DISQUALIFICATION AND CONFLICTS OF INTEREST:
The Year in Review

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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 cases from Washington. The focus then shifts to regional developments from Alaska, California, Idaho, Oregon and the Ninth Circuit. The concluding section addresses selected cases and ethics opinions of note from around the country over the past year.

WASHINGTON[1]

This past year, the U.S. District Court for the Western District of Washington published a disqualification decision touching on several facets of current and former client conflicts. The Washington Court of Appeals also issued several decisions dealing with former client conflicts in both the civil and criminal contexts.

❒ Oxford Systems, Inc. v. Cell Pro, Inc.
45 F.Supp.2d 1055 (W.D. Wash. 1999)
- ✓ Standards for disqualification
- ✓ Current or former client?
- ✓ Disqualification for current client conflict under RPC 1.7
- ✓ Disqualification for former client conflict under RPC 1.9 & 1.10
- ✓ Use of expert testimony in disqualification litigation

If a lawyer doesn't currently have a file open for an out-of-state company that has periodically sent the lawyer work for years, is the company a current or former client? The U.S. District Court in Seattle disqualified a law firm earlier this year for opposing a "periodic" client in Oxford.

A Seattle firm had represented Becton Dickinson (Becton) for 13 years in a variety of advisory and litigation matters. Since 1990, the Seattle firm had been Becton's exclusive Washington counsel. But, the Seattle firm's work for Becton was not continuous. Rather, it was on a case or project specific basis. In April

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[1]Many of the disqualification decisions issued by the Washington Court of Appeals this year were unpublished–but are readily available in electronic form. Under RCW 2.06.040 and RAP 12.3(d), an unpublished decision is a matter of public record but does not have "precedential value."

1998, the Seattle firm had no open files for Becton when it began defending a California law firm in a Washington securities fraud case brought by the shareholders of a company called CellPro for which the California firm had done IP work. The securities fraud suit grew out of patent infringement litigation that Becton was then prosecuting in Delaware against CellPro in which the California law firm's opinion on the validity of the patents involved was a central element of CellPro's defense. Although the Seattle firm had been local counsel for Becton in an earlier phase of the patent litigation pending in Washington in 1992 and 1993 and continued to assist with local aspects of the patent dispute after the litigation had been transferred to Delaware, the partner who had represented Becton in that matter had left the Seattle firm in 1996. The Seattle firm ran a conflict check when it opened the securities fraud case in 1998, but the check did not reveal a problem because Becton was not a party to that case.

When Becton learned of the Seattle firm's involvement in the securities fraud case, it intervened in Oxford to seek the Seattle firm's disqualification. Becton argued that its longstanding, albeit periodic, use of the Seattle firm demonstrated an ongoing attorney-client relationship. Becton contended that the Seattle firm had a current client conflict under RPC 1.7[2] because Becton's interests were adverse to the California law firm's due to the overlap between the issues in the patent and securities cases. Becton asserted, therefore, that the Seattle firm should be disqualified.

Judge Zilly agreed. He found that the length, scope and general continuity of the relationship between Becton and the Seattle firm supported Becton's belief that it remained a current client of the Seattle firm. In doing so, Judge Zilly relied on the Washington Supreme Court's decision in Bohn v. Cody, 119 Wash.2d 357, 832 P.2d 71 (1992) and the Washington Court of Appeals' opinion in Teja v. Saran, 68 Wash.App. 793, 846 P.2d 1375, rev. den., 122 Wash.2d 1008 (1993), holding that the question of whether an attorney-client relationship exists turns primarily on the client's subjective belief as long as that subjective belief is

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[2]RPC 1.7(a) provides:

> "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
> >
> > "(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)."

reasonably formed under the surrounding circumstances. Having found that Becton was a current client of the Seattle firm, Judge Zilly then used RPC 1.7 to conclude that a conflict existed and ordered disqualification.

