DISQUALIFICATION OF LAWYERS FOR CONFLICTS OF INTEREST: A View from the Trenches

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INTRODUCTION

This paper surveys developments in the law of disqualification over the past year. As the title implies, the principal focus of the materials collected is on disqualification for conflicts of interest. But, cases resulting in disqualification for other reasons are noted as well.

The initial section discusses developments in Washington. The focus then shifts to regional cases of interest from Alaska, California, Idaho and Oregon. The concluding section addresses cases, ethics opinions and other developments of note from around the country over the past year.

WASHINGTON[1]

Thus far in 1998, Washington's courts have issued several reported disqualification decisions. Although none of these decisions represented a sea change in the courts' approach to disqualification, the cases involved reaffirmed earlier decisions on several facets of the procedural aspects of disqualification and clarified the application of the Rules of Professional Conduct ("RPC") to public prosecutors' offices in the context of disqualification.

- ❒ **Standard of Review and Standing to Raise a Motion to Disqualify:**
  ***Estate of McCorkle v. England*,**
  1998 Westlaw 295896 (Wash. App. June 5, 1998) (unpublished)

The sellers of property sued to enforce the personal guaranties of two former shareholders of a bankrupt corporation that had purchased the property. After the trial court had granted summary judgment in favor of the sellers, the two guarantors moved to disqualify the sellers' law firm. The guarantors contended that the law firm had represented the steering committee formed to supervise management of the property in the related bankruptcy proceeding, and, so they argued, owed them a fiduciary duty as well. But, they presented no evidence to this effect. Rather, the Court of Appeals noted pointedly that the law firm had represented only the sellers in the bankruptcy proceeding. The Court of Appeals, therefore, affirmed the denial of the motion to disqualify.

In doing so, the Court of Appeals addressed both the standard of review in disqualification cases and the standing required to raise a motion to disqualify on conflict of interest grounds. First, it highlighted that whether an attorney has violated RPCs is a question of law that an

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[1]Many of the disqualification decisions issued by the Washington Court of Appeals this year were unpublished–but readily available in electronic form. Under RCW 2.06.040 and RAP 12.3(d), an unpublished decision is a matter of public record but does not have "precedential value."

appellate court will review de novo.[2] 1998 Westlaw 295896 at *6 (citing *Gustafson v. City of Seattle*, 87 Wash. App. 298, 302, 941 P.2d 701 (1997)). Second, the Court of Appeals noted that a party pursuing a motion to disqualify for an asserted conflict of interest must show that it is, or has been, a *client* of the attorney the party is attempting to disqualify. *Id.* at *6.

❒ **More on Standard of Review and Former Client Conflicts:**
In re Hooper,
1998 Westlaw 107023 (Wash. App. March 12, 1998) (unpublished)

Hooper involved a child custody dispute. The wife's lawyer had represented the husband two years before in having a police record reclassified from a felony to a misdemeanor. The husband moved to disqualify the lawyer. He contended that the earlier representation had also involved community property matters that formed the backdrop of the child custody dispute. A superior court commissioner found that the prior representation was limited to the reclassification issue and that, in any event, the husband had not imparted any confidential information to the lawyer concerning the property matters. Nonetheless, the trial court disqualified the lawyer. The Court of Appeals reversed.

The Court of Appeals began by noting that, as to the alleged scope of the prior representation, whether an attorney-client relationship exists and the extent of that relationship are questions of fact. 1998 Westlaw 107023 at *2 (citing *Teja v. Saran*, 68 Wash. App. 793, 795, 846 P.2d 1375 (1993) and *Bohn v. Cody*, 119 Wash. 2d 357, 363, 832 P.2d 71 (1992)). The question of whether a lawyer is then precluded from subsequently representing a party under RPC 1.9 is, however, a question of law. *Id.*

The Court of Appeals next addressed the question of whether a current representation is substantially related to a former matter under RPC 1.9.[3] In doing so, it relied on a three-point test

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[2]*McCorkle* was decided under RPC 1.7 which provides, in pertinent part:

> "(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client unless:
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> > "(1) The lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
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> > "(2) Each client consents in writing after consultation and a full disclosure of the material facts (following authorization from the other client to make such a disclosure)."

[3]RPC 1.9 provides:

> "A lawyer who has formerly represented a client in a matter shall not thereafter:

articulated in *State v. Hunaker*, 74 Wash. App. 38, 43, 873 P.2d 540 (1994):

> "To determine whether the two representations are in fact substantially related, we:
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> "(1) reconstruct the scope of the facts of the former representation;
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> "(2) assume the lawyer obtained confidential information from the client about all these facts;
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> "(3) determine whether any former factual matter is sufficiently similar to a current one that the lawyer could use the confidential information to the client's detriment." 1998 Westlaw 107023 at *2.

The Court of Appeals concluded that the present representation was not substantially related to the earlier matter and, therefore, reversed the trial court. *Id.* at *3.

❒ **More on Former Client Conflicts:**
***State v. Jerrels*,**
1998 Westlaw 124386 (Wash. App. March 20, 1998) (unpublished)

A criminal defendant moved to disqualify the entire prosecutor's office because the prosecuting attorney, before being elected, had represented the defendant when the prosecuting attorney was formerly in private practice. The criminal case involved several counts of child molestation. While in private practice, the prosecutor had handled a divorce and child custody action for the defendant. The same child was involved in both proceedings. But, there was no evidence the prior custody proceedings concerned allegations of child molestation. There was also no evidence that the prosecutor had obtained confidential information about the defendant in the prior representation that he could potentially apply to the subsequent criminal proceeding. Accordingly, the trial judge denied the motion. The Court of Appeals affirmed.

