Potential Conflict of Interests: When Do Attorneys Cross the Line from Counsel to Possible Witnesses?

California Council of School Attorneys
Spring 2009 Workshop
May 15, 2009

Presented by:
Douglas N. Freifeld
Fagen Friedman & Fulfrost LLP
70 Washington Street, Suite 205
Oakland, CA 94607
(510) 550-8224
dfreifeld@fagenfriedman.com

I. ATTORNEY AS WITNESS

A. Competence

1. The courts have recognized that in civil proceedings, an attorney is competent to testify on behalf of his client.

   (a) *See* 35 A.L.R. 4th 810, § 2; *Thompson v. Beskeen* (1963, 3d Dist) 223 Cal.App.2d 292; *Fireman's Fund Ins. Co. v Superior Court of Los Angeles* (1977, 2d Dist) 72 Cal App 3d 786.)

2. Although an attorney is generally considered competent to testify on behalf of his client in modern state civil proceedings, the courts, relying on either the American Bar Association's Code of Professional Responsibility or a local bar association's standards, have disapproved of an attorney's testifying for his client unless the attorney withdraws as counsel. (35 A.L.R. 4th 810, § 2.)

B. Rule 5-210 California Rules of Professional Conduct

1. Rule 5-210 of the California Rules of Professional Conduct provides exceptions to the duty to withdraw from the case in which an attorney seeks to testify on behalf of a client.

2. The Rule states: A member shall not act as an advocate before a jury which will hear testimony from the member unless:

   (a) The testimony relates to an uncontested matter; or

   (b) The testimony relates to the nature and value of legal services rendered in the case; or

   (c) The member has the informed written consent of the client. If the member represents the People or a governmental entity, the consent shall be obtained from the head of the office or a designee of the head of the office by which the member is employed and shall be consistent with principles of recusal.

3. Rule 5-210 is intended to apply to situations in which the member knows or should know that he or she ought to be called as a witness in litigation in which there is a jury.

4. This rule is not intended to encompass situations in which the member is representing the client in an adversarial proceeding and is testifying before a judge.

5. In non-adversarial proceedings, as where the member testifies on behalf of the client in a hearing before a legislative body, rule 5-210 is not applicable.

6. Rule 5-210 is not intended to apply to circumstances in which a lawyer in an advocate's firm will be a witness. (Amended 9/11/1992.)

C. ***Smith, Smith & Kring v. Superior Court*** **(1997) 60 Cal. App. 4th 573 –** The Court of Appeal used a balancing test to determine that the trial court had abused its discretion of ordering the recusal of a law firm in a legal malpractice matter.

1. Facts: Smith, Smith & Kring ("SSK") represented Grace Oliver in an action for personal injuries arising from an automobile accident. Haight, Brown & Bonesteel ("HBB") represented the defendant in the personal injury lawsuit. Subsequently, Oliver filed a legal malpractice action against SSK, seeking damages on several theories, including fraud and breach of fiduciary duty. Oliver alleged that the actual value of her personal injury case far exceeded the settlement she received and that SSK misled her into agreeing to the settlement. SSK hired HBB to represent them in the legal malpractice action. The trial court, citing the "smell test," ordered the recusal of the HBB.

2. Ruling: The Court of Appeal found that the trial court abused its discretion by recusing HBB.

3. Analysis: The State Bar has *liberalized* the rule on attorney as witness. Counsel need no longer withdraw from either a civil or criminal case if the client consents in writing to continued representation. The State Bar has concluded that a fully informed client's right to chosen counsel outweighs potential conflict or threat to trial integrity posed by counsel's appearance as witness.

   (a) *Disadvantages* - Where a lawyer representing a party in trial is also a witness during the trial, his or her effectiveness, both as a lawyer and as a witness, may be impaired in the eyes of the fact finder. Such disadvantage inures to the detriment of the party being represented by the lawyer serving such a dual function.

   (b) *Balancing of Interests* - The trial court should balance the several competing interests and then resolve the close case in favor of the client's right to representation by an attorney of his or her choice and not in favor of complete withdrawal of the attorney. If a party is willing to accept less effective counsel because of the attorney's testifying, neither his opponent nor the trial court should be able to deny this choice to the party without a convincing demonstration of detriment to the opponent or injury to the integrity of the judicial process.

(c) *Will there be detriment to plaintiff?* No, because there was no evidentiary showing that HBB obtained confidential information in any communications with Oliver's former attorneys. As for SSK, Oliver's allegation of legal malpractice against that firm necessarily waives all claims of confidentiality as to them. Whether SSK is represented by HBB or by any other firm, the former will need to disclose any relevant communications between the members of their firm and Oliver, their former client, in order to defend the malpractice action.

