

Case No. S232946

SUPREME COURT COPY

IN THE SUPREME COURT OF CALIFORNIA

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

SUPREME COURT
FILED

DEC 13 2016

vs.

Jorge Navarrete Clerk

J-M MANUFACTURING CO., INC.,
Defendant and Appellant.

Deputy

After an Order of the Court of Appeal, Second Appellate District,
Division Four, Case No. B256314

The Superior Court of Los Angeles County, Case No. YC067332
The Honorable Stuart M. Rice, Presiding

**APPLICATION FOR LEAVE TO FILE AMICUS CURIAE
BRIEF IN SUPPORT OF SHEPPARD, MULLIN,
RICHTER & HAMPTON LLP AND
BRIEF OF AMICUS CURIAE LEGAL SCHOLARS**

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J-M MANUFACTURING CO., INC.,
Defendant and Appellant.

**APPLICATION FOR LEAVE TO FILE AMICUS
CURIAE BRIEF IN SUPPORT OF SHEPPARD,
MULLIN, RICHTER & HAMPTON LLP**

Pursuant to California Rule of Court 8.520(f), the individuals identified on Exhibit A (Amici Legal Scholars) respectfully request leave to file the accompanying amicus curiae brief in support of Plaintiff-Respondent Sheppard, Mullin, Richter & Hampton LLP. Amici Legal Scholars are individuals who teach and write in the field of professional responsibility and legal ethics.

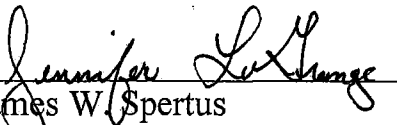
This case raises important questions about the validity and enforceability of general waivers of unrelated-matter conflicts, specifically the level of disclosure required to render consent to such waivers “informed” and whether lawyers and law firms may properly obtain such waivers while also complying with their ethical obligations to maintain client confidentiality. Amici Legal Scholars

believe their views will assist the Court in resolving this case by presenting concerns from the perspective of the academic community.

Pursuant to California Rule of Court 8.520(f)(4), the undersigned represents that no party or counsel for a party in the pending litigation authored this brief in whole or in part, or made a monetary contribution to fund preparation or submission of this brief, and no person or entity other than Amici Legal Scholars and the undersigned made a monetary contribution to fund preparation or submission of this brief.

Dated: December 2, 2016 Respectfully submitted,

SPERTUS, LANDES & UMHOFFER LLP


James W. Spertus
Jennifer E. LaGrange

Attorneys for Amici Legal Scholars

BRIEF OF AMICUS CURIAE LEGAL SCHOLARS IN SUPPORT OF SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

I.

INTRODUCTION

Amici Legal Scholars respectfully request that this Court reverse the Court of Appeal decision and recognize the validity and enforceability of the conflict waiver in this case. Amici Legal Scholars submit that the following considerations are vital to the Court's decision:

1. The level of disclosure required to render consent “informed” is substantially less when a client is sophisticated and represented by independent counsel during negotiation of the conflict waiver;
2. An informed consent to general waivers of unrelated-matter conflicts, such as the one here, need not require lawyers or law firms to disclose the confidential information of their other clients; and
3. General waivers of unrelated-matter conflicts, such as the one here, help reduce the cost of legal services and provide lawyers and law firms flexibility to represent clients of all means—large, modest, and pro bono.

Amici Legal Scholars are concerned that rigid client conflict rules that attorneys cannot address through informed waivers will accelerate a worrisome trend in which the most prominent law firms, as well as firms that specialize in particular practice areas, represent the largest clients and decline representation for other clients and pro bono

clients, some of which may be unable to find representation. Amici Legal Scholars do not believe that precluding sophisticated or represented clients from waiving conflicts in unrelated matters is worth denying clients the ability to be represented by counsel of choice.

II.

DISCUSSION

A. **Courts Should Consider A Client's Sophistication And Independent Representation In Evaluating The Validity And Enforceability Of Conflict Waivers.**

Amici Legal Scholars are concerned because the Court of Appeal's decision does not give due weight to a client's sophistication or independent representation in evaluating the validity and enforceability of conflict waivers. The American Bar Association is somewhat skeptical of general, open-ended, advance waivers but recognizes that waivers involving sophisticated clients or clients represented by independent counsel during negotiation of a conflict waiver should be treated differently:

[I]f the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, such consent is more likely to be effective, particularly if, e.g., the client is independently represented by other counsel in giving consent and the consent is limited to future conflicts unrelated to the subject of the representation.

