

SUPREME COURT COPY

IN THE  
SUPREME COURT OF CALIFORNIA

SUPREME COURT  
FILED

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Deputy

SHEPPARD, MULLIN, RICHTER & )  
HAMPTON, LLP, )

No. S 232 946

*Plaintiff and Respondent,* )

[2nd Civ. No. B 256 314]

*vs.* )

(L.A.S.C. No. YC067332)

J-M MANUFACTURING CO., )

*Defendant and Appellant,* )

AFTER A DECISION BY THE COURT OF APPEAL,  
SECOND APPELLATE DISTRICT, DIVISION FOUR

**APPLICATION FOR LEAVE TO FILE AMICUS CURIAE  
BRIEF OF STEVEN W. MURRAY IN SUPPORT OF APPELLANT  
J-M MANUFACTURING and AMICUS CURIAE BRIEF**

STEVEN W. MURRAY, APC (No. 41493)  
14930 Ventura Blvd., Ste. 205  
Sherman Oaks, CA 91403  
(818) 501-2277; fax (818) 501-6441  
swm@psilaw.com  
Attorney for Amicus Curiae  
STEVEN W. MURRAY

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SUPREME COURT OF CALIFORNIA**

SHEPPARD, MULLIN, RICHTER & HAMPTON, LLP,	)	
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14930 Ventura Blvd., Ste. 205  
Sherman Oaks, CA 91403  
(818) 501-2277; fax (818) 501-6441  
swm@psilaw.com  
Attorney for Amicus Curiae  
STEVEN W. MURRAY

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**IN THE  
SUPREME COURT OF CALIFORNIA**

**SHEPPARD, MULLIN, RICHTER & HAMPTON, LLP,**  
*Plaintiff and Respondent,*

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*Defendant and Appellant.*

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**APPLICATION FOR LEAVE TO FILE AMICUS  
CURIAE BRIEF OF STEVEN W. MURRAY IN  
SUPPORT OF APPELLANT J-M MANUFACTURING**

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TO THE HONORABLE CHIEF AND  
ASSOCIATE JUSTICES:

Permission is respectfully requested to file the attached brief as Amicus Curiae in support of Defendant and Appellant J-M Manufacturing (J-M) concerning Issue Two presented herein: the validity of an advance waiver of conflicts of interest —and the waiver of the duty of loyalty. This application is timely made within thirty days after the November 2, 2016, filing of Sheppard’s Reply Brief.

Applicant's interest in this action is based on the nature of his practice, which emphasizes insurance coverage on behalf of insureds. Applicant is presently involved in disputes concerning the application and effect of *C.P.R.C.* Rule 3-310(C) when a liability insurer agrees to defend while reserving its right to deny coverage. The insurer then refuses to recognize any conflict of interest between its selected defense counsel and the insured requiring appointment of independent counsel. This Court's construction and application of Rule 3-310(C) will directly affect such matters because the rule applies to all attorneys, including those selected by an insurer as defense counsel.

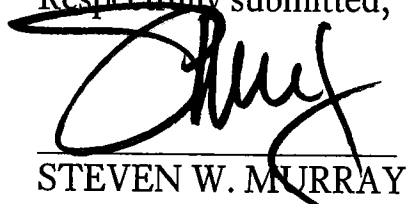
No lawyer can prospectively have a client waive any and all unknown conflicts. Rule 3-310(C) requires a client's informed consent to a conflict waiver — if the lawyer doesn't know anything about an unknown conflict, how can he or she give the client any information to give an informed consent? Like the lawyer, the client cannot know the unknown.

Nor can a lawyer ask the client to waive the duty of loyalty — the foundation of fairness in legal proceedings. Without it the client does not receive due process of law. And that right cannot so easily be waived.

Applicant has reviewed the Court of Appeal opinion herein and the briefs of the parties, and is familiar with the issues in this case and the scope of their presentation. The proposed Amicus Curiae Brief was solely prepared and authored by Applicant, who solely funded the preparation and submission hereof. To properly inform the Court regarding these and other related matters, permission is respectfully requested to file the following Amicus Curiae Brief.

Dated: November 28, 2016

Respectfully submitted,



STEVEN W. MURRAY



**IN THE  
SUPREME COURT OF CALIFORNIA**

SHEPPARD, MULLIN, RICHTER & HAMPTON, LLP,  
*Plaintiff and Respondent,*

vs.

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*Defendant and Appellant.*

---

**AMICUS CURIAE BRIEF OF STEVEN W. MURRAY**

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“The good lawyer is not the man who has an eye to every side and  
angle of contingency, and qualifies all his qualifications,  
but who throws himself on your part so heartily,  
that he can get you out of a scrape.”

(Ralph Waldo Emerson, “Power,” *The Conduct of Life* (1860).)

**SUMMARY OF ARGUMENT**

Rule 3-310(C) was promulgated for a public reason and cannot be waived. Neither can the duty of loyalty. Whenever a lawyer discovers a conflict of interest, full disclosure to clients is required.