(d) *Was there a convincing demonstration of injury to the integrity of the judicial process?* The courts start with the proposition that the right of a party to be represented in litigation by the attorney of his or her choice is a significant right and ought not to be abrogated in the absence of some indication the integrity of the judicial process will otherwise be injured. It appeared that the trial court disqualified HBB simply by virtue of the fact members of the firm may be called to testify and found that status "just not tolerable" because it failed "the smell test."

(i) However, an attorney acting as both advocate and witness in a client's case is tolerable. Rule 5-210 of the California Rules of Professional Conduct permits HBB to act as both advocate and witness since the firm obtained SSK's consent and "the fact that the client has consented to the dual capacity must be given great weight.

(ii) Furthermore, "the smell test" is not consonant with the current state of the law. Although a court has discretion to recuse an attorney who may testify, in exercising that discretion, the court must weigh the competing interests of the parties against potential adverse effects on the integrity of the proceeding before it and should resolve the close case in favor of the client's right to representation by an attorney of his or her choice.

4. <u>What Should Courts Do?</u>

(a) First, the court must consider the combined effects of the strong interest parties have in representation by counsel of their choice, and in avoiding the duplicate expense and time consuming effort involved in replacing counsel already familiar with the case. It must be kept in mind that disqualification usually imposes a substantial hardship on the disqualified attorney's innocent client, who must bear the monetary and other costs of finding a replacement.

(b) Second, the court must consider the possibility counsel is using the motion to disqualify for purely tactical reasons. Should counsel freely be able to disqualify opposing counsel simply by calling them as witnesses, it would pose the very threat to the integrity of the judicial process that motions to disqualify purport to prevent. After all, in cases that do not involve past representation conflict cases the attempt by an opposing party to disqualify the other side's lawyer must be viewed as part of the tactics of an adversary proceeding.

(c) Finally, whenever an adversary declares his intent to call opposing counsel as a witness, prior to ordering disqualification of counsel, the court should determine whether counsel's testimony is, in fact, genuinely needed. In determining the necessity of counsel's testimony, the court should consider the significance of the matters to which he might testify, the weight his testimony might have in resolving such matters, and the availability of other witnesses or documentary evidence by which these matters may be independently established. The court should also consider whether it is the trial attorney or another member of his or her firm who will be the witness.

5. Did the Trial Judge Make Specific Findings of Fact?

(a) In light of the importance the law places on clients' ability to retain an attorney of their choice and waive any potential conflict, the Court of the Appeal held that trial judges must indicate on the record they have considered the appropriate factors and make specific findings of fact when weighing the conflicting interests involved in recusal motions.

(b) Here, Oliver failed to provide an adequate evidentiary showing as to why HBB must testify or how any testimony would be harmful to the integrity of the judicial process. Speculative contentions of conflict of interest cannot justify disqualification of counsel. Failing "the smell test" is insufficient to deny parties representation by the attorney of their choice.

D. Practice Pointers:

1. Consider associating other counsel when the need for testifying becomes apparent, and should withdraw before testifying so that the appearance of impropriety will be lessened.

2. Be aware that certain conduct by an attorney may or may not constitute testifying in a case, e.g. the making of an opening statement does not constitute appearing as a witness.

3. Procedural tactics utilized by an attorney may affect a court's determination of the attorney as witness issue, e.g. one court noted that most of the testifying attorney's objectionable remarks could have been avoided by a timely objection, rather than by waiting until a recess to move for a mistrial. (35 A.L.R. 4th 810, § 2.)

E. Discussion Questions

1. Scenario #1: Client asks whether you should attend an IEP team meeting for a student whose parents will likely reject the District's offer of an educational placement and immediately file a due process complaint. Parents provided written notice that they intend to bring an advocate and attorney to the IEP team meeting. How should you respond to the client?

2. Scenario #2: You attend the IEP team meeting in Scenario #1. Both the advocate's name and your name appear on Student's witness list. What should you do at the prehearing conference and/or due process hearing?

3. Scenario #3: After interviewing school district employees and reviewing student records, you prepare a response to compliance complaint filed with the California Department of Education ("CDE") and Office of Civil Rights ("OCR") regarding matters related to a Section 504 eligibility issue and grade change policy. Subsequently, you receive voicemail messages from the CDE consultant, the 504 hearing officer, and an OCR representative. What are your next steps?

