

SUPREME COURT COPY

No. S232946

2d Civil No. B256314

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP,

Plaintiff and Respondent,

vs.

J-M MANUFACTURING CO., INC.,

Defendant and Appellant.

SUPREME COURT
FILED

DEC 13 2016

Jorge Navarrete Clerk

Deputy

**APPLICATION TO FILE BRIEF OF AMICUS CURIAE
BEVERLY HILLS BAR ASSOCIATION
IN SUPPORT OF
J-M MANUFACTURING CO., INC.**

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**APPLICATION TO FILE BRIEF OF AMICUS CURIAE
BEVERLY HILLS BAR ASSOCIATION
IN SUPPORT OF
J-M MANUFACTURING CO., INC.**

The Beverly Hills Bar Association (“BHBA”) respectfully applies for leave to file the accompanying amicus curiae brief in support of J-M Manufacturing Co., Inc. pursuant to rule 8.520(f) of the California Rules of Court. The BHBA is familiar with the contents of the parties’ briefs.

The BHBA is a voluntary bar association with more than 5,600 members who live or work primarily on the west side of Los Angeles.¹ It

¹ The BHBA certifies that no person or entity other than the BHBA and its counsel authored this proposed brief in whole or in part and that no

was founded in 1931 to advocate for justice in the community and to assist its lawyer members reach and exceed the highest levels of legal skills and ethics. Consistent with these values, the BHBA has long been an active participant in the California Conference of Bar Associations and the American Bar Association House of Delegates, with a particular emphasis on issues affecting the administration of justice, including questions of legal ethics.

The BHBA believes that this Court can benefit from additional briefing on the question of whether the broad, non-specific conflict waiver employed in this case comported with the California Rules of Professional Conduct, including the related question of what weight a client's degree of "sophistication" should be afforded.² Guidance from the Court on this issue would be particularly timely given the growing prevalence of advance waivers by large firms, as well as the State Bar's current project to review and revise the Rules of Professional Conduct. And, of course, this ethical question affects both the BHBA's members and their clients. Accordingly, the BHBA respectfully requests that this Court accept and file the attached amicus curiae brief.

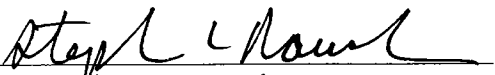
person or entity other than the BHBA, its members, or its counsel made any monetary contribution intended to fund the preparation or submission of the proposed brief. *See* Cal. Rules of Court, rule 8.520(f)(4).

² The BHBA takes no position on the first and third questions certified by the Court for review, namely whether a court may rely on non-legislative expressions of public policy to overturn an arbitration award and whether disgorgement was an appropriate remedy here.

Dated: December 1, 2016

Respectfully submitted,
REUBEN RAUCHER & BLUM

KARPMAN & ASSOCIATES

By: 
Stephen L. Raucher
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AMICUS CURIAE BRIEF

I.

INTRODUCTION

The Court of Appeal below found that because Shepard Mullin did not disclose a known or foreseeable conflict of interest to its client, the firm failed to secure informed written consent, which rendered its advance waiver of conflicts of interest ineffective. The BHBA agrees with this result and the Court of Appeal's reasoning. The BHBA further believes that a reversal of the lower court's decision in this regard would be wholly inconsistent with the policies underlying the law of professional responsibility in California. But in any event, particularly given that California is in the process of revising its Rules of Professional Conduct, it is imperative that this Court provide guidance to the legal profession on the question of advance waivers.

II.

LEGAL ARGUMENT

A. **An Open-Ended Advance Waiver of Future Conflicts of Interest is Incompatible with Existing California Law.**

Historically, the California ethics rules that regulate attorney-client relationships have been more client protective than the American Bar Association's ("ABA") Model Rules. Though California policy is more favorable to client autonomy than the ABA with respect to waivers, California's elevation of decisional freedom is balanced by its corollary

emphasis on full disclosure. (See *Maxwell v. Superior Court* (1982) 30 Cal.3d 606, 621-622, overruled in part on other grounds by *People v. Doolin* (2009) 45 Cal. 4th 390 [upholding client's consent to a waiver of potential conflict that the Court found problematic because the Court determined that the client's waiver of potential conflicts was made "after extensive disclosure of the risks"].) For example, California permits the concurrent representation of clients with interests who actually conflict if the attorney obtains informed written consent from both clients, whereas the ABA finds such concurrent representation "nonconsentable" in proceedings before a tribunal. (Rules of Professional Conduct 3-310, discussion; Model Rules of Professional Conduct, cmt 17.)

