



Ethics Committee

ABI Committee News

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If Someone Thinks You're Their Attorney, Make Sure You're Not Before You Take On an Adverse Representation

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"Bad facts make [for] bad law." [1] The flip side is that sometimes, easy facts make for easy decisions, but serve as a reminder of some basic rules. In *In re Muscle Improvement Inc.*, [2] one of Judge **Samuel L. Bufford's** (ret.) last decisions, presents an example of the latter.

In *Muscle Improvement*, the debtors had substantial disputes with Allstate Financial Group Inc., their primary creditor, which possessed the debtors' funds and key records. [3] The debtors had been recommended to consult with attorney Haleh Naimi. Naimi, the debtors and John Michael, an Allstate representative, met for two hours. [4] After this first meeting, Naimi sent the debtors an engagement letter, but the debtors did not sign or return it. [5]

Naimi and the debtors met a second time, which the parties called a "consultation," and for which Naimi billed the debtors for \$350. [6] The debtors brought a financial consultant, Brian Avaylon, [7] and financial documents to the second meeting. [8] In that meeting, Naimi advised the debtors that due to costs, they should attempt a workout instead of filing for bankruptcy, and that they should not make preferential payments. [9] The debtors decided not to retain Naimi, and filed chapter 11 petitions through other counsel. [10] Allstate and Michael retained Naimi as their counsel in

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the bankruptcy. [11] The debtors moved to disqualify Naimi and her firm. [12]

In a decision that will surprise no one (other than Naimi), Judge Bufford granted the debtors' motion to disqualify her and her firm, effective immediately. Somewhat surprising are how much analysis Judge Bufford apparently felt was necessary to reach this conclusion and some of his subsidiary rulings. Judge Bufford started his analysis with Rule 3-310 of the California Rules of Professional Conduct, [13] which "requires an attorney to avoid the representation of adverse interests." [14] Rule 3-310(E) provides:

A member shall not, without the informed written consent of the client or former client, accept employment adverse to the client or former client where, by reason of the representation of the client or former client, the member has obtained confidential information material to the employment. [15]

Judge Bufford noted that the "chief fiduciary value" to be protected in precluding "successive clients" is the duty of confidentiality, although he subsequently suggested that Naimi had been "consulted," but not "retained," that is, the debtors never were Naimi's clients and hence there were no "successive clients." [16]

Naimi attempted to demonstrate that she had received no confidential information from the debtors—a contested factual issue. [17] Judge Bufford quickly dismissed any need—or even the court's ability—to resolve that contested factual issue, noting that the client (or, here, the potential client) could not be compelled to reveal, or to permit the attorney to reveal, the purported confidences as a condition to disqualify the attorney, and that Naimi's attempted refutation was "impermissible" under California law. [18] Instead, as a substitute, the court must determine whether the two engagements are "substantially related." [19] If they are, the attorney is *irrebutably* presumed to have received confidential information. [20] "To prevail under the substantial relationship test, the former client [21] must satisfy two elements: (1) the subject matter of the attorney's current representation is substantially related to the subject matter of the attorney's earlier representation of the former client; and (2) the attorney's earlier representation of the former client was one in which confidential information would ordinarily be disclosed." [22]

Judge Bufford easily found the two engagements to be "substantially related"—after all, it was the very same dispute. [23] He also found that the circumstances were such that the potential client ordinarily would have communicated confidential information to Attorney. [24] Judge Bufford specifically did not take into account the first meeting, at which Michael attended, because anything the debtors communicated at that meeting would not be confidential. [25] However, Judge Bufford found that Naimi likely received confidential information at the second

meeting, as she requested and received financial documents after the first meeting, gave advice about filing for bankruptcy and making preferential payments, and charged the debtors a fee for the second meeting. [26] Naimi argued that Avaylon's presence at the second meeting negated any confidentiality, which Judge Bufford rejected, finding that Avaylon was the debtors' financial consultant. [27] Judge Bufford disqualified Naimi but interestingly declined to decide whether to disqualify Naimi's law firm because neither Allstate nor the law firm had suggested that the firm might represent Allstate without Naimi. [28] Judge Bufford closed with the following advice:

In view of this decision, counsel may well wonder how to obtain protection where counsel is consulted about a case but ultimately not hired. Rule 3-310(E) provides an answer: [C]ounsel may obtain written consent from those who attend the consultation to represent another party in the case if counsel is not retained by the parties to the consultation. [29]

Although Judge Bufford's suggestion, if achievable, generally would work, another approach, which is not dependent in obtaining the opposing party's informed written consent, is to make it clear to the potential client that he or she should not provide the attorney any confidential information until the attorney and the client decide whether to form an attorney-client relationship, and for the attorney to realize that once an attorney has been in a position in which confidential information ordinarily would be conveyed, the attorney no longer may switch sides. Among other things, as an ethical matter, an attorney must conduct a conflicts search *before* he or she obtains *any* confidential information. As a business matter, the attorney should consider whether to risk forgoing representing other parties in the matter before putting himself or herself in a position to obtain such information. [30] We learned these "rules to live by" in law school and when studying for the bar. The fate of Naimi in *Muscle Improvement* is a refresher lesson for us all.