II. ATTORNEY-CLIENT RELATIONSHIP AND SCOPE OF CONFIDENTIALITY

A. California Evidence Code sections 951 and 952

1. **Section 952** - As used in this article, "confidential communication between client and lawyer" means information transmitted between a client and his or her lawyer in the course of that relationship and in confidence by a means which, so far as the client is aware, discloses the information to no third persons other than those who are present to further the interest of the client in the consultation or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted, and includes a legal opinion formed and the advice given by the lawyer in the course of that relationship.

2. **Section 951** - As used in this article, "client" means a person who, directly or through an authorized representative, consults a lawyer for the purpose of retaining the lawyer or securing legal service or advice from him in his professional capacity, and includes an incompetent (a) who himself so consults the lawyer or (b) whose guardian or conservator so consults the lawyer in behalf of the incompetent.

B. California Business and Professions Code section 6068

1. It is the duty of an attorney to do all of the following:

(a) To support the Constitution and laws of the United States and of this state.

(b) To maintain the respect due to the courts of justice and judicial officers.

(c) To counsel or maintain those actions, proceedings, or defenses only as appear to him or her legal or just, except the defense of a person charged with a public offense.

(d) To employ, for the purpose of maintaining the causes confided to him or her those means only as are consistent with truth, and never to seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law.

(e) (1) To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client. (2) Notwithstanding paragraph (1), an attorney may, but is not required to, reveal confidential information relating to the representation of a client to the extent that the attorney reasonably believes the disclosure is necessary to prevent a criminal act that the attorney reasonably believes is likely to result in death of, or substantial bodily harm to, an individual.

C. ABA Model Rule 4.2 – Communication With A Person Represented by Counsel

1. In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows[1] to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

D. California Rules of Professional Conduct Rule 2-100 – Communication With a Represented Party.

(A) While representing a client, a member shall not communicate directly or indirectly about the subject of the representation with a party the member knows to be represented by another lawyer in the matter, unless the member has the consent of the other lawyer.

[1] "Knowingly," "known," or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

(B) For purposes of this rule, a "party" includes:

(1) An officer, director, or managing agent of a corporation or association, and a partner or managing agent of a partnership; or

(2) An association member or an employee of an association, corporation, or partnership, if the subject of the communication is any act or omission of such person in connection with the matter which may be binding upon or imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization.

(C) This rule shall not prohibit:

(1) Communications with a public officer, board, committee, or body; or
(2) Communications initiated by a party seeking advice or representation from an independent lawyer of the party's choice; or
(3) Communications otherwise authorized by law.

E. California Rules of Professional Conduct Rule 3-100 - Confidential Information of a Client

1. Rule 3-100(A) – Lays out the general duty of confidentiality and states the following:

A member shall not reveal information protected from disclosure by Business and Professions Code section 6068, subdivision (e)(1) without the informed consent of the client, or as provided in paragraph (B) of this rule."

2. Purpose of Duty of Confidentiality - to avoid disclosure of any client information when disclosure would be embarrassing or harmful to the client, absent client consent. The duty of confidentiality encourages client disclosures and assists lawyers to help advise and assist their clients in complying with the law. (*In re Jordan* (1972) 7 Cal.3d 930, 940-941.) Additionally, the client's autonomy and personal integrity is protected, while preserving the client's right to make the ultimate decisions as to the outcome of the matter. (*Blanton v. Womancare, Inc.* (1985) 38 Cal.3d 394, 403-405.)

3. Different than Attorney-Client Privilege – Compared with the attorney-client privilege, which serves as an evidentiary privilege, the duty to protect client confidences and secrets serves as an *ethical duty* and is traditionally seen as invoking a broader rule than the attorney-client privilege.

4. Rule 3-100(B) – Limited Exception to the Duty of Confidentiality. This section states the following:

   A member may, but is not required to, reveal confidential information relating to the representation of a client to the extent that the member reasonably believes the disclosure is necessary to prevent a criminal act that the member reasonably believes is likely to result in death of, or substantial bodily harm to, an individual.

5. Rule 3-100(C) – How Lawyer Should Inform Client Regarding Disclosure. This section describes how and when an attorney should inform the client that confidential information may be revealed. Rule 3-100(C) states:

   Before revealing confidential information to prevent a criminal act as provided in paragraph (B), a member shall, if reasonable under the circumstances:

   (1) make a good faith effort to persuade the client: (i) not to commit or to continue the criminal act or (ii) to pursue a course of conduct that will prevent the threatened death or substantial bodily harm; or do both (i) and (ii); and

   (2) inform the client, at an appropriate time, of the member's ability or decision to reveal information as provided in paragraph (B).