Model Rules of Prof'l Conduct r. 1.7 cmt. 22; see also ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 05-436 (restating same and withdrawing ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 93-372, which was more restrictive towards advance

waivers); see generally Richard W. Painter, Advance Waiver of Conflicts, 13 GEO. J. LEGAL ETHICS 289 (2000).

The Restatement takes a similar approach, approving of “a client’s open-ended agreement to consent to all conflicts” if the “client possesses sophistication in the matter in question and has had the opportunity to receive independent legal advice about the consent.” RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 122, cmt d; see also Galderma Labs. v. Actavis Mid Atlantic LLP (N.D. Tex. 2013) 927 F. Supp. 2d 390, 403 (“When the client has the benefit of its own lawyer, who is bound by and familiar with the same ethical obligations of the lawyers seeking a waiver, less disclosure is needed to reveal to the independent counsel and its client the consequences of agreeing to the proposed waiver of future conflicts.”).

In this case, the Court of Appeal recognized that J-M was represented by independent counsel during negotiation of the conflict waiver with Sheppard Mullin, but did not give this fact or J-M’s sophistication any weight in analyzing the validity and enforceability of the conflict waiver. Sheppard, Mullin, Richter & Hampton, LLP v. J-M Mfg. Co. (2016) 244 Cal. App. 4th 590, 599-600, 608-13. Amici Legal Scholars respectfully submit that courts should consider a client’s sophistication and independent representation in analyzing the validity and enforceability of conflict waivers. Sophisticated clients need less information and explanation than other clients; and the most useful tool for protecting clients against overreach by lawyers is the advice of independent lawyers. Any rule that does not recognize this ignores business realities, imposes cumbersome and unnecessary disclosure

requirements, and perversely provides no incentive for lawyers or law firms to suggest independent counsel's review of a conflict waiver.

Two scenarios illustrate the problems with the Court of Appeal's approach. In the first scenario, Company A, which is a sophisticated multinational company, asks a law firm for representation. The law firm tells Company A's General Counsel that, because of the prospect of a future conflict that the retention could generate, the law firm is not in a position to represent Company A. Company A's General Counsel responds, "we understand the types of conflicts that might arise in the future, but we really want you to represent us in this matter and we do not care about these kinds of conflicts, so long as they do not relate to the subject on which we are asking you to represent us; and, therefore, we will gladly waive any such conflicts." Under the Court of Appeal's decision, the law firm would still need to decline and explain, "we are sorry, but the law does not allow you to waive these conflicts, no matter how much you wish to, and no matter how much you understand what you are doing." This is true even if the law firm has the expertise, reputation, price or other desired features Company A needs in order to secure the best representation for its needs.

In the second scenario, Company B, which is a sophisticated multinational company, asks the law firm for representation. The law firm shortly informs Company B's General Counsel that the law firm's conflict check has revealed that one of the parties who will be adverse to Company B in the prospective representation is a current firm client on a wholly unrelated matter. The law firm either has or is prepared to get informed consent to the conflict from that current

client. But the current client's matter is confidential. So, the law firm is not able to disclose any details about it or the current client's identity to Company B in order to get a case-specific waiver. As a result, the law firm will have to decline the case. Company B's General Counsel responds, "we understand the conflict issue, but we really want you to represent us in this matter and we do not care about these kinds of conflicts, so long as they do not relate to the subject on which we are asking you to represent us; and, therefore, we will gladly waive that conflict without knowing the identity of that current adverse client." Under the Court of Appeal's decision, the law firm would again have to say, "we are sorry, but the law does not allow you to waive these conflicts, no matter how much you wish to, and no matter how much you understand what you are doing."

In both scenarios, rules that are designed to help clients are actually harming them. Sophisticated companies that are represented by their own counsel in negotiating waivers are decidedly not a group that needs—or benefits from—paternalistic protection.

