

# CASE STUDY PREPARED FROM ORIGINAL PUBLISHED OPINION

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## *Great Lakes Construction, Inc. v Burman (7/27/10)*

### **Conflict of Interest; Duty of Loyalty; Standing**

Armed with recently prepared plans, the Burmans hired Hampton Builders to remodel their home. Hampton hired Kipers as a subcontractor. Unhappy with the resulting work, Mrs. Burman posted comments on the internet about Great Lakes and Hampton.

Great Lakes and Hampton then sued Burman for libel, breach of contract, and common counts to recover for Hampton's services on the remodeling project. The Burmans filed a cross-complaint against Great Lakes as the alter ego of Hampton Builders, alleging failure to perform the terms of the contract, and failure to pay Kipers who placed a lien on the project and stopped work. They also alleged breach of contract, negligence and fraud. Kipers cross-complained as well, alleging breach of an oral contract against both Hampton Builders and Great Lakes.

Hampton then filed a cross-complaint against Kipers, alleging breach of contract, express contractual indemnity and equitable indemnity. Hampton's express contractual indemnity claim against Kipers is based upon the indemnification provision in their subcontract which provides the, "*subcontractor shall indemnify and save harmless Contractor from and against any and all suits, claims ....and damages, ... including attorney fees, arising out of, in connection with, or incident to Subcontractor's performance of this Agreement.*"

In deposition, Hampton's counsel believed Kipers' sworn testimony revealed he had not been informed of a potential conflict arising from Kipers' representation by counsel for the Burmans. The testimony concerned Kipers' understanding of the indemnity provision in his subcontract and his potential obligation to pay the Burman's legal fees. Following the deposition, counsel for Hampton Builders and Great Lakes moved to disqualify attorney Graham from

representing the Burmans and Kipers, based on what they believed was an actual conflict in the joint representation.

The Burmans and Kipers challenged the [standing](#) of Hampton and Great Lakes to bring the motion to disqualify and Graham also offered waivers signed by the Burmans and Kipers, but the trial court granted the motion. Although the writ application filed by the Burmans and Kipers was not granted, their appeal of the final order of disqualification was appealed to the Second District Court of Appeal, Division Three.

A trial court's authority to disqualify an attorney derives from the power inherent in every court to control in furtherance of justice, the conduct of its ministerial officers and of all other persons in any manner connected with a judicial proceeding before it, in every matter pertaining thereto. (*People ex rel. Dept. of Corporations v SpeeDee Oil Change Systems, Inc.* (1999) 20 Cal.4<sup>th</sup> 1135) Disqualification motions involve a conflict between the clients' right to counsel of their choice and the need to maintain ethical standards of professional responsibility. [The important right to counsel of one's choice must yield to ethical considerations that affect the fundamental principles of our judicial process.](#)

In concurrent or joint representation cases, the court is concerned with the attorney's [duty of loyalty](#) to each client. (*Flatt v Superior Court* (1994) 9 Cal.4<sup>th</sup> 275) An attorney's duty of loyalty to a client is not one that is capable of being divided. Joint representation of parties with conflicting interests impairs each client's legitimate expectation of loyalty that his or her attorneys will devote their entire energies to their client's interests. (*Flatt*, at p. 289)

The principle of "*undivided loyalty*" is embraced in the rules of professional conduct governing potential and actual conflicts in joint representation cases. [Rules 3-310\(C\) \(1\) and \(2\)](#) of the State Bar Rules of Professional Conduct provide that an attorney "*shall not, without the informed written consent of each client: (1) Accept representation of more than one client in a matter in which the interest 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...Unless there is informed written consent, an attorney cannot represent two or more clients at the same time whose interests conflict.*" In cases where an attorney concurrently represents two clients with conflicting interest, the automatic-disqualification rule applies. (*Flatt*, at p. 284)

The Second DCA noted that standing generally requires that the plaintiff be able to allege injury, that is, an invasion of a legally protected interest. (*Angelucci v Century Supper Club* (2007) 41 Cal.4<sup>th</sup> 160) Generally, before the disqualification of an attorney is proper, the complaining party must have had an attorney-client relationship with that attorney. (*Strasbourg Pearson Tulcin Wolff Inc. v Wiz Technology, Inc.* (1999) 69 Cal.App.4<sup>th</sup> 1399) Hampton neither has nor had an attorney-client relationship with Graham. Absent an attorney-client relationship, the moving party must have an expectation of confidentiality. (*DCH Health Services Corp. v Waite* (2002) 95 Cal.App.4<sup>th</sup> 829) Hampton does not have and did not have in the past a confidential relationship with Graham or an expectation of confidentiality. A moving party must have standing, an invasion of a legally cognizable interest, to disqualify an attorney.

Hampton then sought to have the Appellate Justices adopt and apply the minority rule in *Colyer v Smith* (C.D.Cal. 1999) 50 F.Supp.2d 966, permitting a non-client to move to disqualify counsel. That case recognized a minority view that a non-client might have standing to bring a disqualification motion if the non-client could establish a “personal stake” in the motion to disqualify opposing counsel that is sufficient to satisfy the standing requirements of Article III of the United States Constitution. Where the ethical breach is “manifest and glaring” and so “infects the litigation in which disqualification is sought that it impacts the moving party’s interest in a just and lawful determination of his or her claims,” a non-client might meet the standing requirements to bring a motion to disqualify based upon a third-party conflict of interest or other ethical violation. (*Colyer*, at p. 971) After articulating this view, the *Colyer* court did not invoke the minority rule because the moving party did not have a personal stake in the duty of loyalty opposing counsel owed to his client and would suffer no harm from any purported breach. Moreover, the alleged conflict did not rise to the level, “...where it infects the proceedings and threatens Colyer’s individual right to a just determination of his claims.” (*Colyer*, at p. 973) The motion to disqualify was denied based on lack of standing. The moving party in *Colyer* argued it had standing to move to disqualify opposing counsel to ensure the integrity of the process and the fair administration of justice. The Court found that Colyer’s broad interest in the administration of justice was insufficiently concrete and particularized to support a finding of standing. The Second DCA agreed that imposing a standing requirement for attorney disqualification motions protects against the strategic

exploitation of the rules of ethics and guards against improper use of disqualification as a litigation tactic.

Hampton's "*personal stake*" to satisfy standing requirements involves Kipers' duty to indemnify Hampton Builders; Kipers will have to indemnify Hampton Builders if the Burmans prevail in their cross-complaint. If attorney Graham tries to win the Burman's case, Kipers will lose because he has to indemnify Hampton. Thus, Graham represents potential adversaries and cannot devote his entire energies to either client. This is of no concern to Hampton, which has no legally cognizable interest in the duty of loyalty owed to Kipers and the Burmans. Only they will be harmed by any breach of the duty of loyalty. If either party is getting bad advice in connection with their joint representation, then the issue is between Graham and his clients.

Without any legally cognizable interest, the Justices are left with opposing parties' perception of a conflict arising from their adversaries' joint representation by Graham. Joint representation alone does not trigger an ethical violation requiring automatic disqualification. (*Dino v Pelayo* (2006) 145 Cal.App.4<sup>th</sup> 347) The order disqualifying Graham is reversed and the matter is remanded. Appellant is to recover costs on appeal.

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