6. Rule 3-100(D) - Permitted Disclosure Should be Limited. If an attorney decides to reveal information, the information should be just enough in order to prevent a criminal act. Rule 3-100(D) states:

   In revealing confidential information as provided in paragraph (B), the member's disclosure must be no more than is necessary to prevent the criminal act, given the information known to the member at the time of the disclosure.

7. Rule 3-100(E) – All Disclosures are Discretionary. Even if an attorney is permitted to reveal confidential information, this ability to reveal is discretionary and not mandatory. Rule 3-100(E) states:

   A member who does not reveal information permitted by paragraph (B) does not violate this rule.

SMITH, SMITH & KRING et al., Petitioners,
v.
THE SUPERIOR COURT OF ORANGE COUNTY, Respondent; GRACE OLIVER, Real Party in Interest.
No. G021209.

Court of Appeal, Fourth District, Division 3, California.
Dec. 30, 1997.

SUMMARY

The trial court recused a law firm's counsel in an individual's legal malpractice action against the firm. The firm's counsel had represented the defendants in the underlying personal injury action, and the court granted plaintiff's motion to recuse the firm on the ground that counsel were likely to be called as witnesses. (Superior Court of Orange County, No. 767524, James P. Gray, Judge.)

The Court of Appeal ordered issuance of a writ of mandate directing the trial court to vacate its order recusing counsel without prejudice to plaintiff's renewing her motion based upon an adequate factual showing. The court held that the trial court abused its discretion in granting plaintiff's motion to recuse the firm's counsel. First, counsel's representation of the firm caused no detriment to plaintiff. Second, there was no convincing demonstration of any injury to the integrity of the judicial process. Plaintiff provided no declarations to demonstrate what facts counsel knew that would be discoverable and how any testimony by counsel would be adverse to the integrity of the judicial process. Furthermore, there was no factual showing as to why testimony from counsel was necessary and unobtainable from other witnesses. (Opinion by Rylaarsdam, J., with Sills, P. J., and Wallin, J., concurring.)

HEADNOTES

Classified to California Digest of Official Reports

(1) Motions and Orders § 8--Motions--Hearing--Matters to Be Considered.
In law and motion practice, counsel will frequently prepare a summary of facts in support of or in opposition to the motion. This may be part of a memorandum of points and authorities or consist of a separate statement of facts. Such a practice is useful as long as each fact mentioned is supported by admissible evidence and preferably if each such factual allegation is followed by an appropriate reference to the evidence accompanying the motion or opposition. However, absent such support in the evidence submitted, the court must disregard “facts” contained in an unverified statement. Thus, in a legal malpractice action in which plaintiff moved to recuse defendant law firm's counsel, the only evidence entitled to consideration by the court was that contained in the declarations filed in support of and in opposition to the motion. The matters set forth in plaintiff's unverified “Statement of Facts” and in memoranda of points and authorities were not evidence and could not provide the basis for the granting of the motion. Similarly, the appellate court reviewing the ruling on the motion could not consider evidence contained in documents filed on appeal that the parties failed to present as evidence to the trial court.

(2) Attorneys at Law § 13.2--Attorney-client Relationship--Rules of Professional Conduct--Attorney as Witness.
When a lawyer representing a party in trial is also a witness during the trial, his or her effectiveness, both as a lawyer and as a witness, may be impaired in the eyes of the fact finder. Such disadvantage inures to the detriment of the party being represented by the lawyer serving such a dual function. Rules Prof. Conduct, rule 5-210(C), formerly Rules Prof. Conduct, rule 2-211(A)(4), provides that an attorney shall not act as an advocate before a jury that will hear testimony from the attorney unless the attorney has the informed written consent of the client. Thus, a trial court has discretion to order an attorney who may appear as a witness to withdraw from representing the client. In exercising this discretion, the trial court, when balancing the several competing interests should resolve the close case in favor of the client's right to representation by an attorney of his or her choice and not in favor of complete withdrawal of the attorney. The pertinent inquiry for the court is whether, based on the evidence, there is a convincing demonstration of detriment to the opponent or injury to the integrity of the judicial process.

