

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
SPECIAL EDUCATION DIVISION  
STATE OF CALIFORNIA

In the Matter of:

STUDENT,

Petitioner,

v.

NEWPORT-MESA UNIFIED SCHOOL  
DISTRICT,

Respondent.

OAH CASE NO. N 2006110361

ORDER DENYING MOTION TO  
DISQUALIFY COUNSEL

On November 14, 2006, the Office of Administrative Hearings (OAH) received a due process hearing complaint (Complaint) on behalf of Petitioner Student from attorneys Paul Roberts and Hans Gillinger, of the law firm Roberts & Adams. The Complaint named Newport-Mesa Unified School District (District) as the respondent. On November 21, 2006, OAH received a notice of representation from attorney Adam Newman of the law firm Atkinson, Andelson, Loya, Ruud & Romo (AALRR); Mr. Newman wrote that the District had retained him to represent it in this due process proceeding.

On April 18, 2007, attorneys from Roberts & Adams filed on behalf of Student a motion to disqualify AALRR from representing the District in this case. The motion alleges that AALRR should be disqualified because of a conflict of interest created by Mr. Gillinger, who left his employment with Roberts & Adams by stating that he had accepted an employment offer from AALRR. The motion also argues in the alternative that OAH lacks jurisdiction to disqualify counsel. On April 25, 2007, OAH received the District's opposition to the motion to disqualify. On April 30, 2007, OAH received Student's reply to the District's opposition.

APPLICABLE LAW

California Business and Professions Code section 6068, subdivision (e)(1) provides that it is the duty of an attorney to "maintain inviolate the confidence, and at

every peril to himself or herself to preserve the secrets, or his or her client.” Likewise, the California State Bar Rules of Professional Conduct, rule 3-310 prohibits attorneys from accepting, without the client’s written informed consent, “employment adverse to the client or former client where, by reason of the representation of the client or former client, the [attorney] has obtained confidential information material to the employment.”

Hence, without the consent of a former client, an attorney may be disqualified from representing a client with interests adverse to the former client if the former client can show the attorney actually possesses confidential information or has a “substantial relationship” between the current and former representations. (*H.F. Ahmanson & Co. v. Salomon Brothers, Inc.* (1991) 229 Cal.App.3d 1445 [280 Cal. Rptr. 614].) An attorney is presumed to possess confidential information if the subject of the prior representation put the attorney in a position in which confidences material to the current representation would normally have been imparted to counsel. (*H.F. Ahmanson, supra*, at 1453-1454; *Adams v. Aerojet-General Corp.* (2001) 86 Cal.App.4th 1324, 1332 [104 Cal. Rptr. 2d 116].) In most instances, an attorney’s conflict is imputed to his or her law firm as a whole on the rationale “that attorneys, working together and practicing law in a professional association, share each other’s, and their clients’ confidential information.” (*People ex rel. Dept. of Corporations v. Speedee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135, 1153-1154 [86 Cal.Rptr. 2d 816, 980 P.2d 371] (*Speedee Oil Change Systems*); see, *Henricksen v. Great American Savings and Loan* (1992) 11 Cal.App.4th 109, 114 [14 Cal.Rptr.2d 184].)

Under California labor law, at-will employment contracts are unilateral contracts, which means that a contract is formed only when the employee commences performance of the contract as consideration. (See, *Asmus v. Pacific Bell* (2000) 23 Cal.4th 1 [999 P.2d 71]; *DiGiacinto v. Ameriko Observ* (1997) 59 Cal.App.4th 629, 635 [69 Cal.Rptr.2d 300]; see also, *Neisendorf v. Levi Strauss & Co.*, 143 Cal.App.4th 509, 523-524 [49 Cal.Rptr.3d 216].)