Also in line with California being more client protective, the California Rules of Professional Conduct employ narrower definitions of "informed consent" and "representation." (See ABA Model Rule 1.0(e) [defining "informed consent" as "the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct"], *Cf.* Rule of Professional Conduct 3-310(A) [defining "informed consent" as "the client's or former client's written agreement to the representation following written disclosure" of "the relevant circumstances and of the actual and reasonably foreseeable adverse consequences to the client or former client"]. See also *American Airlines, Inc., v. Sheppard Mullin, Richter & Hampton* (2002) 96

Cal.App.4th 1017, 1036 [court declining to use the Model Rule’s limited definition of “representation” for purposes of applying CA’s Rule 3-310].)

Accordingly, California’s departure from the ABA standards necessarily includes advance waivers of conflict of interest. Under current Rule of Professional Conduct 3-310: Avoiding the Representation of Adverse Interests (“Rule 3-310”), a client may waive future conflicts of interest. However, “[i]f such an advanced waiver does not sufficiently inform a client of later-developing conflict, [] a second waiver may be required.” (*Lennar Mare Island, LLC v. Steadfast Ins. Co.* (N.D. Cal. 2015) 105 F.Supp.3d 1110, 1114.) Rule 3-310, as it currently stands, does not make a distinction between “sophisticated” clients — generally meaning an experienced user of legal services who may be independently represented by counsel — and “unsophisticated” clients for purposes of determining whether a client is sufficiently informed of the risks of consenting to future conflict.

In fact, California has found general, open-ended advance waivers of conflict to be insufficient, even when the client is considered sophisticated. Perhaps no case illustrates this point better than *Concat LP v. Unilever, PLC* (N.D.Cal. 2004) 350 F.Supp.2d 796 (*Concat*). In *Concat*, Dr. Winchell hired Morgan, Lewis & Bockius (“Morgan Lewis”) to assist him in planning his estate. Morgan Lewis’s engagement letter with Dr. Winchell stated in pertinent part: “Morgan Lewis, & Bockius is a very large law firm, and we represent many other companies and individuals. It is possible that some of our present or future clients will have disputes or

other dealings with you during the time that we represent you. Accordingly, as a condition of our undertaking this matter for you, you agree that Morgan, Lewis & Bockius may continue to represent, or may undertake in the future to represent, existing or new clients in any matter, including litigation, that is not substantially related to our work for you, even if the interests of such clients in those other matters are directly adverse to you.” (*Id.*, at p. 801). The letter went on to state that Morgan Lewis was not required to notify Dr. Winchell “of each such representation as it arises.” (*Id.* at p. 802).

Shortly after this advance waiver was executed, Morgan Lewis began representing a company called Unilever in a dispute over patents with a company called Concat/Chelator, which Dr. Winchell was once a managing partner of and still had an ownership interest in. (*Id.* at p. 818.) Although the court recognized that Dr. Winchell’s education indicated “a high degree of sophistication,” the court found that the advance waiver he signed was “inefficient to establish informed consent owing to its very general nature and because Morgan Lewis failed in its obligation to request a further waiver when it discovered the dispute between Unilever and Concat/Chelator.” (*Id.* at p. 820-821). Thus, this case demonstrates that not only are general, open-ended advance waivers inconsistent with California’s requirement of informed consent, but that California is unwilling to make a blanket exception for sophisticated clients.³

³ In its Opening Brief, Sheppard Mullin asserts that its disclosure to J-M “that ‘it may currently or in the future’ represent clients in matters

In contrast, under the ABA Model Rules, a disclosure of potential conflicts that is general and open-ended waiver can be sufficient to establish informed consent. (*Galderma Labs., L.P. v. Actavis Mid Atl. LLC* (N.D. TX 2013) 927 F.Supp.2d 390). The Model Rules provide that: “if the client agrees to consent to a particular type of conflict with which the client is already familiar, then the consent ordinarily will be effective with regard to that type of conflict. If the [advance] consent is general and open-ended, then the consent ordinarily will be ineffective, because it is not reasonably likely that the client will have understood the material risks involved. On the other hand, if the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that conflict may arise, such consent is more likely to be effective.” (Model Rule 1.7, cmt 8). In other words, the ABA Model Rules effectively require less disclosure in cases where the client is sophisticated -- a position that California has been unwilling to adopt as its default standard.

adverse to J-M” was sufficient disclosure for obtaining J-M’s waiver. (Opening Brief on the Merits, p. 26.) Sheppard Mullin further argues that J-M “plainly understood” that any of the entities in the underlying action could have been among these “current, former, [or] future clients.” (OPM, at p. 36.) However, particularly as it relates to existing clients, blessing this form of “disclosure” would inappropriately relieve Sheppard Mullin of its obligation to provide pertinent, current information to the client.