(3a, 3b, 3c) Attorneys at Law § 13.2--Attorney-client Relationship-- Rules of Professional Conduct--Attorney as

Witness--Requisite Showing to Support Recusal of Attorney--Legal Malpractice Defendant.
In a legal malpractice action against a law firm arising from a client's personal injury suit, the trial court abused its discretion in granting plaintiff client's motion to recuse the firm's counsel, who had represented the defendants in the underlying personal injury suit, on the ground that counsel were likely to be called as witnesses. First, counsel's representation of the firm caused no detriment to plaintiff. There was no showing that the firm had disclosed any confidential information to counsel, and in any event, by filing the malpractice action, plaintiff had waived claims of confidentiality. Second, there was no convincing demonstration of any injury to the integrity of the judicial process. In light of the importance placed on clients' ability to retain an attorney of their choice and waive any potential conflict, a trial court must indicate on the record it has considered the appropriate factors and made specific findings of fact when weighing the conflicting interests involved in recusal motions. There was no such indication in the record. Plaintiff provided no declarations to demonstrate what facts counsel knew that would be discoverable and how any testimony by counsel would be adverse to the integrity of the judicial process. Furthermore, there was no factual showing as to why testimony from counsel was necessary and unobtainable from other witnesses.
[See 1 Witkin, Cal. Procedure (4th ed. 1996) Attorneys, § 522.]
(4a, 4b) Attorneys at Law § 13.2--Attorney-client Relationship--Rules of Professional Conduct--Attorney as Witness--Requisite Showing to Support Recusal of Attorney.
An attorney acting as both advocate and witness in a client's case is allowable under Rules Prof. conduct, rule 5-210. Although a court has discretion to recuse an attorney who may testify, in exercising that discretion, the court must weigh the competing interests of the parties against potential adverse effects on the integrity of the proceeding before it, and the court should resolve the close case in favor of the client's right to representation by an attorney of his or her choice. First, the court must consider the combined effects of the strong interest parties have in representation by counsel of their choice and in avoiding the duplicate expense and time-consuming effort involved in replacing counsel. Second, the court must consider the possibility counsel is using the motion to disqualify for purely tactical reasons. Third, the court should determine whether counsel's testimony is genuinely needed; the court should consider the significance of the matters to which the attorney might testify, the weight that testimony might have, and the availability of other witnesses or evidence by which these matters may be established. The court should also consider whether it is the trial attorney or another member of his or her firm who will be the witness.

COUNSEL

Haight, Brown & Bonesteel, Roy G. Weatherup, Peter Q. Ezzell, Alicia E. Taylor, Margaret Johnson Wiley and J. Alan Warfield for Petitioners. ***576**

No appearance for Respondent.

Kopeny & Powell, William J. Kopeny and John W. Powell for Real Party in Interest.

RYLAARSDAM, J.

The law firm of Smith, Smith & Kring, and Attorneys Stuart Smith, Gregory Brown and Jeffrey Marquart (collectively SS&K) petitioned to vacate respondent superior court's order recusing the law firm of Haight, Brown & Bonesteel (HB&B) from representing them in a legal malpractice action filed by real party in interest Grace Oliver. Initially, we denied the petition, but the Supreme Court granted review and transferred the matter to us with directions to issue an alternative writ. We complied and now issue a writ granting the petition, finding the admissible evidence does not support recusal of HB&B.

Facts

SS&K represented Oliver in an action for personal injuries arising from an automobile accident. HB&B represented the defendants in that lawsuit. During trial, Oliver agreed to settle the personal injury action in return for payment of $275,000, payable to her attorneys in trust, and execution of an agreement promising to indemnify the defendants in that action and HB&B.

Subsequently, Oliver sued SS&K seeking damages on several theories, including legal malpractice, fraud and breach

of fiduciary duty. Her first amended complaint alleges the actual value of the personal injury case far exceeded the settlement she received and that SS&K misled her into agreeing to the settlement. She also complains SS&K incurred excessive expenses in their preparation for the trial without her consent. In addition, she asserts the indemnity agreement allowed the settlement proceeds to be paid directly to SS&K and therefore allowed SS&K to distribute the proceeds without her knowledge or consent. HB&B was retained to represent SS&K in the malpractice suit.

Oliver moved to recuse HB&B. She supported her motion by a declaration from Marc Vincent, her current attorney. Vincent declared that, before HB&B agreed to represent SS&K in the current action, he spoke with Peter Ezzell, a member of HB&B who represented the defendants in the personal injury action, and "made certain ex-parte communications regarding ... Oliver to Mr. Ezzell and spoke about the indemnity agreement, distribution ***577** of funds, potential violation of the indemnity agreement, authorization to distribute funds, the insurance draft and other relevant matters." His declaration further stated Ezzell spoke with another attorney named Brusavich "about relevant issues of the potential malpractice action."

