelligent or informed. Klemm v. Superior Court, 75 Cal.App.3d 893, 898 (1977); see also Flatt v. Superior Court, 9 Cal.4th 275, 282-283 (1994). For this reason, a lawyer cannot concurrently represent parties pursuing opposing claims at a trial or at a hearing even with client consent. However, a lawyer may represent such clients in a uncontested proceeding. Klemm v. Superior Court, supra, 75 Cal.App.3d at 898.

Even without a lawsuit, when a lawyer owes a duty of loyalty to two clients, it impossible for him or her to advise either one about a disputed claim between them. Tsakos Shipping & Trading S.A. v. Juniper Garden Homes, Ltd., 12 Cal.App.4th 74, 95-96; see also Dettamanti v. Lompoc Union School Dist., 143 Cal.App.3d 715, 723 ("where there is a duty of loyalty to different clients it is impossible for an attorney to advise either one as to a disputed claim against the other"). A lawyer cannot possibly exercise independent judgment on behalf of both. See Tsakos Shipping & Trading S.A. v. Juniper Garden Homes, Ltd., supra, 12 Cal.App.4th at 96 (an attorney representing clients with conflicting interests may be tempted to favor the interests of one over the other). In addition, a lawyer called on to simultaneously advance opposing positions will inevitably face conflicting instructions. On the other hand, a lawyer may represent such parties with their informed written consent in the drafting of agreements and negotiations where the lawyer is not called on to simultaneously advance antagonistic positions. See e.g. Gregory v. Gregory, 92 Cal.App.2d 343, 349 (1949) (marital agreement); Davidson v. Davidson, 90 Cal.App.2d 809, 819

(1949); Lessing v. Gibbons, 6 Cal.App.2d 598, 605-606 (1935) (representation of studio and actress in contract negotiations); BASF Formal Opinion No. 1973-26.

B. When Client Incapable of Giving Consent - The concept of informed consent assumes that a client is in a position to understand and assess the lawyer's disclosure and the consent being sought. When the client lacks the capacity to do so, informed consent is not possible. See LACBA Formal Opinion No. 471 (1992).

C. When Adequate Disclosure Cannot Be Made - The Discussion to Rule 3-310 observes that "[o]ther rules and laws may preclude making adequate disclosure under this rule. If such disclosure is precluded, informed written consent is likewise precluded." Thus, for example, if a lawyer cannot make adequate disclosure without violating the duty to maintain the confidence and secrets of another present or former client, the lawyer can not make that disclosure and, therefore, cannot obtain informed consent to the representation.

D. When Competent Representation Not Likely - A client cannot waive a conflict that makes it unlikely that the lawyer can competently represent a client. LACBA Formal Opinion No. 471 (1992); see also Ishmael v. Millington, 241 Cal.App.3d 520, 526-527 (1966) (where court stated that counsel should terminated a lawyer-client relationship when the discharge of a duty to one client conflicts with a duty to another client); Detamanti v. Lompoc Union School Dist., 143 Cal.App.2d 715, 723 (1956) (lawyer representing school district cannot be engaged to advise a party about a claim against the district); Hammett v. McIntyre, 114 Cal.App.2d 148 (1952) (a lawyer may not represent a civil defendant and insurer at trial when the insurer is seeking to prove facts that establish no coverage for the defendant); Pennix v. Winton, 61 Cal.App.2d 761 (1943) (lawyer acted improperly by advancing interests of insurer over defendant client at trial and should have withdrawn); BASF Formal Opinion Nos. 1973-15, 1973-26 and 1979-2; see also SDCBA Formal Ethics Opinion No. 1990-3. Cf. A.B.A. Model Rule 1.7(b) (additional requirement that a lawyer must reasonably believe that the representation of one client will not be adversely affected by the lawyer's responsibilities to another client or to a third party or by the lawyer's own interests).