B. The Proposed Changes to California’s Rules of Professional Conduct Would Still Not Track the ABA With Regard to Advance Waivers of Conflict of Interest

As this Court is aware, the Commission for the Revision of the Rules of Professional Conduct (“Commission”) is in the process of a comprehensive review of California’s rules. In doing so, the Commission is considering the organizational structure of the ABA’s Model Rules as a template for re-organizing California’s rules, including Rule 3-310. The ABA uses separate rules that regulate different conflict of interest situations, which the Commission has concluded would reduce confusion and otherwise help out-of-state lawyers quickly locate the rule that would govern their particular situation.

The Commission ultimately recommended implementing the structure of the ABA’s conflict of interest rules in developing a Proposed Rule 1.7. Under Rule 3-310, which Proposed Rule 1.7 sets out to replace, there is a “checklist” of discrete categories of conflict situations. In forming Proposed Rule 1.7, the Commission combined the ABA’s approach of including general conflict principles and then providing specific examples through California’s checklist approach.⁴

⁴ Executive Summary of Proposed Rule of Professional Conduct 1.7 [http://ethics.calbar.ca.gov/Portals/9/documents/2d_RRC/Public%20Comment%20Y/PC%20Rules/RRC2%20-%201.7%20\[3-310\]%20-%20Rule%20-%20XDFT1%20\(10-26-16\)%20-%20ALL.pdf](http://ethics.calbar.ca.gov/Portals/9/documents/2d_RRC/Public%20Comment%20Y/PC%20Rules/RRC2%20-%201.7%20[3-310]%20-%20Rule%20-%20XDFT1%20(10-26-16)%20-%20ALL.pdf) at pp. 1-2 (“*Executive Summary*”).

However, the Commission declined to adopt the ABA's more relaxed standards concerning matters of consent. Specifically, the California body was not as generous as the ABA with regards to advance waivers of conflicts of interest.⁵ To begin with, the Commission removed the beginning portion of Comment 8 of the ABA rule that Proposed Rule 1.7 is modeled after, which states that "[w]hether a lawyer may properly request a client to waive conflicts that might arise in the future is subject to the test of paragraph (b)," opting instead to replace the language with the more limited: "[t]his Rule does not preclude an informed, written consent to a future conflict in compliance with applicable case law."⁶ Not only does this careful construction illustrate the Commission's lack of enthusiasm for advance waivers of conflict -- the language suggests that advance waivers would be the exception and not the norm -- but it also indicates that California is still unwilling to approve the use of an open-ended advance waiver. The Commission also declined to give the sophistication of a client the same weight as the ABA does, as discussed in further detail below.

Clearly, the Commission did not find that the ABA's position on this topic satisfies California's bedrock principle that a waiver requires full

⁵ Also referred to as "prospective waivers."

⁶ Bar's Redline Comparison of ABA Model Rule 1.7, comment 22 and California Proposed Rule 1.7, comment 8 [http://ethics.calbar.ca.gov/Portals/9/documents/2d_RRC/Public%20Comment%20Y/PC%20Rules/RRC2%20-%201.7%20\[3-310\]%20-%20Rule%20-%20XDFT1%20\(10-26-16\)%20-%20ALL.pdf](http://ethics.calbar.ca.gov/Portals/9/documents/2d_RRC/Public%20Comment%20Y/PC%20Rules/RRC2%20-%201.7%20[3-310]%20-%20Rule%20-%20XDFT1%20(10-26-16)%20-%20ALL.pdf) at redline p. 8.

disclosure and full consent. (*See Concat, supra*, at p. 816 [noting that consent for dual representation for clients with adverse interests is prohibited unless both clients give informed consent even when the matters are unrelated], *Lysick v. Walcom* (1968) 258 Cal.App.2d 136, 147 [observing that under minimum standards of professional ethics, a lawyer can represent dual interests as long as there is full consent and full disclosure]. *See also* State Bar Standing Com. On Prof. Responsibility & Conduct, Formal Opn. No. 1989-115 [stating that “it is the opinion of the Committee that the execution of an advance waiver of conflict of interest and confidentiality protections is not *per se* improper; that to the extent that the waiver of confidentiality is ‘informed,’ it is valid[.]”]) Applicable case law has also demonstrated that the essential inquiry is whether the client was fully informed, no matter the client’s level of sophistication. (*Western Sugar Coop. v. Archer-Daniels-Midland Co.* (2015) 98 F.Supp.3d 1074, 1083 [where the advance waiver did not disclose anything, the court found that it was difficult to imagine that the client “as sophisticated as it [was] – fully appreciated the risks and made an informed waiver.”] *See also Concat, supra.*)

Given the fact that California has always emphasized informed consent, open-ended advance waivers -- even for “sophisticated” clients -- pose this insurmountable challenge: how can there ever be informed consent from the affected clients “when the facts have not yet developed, the conflict doesn’t yet exist, and the relevant circumstances and the reasonably foreseeable adverse consequences are not fully known[?]”