In opposition to Oliver's motion, SS&K submitted the declaration of Ezzell. He denied any member of HB&B "negotiated this matter to its conclusion," claiming "[t]hat was done by Carola Cort at Insurance Company of the West pursuant to their protocol." Ezzell also denied either sharing confidential information with SS&K, receiving any such information from that firm before the personal injury action was settled or participating in any ex parte communications which "would be precluded under the Rules of Professional Conduct." In addition, Ezzell declared: "My clients ... in the underlying [personal injury] action have not waived the attorney/client privilege. I have not waived nor will I waive the attorney work product privilege. Therefore, communications of a confidential nature between myself [*sic*] and my clients will not be revealed at my deposition, nor will I reveal my thought processes, nor give opinions in the matter. [SS&K] are well aware of this and have waived any potential detriment to my not voicing opinions as to tactics, value, potential outcome, etc."

Ezzell claimed an indemnity agreement is standard whenever a client pays money directly to the trust account of opposing counsel. He asserted that HB&B took no part in the discussions of how to distribute or transfer funds held in SS&K's trust account. Finally, while Ezzell admitted speaking with both Vincent and Brusavich, he declared, "I indicated to both that I did not believe there had been any legal malpractice" by SS&K, and "[i]n neither communication was there a request for privacy by Mr. Brusavich or Mr. Vincent, nor were there any admissions with regards to Ms. Oliver by any party to those conversations."

Discussion

Evidence to be considered

(1) In an unverified document captioned "Statement of Facts," Oliver purportedly presented additional facts to the trial court to support her recusal motion. By way of these unsupported and conclusory statements she argued "[t]he extensive nature of HB&B's relationship with their clients on the underlying matter makes recusal necessary. HB&B must now testify as witnesses at deposition and trial."

In law and motion practice, counsel will frequently prepare a summary of facts in support of or in opposition to the motion. This may be part of a ***578** memorandum of points and authorities or consist of a separate statement of facts. Such a practice is useful as long as each fact mentioned is supported by admissible evidence and preferably if each such factual allegation is followed by an appropriate reference to the evidence accompanying the motion or opposition. However, absent such support in the evidence submitted, the court must disregard "facts" contained in an unverified statement. (*Calcor Space Facility, Inc. v. Superior Court* (1997) 53 Cal.App.4th 216, 224 [61 Cal.Rptr.2d 567].) The only evidence the trial court should have considered and which we may consider here is that contained in the declarations filed in support of and in opposition to the motion. The matters set forth in the unverified "Statement of Facts" and in memoranda of points and authorities are not evidence and cannot provide the basis for the granting of the motion. Likewise, we do not consider evidence contained in documents filed here which the parties failed to present as evidence to the trial court. (See *Ganter v. Ganter* (1952) 39 Cal.2d 272, 278 [246 P.2d 923]; *Loving & Evans v. Blick* (1949) 33 Cal.2d 603, 614 [204 P.2d 23].)

The attorney of record as a potential witness

(2) Where a lawyer representing a party in trial is also a witness during the trial, his or her effectiveness, both as a lawyer and as a witness, may be impaired in the eyes of the fact finder. Such disadvantage enures to the detriment of the party being represented by the lawyer serving such a dual function. In *Comden v. Superior Court* (1978) 20 Cal.3d 906 [145 Cal.Rptr. 9, 576 P.2d 971, 5 A.L.R.4th 562], our Supreme Court upheld a trial court decision recusing an attorney solely on the basis that the attorney was a potential witness at the trial. (*Id.* at pp. 915-916.)However, that decision was based on former rule 2-111(A)(4) of the Rules of Professional Conduct, superseded in 1989, which, with exceptions not relevant here, declared that, if "a member of the State Bar knows or should know that he or a lawyer in his firm ought to be called as a witness on behalf of his client in litigation concerning the subject matter of such employment he shall withdraw from the conduct of the trial ...."