B. A Waiver Of Unrelated-Matter Conflicts Should Not Be Conditioned On Disclosure Of Client Identities.

Amici Legal Scholars are concerned because the Court of Appeal's decision does not give due weight to the confidentiality of a client's identity. Confidentiality of client information is one of the most important tenets of legal ethics. Cal. Bus. & Prof. Code §6068(e)(1) (stating attorney's duty to "maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client"); Cal. Rules Prof'l Conduct r. 3-100(A)

“A member shall not reveal information protected from disclosure by [section 6068(e)(1)] without the informed consent of the client, or as provided in paragraph (B)[.]”); Model Rules of Prof'l Conduct r. 1.6(a) (“A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).”).

Clients seek representation on a confidential basis for a wide range of reasons and a lawyer must not disclose the client's identity without the client's informed consent. Cal. State Bar Standing Comm. on Prof'l Responsibility & Conduct, Formal Op. No. 2007-173 (“The client's identity may ... be a client confidence or secret protected by Business and Professions Code section 6068, subdivision (e) and rule 3-100, or be deemed confidential information protected by the client's Constitutional right of privacy.”); ABA Comm. on Ethics & Prof'l Responsibility, Informal Op. 1287 (1974) (“[T]he names, addresses and telephone numbers of clients of a Legal Services Office are secret within the meaning of DR 4-101(A) since it might be an embarrassment to the client for any number of reasons to have it revealed that he was a client of the Legal Services Office.”).

In this case, the Court of Appeal reasoned that the conflict waiver was not informed because it did not disclose to J-M Sheppard Mullin's representation (whether prior or concurrent) of South Tahoe, by name, in an unrelated matter; instead, it contained general language allowing Sheppard Mullin to represent current or future clients adverse to J-M in unrelated matters. 244 Cal. App. 4th at 599-600, 610. The Court of Appeal's reasoning does not give any consideration to whether

prior or current clients have authorized disclosure of their identities, or whether prospective clients need or want the identity of prior or current clients before waiving conflicts in unrelated matters.

It is easy to imagine a prior or current client that may not want its identity disclosed to other clients—e.g., a corporation seeking advice on a potential merger, someone inquiring about divorce, or someone seeking advice on a dispute with a current employer. It is equally easy to imagine a prospective client that cares more about obtaining the services of a specific lawyer or law firm, than whether the lawyer or law firm represents or will represent an adverse party in an unrelated matter—e.g., the client may still want the lawyer or law firm because of a pre-existing relationship, expertise, skill, or price.

In light of ethical obligations, a lawyer or law firm cannot properly insist that all clients waive confidentiality over their identities simply to secure the lawyer's or law firm's own ability to negotiate conflict waivers. And without the ability to negotiate waivers that do not disclose client identities, lawyers and law firms may be forced to decline representation on modest or pro bono matters to remain available for larger clients. For example, why would a law firm known for defending large banks represent bank customers in unrelated matters if the representation may threaten ongoing representation of a longstanding client, to which it is loyal? More important than the lawyer's or law firm's profitability, however, is the denial of representation to the more modest or pro bono clients

who would otherwise have been able to secure representation by the lawyer or law firm.

Lawyers and law firms need the flexibility that conflict waivers offer in order to provide representation to a broad base of clients, including clients of modest means and pro bono clients. Amici Legal Scholars respectfully submit that a rule prohibiting general waivers of unrelated-matter conflicts because they do not disclose the identities of prior or current clients cannot stand.

C. Inflexible Conflict Waiver Rules Negatively Impact The Cost And Availability Of Legal Services.

Amici Legal Scholars are concerned because the Court of Appeal's decision does not give due weight to the value of general waivers of unrelated-matter conflicts in regulating legal fees and making representation available to clients of all means. Legal fees depend, in large part, on whether a particular engagement will preclude a lawyer or law firm from representing other clients. Cal. Rules Prof'l Conduct r. 4-200(B)(4) ("Among the factors to be considered, where appropriate, in determining the conscionability of a fee are the following ... [t]he likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the member."); Model Rules of Prof'l Conduct r. 1.5(a)(2) ("The factors to be considered in determining the reasonableness of a fee include ... the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.").

If representation of one client is likely to preclude a lawyer or law firm from representing a second client, for whatever reason, then the lawyer or law firm may be inclined to charge the first client more money to compensate for the lost opportunity. By extension, if one client asks the lawyer or law firm to keep its identity confidential, then the lawyer or law firm may be inclined to charge that client a premium to compensate for the inability to obtain a general waiver of unrelated-matter conflicts under the Court of Appeal's decision. This is true even if a second client does not care about the first client's identity.