Although the principal issue in Oxford was whether Becton was a current client, Judge Zilly's opinion also addresses several other facets of disqualification litigation:

- Judge Zilly used Washington RPC 1.9[3] to conclude that even if Becton was a former client, the Seattle firm could only have undertaken the new representation with Becton's consent because the securities fraud litigation was substantially related to the earlier patent case that the Seattle firm had handled.

- Although the partner who handled the Washington phase of the Becton patent case had left the firm, several lawyers remained at the firm who had assisted with that case and who Judge Zilly found had acquired Becton's confidences during the earlier representation. Therefore, Judge Zilly found that RPC 1.10's exception to the former client conflict rule when the lawyer who handled the earlier related matter has left the firm was inapplicable.[4]

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[3]RPC 1.9 reads:

> "A lawyer who has formerly represented a client in a matter shall not thereafter:
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> > "(a) 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
> >
> > "(b) Use confidences or secrets relating to the representation to the disadvantage of the former client, except as rule 1.6 would permit."

[4]RPC 1.10(c) provides:

> "(c) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:
>
> > "(1) The matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

- In hearing the motion, Judge Zilly allowed the parties to present expert testimony by affidavit on the questions of whether a conflict existed and, if so, whether disqualification was appropriate.

❒ Miller v. Robertson,
1999 WL 65638 (Wash.App. Feb. 12, 1999) (unpublished)
✓ Standard of review
✓ Conflicts as a basis for reversal of a judgment
✓ Former client conflict: Substantial relationship test

A minority shareholder in a closely-held corporation sued the majority shareholder and the corporation for breach of fiduciary duty and wrongful termination after he had allegedly been forced out by the majority shareholder. The minority shareholder, Miller, moved to disqualify the defendants' law firm on the ground that one of its attorneys had formerly represented him in several facets of his involvement with the corporation–principally advice on a related building ownership partnership and a right of first refusal for corporate stock. The trial court denied the motion. It later held for the defendants on the merits as well. Miller sought reversal on, among other grounds, the trial court's failure to disqualify the law firm.

The Court of Appeals first addressed the standard of review: "[W]hether an attorney has violated the Rules of Professional Conduct * * * [is] * * * a question of law * * * [that we] * * * review * * * de novo." 1999 WL 65638 at *6. It then noted that "to obtain reversal of a judgment in a case where there has been a violation of the conflict of interest rules, the former client must show prejudice." Id. at *7.

Miller did not allege that the law firm had used confidential information adverse to him under RPC 1.9(b). Therefore, the Court of Appeals focused on whether the law firm's former representation of Miller was a "substantially related matter" under RPC 1.9(a):

> "In deciding whether the current and former matters are substantially related, 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.'" Id. at *6, quoting Teja v. Saran, supra, 68 Wash.App. at 798.

"(2) Any lawyer remaining in the firm has acquired confidences or secrets protected by rules 1.6 and 1.9(b) that are material to the matter."

The Court of Appeals concluded that the advice on the building partnership was not a substantially related matter because the present case did not involve the building partnership directly. Id. at *7. But, the Court of Appeals found that the right of first refusal presented a much closer question:

> "We find that * * * [the lawyer's] * * * involvement in drafting the Rights of First Refusal as to ownership in both the corporation and the partnership more problematic. Both Miller and Robertson [the majority shareholder] were to sign these documents and * * * [the lawyer] * * * spoke with Miller regarding suggested revisions. These matters appear substantially related to the present lawsuit, but Robertson contends that * * * [the lawyer] * * * was not representing Miller at the time. This assertion is consistent with * * * [the lawyer's] * * * testimony, but the circumstances are ambiguous.
>
> "Because the trial court made no findings as to * * * [the lawyer's] * * * representation, we cannot determine whether there was an RPC violation. * * * We observe, however, that if * * * [the lawyer] * * * had been representing both Miller and Robertson when drafting the rights of first refusal, RPC 1.9(a) would have prohibited * * * [the lawyer] * * * from representing Robertson in this lawsuit. And if that were the case, RPC 1.10[5] would have prohibited the * * * [law] firm also from representing Robertson, and the trial court would have erred in denying Miller's motion for disqualification." Id.