If loyalty to a client cannot be given, the profession of law demands no less than the lawyer's resignation — regardless of arguments that we now have a “modern legal marketplace.” Law is a profession, not a business, and inferior commercial standards are unacceptable. No lawyer should be excused from disclosing a specific potential or actual conflict because it might be bad for business. No lawyer can continue to represent a client without complete loyalty.

This Court should make it clear that Justice Werdegar's meaningful pronouncement in *Lexin vs. Superior Court* (2010) 47 Cal.4th 1050, 1073, is still the law: “The common law rule and [Rule 3-310(C) and *Bus. & Prof. Code* §6068(e)(1)] recognize the truism that a person cannot serve two masters simultaneously . . . . “ These ethics rules are “‘evolved from the self-evident truth, as trite and impregnable as the law of gravitation, that no person can, at one and the same time, faithfully serve two masters representing diverse or inconsistent interests with respect to the service to be performed.’” Integrity in our profession is just as important as in government.

## ARGUMENT

### **A. ETHICAL STANDARDS CANNOT BE WAIVED.**

As the Court of Appeal correctly explained, Rule 3-310(C) is both an ethical standard and public policy. (Slip Op., p. 23.) So is *Bus. & Prof. Code* §6068(e)(1): “It is the duty of an attorney to ... maintain inviolate the confidence, at every peril to himself or herself to preserve the secrets, of his or her client.”

These two laws were part of Sheppard’s retainer agreement and apply to its validity, construction and enforcement. (““all applicable laws in existence when an agreement is made necessarily enter into it and form a part of it as fully as if they were expressly referred to and incorporated in its terms.” [Citation.]” (*Wing vs. Forest Lawn* (1940) 15 Cal.2d 472, 476.)

Sheppard’s retainer not only sought a blanket advance conflict waiver, it also tried to abandon its duty of loyalty. By signing the retainer, J-M would be waving Sheppard’s “obligation” of loyalty.

(Slip. Op., p. 5.) But law established for a public reason cannot be waived. (*Coker vs. JP Morgan Chase Bank* (2016) 62 Cal.4th 667, 686: “Any one may waive the advantage of a law intended solely for his benefit. But a law established for a public reason cannot be contravened by a private agreement.”) See *Civil Code* §3513. The public policies underlying Rule 3-310(C) and §6068(e)(1) are evident and prohibit any attempt to evade them.<sup>1</sup>

## **B. LOYALTY ENSURES DUE PROCESS.**

Legal mayhem — and a denial of due process — happens when these policies are ignored. Lax enforcement of ethical standards harms the parties and courts, by adding appeals and retrials to an already overburdened judicial system. Thus in *Pennix vs. Winton* (1943) 61 Cal.App.2d 761, 773-775, insurance defense’ counsel’s ethical misconduct impaired the parties’ right to a fair trial (*id.* at 776) and judgment for defendant was reversed. (*Id.* at 177.) In *Hammet vs.*

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<sup>1</sup> If an unrestricted waiver of either a conflict or the duty of loyalty is deemed lawful, this Court should restrict such holding to non-insurers to prevent insertion of such draconian provisions in insurance policies. (See *Hartford Casualty vs. J.R. Marketing* (2015) 61 Cal.4th 988, 997, fn. 7.)

*McIntyre* (1952) 114 Cal.App.2d 148, 153-156, insurance defense counsel's similar misconduct denied the parties due process. (*Id.* at 157.) "We have concluded that the judgment must be reversed and the cause set at large for a new trial. A review of this entire proceeding impresses us that, so far as appellant Lucille M. McIntyre is concerned, there is an absence of that element of fairness which is essential to due process." (*Id.* at 157.) Retrial was necessary. (*Id.* at 159.) Witkin agrees. (9 Witkin Procedure (5<sup>th</sup> ed.2008) Appeal, §456, Denial of Fair Hearing, p. 512.) *Price vs. Giles* (1983) 196 Cal.App.3d 1469, 1473, involved similar defense counsel misconduct and reached the same denial-of-due-process result. ["once defense counsel had indicated to the jury his client was not credible, and impliedly had lied about driving the vehicle, it was impossible for Price to receive a fair trial."] See also *Tsakos Shipping vs. Juniper Garden Town Homes* (1993) 12 Cal.App.4th 74, 96: "Dual representation under such circumstances resulted in the denial of a fair trial."

Common sense says it is not only good morals and good law, but also good economic policy to do it right the first time. That a

corporate party is involved is does not matter because the focus is on the lawyer's duty, not the client's sophistication. The men and women who conduct business are also entitled to the ethical duties owed to any client who seeks legal help.

### CONCLUSION

Being a lawyer used to be something special. It still should be. Law is an ancient and honorable profession. Regardless of the changes in the country, it never has been and never should be compared to or considered as just a profit-driven business.

While it may be easier for a large firm to insert blanket advance waivers in retainer agreements, business efficiencies are not a good enough reason to allow them. Any difficulty in initially telling a client that if a conflict arises the firm will immediately disclose it and attempt to work out a fair resolution is not worth the public harm to the profession. Life teaches when given a choice to do something the easy way or the hard way, the hard way is usually the right way.

