

California Supreme Court Opinion Yields Warnings Regarding Attorney Conflicts Of Interests And The Preparation Of Engagement Agreements

In a closely watched case concerning attorney ethical duties, many predicted that the California Supreme Court would decide the permissibility of blanket advance conflict waivers. Instead, the Court fully adopted J-M's argument that "this debate is beside the point," because the case does not involve an advance waiver of a hypothetical future conflict. Rather, the conflict existed before the waiver. *Sheppard, Mullin, Richter & Hampton, LLP v. J-M Manufacturing Co., Inc.*, No. S232946 (Cal. 8/30/18) outlines critical distinctions between various types of attorney engagement agreements.

A law firm had for many years provided employment advice to South Tahoe on a recurring, as-needed basis. The firm then undertook the defense of a new client, J-M, against South Tahoe. Although revealed by a conflict check, the firm did not disclose the conflict to either client. Instead, the firm's engagement agreement with J-M merely stated that the firm "may currently or in the future" represent parties adverse to J-M and asked that J-M waive such conflicts. The Court held that South Tahoe was an existing client at the time the J-M engagement began and that the firm was required to disclose that relationship.

Existing client relationship. When a firm and client have a long-term course of business calling for occasional work on discrete assignments, the attorney-client relationship does not necessarily terminate even when the firm has not performed work for months or even years. Instead, the existence of the relationship turns on whether the client would reasonably understand the relationship has terminated. Here:

1. The South Tahoe engagement agreement defined the "Matter" that was the scope of work as "general employment matters," rather than a discrete matter; and
2. Neither South Tahoe nor the firm had terminated the representation according to the agreement's termination clause.

The Court distinguished this from "framework" agreements, which (a) define the terms of future relationships and (b) expressly provide that such future relationships only exist upon an actual request and acceptance of a particular matter.

Conflict disclosures. Attorneys cannot obtain informed consent through blanket waivers of existing conflicts regardless of whether the client is an individual or a sophisticated, multinational corporation with a large legal department. California law—and even jurisdictions that permit blanket waivers of *future* conflicts—require actual disclosure of material facts concerning existing conflicts.

Remedy. Attorneys who fail to obtain informed consent are not entitled to any fees under the contract. But over a vociferous dissent, the majority left open the possibility that attorneys might still recover some amount in quantum meruit. While the Court rejected the argument that fees are owed except to the extent of provable harm to the client, the Court outlined a multi-factor equitable analysis that trial courts must consider on a case-by-case basis. Attorneys bear the burden of proof in that analysis.