❒ Tarabochia v. Tarabochia,
1999 WL 512501 (Wash.App. July 16, 1999) (unpublished)
- ✓ Standard of review
- ✓ Former client conflict: Substantial relationship test

This was a marital dissolution proceeding. The wife's law firm had formerly represented the husband and his family and the husband moved to disqualify it on that basis. The husband did not contend that the law firm used confidential information adverse to him under RPC 1.9(b). Instead, he asserted that the earlier matters were substantially related the to present one under RPC 1.9(a). But, the

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[5] RPC 1.10(a) imputes one law firm member's conflicts to the balance of the firm:

> "Except as provided in section(b) [which permits lateral-hire screening], while lawyers are associated in a firm none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by rules 1.7, 1.8(c), 1.9 or 2.2."

prior matters involved land use and real estate matters that had no connection to the dissolution. The trial court denied the motion and the Court of Appeals affirmed.

In doing so, the Court of Appeals again cited Teja for the applicable standard of review. It then noted that "[m]atters are 'substantially related' if "'the factual contexts of the two representations are similar or related.'" 1999 WL 512501 at *2, quoting State v. Hunsaker, 74 Wash.App. 38, 43, 873 P.2d 540 (1994). It found no such relationship here.

❒ State v. Dalluge,
1999 WL 599308 (Wash.App. Aug. 10, 1999) (unpublished)
✓ Disqualification for conflicts in the criminal prosecution context

A criminal defendant appealed his conviction, in pertinent part, on the trial court's refusal to disqualify the prosecutor. The conflict alleged was that the prosecutor's husband was the defendant's former wrestling coach who supposedly had been "angry with * * * [the defendant] * * * ever since he quit the wrestling team." 1999 WL 599308 at *3. The Court of Appeals affirmed.

Without specifically citing to RPC 1.7(b)[6], the Court of Appeals first discussed the general standard for disqualifying a prosecutor when the prosecutor has a personal interest of some kind in a case:

> "A public prosecutor is a quasi-judicial officer and represents the State, and thus 'in the interest of justice must act impartially.' * * * 'If a prosecutor's interest in a criminal defendant or in the subject matter of the defendant's case materially limits his or her ability to prosecute a matter impartially, then the prosecutor is disqualified from litigating the matter, and the prosecutor's staff may be disqualified as well.'" Id. at *3 (citations omitted).

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[6]RPC 1.7(b) reads, in relevant part:

> "A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:
>
> > "(1) The lawyer reasonably believes the representation will not be adversely affected; and
> >
> > "(2) The client consents after consultation * * *. * * * "

The Court of Appeals found that the simple acquaintance with the defendant here did not meet this standard.

The Court of Appeals noted that this would not raise a former client conflict either. For a conflict to arise under RPC 1.9, there must have been, of necessity, a prior attorney-client relationship. It found none here.

❒ State v. Roberts,
1999 WL 982397 (Wash.App. Oct. 26, 1999) (unpublished)
✓ Disqualification for conflicts in the criminal defense context

A criminal defendant appealed his conviction asserting, in relevant part, ineffective assistance of counsel based on an alleged conflict between his defense attorney and a prosecution witness whom the defense attorney had represented "some years before" on an unrelated charge.

In affirming the conviction, the Court of Appeals analyzed this issue under RPC 1.9. It first concluded that the present case was not "substantially related" under RPC 1.9(a) to the earlier case that the defense attorney had handled for the prosecution witness. It then found that there was no evidence that the defense lawyer was limited in any respect under RPC 1.9(b) by confidential information that he had obtained during the course of the earlier representation.