In doing so, it noted that RPC 1.9 does apply to prosecutors as well. But, it agreed with the trial court that the defendant had failed to show either that the subsequent action involved the same or a substantially related matter under RPC 1.9(a) or would involve the use of confidential

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> "(1) Represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents in writing after consultation and a full disclosure of the material facts; or
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> "(2) Use confidences or secrets relating to the representation to the disadvantage of the former client, except as rule 1.6 would permit."

information to the disadvantage of a former client under RPC 1.9(b). 1998 Westlaw 124386 at *2.

- ❒ **Timeliness (or the Lack Thereof):**
  State v. Franks,
  1998 Westlaw 726485 (Wash. App. October 16, 1998) (unpublished)

A criminal defendant moved for a continuance on the day of trial to locate witnesses to support a motion to disqualify the prosecutor who, so the defendant felt, had a "personal vendetta" against him because he had supposedly referred to the defendant as a "cry baby." The trial court denied the request. The Court of Appeals affirmed the defendant's subsequent conviction. It concluded that the defendant had not been denied a fair trial by, in pertinent part, the denial of the motion for a continuance involved. 1998 Westlaw 7264485 at *5-*6.

- ❒ **Preserving Your Objection and Mediation-Related Conflicts:**
  State v. Tolias,
  135 Wash. 2d 133, 954 P.2d 907 (1998)

This was a criminal case in which, although the record was not clear, the defendant contended that the prosecutor met with the defendant and apparently the victim of the assault involved as a "mediator" and then later prosecuted the same defendant when the mediation failed. (The State characterized the meeting as plea bargaining.) The defendant moved to disqualify the entire county prosecutor's office. Although the trial court denied the motion, the Court of Appeals reversed. The Supreme Court, in turn, reversed the Court of Appeals and affirmed the underlying conviction.

The Supreme Court found that record was insufficient to preserve the issue involved, and, therefore, declined to consider it on appeal:

> "The implication, however vague, of Defendant's contentions regarding *** [the prosecutor's] *** mediation and subsequent prosecution may be troubling. But that alone does not cure the defective record, or the dearth of substantive information about the nature or context of *** [the prosecutor's] *** alleged mediation." 135 Wash. 2d at 141.

- ❒ **The Lawyer-Witness Rule:**
  ***State v. Bland*,**
  90 Wash. App. 677, 953 P.2d 126 (1998)

A deputy prosecuting attorney was also employed as a social worker at a local hospital emergency room. In the later capacity, she interviewed a rape victim. She later testified at trial regarding her emergency room interview with the victim. The defendant argued that the entire

prosecutor's office should have been disqualified under RPC 3.7.[4]

As an initial matter, the Court of Appeals found that a prosecutor's office is subject to RPC 3.7 even though it is not specifically included within the definition of "law firm" under the RPCs. 90 Wash. App. at 679-80. The Court of Appeals did, however, take a somewhat more relaxed view of RPC 3.7 in the context of a prosecutor's office than a literal application of the rule would suggest:

> "*** [W]e reject *** [the defendant's] *** contention that the rule mandates disqualification of the entire office in this case. A deputy prosecutor does not represent a 'client' in the traditional sense, and the deputy has no financial interest in the outcome of the case. Therefore, a more flexible application of the RPCs is appropriate where a public law office is concerned. Trial courts should consider whether the testifying deputy can be an objective witness, whether the dual positions artificially bolster the witness's credibility or make it difficult for the jury to weigh the testimony, and whether the dual role raises an appearance of unfairness. If, after considering those factors, the court concludes the defendant will not be prejudiced, it need not order disqualification. But if the deputy is personally involved in prosecuting the case or has another personal interest which would raise a conflict of interest or appearance of unfairness, the office should be disqualified, and the trial court should appoint a special prosecutor for the case." 90 Wash. App. at 680-81 (footnotes omitted).

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[4]RPC 3.7 reads:

> "A lawyer shall not act as advocate at a trial in which the lawyer or another lawyer in the same law firm is likely to be a necessary witness except where:
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> "(a) The testimony relates to an issue that is either uncontested or a formality;
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> "(b) The testimony relates to the nature and value of legal services rendered in the case; or
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> "(c) The lawyer has been called by the opposing party and the court rules that the lawyer may continue to act as an advocate; or
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> "(d) The trial judge finds that disqualification of the lawyer would work a substantial hardship on the client and that the likelihood of the lawyer being a necessary witness was not reasonably foreseeable before trial."

❒ **Personal Conflicts and the "Appearance of Fairness Doctrine" as Applied to Criminal Defense Counsel:**
***State v. Lundon*,**
1998 Westlaw 409002 (Wash. App. July 21, 1998) (unpublished)

A criminal defendant moved to disqualify his own appointed defense counsel on the ground that the lawyer was biased because the defendant's brother had filed a lawsuit and a bar complaint against the defense counsel. The trial court denied the motion. Following his conviction, the defendant argued that he was entitled to a new trial, in part, under the "appearance of fairness doctrine" applicable to criminal proceedings for the trial court's refusal to disqualify his appointed defense counsel. The Court of Appeals affirmed, noting that the "appearance of fairness doctrine" did not apply to defense counsel. Interestingly, the Court of Appeals did not discuss RPC 1.7(b)--which addresses conflicts stemming from the lawyer's own interests.

REGIONAL DISQUALIFICATION CASES OF INTEREST

ALASKA

Although there have been no significant reported decisions this year, the Alaska Supreme Court issued a decision in a malpractice case last year–*Griffith v. Taylor*, 937 P.2d 297 (Alaska 1997)–that contains an extended discussion of former client conflict issues under Alaska's version of RPC 1.9 and cites a number of disqualification cases in the process.

In *Griffith*, the Supreme Court concluded that a former client conflict exists in either of two situations: "(a) there is a potential that confidential information may be revealed or (b) the subject matters are substantially related and the attorney is taking a position directly adverse to the client's position in the former representation." 937 P.2d at 303.