1. See, e.g., *Doggett v. United States*, 505 U.S. 647, 659, 112 S.Ct. 2686, 2694, 120 L.Ed.2d 520, 533 (1992) (Thomas, J., dissenting).

2. *In re Muscle Improvement Inc.*, 2010 Bankr. LEXIS 3038 (Bankr. C.D. Cal. Aug. 31, 2010).

3. *In re Muscle Improvement Inc.*, 2010 Bankr. LEXIS 3038, at *2 (Bankr. C.D. Cal. Aug. 31, 2010).

4. *Id.* at *2.

5. *Id.* at *2.

6. *Id.* at *2.

7. *Id.* at *3.

8. Naimi disputed the debtors' account of this meeting, but Judge Bufford noted that "the court must credit the account of the debtors." (*Id.* at *2-3 n.3.) *But see Med-Trans Corp. Inc. v. City of California City*, 156 Cal. App. 4th 655, 668-69 (2007) (reversing disqualification order based on 90-minute meeting, refusing to accept potential client's account blindly.)

9. *Id.* at *3.

10. *Id.* at *4.

11. *Id.* at *4.

12. *Id.* at *4.

13. The court's Local Rules referenced and incorporated the California Rules of Professional Conduct. *Id.* at *5, n.5 and n.6.

14. *Id.* at *7. California has not adopted the ABA's Model Rules of Professional Conduct, although subject to Supreme Court review, the State Bar recently adopted a variation of them. (*California Bar eJournal*, October 2010 ed.) Rule 3-310(E) generally comports with Model Rule 1.9.

15. *Id.* at *7.

16. *Compare id.* at *7 with *id.* at *9. Judge Bufford concluded that duty of loyalty did not apply because "because of the fleeting nature of [Naimi's] relationship with the debtors and the fact that they declined to retain her." (*Id.* at *8 n.8.) That conclusion, however, seems questionable. Even if the debtors did not retain Naimi for their bankruptcy cases, they certainly had reason to believe that she represented them at the two meetings—as Judge Bufford seemed to conclude. *Id.* at *12. Judge Bufford also acknowledged the *prima facie* existence of an attorney-client relationship. *Id.* The duty of loyalty survives termination of the attorney-client relationship, however "fleeting." *See, e.g., People v. Noriega*, 48 Cal. 4th 517, 524 (2010).

17. *Id.* at *13-14.

18. *Id.* at *11 n.9 (discussing this "rule of necessity") and *14. Judge Bufford also found that Naimi's rebuttal efforts failed factually. *Id.* at *15 n.11. Because the presumption could not be refuted, Judge Bufford also denied Naimi's request for discovery. *Id.* at *14 n.10. *But see Med-Trans Corp. Inc. v. City of California City, supra*, 156 Cal. App. 4th at 667 (party seeking disqualification may establish whether attorney obtained confidential information "directly or by reasonable inference" (emphasis added), reversing disqualification order based on 90-minute meeting.)

19. *Id.* at *9.

20. *Id.* at *11-12 and n.9.

21. Query how Judge Bufford's reference to "former client" comports with his finding that the debtors did not retain Naimi.

22. *Id.* at *10-11, citing *Jessen v. Hartford Ins.*, 111 Cal. App. 4th 698, 709, 3 Cal. Rptr. 3d 877 (2003).

23. *Id.* at *13.

24. *Id.* at *13-16.

25. *Id.* at *16. This statement assumes certain facts, and ignores the duty of loyalty.

26. *Id.* at *16.

27. *Id.* at *16-17.

28. *Id.* at *17. This is rather odd given that it appears that Naimi is the only attorney with the law firm, and there is no suggestion that any "ethical wall" had been erected separating her from any other person at the firm (even assuming that California would recognize the efficacy of an ethical wall in this setting).

29. *Id.* at *18.

30. The risks go beyond just lost business. In *Muscle Equipment*, Attorney faces a sanctions motion, a threatened claim by debtors, and a potential claim by Allstate because the debtors are seeking equitable subordination of Allstate's claim based on Attorney's alleged disclosure of confidential information. (United States Bankruptcy Court for the Central District of California, Case No. LA-10-12736, Docket Nos. 117 and 254 [page 7, lines 15-17].)