(Sall, *Ethically Speaking: Testing Loyalty's Limits -- Thoughts On The Proliferation Of Advance Waivers* (2009) 51 Orange County Lawyer 42, 44. The short answer is that as a general matter, there cannot be, and the Model Rules, while an example for California, are not controlling, even under the currently proposed revisions to the Rules of Professional Conduct. (*Lennar Mare Island, supra*, 105 F.Supp.3d at p. 1118 [“California courts may look outside the state for guidance on ethical questions, but out-of-state authority is persuasive only absent ‘a conflicting state public policy.’ [Citation Omitted]”].) Thus, California’s emphasis on informed consent makes a general, open-ended advance waiver extremely problematic.⁷

C. A Bright Line Distinction Between Sophisticated and Unsophisticated Clients Would Also Be Inconsistent With the Applicable Law.

California’s deeply rooted emphasis on informed written consent would be severely undermined by a policy that would absolve a firm from notifying a client of conflicts of interests that later arise -- or are actually present -- once they secure an advance waiver from a sophisticated client. Indeed, in the Commission’s first version of Proposed Rule 1.7, the

⁷ In fact, in the Commission’s Executive Summary regarding Proposed Rule 1.7, the Commission references client protection twice: first to say that the hybrid approach between the ABA rule and Proposed Rule 1.7 will “increase client protection,” and second, that the Commission recommended “carrying forward *California’s more client-protective requirement that a lawyer obtain the client’s ‘informed written consent’* [.]” (*Executive Summary, supra*, at p.2) (emphasis added).

Commission excluded Comment 8 of the Model Rule, excerpted above, which indicated that if a client is sophisticated, then a general, open-ended waiver is likely to be effective. (Bar's Redline Comparison of ABA Model Rule 1.7, comment 22 and California Proposed Rule 1.7, comment 8, *supra*, at redline p. 8.)

To be clear, California has obviously recognized that all clients are not created – for lack of a better term – equal. That is to say, California appreciates that a client's status has some bearing on its reasonable expectations with regard to legal representation.⁸ For instance, if a client is a large company or has independent counsel, there is less reason to believe that it is being taken advantage of by its lawyers in matters of representation than a client who does not have the benefit of outside counsel. (Diane Karpman, *Advice & Consents*, (2007) 30-JUNE L.A. Law 23.) However, the same is not necessarily true in the case of advance waivers. While experience with legal services may make a client better equipped to understand the consequences of a waiver, it is of questionable, if any, assistance in this area. No amount of sophistication will help a client determine if a conflict that arises later in its representation is one that it would have consented to if it had known about it. When knowledge of the relevant circumstances depends on the attorney informing the client, then the client's level of "sophistication" is not pertinent. Rather, the

⁸ California's Rule 4-200 actually lists the relative sophistication of a client as factor for determining whether a legal fee is unconscionable. (Rules of Prof. Conduct, rule 4-200) Thus, it is unlikely that the absence of a corresponding provision in the conflict of interest rules was an oversight.

sophisticated and unsophisticated client alike must both equally rely on the firm's full disclosure and *integrity*.

In fact, even after several revisions of Proposed Rule 1.7, including after public comments, the Commission refrained from adopting the language of the ABA with regard to the sophistication of a client. Instead, Comment 10 of draft 5.1 of Proposed Rule 1.7 states: “the experience and sophistication of the client giving consent, as well as whether the client is independently represented in connection with giving consent, are also relevant in determining whether the client reasonably understands the risks involved in giving consent.”⁹ This construction is not materially different from existing California law, which already takes these factors into consideration when determining whether a client was sufficiently informed. For example, in *Visa U.S.A., Inc. v. First Data Corp* (2003) 241 F.Supp.2d 1100, the court listed the factors relevant for determining whether a client made an informed waiver. These factors include: “the breadth of the waiver, the temporal scope of the waiver (whether it waived a current conflict or whether it was intended to waive all conflicts in the future), the quality of the conflicts discussion between the attorney and the client, the specificity of the waiver, the nature of the actual conflict (whether the attorney sought to represent both clients in the same dispute or in unrelated disputes), the sophistication of the client, and the interests of justice.” (*Visa*

⁹ Cal. Rules Revision Com., Rule 1.7[3-310] Draft 5.1 <http://board.calbar.ca.gov/docs/agendaItem/Public/agendaitem1000016077.pdf> at p. 3.