At the same time, the Supreme Court recognized a "scrivener's exception" to the former client conflict rule:

> "As we envision such a rule, an attorney owes no duty of loyalty to a former client where the attorney acts in such a manner that a reasonable client would not expect the attorney to have assumed a continuing duty of loyalty to the client. Such a situation exists where the attorney merely fashions a statutory form of deed, or performs other clerical or ministerial tasks."
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> "This exception should, of course, be construed extremely narrowly. Therefore, if the attorney furnishes any legal advice to a client, or in any way makes use of her or his legal skills, the exception will not apply. Additionally, if the client divulges any confidences to the attorney during the course of representation, the attorney's duty of confidentiality is triggered, even if the attorney is merely acting as a scrivener." 937 P.2d at 305.

The Supreme Court then exempted the "scrivener's exception" from the former client consent requirements of Alaska RPC 1.9(a):

> "*** [I]n the rare instance where the scrivener's exception applies, the attorney can forego receiving the consent of the former client, without running afoul of Rule 1.9(a). We are aware that Rule 1.7 also contains the substantial relation test. That rule deals with conflicts of interest between a lawyer's current clients. However, we express no opinion as to whether the scrivener's exception also applies to that situation." 937 P.2d at 306 n.17.[5]

CALIFORNIA

California proved to be fertile ground for interesting disqualification decisions this year–including cases dealing with the forfeiture of fees, imputed conflicts and the "hot potato rule."

- ❒ **Forfeiture of Fees:**
  ***Image Technical Service, Inc. v. Eastman Kodak Co.*,**
  136 F.3d 1354 (9th Cir. 1998)

In this case, the plaintiff, Image Technical Service, Inc. ("Image Tech"), hired a large law firm to represent it in an antitrust claim against Eastman Kodak Co. ("Kodak"). After the large law firm had incurred $400,000 in handling an initial appeal to the United States Supreme Court for Image Tech, both the large law firm and Kodak apparently realized that the large law firm had been representing one of Kodak's major operating divisions for the past six years on unrelated matters. Once the conflict was discovered, Kodak declined to grant a waiver. Instead, when the case was remanded from the Supreme Court to the district court for trial, Kodak moved to disqualify the large law firm. The district court granted the motion. Eventually, Image Tech won a substantial verdict at trial. Under the antitrust statutes, Image Tech, as the prevailing party, was entitled to its attorney fees. Image Tech included the $400,000 incurred with the large law firm in its fee petition. Kodak objected, arguing that the large law firm was not entitled to recover the $400,000 under California law due to the conflict, and, therefore, Image Tech could not recover that fee either. The district court awarded the fees. The Ninth Circuit reversed.

Citing California RPC 3-310,[6] the Ninth Circuit concluded:

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[5]Note that under the Alaska Supreme Court's own formulation of the "scrivener's exception," former client consent would still presumably be required under Alaska RPC 1.9(b) if the lawyer had received confidential information from the client.

[6]The then-current version of California RPC 3-310 provided:

> "'(A) If a member has or has had a relationship with another party interested in the

"Simultaneous representation of clients with conflicting interests (and without written informed consent) is an automatic ethics violation in California and grounds for disqualification. Flatt v. Superior Ct., 9 Cal.4th 275, 36 Cal.Rptr.2d 537, 542-43, 885 P.2d 950, 955 (1994). An attorney cannot recover fees for such conflicting representation, Blecher & Collins v. Northwest Airlines, Inc., 858 F.Supp. 1442, 1457 (C.D.Cal.1994), because 'payment is not due for services not properly performed.' Cal Pak Delivery, Inc. v. United Parcel Serv., 52 Cal.App.4th 1, 60 Cal.Rptr.2d 207, 215 n. 2 (1997) (quotation omitted). This applies even where, as here, the matters in which the firm represents the clients with conflicting interests are unrelated. Jeffry v. Pounds, 67 Cal.App.3d 6, 136 Cal.Rptr. 373, 376 (1977). An attorney may claim fees only for services provided before the conflict arose and the ethical breach occurred. Id. at 377.

"The district court awarded fees because *** [the large law firm's] *** disqualification was prospective only. But *** [the large law firm's] *** ineligibility to recover fees was not prospective. Under California law the bar to compensation extended back to the beginning of *** [the large law firm's] *** representation. *** [The large law firm] *** represented Kodak throughout its representation of Image Tech, so there was never a time when the representation was conflict-free." 136 F.3d at 1358.

❒ **Imputed Conflicts and Disqualification:**
***Western Digital Corporation v. Superior Court*,**
60 Cal. App. 4th 1471, 71 Cal. Rptr. 2d 179 (1998)

The underlying dispute in this case was between a computer manufacturer, Amstrad, and a disk drive manufacturer, Western Digital Corporation ("Western Digital"). Amstrad's attorneys had discussed the case with a consulting firm, but had not hired the firm. Western Digital's attorneys later retained a different team of experts from the *same* consulting firm. The consulting firm told Western Digital's attorneys about the earlier contact, but added that no confidential information had been disclosed. Western Digital's attorneys did not disclose the retention to

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representation . . . the member shall not accept or continue such representation without all affected clients' informed written consent.

"(B) A member shall not concurrently represent clients whose interests conflict, except with their informed written consent.'" 136 F.3d at 1355.

The case at issue was filed in the Northern District of California, which had adopted the California RPCs by local rule. *See* 136 F.3d at 1357.

