


3:18 "Loyalty" in Its Second Sense

The fiduciary has a duty not to betray the trust
of the beneficiary. 

Probate Code Sec. 16002 is captioned "Duty of Loyalty", and some cases use the word "loyalty" in speaking of the attorney's fiduciary obligation towards the client. *Flatt v. Superior Court* (1994) 9 Cal.4th 275, 36 Cal.Rptr.2d 537, 885 P.2d 950; *Stanley v. Richmond* (1995) 35 Cal.App.4th 1070, 41 Cal.Rptr.2d 768; *Jeffry v. Pounds* (1977) 67 Cal.App.3d 6, 136 C.R. 373. The same word is used in the employment setting: *Stokes v. Dole Nut Co.* (1995) 41 Cal.App.4th 285, 48 C.R.2d 673.

In *Jeffry v. Pounds*, *supra*, a law firm breached its duty of loyalty towards its client, whom it represented in a personal injury action, by undertaking to represent his wife against him in their marital dissolution action. Even though there was no actual conflict between these two representations, the firm had breached its duty of "loyalty" towards the husband during the time it represented the wife, and for this reason it would be denied recovery of a part of its fee. A discussion of this same idea may be found in *Anderson v. Eaton* (1930) 211 Cal. 113, 293 P. 788, where an attorney represented a party adverse to his own client in matters potentially related to the one in which the client was involved. The court there talked about the lawyer's duty of "fidelity" towards his client, saying, "By virtue of this rule an attorney is precluded from assuming any relation which would prevent him from devoting his entire energies to his client's interests. Nor does it matter that the intention and motives of the attorney are honest. The rule is designed not alone to prevent the dishonest practitioner from fraudulent conduct, but as well to preclude the honest practitioner from putting himself in a position where he may be required to choose between conflicting duties, or be led to an attempt to reconcile conflicting interests, rather than to enforce to their full extent the rights of the interest which he should alone represent."

In *Metro-Goldwyn-Mayer Inc. v. Tracinda Corp.* (1995) 36 Cal.App.4th 1832, 43 C.R.2d 327, the court reversed a trial court's order refusing to disqualify a law firm from representing a group of former principals of a corporation in litigation brought against them by the corporation and a third party (a bank), arising out of transactions whereby vast amounts of cash were injected into the corporation and then lost. The motion was based on the accusation that the firm had a "conflict of interest" because it had represented the corporation during the time when the cash was injected. The court pointed out that the Rules of Professional Conduct and the cases distinguish two different kinds of conflicts: a conflict between two clients whom the lawyer is representing simultaneously; and a conflict between successive clients. Different considerations apply to the two cases, but the overriding concern in both kinds of case, as far as the court is concerned, is to preserve the trust of the public in the bar and its members. The lawyer does not owe many duties to a former client but does continue to owe a duty of "loyalty"; and by representing adversaries against former clients, the lawyer could be seen as breaching that duty. The trial court was directed to grant the motion.

Flatt v. Superior Court (1994) 9 Cal.4th 275, 36 Cal.Rptr.2d 537, arose in a very different context but is still pertinent to the general subject of conflict of interest and attorney disqualification. In *Flatt*, a wife sued her divorce attorney when she discovered that during the time the attorney was

representing her, she was negotiating to share office space with the attorney who was representing the husband. This created a conflict between the attorney and her client which, the Court held, might be actionable if all the other elements of the tort were found. *Flatt* discusses the rationale for the prohibition against attorneys undertaking conflicting interests or duties. The rationale is not only the concern over the potential breach of the client's confidence: it also involves issues of *loyalty*: if the client cannot trust the loyalty of the attorney, the whole relationship will be undermined.

The duty being discussed here is different from that discussed in *Wutchumna Water Co. v. Bailey* (1932) 216 Cal. 564, 15 P.2d 505. In that case, the Supreme Court disqualified an attorney from representing a new client against his former client in litigation over rights conferred under a contract he had drafted while representing the earlier client. His representation was held to be a breach of his duty towards his former client, which duty is now spelled out in Rules of Prof. Conduct 3-310. The idea there was that the lawyer could not help his client build a contract and then work for a new client to tear down what he had helped build. But even though this duty of the attorney towards a former client is one aspect of his duty of management, still, it is closely allied with the duty of loyalty. Consider this hypothetical case: D, a sports celebrity, is indicted for the murder of his former wife and her escort. The criminal trial lasts for nearly a year and is widely publicized: in fact, the proceedings are televised and millions of people watch them. Attorney C defends D against the criminal charges successfully. Now the father of the escort, F, sues D in civil court for wrongful death; C is not involved in D's defense of the civil suit. While the wrongful death suit is pending, F asks C to represent him in a totally unrelated business matter: may C do so? Under a literal reading of Rule 3-310, C would be free to undertake the representation because the business matter is totally unrelated to the criminal case. But by representing F, C somehow vouches for him and endorses his integrity. [Historical Note—Aristotle, Quintilian(1).] D might see C's aligning himself with F as undermining his defense of the civil action; and the press might see it that way as well. While C would not be breaching any duty of management, would he be breaching a duty of loyalty? The question has not come up, but it appears that C's endorsement of F while the civil case is still pending would be a betrayal of his former client which the courts should not permit.

This sense of "loyalty" is quite different also from the sense in which we discussed the word in Section 3:8 above. In that Section we dealt with an affirmative duty to protect the trust res and to persevere in defense of it. The duty we are discussing here is fundamentally *psychological*: something the law imposes on the fiduciary in order to assure the cestui *peace of mind* and not to betray the cestui's *trust*. "Loyalty" in its first sense, as defined in Prob. Code Sec. 16002, is a substantive duty, which includes a requirement of acting in a certain way and of taking certain steps to protect the beneficiary. But this second duty of loyalty is breached not by any particular action in connection with the subject of the trust but rather by affiliation and association, and by taking positions which raise the threat of harm to the beneficiary by suggesting that the fiduciary might breach his duty towards the beneficiary in other ways. See also Section 3:8a above, dealing with the duty to maintain confidences, which also has a heavily "psychological" character.

Practice Tip: It is not a breach of the attorney's duty of loyalty for him to maintain

cordial, even friendly, relations with opposing counsel. The fact that the clients hate each other is no reason at all for the attorneys to hate each other. To the contrary: it may be a good reason for the attorneys to make extra efforts to maintain cordial relations. When the clients cannot talk to each other, often their lawyers can work together to accomplish common objectives. In litigation, "common objectives" include such simple things as scheduling of motions, discovery, and trial; and settlement too is as often achieved by the efforts of lawyers as by those of the clients. For these reasons, one of the most important benefits a lawyer can confer on his client is his good relationship with opposing counsel, since opposing counsel has the ear of the adversary. — But in *Flatt v. Superior Court, supra*, the relations went too far, and breached the attorney's duty of loyalty.

Endnotes

1 (Popup - Popup)

According to Quintilian, who ascribes the idea to Cato, one of the lawyer's principal functions was to vouch for, or sponsor, his client. The orator was defined by Cato as "vir bonus peritus dicendi"—a good man skilled in speaking. His "goodness" was what gave him credibility when he sponsored his client's cause. — The idea was advanced first in Aristotle's Rhetoric, and see Quintilian, Institutio Oratoria 12.1.1: "Sit ergo nobis orator, quem constituimus, is, qui a M. Catone finitur, vir bonus dicendi peritus; . . ."

The hypothetical case discussed here is taken from the notorious O.J. Simpson trial. The question is, Could Johnnie Cochran represent Fred Goldman in a business matter totally unrelated to the Simpson case without breaching a duty of loyalty towards Simpson?