If there is any exception to the unwritten rule against using long quotations, Judge Guilford's opinion in *State Comp. Ins. Fund vs. Drobot* (C.D. Cal. June 24, 2016, No. SAC 13-0956, pp. 2-3, 2016 U.S. Dist Lexis 83319 at \*15-16, is it. He eloquently explains why the duty of loyalty — the lynchpin of our society — must be protected.

“The importance and impact of loyalty in the attorney-client relationship extends beyond the client and counsel, to courts too. Judges are often confronted with important issues and difficult disputes. Under our system of law, judges rely on adversarial advocates to help ensure that courts reach the right results in these situations. Adversarial advocacy assumes that lawyers are fiercely loyal in representing their clients. If that loyalty doesn't exist, the engine of our legal system can't run. Justice can't be administered.

“And the importance and impact of loyalty in the attorney-client relationship extends even further — beyond

clients, beyond counsel, beyond courts — to our country itself. We live in a nation governed by the rule of law. We've constructed a powerful government to administer that law — a government that can deprive a person of property, liberty, and even life. But unlike governments of men, which depend on might, our government of law ultimately depends on the consent of the governed for its continued existence. The public must trust that the government and the legal system that undergirds it are fair and just. Lawyers serve as both stewards and servants of that trust. Since well before the law was an industry, our society looked to the profession to safeguard a complex system that keeps our country going. When the loyalty of a lawyer to a lawyers' clients comes into question, the public can lose faith in both the justice system and the bar that purportedly protects it. So while maintaining private confidences, a lawyer must sustain the public's confidence. In this way a lawyer leads two lives, both bound by loyalty.



“Given all this, it’s easy to see why a lawyer’s duty of loyalty is a duty recognized in the common law of every jurisdiction of the United States. It’s easy to see why a lawyer’s duty of loyalty is codified in every significant American code of legal ethics ever promulgated. It’s easy to see why a lawyer’s duty of loyalty is the most fundamental of all duties a lawyer owes a client. And it’s easy to see why so much is endangered when a lawyer lets opportunity affect that loyalty.”

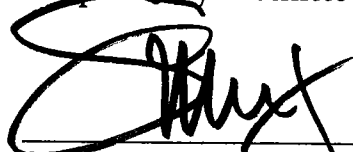
In sum, the ethical rules are “there to protect the best of us from the worst in us.” (*Id.* at p. 74, \*118.)

“This opinion ends where it began: with loyalty. For the layperson, loyalty might be just one of many desirable characteristics. For lawyers— the keepers of confidences both private and public— loyalty is the basic job requirement. Rarely can it be compromised, and never without a careful

look at the consequences to the clients, the courts, and the  
ability of our system to achieve justice.” (*Id.* at 75, \*119-120.)

Dated: November 28, 2016

Respectfully submitted,



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STEVEN W. MURRAY

**CERTIFICATION OF LENGTH OF BRIEF  
(Rule 8.204(c)(1))**

I HEREBY CERTIFY that this Application to File an Amicus Curiae Brief and Amicus Curiae Brief contains 1,890 words, which is less than the total words permitted by said Rule. This certification is based on the computer program used to prepare this Brief.

Dated: November 28, 2016



---

STEVEN W. MURRAY  
Attorney for Amicus Curiae

**PROOF OF SERVICE**

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 years, and am not a party to the within action; my business address is 14930 Ventura Boulevard, Suite 205, Sherman Oaks, California 91436.

On the date hereinbelow specified, I served the foregoing document(s) described below on the interested parties in this action by placing true copies thereof enclosed in (a) sealed envelope(s) addressed as follows:

Date of Service : November 28, 2016

Document(s) Served : APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF

Parties Served : See Attached Service List

x (BY U.S. MAIL) As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Sherman Oaks, California in the ordinary course of business. I am aware that on motion of 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.

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— (FEDERAL) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

EXECUTED at Sherman Oaks, California on November 28, 2016.

  
HELEN DUNCAN

*SHEPPARD, MULLIN, et al. vs. J-M MFG.*  
No. S 232 946

**Service List**

Kent J. Richland, Esq.  
Jeffrey E. Raskin, Esq.  
GREINES, MARTIN, STEIN & RICHLAND  
5900 Wilshire Blvd., 12<sup>th</sup> Fl.  
Los Angeles, CA 90036  
(310) 859-7811; fax (310) 276-5261

J-M MANUFACTURING

Kevin S. Rosen, Esq.  
Theane Evangelis, Esq.  
GIBSON, DUNN & CRUTCHER LLP  
333 S. Grand Ave  
Los Angeles, CA 90071  
(213) 229-7000; fax (213) 229-7520

SHEPPARD, MULLIN

Clerk, Court of Appeal  
SECOND APPELLATE DISTRICT, DIV. FOUR  
300 S. Spring St., 2<sup>nd</sup> Fl., N. Tower  
Los Angeles, CA 90013  
(213) 830-7000

Hon. Stuart M. Rice  
LOS ANGELES SUPERIOR COURT  
Civic Center Courthouse  
825 Maple Ave., Dept. B  
Torrance, CA 90503  
(310) 787-3722