Amstrad's lawyers at that point and trial preparation proceeded. The second team at the consulting firm was, however, screened from the firm's members who had discussed the case earlier with Amstrad's attorneys. When Western Digital eventually disclosed its retention of the consulting firm, Amstrad immediately moved to disqualify the consulting firm *and* Western Digital's attorneys. Amstrad argued that the consulting firm had a conflict based on its earlier–and allegedly confidential–discussions with Amstrad's attorneys *and* that this conflict should be imputed to Western Digital's attorneys as well. The trial court agreed, disqualifying both. At that point, Western Digital's law firm had spent 15,000 hours on the case and billed Western Digital over $2.5 million for its work.

Western Digital filed a petition for a writ of mandate vacating the disqualification. The California Court of Appeal granted the writ and held that neither the consulting firm nor the lawyers should be disqualified. The Court of Appeal found that Amstrad's attorneys had shared confidential information with the consulting firm and that their expectation that this information would remain confidential was reasonable. But, the Court of Appeal also found that the internal screen employed by the consulting firm had been effective and that the second team had not, in fact, been privy to any of Amstrad's confidences imparted during the contacts with the first team of experts. Having found that the consulting firm should not be disqualified, the Court of Appeal concluded that Western Digital's lawyers should not be disqualified either. 71 Cal. Rptr. 2d at 189.

- ❒ **The Hot Potato Rule:**
  ***GATX/Airlog Co. v. Evergreen Int'l Airlines, Inc.*,**
  8 F. Supp. 2d 1182 (N.D. Cal. 1998)

GATX/Airlog Company ("GATX") converted four 747s from passenger aircraft to cargo planes for Evergreen International Airlines, Inc. ("Evergreen"). The Bank of New York ("BNY") became the "beneficial owner" (apparently through a financial arrangement not specified in the opinion) of one of the four converted 747s. Later, the FAA became concerned that the conversion design GATX used was faulty and, as a result, the converted airliners would not be able to carry their stated payloads safely. The FAA, therefore, issued an "airworthiness directive" in January 1996 effectively grounding all of the planes GATX had converted–including the Evergreen conversions. At that point, Evergreen sent GATX a demand letter asserting various claims. In response to Evergreen's demand letter, GATX retained a large law firm, which, in turn, filed a declaratory judgment action against Evergreen contending that the design that GATX employed in the Evergreen conversions and for other owners was sound. Although the lawsuit was filed in specific response to the Evergreen demand letter, GATX knew that BNY was, in effect, an owner of one of the aircraft involved and the two began exchanging correspondence on the alleged design defect issues beginning in at least February 1996. Although the large law firm had apparently run a conflict check on Evergreen, it had not done so as to the other owners of similar aircraft that might be affected by the declaratory judgment proceeding. In May 1997, GATX and BNY entered into a tolling agreement. At that point, the large law firm realized that BNY was one of the owners of the affected aircraft. From 1995 through at least January 12,

1998, the large law firm represented BNY on a variety of unrelated matters. There was also some evidence that the large law firm continued in its role as BNY's regular local counsel in Illinois, where the large law firm is headquartered, into February 1998. The large law firm, however, did not inform either GATX or BNY of any conflict and seek waivers *until February 1998.* When BNY refused to grant the waiver, the large law firm "fired" BNY on March 5, 1998. On January 30, 1998, BNY filed a claim against GATX on the conversion design. It then moved to disqualify the large law firm in that case and three related cases then-pending in the Northern District–including *Evergreen*. The district court granted the motion.

The large law firm raised several arguments in opposition to the BNY's motion. As the result implies, none seemed to resonate particularly well with the trial judge:

- First, the large law firm contended that its representation of GATX was not adverse to BNY until BNY filed its own lawsuit against GATX in late January 1998 and was, therefore, a "party" to the litigation. But, the district court noted that California RPC 3-310 was not defined in terms of "parties." *See* 8 F. Supp. 2d at 1185.

- Second, the large law firm argued that it had completed all work for BNY with a bill on January 12, 1998, had no matters pending for BNY at the point BNY filed its own lawsuit on January 30 and was, therefore, not a current client as of that time. But, the trial judge found that BNY remained a current client even though it had no matters pending at that precise moment where it had sent work to the large law firm on a regular basis over the past three years and the large law firm's own letter of February 16, 1998 disclosing the GATX conflict itself stated that the large law firm's representation of BNY "'[c]urrently . . . involves advice, including the periodic review and revision of trust agreements . . .'." *See* 8 F. Supp. 2d at 1186.

- Third, the large law firm noted that any relationship with BNY was terminated on March 5, 1998 when the large law firm informed BNY that it was severing its relationship–apparently after BNY refused to grant a conflict waiver. The district court, however, found that the "hot potato rule" (which prohibits curing a current client conflict by withdrawing from the offending, and presumably less remunerative, relationship) applied: "*** [The large law firm] *** cannot, then, end the conflict caused by its simultaneous representation of BNY and GATX by 'firing' BNY." 8 F. Supp. 2d at 1187.

- Finally, the large law firm asserted that disqualifying it would harm all large law firms because they would need to run conflict checks on entities that were involved in, but not yet formal parties to, litigation. The district court

disposed of this argument succinctly: "Whether or not *** [the large law firm] *** should have known of BNY's claims [at the outset of the GATX representation], *** [the large law firm] *** did know as of the Tolling Agreement. When a firm knows that a client is actively engaged in settlement negotiations with another 'party,' then that firm has responsibility to run a conflicts check. *** [The large law firm] *** did not make that check." 8 F.Supp. 2d at 1188.[7]

IDAHO

This past year produced a Ninth Circuit decision containing an extended discussion of conflict waivers in the criminal context and an Idaho Supreme Court decision in a sanctions case reaffirming the general standards for disqualification motions the Idaho Court of Appeals had originally outlined in 1991.