U.S.A., Inc., supra, 241 F. Supp. 2d at p. 1106.)

In light of all of this, California will presumably continue to decline to adopt the ABA's language with regards to sophisticated clients because such differentiation would tempt attorneys to be less than forthcoming with certain clients than they otherwise would or should be – as is illustrated in the case at bar. (*See also Lennar Mare Island*, supra, 105 F.Supp.3d at p. 1118 [concluding that making an advance waiver enforceable where the first waiver insufficiently disclosed the nature of a subsequent conflict “would promote broad, static agreements over timely and forthright discussions of conflicts and their effects, a result contrary to California ethical rules and policy.”] After obtaining an advance waiver, firms would decide for themselves whether or not representation of clients with adverse interests was acceptable, with no further discussion with their clients. In other words, the advance waiver would virtually amount to “the fox guarding the henhouse.”

Though some – presumably large firms with multiple offices – may insist that advance waivers give potential clients freedom in obtaining and retaining counsel, that freedom must not come at the cost of ethical integrity. (*See Forrest v. Baeza* (1997) 67 Cal.Rptr.2d 857, 862 [observing that the right to counsel of one's choosing “must yield to considerations of ethics that run to the very integrity of our judicial process. [Citations omitted].”].) Informed consent means that the firm must actually *disclose* actual or foreseeable conflicts to the client in advance, or disclose and seek a subsequent waiver when a conflict later arises. This is not too much to

ask, given that confidence and trust in counsel is one of the “foundations” of the attorney-client relationship and that a client could reasonably be expected to lose confidence in a lawyer once learning that the lawyer is representing an adversary (no matter how unrelated the representation is to the client’s matter). (*Flatt v. Superior Court* (1994) 9 Cal.4th 275, 285.). Accordingly, advance waivers have been found effective only where they sufficiently informed the client of the foreseeable future conflicts or notified the clients of the conflict. (*Visa U.S.A., Inc., supra*, 241 F.Supp.2d 1100, *Zador Corp. v. Kwan* (1995) 31 Cal. App. 4th 1285.) In other words, the waiver must not be general and open-ended. Such an advance waiver of conflict, in almost all circumstances, and for all clients, is the antithesis of California’s understanding and requirement of informed consent. (*Lennar Mare Island, supra*, 105 F.Supp.3d at p. 1118 [California’s public “policy, as correctly distilled by the *Visa* and *Concat* courts, encompasses a broader range of concerns that goes beyond the client’s sophistication or the absence of a direct and substantially related conflict.”].)

III.

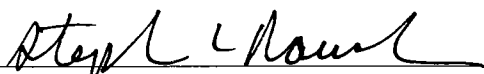
CONCLUSION

Based on the foregoing, the BHBA respectfully urges this Court to not only uphold the decision of the lower court on the question of advance waivers, but also clarify what constitutes “informed consent” in the context of such waivers.

Dated: December 1, 2016

Respectfully submitted,
REUBEN RAUCHER & BLUM

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By: 
Stephen L. Raucher
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BEVERLY HILLS BAR ASSOCIATION

CERTIFICATE OF WORD COUNT

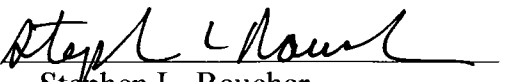
[Cal. Rule of court 8.204(c)(1)]

The text of this brief consists of 3,543 words as counted by the Microsoft Word version 2010 word-processing program used to generate the application and brief, not including the tables of contents and authorities, signature block, and caption page.

Dated: December 1, 2016

Respectfully submitted,
REUBEN RAUCHER & BLUM

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Stephen L. Raucher
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BEVERLY HILLS BAR ASSOCIATION

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is **10940 Wilshire Boulevard, 18th Floor, Los Angeles, California 90024.**

On **December 1, 2016**, I served the foregoing document described as:

**APPLICATION TO FILE BRIEF OF AMICUS CURIAE
BEVERLY HILLS BAR ASSOCIATION
IN SUPPORT OF J-M MANUFACTURING CO., INC.**

on all interested parties in this action by placing a true copy thereof enclosed in sealed envelope(s) addressed as follows:

SEE ATTACHED LIST

I am “readily familiar” with the firm’s practice of collection and processing correspondence for mailing. Under that practice it would be deposited in U.S. Postal service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on **December 1, 2016**, at Los Angeles, California.


Nathalie Quach

SERVICE LIST

In the Supreme Court of California
Case No. S232946

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