Not only does this increase the cost of legal services, but it also decreases the availability of legal services to clients of more modest means and pro bono clients. Clients willing to pay more to protect their identities will generally get representation, while clients unwilling or unable to pay premiums must either forego representation or give up their right to insist on confidentiality. Amici Legal Scholars respectfully submit that the ability of a lawyer or law firm to obtain a general waiver of unrelated-matter conflicts allows the lawyer or law firm flexibility in representing multiple clients of all means—large, modest, and pro bono.

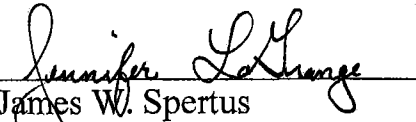
III.

CONCLUSION

For these reasons, Amici Legal Scholars respectfully request that this Court reverse the Court of Appeal decision and recognize the validity and enforceability of the conflict waiver here.

Dated: December 2, 2016 Respectfully submitted,

SPERTUS, LANDES & UMHOFFER LLP


James W. Spertus
Jennifer E. LaGrange

Attorneys for Amici Legal Scholars

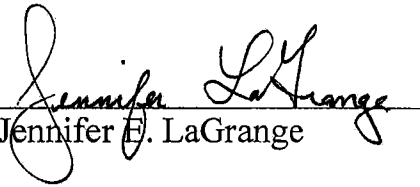
Exhibit A

Amici Legal Scholars

Name	Title	Affiliation
Andrew M. Perlman	Dean and Professor of Law	Suffolk University Law School
Gregory Keating	William T. Dalessi Professor of Law and Philosophy	USC Gould School of Law
Richard W. Painter	S. Walter Richey Professor of Corporate Law	University of Minnesota School of Law
Robert W. Hillman	Professor of Law, Fair Business Practices and Investor Advocacy Chair	University of California, Davis, School of Law
Stephen Gillers	Elihu Root Professor of Law	New York University School of Law
W. Bradley Wendel	Professor of Law	Cornell Law School

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this amicus curiae brief was produced using 14-point Times New Roman type style and contains approximately 2,327 words, including footnotes. In arriving at that estimate, the undersigned relied on the word count function of the computer program to prepare this document.


Jennifer E. LaGrange

CERTIFICATE OF SERVICE

I, Jennifer E. LaGrange, declare as follows:

I am employed in the County of Los Angeles, State of California, I am over the age of eighteen years and am not a party to this action; my business address is 1990 S. Bundy Drive, Suite 705, Los Angeles, California 90025, in said County and State.

On December 2, 2016, I caused to be served the following documents:

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF SHEPPARD, MULLIN, RICHTER & HAMPTON LLP AND BRIEF OF AMICUS CURIAE LEGAL SCHOLARS

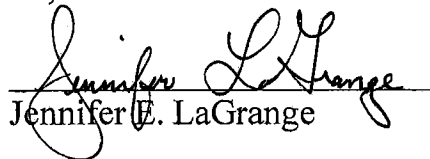
on the parties stated below:

Kent L. Richard Barbara W. Ravitz Jeffrey E. Raskin Greines, Martin, Stein & Richland LLP 5900 Wilshire Blvd., 12 th Floor Los Angeles, CA 90036	Attorneys for Defendant and Appellant J-M Manufacturing Co., Inc.
Kevin S. Rosen Theane Evangelis Bradley J. Hamburger Andrew G. Pappas Gibson, Dunn & Crutcher LLP 333 S. Grand Ave. Los Angeles, CA 90071	Attorneys for Plaintiff and Respondent Sheppard, Mullin, Richter & Hampton LLP

Office of the Clerk of Court Los Angeles Superior Court 111 North Hill Street Los Angeles, CA 90012	✓
Office of the Clerk of Court Court of Appeal Second Appellate District, Division Four 300 South Spring Street Los Angeles, CA 90013	✓

BY MAIL, that is, by placing a true copy in a sealed envelope addressed as indicated above, on the above-mentioned date. I caused to be placed such envelope for deposit in the U.S. Mail for service by the United States Postal Service, with postage thereon fully prepaid for service on the addressees listed above.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on December 2, 2016, in Los Angeles, California.


Jennifer E. LaGrange