❒ **Waiver in the Criminal Context:**
***United States v. Martinez*,**
143 F.3d 1266 (9th Cir.) , *cert. denied,* __ U.S. __, 119 S.Ct. 254 (1998)

This was a federal criminal case prosecuted in Idaho. The defendant's lawyer had formerly represented another principal member of the drug trafficking conspiracy involved who was facing a separate trial under a separate indictment. The defense counsel disclosed the former representation to the district court and his client. Following a hearing during which the district court explained the defendant's right to conflict-free counsel and the availability of independent counsel to confer with him on the issue of waiver, the defendant waived the conflict and proceeded with his original lawyer. Following his conviction, the defendant argued that he was entitled to conflict-free counsel under the Sixth Amendment regardless of his waiver and that the trial judge should not have accepted his waiver.

The Ninth Circuit rejected both arguments. As an initial matter, the Ninth Circuit found that a waiver would be proper where it involved a "'defendant who was well aware of his interests, his right to unbiased counsel, his right to seek outside legal advice, and his right to discuss with the court any dissatisfaction with his appointed counsel . . . .'" 143 F.3d at 1269 (*quoting Garcia v. Bunnell*, 33 F.3d 1193, 1197 (9th Cir. 1994). The Ninth Circuit then found that, barring a situation in which the trial court determined that the waiver must be rejected to ensure "'that criminal trials are conducted within the ethical standards of the profession and that the legal proceedings appear to fair to all who observe them ***,'" there was no obligation on the trial court's part to reject the waiver. 33 F.3d at 1269 (*quoting Wheat v. United States*, 486 U.S. 153, 160, 108 S.Ct. 1692, 100 L.Ed.2d 140 (1988).

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[7]GATX and the large law firm have sought review by way of mandamus to the Ninth Circuit.

❒ **Sanctions for Disqualification Motions:**
***Chapple v. Madison County Officials*,**
1998 Westlaw 734480 (Idaho October 22, 1998)
(not yet released for publication)

This was primarily a jurisdictional and sanctions case involving pro se plaintiffs pursuing various "freemen" theories against several county officials. The sanctions portion of the case, however, stemmed from the plaintiffs' unsuccessful motion to disqualify the county officials' attorney. The trial court found their motion without merit, denied it and imposed sanctions. The Idaho Supreme Court affirmed. Both the trial court and the Supreme Court assessed the plaintiffs' motion against the general standards articulated for disqualification motions in *Weaver v. Millard*, 120 Idaho 692, 819 P.2d 110 (Idaho App. 1991), which contains an extensive discussion of these motions in the context of an alleged conflict under Idaho RPC 1.7.

OREGON

This year saw the appeal of a major disqualification decision issued late last year involving two former internal counsel at an electric utility. Oral argument is set for this month in the Oregon Court of Appeals. A decision should be expected some time in the coming year.

❒ **Disqualification of Former In-House Counsel:**
Portland General Electric Company v. Duncan, Weinberg, Miller & Pembroke,
Multnomah County Circuit Court No. 9708-06492,
***appeal pending as* Oregon Court of Appeals No. CA A100072**

This case involves two former internal counsel at plaintiff Portland General Electric Company ("PGE") who left the utility in 1996 to join a law firm specializing in energy issues, Duncan, Weinberg, Miller & Pembroke ("Duncan Weinberg"). One of Duncan Weinberg's clients was a consortium of large industrial electricity customers called the Industrial Customers of Northwest Utilities ("ICNU"). The two former PGE lawyers began representing ICNU in various matters. PGE then raised concerns that, in its view, the representation of ICNU on issues relating to deregulation and associated cost recovery questions in the context of the then-pending merger of PGE into Enron constituted a former client conflict under Oregon Disciplinary Rule ("DR") 5-105.[8] The parties "agreed to disagree" and later in 1996 entered into a "waiver agreement" which

[8]Oregon DR 5-105(C) provides:

> "*Former Client Conflicts–Prohibition*. Except as permitted by DR 5-105(D) [which permits waiver of former client conflicts], a lawyer who has represented a client in a matter shall not subsequently represent another client in the same or significantly related matter when the interests of the current and former clients are in actual or likely conflict. Matters are significantly related if either:

specified particular areas that the former internal counsel were, and were not, permitted to work. Two of the areas the lawyers agreed refrain from handling matters adverse to PGE related to "disaggregation" (splitting the integrated utility into separate companies focusing on separate functions, such as power generation and distribution) and "stranded cost recovery" (dealing with the recovery of prior investments in utility generating assets once deregulation occurred and those assets had a market value lower than their book value) encompassed within a proposed rate plan for industrial customers called "Schedule 77."[9] The former PGE lawyers, however, were arguably permitted under the waiver agreement to advise ICNU concerning general disaggregation and stranded cost issues. In early August 1997, PGE filed a rate plan with the Oregon Public Utilities Commission ("OPUC") dealing with aspects of disaggregation and stranded costs. The two former lawyers began representing ICNU in the OPUC proceedings. Although the OPUC had a disqualification procedure, PGE filed a lawsuit against the lawyers and Duncan Weinberg seeking a declaration that they were violating DR 5-105(C) and an injunction barring the former internal counsel from representing ICNU in the rate proceedings. PGE argued that both lawyers had participated in an "unbundling task force" on disaggregation and stranded cost issues that had led to "Schedule 77" and that this work constituted a "matter" for purposes of former client conflict analysis. The lawyers, in turn, contended that their earlier work for PGE did not involve the same "matter" that they were handling for ICNU, and, even if it was, it was permitted under the waiver agreement.