No matter how much disclosure is made, a client cannot waive a lawyer's duty to practice competently. LACBA Formal Opinion No. 471 (1992). See e.g. Rule 3-400(A) ("A member shall not . . . contract with a client prospectively limiting the member's liability to the client for the member's professional malpractice"). For example, a lawyer cannot adequately represent clients who give conflicting instructions so that the lawyer cannot act on one client's instruction without violating the other client's instruction. LACBA Formal Opinion No. 471 (1992). In that situation, the lawyer must withdraw from representing both. LACBA Formal Opinion No. 344 (1974).

Another example is where interests of the lawyer in the subject matter of the representation are so great that the lawyer cannot be expected to competently represent the

client. Some of these conflicts are covered by rules that prohibit a lawyer from engaging in certain practices altogether. See e.g. Rule 4-210, (payment of personal or business expenses incurred by or for a client), Rule 4-300 (purchase of property at foreclosure sale) and Rule 4-400 (inducing a client to make a substantial gift).

III. Flatt v. Superior Court and Representations Adverse to a Client

Under Rule 3-310(C)(3), informed written consent is required from both the new and preexisting client. Consent is also required under the broader common law rule concerning representations adverse to a client. Flatt v. Superior Court, 9 Cal.4th 274, 285, n.4.

Flatt suggests, however, that the circumstances under which consent may be obtained is limited. After noting the general rule that "courts and ethical codes alike prohibit an attorney from simultaneously representing two client adversaries, even where the substance of the representations is unrelated," the Court stated in a footnote:

There are of course exceptions to this rule. The principle of loyalty is for the client's benefit: most courts thus permit an attorney to continue to permit the simultaneous representation of clients whose interests are adverse as to unrelated matters provided full disclosure is made and both agree in writing to waive the conflict. But this class of cases is a rare circumstance, typically involving corporate clients and overcoming the presumption of "prima facie impropriety is not easily accomplished. Flatt v. Superior Court, *supra*, 9 Cal.4th at 285, n.4 (emphasis supplied, citations omitted).

Yet after making this statement, the court went on to state that the exception "is not, in any event, one that concerns us in this case." *Id.* Thus, the Court appears to have left the issue open.

The discussion in Flatt raises more questions than it answers. For example, why would the circumstances under which consent is permitted typically involve corporate clients? On the one hand, the passage suggests that consent may be obtained only when the client possesses the sophistication to comprehend the ramifications of this type of conflict. On the other hand, the reference to corporate clients might reflect that Court's assumption the impacts on client trust in the lawyer may not be as pronounced when the representations involve different personnel in the same corporation.

The passage indicates that consent may be obtained only when the two matters are unrelated. It therefore suggests that the exception allowing for consent may not apply when the two matters are related. In making this suggestion, the Court appears to have had in mind the situation where a lawyer is representing opposing interests in the same litigation.

See Flatt, supra at 284, n. 3. It is not clear that the same limitation would apply when the two matters are factually related but the lawyer is not representing opposing interests on the same subject. While Flatt emphasized that client loyalty is the primary concern, when the representations are related, preservation of client confidences is also a concern.

Flatt also does not distinguish between adverse representations in situations where the clients are hostile and those where they are not hostile. In practice, it is not uncommon for a client to consent for the client's lawyer to represent another party in negotiations, but not in litigation that might arise out of the transaction. Under Flatt, would a lawyer be precluded from obtaining the client's informed written consent except in the rare circumstance? In addition, if loyalty is for the client's benefit, except in those cases where competent representation is unlikely, why should a properly informed client be precluded from freely consenting to an adverse representation?

Given the absence of a principled discussion by the Court, these questions remain open. In the absence of precise standards, the practitioner is left to the general rules for when a conflict cannot be waived. In addition, the practitioner must carefully consider and fully disclose whether the adverse representation will adversely affect the client's trust. In those situations where client trust is (or, perhaps, is likely to be) adversely affected, Flatt suggests, while not necessarily holding, that consent may not be obtained.