REGIONAL DISQUALIFICATION CASES

ALASKA

There have not been any reported appellate decisions on disqualification from Alaska thus far this year (mid-November, at this writing). The Alaska Bar Association Ethics Committee, however, did release an opinion earlier this year, Ethics Opinion No. 99-2 [1999 WL 271924], that discusses current client conflicts involving governmental counsel that may have some application in the disqualification setting.

CALIFORNIA

California once again proved to be a fertile ground for interesting disqualification decisions–including this selection of cases dealing with "of counsel" relationships, insurance defense-related conflicts, standing to seek disqualification and conflicts arising from confidentiality provisions in settlements.

❒ People v. Speedee Oil Change Systems, Inc.,
20 Cal.4th 1135, 86 Cal.Rptr.2d 816, 980 P.2d 371 (1999)
✓ "Of counsel" is firm member for conflicts analysis

A solo practitioner had associated a law firm to help him prosecute franchise claims against Mobil Oil (Mobil). The notice of the law firm's association, however, was not filed until several weeks after the firm had actually begun work on the case. In the meantime, Mobil contacted an "of counsel" lawyer at the firm with special expertise in franchise law about representing it in the same case. Neither Mobil nor the "of counsel" were aware that the firm had already begun working for the other side. Mobil's lawyers then met with the "of counsel" and discussed Mobil's strategy in detail. Shortly afterward, the firm filed its notice of association with the claimant's counsel, and Mobil moved to disqualify. The law firm argued in response that the "of counsel" was, in essence, merely an independent co-counsel and, therefore, his individual conflict should not be imputed to the firm. The California Supreme Court disagreed. The Supreme Court noted pointedly that the firm held the lawyer out to the public as being associated with the firm. Given that affiliation, the Supreme Court imputed the "of counsel" lawyer's conflict to the entire firm and ordered disqualification. 86 Cal.Rptr.2d at 830-31.[7]

❒ State Farm v. Federal Insurance Company,
72 Cal.App.4th 1422, 86 Cal.Rptr.2d 20 (1999)
✓ Conflicts created by insurance defense relationship
✓ Conflict not "cured" by settlement

Federal Insurance Company (Federal) hired a law firm to defend its insured. While the defense case was underway, State Farm Mutual Automobile Insurance Company (State Farm) retained the same law firm to prosecute a coverage claim against Federal. Federal objected and moved to disqualify the law firm in the coverage case. At the same time, the law firm settled the defense case. The trial court denied the motion, finding that the settlement had converted Federal into a former client and that the two matters were not substantially related. The California Court of Appeal reversed.

The Court of Appeal first concluded that, under California law, an insurance defense counsel has an attorney-client relationship with both the insured and the

[7]For a somewhat different approach that reaches the same result, see Washington State Bar Formal Ethics Op. 178 (1984).

insurer. 86 Cal.Rptr.2d at 24-25.[8] The Court of Appeal next found that the settlement of the defense case did not retroactively cure the conflict created by the concurrent representation that Federal had objected to: "[A]lthough this fortuitous settlement acted to sever * * * [the law firm's] * * * relationship with its preexisting client, it did not remove the taint of a three-month concurrent representation. Consequently, the mandatory disqualification rule [for current client conflicts] applies." 86 Cal.Rptr.2d at 27. It, therefore, ordered the law firm's disqualification.

❒ Morrison Knudsen v. Hancock, Rothert & Bunshoft, LLP, 69 Cal.App.4th 223, 81 Cal.Rptr.2d 425 (1999)
  - ✓ More on insurance defense-related conflicts
  - ✓ Conflicts arising from corporate affiliation

A law firm, Hancock, Rothert & Bunshoft, LLP (Hancock), had formerly represented a corporate parent, Morrison Knudsen (MK), for several years and later acted as "monitoring counsel" for MK's insurance underwriters in supervising MK's defense of professional liability claims. The Contra Costa Water District (District) then approached Hancock about handling a construction claim against MK's wholly-owned subsidiary, Centennial Engineering (Centennial). The law firm asked MK for a waiver, but MK refused. Hancock went ahead with the claim for the District anyway, contending that it had never represented Centennial. MK then sought an injunction against Hancock. The trial court granted a preliminary injunction against Hancock. The California Court of Appeal affirmed.