The trial court granted the injunction. In doing so, the trial court found that *all* work relating to disaggregation and stranded costs constituted a "matter-specific" former client conflict under DR 5-105(C). Next, the trial court voided the waiver on its own motion as "unworkable." It then barred the former internal counsel from representing ICNU in the pending OPUC proceeding at hand *and* all other proceedings in which these issues might arise if they involved generating assets or contracts that they had dealt with while employed by PGE. If the Court of Appeals reaches the substantive issues (conceivably, it could decide that the OPUC and not the courts had primary jurisdiction), it will potentially have to grapple both with the definition of a "matter" under the former client conflict rule of DR 5-105(C) and the trial court's handling of the

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> "(1) Representation of the present client in the subsequent matter would, or would likely, inflict injury or damage upon the former client in connection with any proceeding, claim, controversy, transaction, investigation, charge, accusation, arrest or other particular matter in which the lawyer previously represented the former client; or
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> "(2) Representation of the former client provided the lawyer with confidences or secrets as defined in DR 4-101(A) the use of which would, or would likely, inflict injury or damage upon the former client in the course of the subsequent matter."

[9]The waiver agreement also contained a screening provision allowing Duncan Weinberg's District of Columbia office to work on some of these issues.

waiver under DR 5-105(D)--which generally permits waivers of all former client conflicts upon full disclosure and client consent. Both potentially have significant implications for disqualification motions. Stay tuned.

OTHER DISQUALIFICATION-RELATED CASES AND OPINIONS OF NOTE

- **Imputed Disqualification and Joint Defense Agreements:**
  Essex Chemical Corp. v. Hartford Accident and Indemnity Co.,
  993 F. Supp. 241 (D. N.J. 1998),
  ***reversing* 975 F. Supp. 650 (D. N.J. 1997)**

Plaintiff Essex Chemical Corp. ("Essex") brought a declaratory judgment action against several insurance companies on an environmental coverage issue in 1993. For several years before, a large law firm had represented Essex in merger negotiations and related litigation. During the course of that earlier representation, the large law firm became intimately familiar with Essex's environmental issues, liabilities and confidences--including those at the site at issue in the subsequent coverage litigation. Nonetheless, the large law firm undertook the representation of one of the defendant insurers in the coverage case (apparently) without obtaining a conflict waiver. In 1996, the large law firm entered into a joint defense agreement with five law firms representing the other defendants in the case. In early 1997, Essex and the large law firm discovered the conflict. Essex declined to grant a waiver. Instead, it moved to disqualify both the large law firm *and* all of the other firms covered by the joint defense agreement. The large law firm then withdrew from the coverage case. But, Essex proceeded with its motion as to the other defense firms under the theory that they had been tainted by a presumption that the large law firm had shared confidential information with them under the joint defense arrangement. The magistrate hearing the motion agreed and disqualified all of the defense firms. *See* 975 F. Supp. 650. The district court reversed.

In doing so, the district court found that the magistrate's use of a "double imputation" of shared confidences--*i.e.,* from Essex to the large law firm and then from the large law firm to its fellow members of the defense group--was improper. 993 F. Supp. at 251. But, at the same time, it did *not* foreclose the possibility of disqualification if the large law firm had, in fact, shared Essex's confidences with the other members of the joint defense group. 993 F. Supp. at 252. The district court, therefore, remanded the case to the magistrate for further factual development of this issue. *Id.*[10]

- **More on Imputed Disqualification:**

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[10]The district court did, however, reverse outright another portion of the magistrate's earlier findings that there was an implied attorney-client relationship between Essex and the other members of the joint defense group. *See* 993 F. Supp. at 253 ("*** [N]one of the authorities on which the Magistrate Judge relied stands for the proposition that a collaborative counsel relationship renders a participating attorney implied counsel for the former client of the collaborating attorney.").

Lateral-Hire Partners, Associates and Staff[11]

- ***Reid Petroleum Corporation v. Boller's Auto Sales and Service, Inc.*, 670 N.Y.S.2d 152 (N.Y. App. Div. 1998)**

  The litigation department administrator of the firm representing the plaintiff joined the firm representing the defendant as its managing partner. Although the lawyer had not participated in the case while working for the plaintiff's firm, she had received monthly reports on all litigation in progress at that firm. Even though she could not recall learning anything about this case through those reports or in conversations with her colleagues, both the lawyer and her new law firm were disqualified. The court placed the burden on the defendant to show that there was no "reasonable possibility" that lawyer did not acquire confidential information while at her old firm. 670 N.Y.S.2d at 152.

- ***Hernandez v. Paoli*, ___ N.Y.S.2d __, 1998 Westlaw 784634 (N.Y. App. Div. November 10, 1998)**

  The plaintiff's attorney, a solo practitioner, hired an associate who was leaving the defendant's law firm. The plaintiff's attorney was disqualified. The court reasoned: "Although it does not appear that the subject attorney worked on the case at bar while with the law firm representing defendant, the law firm's informal setting [25 attorneys], which included discussions among the attorneys and the fully accessible file room warrants disqualification here." 1998 Westlaw 784634 at *1.

- ***In re American Home Products*, 1998 Westlaw 226729 (Tex. May 8, 1998) (not yet released for publication)**

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[11]In Washington, RPC 1.10(b) provides a mechanism to screen newly hired lawyers moving laterally from another private law practice and thereby avoid imputed disqualification without seeking the consent for the newly hired lawyer's former client. *See also* RPC 1.11 (a) (allowing screening for former government lawyers). Screening of non-lawyer personnel under Washington RPC 1.10(b) should also be effective to prevent disqualification. *See generally* Washington Formal Ethics Op. No. 190 (1993). Oregon has a similar procedure. *See* DR 5-105(H)-(I). But, it should be noted that ABA Model Rule 1.10, upon which most states have presently based their own rules of professional conduct, does *not* contain the screening provision found in Washington RPC 1.10(b). *Contrast* ABA Model Rule 1.11(a) (allowing screening for former government lawyers).