After the decision in *Comden*, former rule 2-111(A)(4) of the Rules of Professional Conduct was amended to provide, "If upon or after undertaking employment, a member of the State Bar knows or should know that the member ought to be called as a witness on behalf of the member's client in litigation concerning the subject matter of such employment, the member may continue employment only with the written consent of the client given after the client has been fully advised regarding the possible implications of such dual role as to the outcome of the client's cause and has had a reasonable opportunity to seek the advice of independent counsel on the ***579** matter." Based on this change, the court in *Lyle v. Superior Court* (1981) 122 Cal.App.3d 470 [175 Cal.Rptr. 918], recognized that *Comden* was no longer binding. "[T]he trial court under the new rule still has discretion to order withdrawal of counsel in instances where an attorney or a member of the attorney's law firm ought to testify on behalf of his client. The amended rule, however, changes the emphasis which the trial court must place upon the competing interests, in reaching its decision. Under the amended rule ..., the trial court, when balancing the several competing interests, should resolve the close case in favor of the client's right to representation by an attorney of his or her choice and not as in *Comden*, in favor of complete withdrawal of the attorney. Under the present rule, if a party is willing to accept less effective counsel because of the attorney's testifying, neither his opponent nor the trial court should be able to deny this choice to the party without a convincing demonstration of detriment to the opponent or injury to the integrity of the judicial process." (*Id.* at p. 482, fn. omitted; see also *Reynolds v. Superior Court* (1986) 177 Cal.App.3d 1021, 1028 [223 Cal.Rptr. 258].)

In *Maxwell v. Superior Court* (1982) 30 Cal.3d 606, 619, fn. 9 [180 Cal.Rptr. 177, 639 P.2d 248, 18 A.L.R.4th 333], our Supreme Court also noted *Comden*'s weakened application: "[T]he State Bar has liberalized the rule on attorney-witnesses. Counsel need no longer withdraw from either a civil or criminal case if the client consents in writing to continued representation .... Thus *the State Bar has concluded that a fully informed client's right to chosen counsel outweighs potential conflict or threat to trial integrity posed by counsel's appearance as witness*." (*Id.* at p. 619, fn. 9.) Present rule 5-210(C) of the Rules of Professional Conduct is substantially identical to the rule considered in *Lyle* and *Maxwell* providing, with certain exceptions not relevant here, that an attorney "shall not act as an advocate before a jury which will hear testimony from the member unless" counsel "has the informed, written consent of the client."

The parties do not dispute that HB&B obtained written consent from SS&K. Therefore, in applying the current rule, we must ask, based on the evidence supplied to the trial court, was there "a convincing demonstration of detriment to the opponent or injury to the integrity of the judicial process[?]" (*Lyle v. Superior Court, supra*, 122 Cal.App.3d at p. 482.)

Will there be detriment to plaintiff?

(3a) We can quickly dispose of any contention of detriment to plaintiff. Since we must disregard counsel's conclusory allegations, there is no evidentiary showing HB&B obtained confidential information in any communications with Oliver's former attorneys. As for SS&K, Oliver's allegation ***580** of legal malpractice against that firm necessarily waives all claims of confidentiality as to them. (See Evid. Code, § 958; *Schlumberger Limited v. Superior Court* (1981) 115 Cal.App.3d 386, 392 [171 Cal.Rptr. 413].) Whether SS&K is represented by HB&B or by any other firm, the former will need to disclose any relevant communications between the members of their

firm and Oliver, their former client, in order to defend the malpractice action.

Was there a convincing demonstration of injury to the integrity of the judicial process?

(4a) In balancing the several competing interests, we start with the proposition that "[t]he right of a party to be represented in litigation by the attorney of his or her choice is a significant right [citation] and ought not to be abrogated in the absence of some indication the integrity of the judicial process will otherwise be injured ...." (*Johnson v. Superior Court* (1984) 159 Cal.App.3d 573, 580 [205 Cal.Rptr. 605]; see also *Comden v. Superior Court, supra*, 20 Cal.3d at pp. 917-918 (dis. opn. of Manuel, J.).)

(3b) It appears the trial court disqualified HB&B simply by virtue of the fact members of the firm may be called to testify and found "that status ... just not tolerable" because it failed "the smell test." (4b) However, as we have noted, an attorney acting as both advocate and witness in a client's case *is* tolerable. Rule 5-210 of the California Rules of Professional Conduct permits HB&B to act as both advocate and witness since the firm obtained SS&K's consent and "the fact that the client has consented to the dual capacity must be given great weight." (*Reynolds v. Superior Court, supra*, 177 Cal.App.3d at p. 1028.)

Furthermore, "the smell test" is not consonant with the current state of the law. Although a court has discretion to recuse an attorney who may testify, in exercising that discretion, the court must weigh the competing interests of the parties against potential adverse effects on the integrity of the proceeding before it and "should resolve the close case in favor of the client's right to representation by an attorney of his or her choice ...." (*Lyle v. Superior Court, supra*, 122 Cal.App.3d at p. 482; see also *Reynolds v. Superior Court, supra*, 177 Cal.App.3d at p. 1028.)