The Court of Appeal first noted that Hancock had not represented MK directly for several years. It then observed that, in Hancock's more recent role as "monitoring counsel," the law firm was not representing MK in a traditional insurance defense relationship. Rather, Hancock had been retained by the insurance underwriters to advise them on potential liability of claims being handled by MK's insurance defense counsel. But, the Court of Appeal also found that, in its role as "monitoring counsel," Hancock was privy to MK's confidential defense information, was deeply involved with formulating its general defense strategies and had direct contact with MK's in-house attorneys and claims managers in carrying out the "monitoring" work. The Court of Appeal concluded, therefore, that Hancock had a duty to MK not to use its confidential information adversely to it. The Court of Appeal then found that there was a sufficient similarity between the construction claim at hand and the other professional liability matters Hancock

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[8] Contrast Tank v. State Farm, 105 Wash.2d 381, 715 P.2d 1133 (1986) (in the insurance defense context, the lawyer only has an attorney-client relationship with the insured); accord Washington State Bar Formal Ethics Op. 195 (1999).

had (and continued) to handle as "monitoring counsel" that the "substantial relationship test" for conflicts arising from successive representations had been met.

At that point, the Court of Appeal turned to the issue of whether the conflict involving MK extended to Centennial–which was the only MK related entity named in the construction claim for the District. In addressing this issue, the Court of Appeal relied on both California State Bar and ABA legal ethics opinions (respectively, Formal Opinions 1989-113 and 95-390) that examine the circumstances under which corporate affiliates may be considered one client for conflicts purposes. Both opinions note that if an attorney obtains one corporate family member's confidential information that may, depending on the reasonable expectations of the corporate entities involved, preclude the lawyer from using that information adversely to any member of the corporate family. See 81 Cal.Rptr.2d at 436-39. The Court of Appeal found such an expectation here and affirmed Hancock's disqualification.

❐ Colyer v. Smith,
50 F.Supp.2d 966 (C.D. Cal. 1999)
  - ✓ Standing to seek disqualification

The plaintiff in this federal civil rights action under 42 U.S.C. § 1983 alleged that he had been removed from his position as a trainer with the Riverside County Sheriff's Department in retaliation for his having testified as an expert witness on the use of force on behalf of another deputy in the latter's administrative discharge hearing. The same law firm that had represented the other deputy in a related civil rights claim (which had settled) involving the alleged excessive use of force at issue was now representing Riverside County in this case. The law firm had not, however, represented the other deputy in the administrative proceeding in which the plaintiff had appeared as an expert witness nor had it ever represented the plaintiff himself. Nonetheless, the plaintiff sought the law firm's disqualification on the theory that its representation of Riverside County would violate a duty of loyalty to the other deputy because the present representation would contradict the position taken on behalf of its former client in the earlier excessive force case. The court denied the motion.

Judge Timlin began by noting that there is a split of authority on whether a party who has never had an attorney-client relationship with a lawyer has standing to seek disqualification of the lawyer for an asserted conflict of interest involving a third party. "The majority view is that only a current or former client of an attorney has standing to complain of that attorney's representation of interests adverse to the current or former client." 50 F.Supp.2d at 966. He then

summarized the minority view as finding the requisite standing where the conflict involved would affect the fundamental fairness and legitimacy of the proceeding. 50 F.Supp.2d at 970-71. Judge Timlin also noted that the Ninth Circuit had not yet addressed this issue. 50 F.Supp.2d at 971 (citing Kasza v. Browner, 133 F.3d 1159 (9th Cir. 1998)). In the absence of Ninth Circuit authority, Judge Timlin employed the minority rule–but in a very narrow way:

> "It seems clear to this Court that a non client litigant must establish a personal stake in the motion to disqualify sufficient to satisfy the 'irreducible constitutional minimum' of Article III. Generally, only the former or current client will have such a stake in a conflict of interest dispute. However, * * * in a case where the ethical breach so infects the litigation in which disqualification is sought that it impacts the moving party's interest in a just and lawful determination of her claims, she may have the constitutional standing needed to bring a motion to disqualify based on a third-party conflict of interest or other ethical violation." 50 F.Supp.2d at 971-72.