Two plaintiffs' law firms representing 1,000 claimants in product liability litigation hired a legal assistant who had formerly worked for one of the defense firms involved in the same litigation. One of the defendants moved to disqualify the plaintiffs' firms from the litigation. The trial court denied the motion. The defendant sought a writ of mandamus from the Texas Supreme Court. The Supreme Court granted the writ and directed the disqualification of the plaintiffs' law firms. In doing so, the Supreme Court found:

- There is an *irrebuttable* presumption that a legal assistant received confidential information if the assistant worked on a case. 1998 Westlaw 226729 at *3-*4.

- There is a *rebuttable* presumption that the legal assistant shared that confidential information with the assistant's new employer. *Id.* at *4.

- The rebuttable presumption is *not* overcome by the unequivocal testimony of the lawyers involved that no confidential information had been shared with them. *Id.*

- The rebuttable presumption can only be overcome by a showing that "'sufficient precautions have been taken to guard against any disclosure of confidences.'" *Id.* (Citation omitted.) "*** [T]he only way the rebuttable presumption can be overcome is: 1) to instruct the legal assistant 'not to work on any matter on which the paralegal worked during the prior employment, or regarding which the paralegal has information relating to the former employer's representation,' and 2) to 'take other reasonable steps to ensure that the paralegal does not work in connection with matters on which the paralegal worked during the prior employment, absent client consent.'" *Id.*

❒ **Discovery Abuses as Grounds for Disqualification: Failure to Return Documents Inadvertently Disclosed and Communications with Represented Parties[12]**

● ***Abamar Housing and Development, Inc. v. Lisa Daly Lady Decor, Inc.*, __ So.2d __, 1998 Westlaw 422789 (Fla. App. July 29, 1998); *see also* 698 So.2d 276 (Fla. App. 1997) (discussing the underlying facts)**

A general contractor, Abamar Housing and Development, Inc. ("Abamar") produced 70 boxes containing over 100,000 documents in a construction dispute with one of its subcontractors, Lisa Daly Lady Decor, Inc. ("Lisa Daly"). Despite an effort to review the documents for privilege before producing them, Abamar's lawyers discovered that they had inadvertently produced 23 documents that fell within the attorney-client privilege. Abamar's lawyers promptly asked Lisa Daly's attorneys to return the documents. Lisa Daly's attorneys refused and used the documents, over the objections of Abamar's lawyers, at depositions in the case. Abamar sought a protective order requiring the return of the documents involved. The trial court denied the motion. The Florida Court of Appeal reversed. It held that there had been no waiver of the attorney-client privilege through inadvertent production. 698 So.2d at 277-79. The Court of Appeal then went on to quote pointedly from a Florida Bar Opinion that, in turn, rested in part on ABA Formal Legal Ethics Opinion 92-368 (1992): "*** [W]e remind counsel of the well-justified dictate that '[a]n attorney who receives confidential documents of an adversary as a result of an inadvertent release is ethically obligated to promptly notify the sender of the attorney's receipt of the documents.' The Florida Bar. Comm. on Professional Ethics, Op. 93-3 (Feb. 1, 1994)." 698 So.2d at 279.

On remand, Abamar moved to disqualify Lisa Daly's lawyers. The case then traveled back to the Florida Court of Appeal on that issue. The Court of Appeal this time disqualified Lisa Daly's lawyers. The Court of Appeal noted that "[t]he receipt of privilege documents is grounds for disqualification of the attorney receiving the documents based on the unfair tactical advantage such disclosure provides." 1998 Westlaw 422789 at *1. It then went on to hold that a moving party is *not* required to demonstrate

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[12]For a recent case closer to home addressing disqualification for discovery and related abuses, *see In re Firestorm 1991*, 129 Wash. 2d 130, 140-46, 916 P.2d 411 (1996) (reversing the disqualification of one party's lawyers for unauthorized contact with the other side's expert witness, but noting that disqualification may be warranted where counsel for one party gains unauthorized access to the opponent's privileged information).

specific prejudice to support disqualification:

> "'Like so many other ethical considerations in the practice of law, perceptions are of the utmost importance. Thus how much of an advantage, if any, one party may gain over another we cannot measure. However, the possibility that such an advantage did accrue warrants resort to this drastic remedy for the sake of the appearance of justice, if not justice itself, and the public's interest in the integrity of the judicial process.'" *Id.* *1-*2 (Citation omitted.)[13]

- ***In re News America Publishing, Inc.,***
  974 S.W.2d 97 (Tex. App. 1998)

  USSI, a computer software company, had sued News America Publishing, Inc. and several individual defendants--including USSI's former president, Donald Frazier--for breach of contract and tortious interference with business relations. All parties were represented by counsel. Frazier sent USSI's owner and its attorneys at letter stating that he wanted to meet with them and that he had terminated his representation by his counsel of record. USSI's owner and one of his attorneys then met privately with Frazier at the attorneys' offices and discussed the lawsuit with him. As a result of the meeting, USSI dropped Frazier from the lawsuit and later designated him as an expert witness. When the meeting took place, Frazier had not communicated the termination to his attorney nor did USSI's attorney provide any notice to Frazier's attorney of record. The other defendants in the case moved to disqualify USSI's law firm under the Texas anti-contact rule, which is substantially similar to ABA Model Rule 4.2.[14] The trial court denied their motion. But, the Texas Court of Appeals granted a writ of mandamus and directed the disqualification.

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[13]For a recent ethics opinion on this issue closer to home, *see* Oregon State Bar Legal Ethics Op. No. 1998-150 (1998) (generally requiring the return of inadvertently produced privileged documents).

[14]ABA Model Rule 4.2 reads:

> "In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so."

Washington RPC 4.2 is identical to the ABA Model Rule.

