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Ethical Wall Does Not Preclude Disqualification of Firm

July 8, 2015

Lawyers for the Profession® Alert

Castaneda v. Superior Court, 2015 WL 3892154 (Cal. App. June 24, 2015)

Brief Summary

The Court of Appeal of the State of California, Second Appellate District, held that under no circumstances shall a firm represent a party to a settlement conference where a firm attorney acted as a settlement officer in the conference and received confidential information from a party; establishing an ethical wall does not preclude disqualification.

Complete Summary

In February 2013, petitioner employee (the Employee) sued his former employer (the Employer) for wrongful termination. In January 2014, the Employee participated in a court ordered settlement conference conducted by a judicial officer and two volunteer attorneys. One of the attorney panelists was then senior counsel (Attorney One) with a law firm (the Firm). The Employee's case did not settle at the settlement conference.

In July 2014, a firm partner (Attorney Two) substituted in to represent the Employer and was apparently unaware that Attorney One previously served as an officer in the Employee's settlement conference. Approximately three weeks after Attorney Two substituted into the case, the Employee's counsel emailed her, informing her that Attorney One was previously involved in the settlement conference. The Employee's counsel asked whether Attorney Two and the Firm would withdraw as counsel for the Employer. Attorney Two responded, stating she would not withdraw, and noting that she learned nothing about the case from Attorney One and that Attorney One would not be doing any work on the matter. The Employee then moved to disqualify the Firm.

In his disqualification motion, the Employee argued that during the settlement conference, Attorney One heard *ex parte* communications regarding the merits of his case, and his trial strategy, legal analysis, and other highly confidential appraisals and evaluations. The Employee argued that his lawyer only divulged this information because of the confidential nature of the conference.

The Employer opposed the motion to disqualify, arguing that "no confidential information was conveyed to [Attorney One] at the . . . settlement conference." Similarly, Attorney One's declaration stated that, among other things, at no point during the conference did the Employee's counsel disclose any weaknesses in

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his case, any other confidential information regarding the case, or reveal any "bottom line" settlement position.

Stressing that it had established an "ethical wall" barring Attorney One from any involvement in the Employer's representation, the Employer argued that the Firm should not be vicariously disqualified from the representation. The Employer submitted declarations stating that Attorney Two issued a memorandum to all attorneys in the firm admonishing them to refrain from discussing the case or sharing with Attorney One any documents about the case. Attorney One also submitted a declaration stating that she had not shared any information received from the Employee's counsel during the settlement conference with any firm attorney, with the exception of information necessary to respond to the disqualification motion.

The trial court's tentative ruling denied the motion. The court emphasized that it was not resolving whether Attorney One actually received confidential information during the settlement conference. Instead, the court, presuming that Attorney One had received confidential information, and relying on the screening put in place to prevent her from disclosing any confidences to other persons at the firm, advised that it was inclined to deny the motion on the basis that vicarious disqualification of the law firm was not required. The trial court adopted its tentative ruling and the Employee immediately filed a writ petition to the appellate court.

The appellate court, concerned with preserving public trust in the justice system, agreed with the Employee. According to the court, "the issue is not merely whether confidences will in fact be preserved. If it were, screening might be sufficient. But the issue is also whether participants in the judicial process have confidence in that process." Relying on *Cho v. Superior Court*, 39 Cal. App. 4th 113 (1995), the court therefore held that if the attorney/settlement officer receives confidential information from a party in connection with the settlement conference, the attorney's law firm may not later agree to represent a party in the same action — regardless of the efficacy of the firm's screening procedures.

Because the trial court declined to resolve whether Attorney One was privy to confidential information, the court remanded the matter to the trial court to make a factual finding of whether confidential information was provided to her. However, the court instructed that "once it has been shown that *ex parte* communications have occurred with the settlement officer, then it is conclusively presumed that confidential information has been exchanged." Moreover, the court stated, "if on remand, the court finds that *ex parte* communications from [the Employee's] counsel were conveyed to [Attorney One], the court shall conclusively presume confidences were exchanged and disqualify [the Firm]."

Significance of Opinion

The court's decision is a reminder that to ensure an adequate conflict search, it is not enough to maintain information regarding clients represented. As established here, it is important to include names of litigants involved in mediations and settlement conferences where a firm attorney acts as mediator, arbitrator or settlement officer.

For more information, please contact [Bradley M. Zamczyk](#).