California Education Code section 56501, subdivision (a) provides that a parent or public education agency may request a due process hearing when there is a proposal or a refusal to initiate or change the identification, assessment, educational placement or the provision of a free appropriate public education (FAPE) to their child, or when there is a disagreement regarding the availability of a program available for the child, including the question of financial responsibility, as specified in subsection (b) of Section 300.403 of Title 34 of the Code of Federal Regulations. (See 20 U.S.C. § 1415(b)(6).) In due process proceedings, the ALJ has authority to take action to promote due process or the orderly conduct of the hearing. (Cal. Code Regs., tit. 1, § 1030, subd. (e)(3); *Letter to Anonymous* (OSEP 1994) 23 IDELR 1073 (apart from the hearing rights set out by statute, decisions regarding the conduct of due process hearings are left to the discretion of the hearing officer).)

## DISCUSSION

Preliminarily, while Student filed this motion to disqualify AALRR, he also contends that OAH lacks jurisdiction to order such disqualification. Pursuant to state and federal law, the issues to be determined in a due process hearing extend only to identification, assessment, educational placement or the provision of a FAPE, or when there is a disagreement regarding the availability of a program available for the child, including the question of financial responsibility. (Ed. Code § 56501, subd. (a); 20 U.S.C. § 1415(b)(6).) However, the administrative law judge (ALJ) also has the discretion and authority to make rulings in furtherance of controlling the hearing and insuring that the hearing process is an effective method for resolving special education disputes.<sup>1</sup> In the present circumstances, the motion to disqualify presents a dispute which must be resolved in order for the parties to exercise their due process rights. The motion is within the ALJ's discretion to determine, and the ALJ is able to rule on the motion based upon the present record.

Regarding the underlying motion, Mr. Gillinger is an attorney who previously worked for Roberts & Adams from October 2005 until February 26, 2007. When Mr. Gillinger tendered his resignation to Roberts & Adams, he indicated that he had accepted a job offer in the special education division at AALRR. On February 27, 2007, Adam Newman, a partner at AALRR, left voicemail messages for the two partners at Roberts & Adams, concerning conflicts of interest arising in various cases due to AALRR's hiring of Mr. Gillinger.

However, in a sworn declaration, Mr. Newman states that AALRR extended an offer of employment to Mr. Gillinger on February 22, 2007, but revoked that offer on March 1, 2007. Mr. Newman declares that Mr. Gillinger never worked for AALRR in any capacity at any time, and never disclosed any confidential attorney-client information to AALRR. Consistent with this position, in a February 28, 2007 letter concerning another due process case, Mr. Newman wrote that "Mr. Gillinger has not begun work at our firm and a start date has not been established." Likewise, a March 2, 2007 letter from AALRR states that Mr. Gillinger "never became employed at this firm as associate counsel" and "was never associated with our firm and never imputed any confidential information to our firm."

Hence, the documents establish that Mr. Gillinger never commenced employment with AALRR. In contrast, each court opinion addressing disqualification of an attorney has concerned an attorney who actually began working for a law office representing clients with interests adverse to the attorney's former client. (See, e.g., *City and County of San Francisco v. Cobra Solutions* (2006) 38 Cal. 4th 839 [135 P.3d 20, 43 Cal. Rptr. 3d 771]; *SpeeDee Oil Change Systems, supra*, 20 Cal.4th 1135.) As the court explained in *SpeeDee Oil Change Systems*,

---

<sup>1</sup> For example, OAH rules on motions concerning various matters related to conduct of due process hearings. (See, Cal. Code Regs, tit. 1, § 1022.)

there is a presumption that “attorneys, working together and practicing law in a professional association, share each other’s, and their clients’ confidential information.” (*SpeeDee Oil Change Systems, supra* at 1153-1154.) No such presumption exists for situations, such as the present one, where an attorney does not commence working with, or practice in a professional association with, the attorneys in the “adverse” law office. There appears to be no legal support for Student’s argument that an attorney’s negotiations for prospective employment with a law firm impute that attorney’s conflict to the firm. Accordingly, Student’s motion to disqualify AALRR as the District’s counsel is denied.

ORDER

Student’s motion to disqualify the District’s counsel is denied.

Dated: May 9, 2007

---

SUZANNE B. BROWN  
Administrative Law Judge  
Office of Administrative Hearings  
Special Education Division