In ruling in favor of disqualification, the Court of Appeals relied heavily on ABA Formal Ethics Opinion 95-396 (1995):

> "'As a practical matter, a sensible course for the communicating lawyer [in this situation] would generally be to confirm whether in fact the representing lawyer has been effectively discharged. For example, the lawyer might ask the person to provide evidence that the lawyer has been dismissed. The communicating lawyer can also contact the representing lawyer directly to determine whether she has been informed of the discharge. The communicating lawyer may also choose to inform the person that she does not wish to communicate further until he gets another lawyer.'" 974 S.W.2d at 103.

❒ **More on the Lawyer-Witness Rule: Contrasting Conclusions and Judicial Skepticism**

- ***People v. Reed*, 698 N.E.2d 620 (Ill. App. 1998)**
- ***In re A.M.*, 974 S.W. 2d 857 (Tex. App. 1998)**
- ***Singer Island Ltd., Inc. v. Budget Construction Co., Inc.*, 714 So.2d 651 (Fla. App. 1998)**

These three cases all involved motions for disqualification based on variants of the lawyer-witness rule found in ABA Model Rule 3.7. In *Reed*, the lawyer was disqualified. In *A.M.* and *Singer Island*, the lawyers were not. Although these cases involved very different fact scenarios (*Reed* was a criminal case; *A.M.* involved a child custody dispute; and *Singer Island* was a construction contract case), they all dealt with the slippery issue of whether it was "likely" that the lawyers involved would be "necessary witnesses." Of necessity, these issues are very case-specific. But, it is also worth noting that the courts in these cases voiced a marked skepticism about ordering disqualification when the likelihood of the lawyer being called was simply a *possibility*. As the Texas Court of Appeals noted in *A.M.*, "[d]isqualification is not appropriate under this rule when opposing counsel merely announces his intention to call the attorney as a fact witness; there must be a genuine need for the attorney's testimony that is material to the opponent's client." 974 S.W.2d at 864.

❒ **More on Former Client Conflicts: The Substantial Relationship Test**

- ***Hasco, Inc. v. Roche,*** **700 N.E.2d 768 (Ill. App. 1998)**
- ***Houghton v. Department of Health,*** **962 P.2d 58 (Utah 1998)**
- ***In re Osborne,*** **584 N.W.2d 649 (Mich. App. 1998)**
- ***Kalwar v. Liberty Mutual Insurance Company,*** **506 S.E.2d 39 (W. Va. 1998)**
- ***McAdams v. Ellington,*** **970 S.W. 2d 203 (Ark. 1998)**
- ***People v. District Court of County of Arapahoe,*** **951 P.2d 926 (Colo. 1998)**

These cases all deal with the issue of whether a matter is "substantially related" under variants of the ABA model rule on former client conflicts, ABA Model Rule 1.9, in the context of disqualification proceedings. The results varied in applying essentially the same rule--from disqualification in *Hasco, Osborne, McAdams* and *Arapahoe,* to the refusal to disqualify in *Kalwar*[15] and *Houghton*. The varying results highlight the fact-intensive nature of this determination, which the Comment to ABA Model Rule 1.9 itself acknowledges:

> "The scope of a 'matter' for purposes of this Rule may depend on the facts of a particular situation or transaction. The lawyer's involvement in a matter can also be a question of degree. When a lawyer has been directly involved in a specific transaction, subsequent representation of other clients with materially adverse interests is clearly prohibited. On the other hand, a lawyer who recurrently handled a type of problem for a former client is not precluded from later representing another client in a wholly distinct problem of that type even though the subsequent representation involves a position adverse to the prior client. *** The underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question." Comment to ABA Model Rule 1.9, reprinted in Annotated Model Rules of Professional Conduct 143-44 (3d ed. 1996).

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[15]The West Virginia Supreme Court in *Kalwar* found a former client conflict, but declined to order the disqualification where there was no showing of prejudice. 506 S.E.2d at 46.

❒ **Other Background Materials:**

- **ABA Formal Opinion 98-411 (1998): "Ethical Issues in Lawyer-to-Lawyer Consultation"**

  This opinion deals with informal consultations between lawyers where the consulted lawyer is not retained. The opinion notes that the consulted lawyer does not have an attorney-client relationship with the client of the consulting lawyer. But, the opinion also cautions that the consultation might give rise to a duty under Model Rule 1.7(b) to maintain any confidences shared and might thereby limit the consulted lawyer's ability to take on a matter adverse to the consulting lawyer's client.

- **ABA Formal Opinion 97-409 (1997): "Conflicts of Interest: Successive Government and Private Employment"**

  Although issued last year and, therefore, not quite falling within the self-imposed definition of "recent" employed in this paper, this opinion contains a lengthy discussion of ABA Model Rule 1.11 and a discussion of the application of ABA Model Rule 1.9 to former government lawyers as well.

- **Proposed Federal Rules of Attorney Conduct**

  Although beyond the scope of this paper, it should be noted that the Federal Judicial Conference is considering the possibility of adopting uniform rules for attorney conduct in *all* proceedings conducted in the United States District Courts and Courts of Appeals. The proposed rules contain specific provisions dealing with current and former conflicts of interest and imputed conflicts that would potentially have significant impacts on disqualification motions filed in federal court.

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Disqualification decisions almost invariably involve very case-specific issues that make generalizations difficult. But, two general cautionary themes can be culled from the decisions reported from courts of every stripe this year. The first is the importance of a thorough conflict check at the outset of a representation. Although conflict checks in major cases can be burdensome and time-consuming, this is truly an area where it is "better to be safe than sorry." The second is the acceleration of the trend to use disqualification motions for tactical purposes related to the litigation rather than for the uniform application of professional rules. This trend again puts a premium on sound conflict checking procedures at the outset of a representation so that an opponent will not be able to exploit a perceived deficiency for narrow tactical purposes.