First, the court must consider the combined effects of the strong interest parties have in representation by counsel of their choice, and in avoiding the duplicate expense and time-consuming effort involved in replacing counsel already familiar with the case. (*Lyle v. Superior Court, supra*, 122 Cal.App.3d at p. 481; ***581***People* ex rel. *Younger v. Superior Court* (1978) 86 Cal.App.3d 180, 201 [150 Cal.Rptr. 156].) "[I]t must be kept in mind that disqualification usually imposes a substantial hardship on the disqualified attorney's innocent client, who must bear the monetary and other costs of finding a replacement." (*Gregori v. Bank of America* (1989) 207 Cal.App.3d 291, 300 [254 Cal.Rptr. 853].)

Second, the court must consider the possibility counsel is using the motion to disqualify for purely tactical reasons. (*Comden v. Superior Court, supra*, 20 Cal.3d at p. 915.) Should counsel freely be able to disqualify opposing counsel simply by calling them as witnesses, it would "pose the very threat to the integrity of the judicial process that [motions to disqualify] purport to prevent." (*Gregori v. Bank of America, supra*, 207 Cal.App.3d at pp. 300-301.) " 'After all, in cases that do not involve past representation [conflict cases] the attempt by an opposing party to disqualify the other side's lawyer must be viewed as part of the tactics of an adversary proceeding.' " (*Graphic Process Co. v. Superior Court* (1979) 95 Cal.App.3d 43, 52, fn. 5 [156 Cal.Rptr. 841], quoting *J. P. Foley & Co., Inc. v. Vanderbilt* (2d Cir. 1975) 523 F.2d 1357, 1360.)

Finally, " '[W]henever an adversary declares his intent to call opposing counsel as a witness, prior to ordering disqualification of counsel, the court should determine whether counsel's testimony is, in fact, genuinely needed.' " (*Reynolds v. Superior Court, supra*, 177 Cal.App.3d at p. 1027, quoting *Connell v. Clairol, Inc.* (N.D.Ga. 1977) 440 F.Supp. 17, 18, fn. 1.) In determining the necessity of counsel's testimony, the court should consider "the significance of the matters to which he might testify, the weight his testimony might have in resolving such matters, and the availability of other witnesses or documentary evidence by which these matters may be independently established." (*Comden v. Superior Court, supra*, 20 Cal.3d at p. 913; *Graphic Process Co. v. Superior Court, supra*, 95 Cal.App.3d at p. 50.) The court should also consider whether it is the trial attorney or another member of his or her firm who will be the witness.

(3c) Oliver provided no declarations to demonstrate which discoverable facts HB&B knows and how any testimony would be adverse to the integrity of the judicial process. Furthermore, there was no factual showing as to why testimony from HB&B is necessary and unobtainable from other witnesses. Oliver claims testimony from HB&B regarding the indemnity agreement is necessary to show "why SS&K distributed funds without their client's

authority." There is no evidence to show HB&B has any independent knowledge or reason to know whether such funds were, in fact, improperly distributed or, if so, why such distributions took place. Oliver also claims ***582** HB&B will need to testify as to their opinions regarding the underlying case but fails to show what relevant evidence the HB&B attorneys possess.

In light of the importance the law places on clients' ability to retain an attorney of their choice and waive any potential conflict, we hold that trial judges must indicate on the record they have considered the appropriate factors and make specific findings of fact when weighing the conflicting interests involved in recusal motions. (See *Lyle v. Superior Court, supra*, 122 Cal.App.3d at pp. 482-483.) There is no indication from the record the trial court recognized the importance of SS&K's waiver or considered the factors outlined above.

Here, Oliver failed to provide an adequate evidentiary showing as to why HB&B must testify or how any testimony would be harmful to the integrity of the judicial process. "Speculative contentions of conflict of interest cannot justify disqualification of counsel." (*Castro v. Los Angeles County Bd. of Supervisors* (1991) 232 Cal.App.3d 1432, 1442 [284 Cal.Rptr. 154].) Thus, failing "the smell test" is not enough to deny parties representation by the attorney of their choice. We find the trial court abused its discretion by recusing HB&B.

Disposition

The petition is granted. Let a writ of mandate issue directing the trial court to vacate its order recusing HB&B without prejudice to real party renewing her motion based upon an adequate factual showing.

Sills, P. J., and Wallin, J., concurred. ***583**

Cal.App.4.Dist.