

Playbook Disqualification

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By Alana Hoffman and Marc Poster

When an attorney tries to represent a current client in a matter against a former client, the former client often moves to disqualify the attorney based on the former representation. The former client may say, for example, that the attorney has confidential factual information from the former representation that could be used against it in the current matter. Such a claim likely will prevail if the matters are substantially related and if the attorney was in a position to obtain material confidential information in the former representation. *Flatt v. Superior Court*, 9 Cal.4th 275 (1994).

But the fact that an attorney has specific substantive information is not the only basis on which a former client may move for disqualification. Former clients also may seek disqualification based on what Cornell University Law School professor Charles Wolfram has described as the "playbook" theory - that is, a claim that the attorney now knows the former client's general approach to settlement, litigation strategy or business practices.

California's Parameters

In its purest form, the playbook theory effectively would bar any representation adverse to a former client, because an attorney almost always becomes familiar with a client's litigation strategy during a representation. California courts have not adopted that broad theory, however. *Farris v. Fireman's Fund Insurance Co.*, 119 Cal.App.4th 671 (2004). But they have applied a modified version of it: Courts disqualify an attorney based on playbook knowledge acquired during a prior representation if the knowledge is "material to the evaluation, prosecution, settlement or accomplishment of the current representation given its factual and legal issues." *Jessen v. Hartford Casualty Insurance Co.*, 111 Cal.App.4th 698 (2003).

As recent decisions by the state appellate courts demonstrate, this standard means that a playbook-based motion likely will prevail when the former client shows that the attorney's playbook knowledge is material to the current litigation. Without a showing of materiality, though, the mere allegation that an attorney knows a former client's playbook is unlikely to require disqualification.

Those That Can

The 2nd District Court of Appeal embraced the playbook theory earlier this year in *Knight v. Ferguson*, 149 Cal.App.4th 1207 (2007), explaining that, "[w]here an attorney acquires knowledge about the former client's 'attitudes,' practices, business customs, 'litigation philosophy,' strengths, weaknesses or strategy, disqualification may be required for that reason alone." Based in part on this theory, the 2nd District affirmed an order disqualifying an attorney from defending Knight's sister and brother-in-law against Knight in a suit involving a business venture about which the attorney had advised Knight.

Knight said that, in the course of representing her, the defense attorney acquired both confidential substantive information relevant to the current suit and general information about her feelings relating to litigation - in essence, her playbook. The 2nd District agreed that this information required disqualification. Finding that the matters were substantially related because the current suit involved the same business venture that Knight had consulted the attorney about forming, the appellate court presumed that the defense attorney had confidential information material to the current suit.

The *Knight* court was unswayed by a claim that any information the defense attorney acquired could not have been confidential because Knight's sister and brother-in-law, the

current clients, had attended all of Knight's meetings with the defense attorney. The court noted that the defense attorney also had consulted with another of Knight's attorneys while representing her, presumably outside of the sister and brother-in-law's presence. The court likely would have affirmed disqualification on a playbook theory regardless, given its statements that the attorney "cannot help but use his expertise to exploit" what he knew about Knight's business aspirations and that disqualification may be required solely based on an attorney's knowledge of his former client's attitudes and litigation philosophy.

Interestingly, the *Knight* court seemed to place equal weight on a need to protect the trust that clients place in their attorneys, concluding that the defense attorney had a duty of loyalty to Knight, even after he stopped representing her, because she had reposed confidence in him. It is thus unclear whether *Knight* turns on confidentiality or on loyalty, which is not part of the playbook theory. The Supreme Court recently denied review in the case, meaning that clarification will have to wait for another day.

The playbook theory also contributed to a successful disqualification motion in *Farris v. Fireman's Fund Insurance Co.*, 119 Cal.App.4th 671 (Cal. App. 5th Dist. 2004).

There, an insurer sought disqualification in a bad-faith suit by its insured, on the ground that the insured's counsel had represented the insurer. The trial court denied the motion, finding no evidence that the attorney's prior representation of the insurer for coverage issues was substantially related to bad-faith litigation. The Court of Appeal reversed.

The *Farris* court ordered disqualification primarily based on the attorney's prior "pervasive" role in developing the insurer's coverage practices, which likely were in place when the present dispute arose. But the court also acknowledged that the attorney had "general 'playbook' information" from the prior representation. Although general playbook knowledge would not require disqualification on its own, it "assumes added 'importance and pointed relevance'" in light of the relationship between the two matters.

Those That Can't

The confidentiality concerns underlying the playbook theory are less pressing when the successive representation doesn't involve a closely related matter. In that situation, a claim that the attorney knows the former client's playbook of litigation and business practices will not carry the day.

In the recent case of *Fremont Indemnity Co. v. Fremont General Corp.*, 143 Cal.App.4th 50 (Cal. App. 2nd Dist. 2006), the plaintiff, Fremont Indemnity Co., moved to disqualify counsel for the defendant, Fremont General Corp., in two lawsuits over allocation of tax loss credits, claiming in part that General's counsel's prior representation of Indemnity in a legal-malpractice suit had allowed General's counsel to learn Indemnity's litigation philosophy and practices. The 2nd District held that the trial court erred in ordering disqualification.

The Court of Appeal explained that an attorney's knowledge of a former client's playbook based on a prior representation would not require disqualification unless the knowledge were directly at issue or important in the second representation. Because the defense counsel's former representation of Indemnity in a malpractice suit presented issues "totally unrelated" to the current matters, there was no basis for presuming that defense counsel had confidential information material to the current matters. Without a showing that counsel had information about Indemnity's playbook from the prior representation that would be material to any issue in the present matters, the duty of confidentiality did not require disqualification.

The playbook theory also struck out in *Faughn v. Perez*, 145 Cal.App.4th 592 (Cal. App. 5th Dist. 2006). There, the defendant hospital tried to disqualify a medical-malpractice plaintiff's counsel on the ground that counsel had represented the hospital's parent corporation in previous medical-malpractice suits. As in *Fremont*, the 5th District reversed the trial court's disqualification order.

In *Faughn*, the hospital claimed that information that the plaintiff's counsel had learned about the parent corporation's litigation playbook during his prior representation was material because, although the parent corporation was not a party to the suit, the parent corporation completely controlled the hospital's litigation. The Court of Appeal was not

persuaded. The hospital offered no evidence for its claim that the parent corporation controlled its litigation, even though it was in the best position to present such evidence if it existed. Meanwhile, evidence suggested the opposite: The hospital controlled at least part of its own litigation. If that was true, counsel's knowledge of the parent corporation's playbook was not material to the present matter. The court therefore found that disqualification was not required.

The Right Balance

Fremont and *Faughn* demonstrate the limits of the playbook theory as it has been adopted in California. Although knowledge about a former client's attitudes, practices and litigation philosophy may be a ground for disqualification, as in *Knight* and *Farris*, that knowledge is not always a ground for disqualification. In short, although the playbook theory is not a hit in every case, it can play a role in the right context. Courts considering a playbook-based disqualification motion focus on whether the attorney's knowledge is "material to the evaluation, prosecution, settlement or accomplishment of the current representation." *Jessen*. Parties making or defending against such a motion therefore should do the same.

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