Applying this variant of the minority rule, Judge Timlin found that the plaintiff lacked standing and denied the motion. In doing so, he cautioned further that "[t]he standing requirement protects against the strategic exploitation of the rules of ethics long disfavored by the Courts." 50 F.Supp.2d at 973.

❐ Gilbert v. National Corporation for Housing Partnerships, 71 Cal.App.4th 1240, 84 Cal.Rptr.2d 204 (1999)
- ✓ Conflicts arising from confidentiality provisions in settlements

This was a discrimination claim by an employee against her employer. The plaintiff's lawyer had earlier represented several other employees in a similar claim against the employer that had settled. The settlement agreements in the earlier case contained confidentiality provisions that prohibited the employees from disclosing any aspect of the settlements. The settlement agreements also contained a penalty provision requiring the employees to return the employer's settlement payments if the employees breached the confidentiality provision. In the second case, the plaintiff's lawyer planned to call at least one of the employees from the earlier case as a witness. The employer initially moved in limine to exclude the testimony based on the settlement agreement. When the trial court raised the issue of a conflict, the employer moved to disqualify the lawyer as well.[9] The trial court granted the motion and the California Court of

[9]Perhaps due to the way the conflict issue arose, the standing issues discussed in Colyer were not addressed directly. But, the Court of Appeal did note: "Even without respondent NHP's

Appeal affirmed.

The Court of Appeal analyzed the situation as a current client conflict under California RPC 3-310(C).[10] The Court of Appeal found that calling the witness would present a conflict between the lawyer's duty to the plaintiff and his obligations to his other client who was to testify. The Court of Appeal also noted that the lawyer had not disclosed the conflict to the clients nor obtained their consent. It, therefore, agreed that disqualification was the appropriate remedy.

IDAHO

Idaho's appellate courts issued decisions this year dealing with former client conflicts and disqualification litigated in the context of injunction proceedings under 42 U.S.C. § 1983.

❒ Fairfax v. Ramirez,
__ Idaho __, 982 P.2d 375 (Idaho App. 1999)
✓ Former client conflicts: Substantial relationship test

This was a lien foreclosure action stemming from the construction of a private road by the plaintiff for the defendant. On appeal, the defendants contended that the plaintiff's attorney should have been disqualified because he had previously assisted the defendants in filing a homestead declaration on the

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motion to disqualify, the court would have been entitled to disqualify appellant's attorney under its inherent power to control the conduct of those involved in judicial proceedings before it." 84 Cal.Rptr.2d at 215.

[10]California RPC 3-310(C) provides:

> "A member [of the Bar] shall not, without the informed written consent of each client:
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> "(1) Accept representation of more than one client in a matter in which the interests of the clients potentially conflict; or
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> "(2) Accept or continue representation of more than one client in a matter in which the interests of the clients actually conflict; or
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> "(3) Represent a client in a matter and at the same time in a separate matter accept as a client a person or entity whose interest in the first matter is adverse to the client in the first matter."

property involved. The Idaho Court of Appeals refused to consider the issue because it was being raised for the first time on appeal. But, it did note in dicta that the simple fact that the same property was involved would not create a substantially related matter under Idaho RPC 1.9. 982 P.2d at 379 n.3.

- ❐ Miller v. Ririe Joint School District No. 252,
  132 Idaho 385, 973 P.2d 156 (1999)
  - ✓ Disqualification litigated in the context of a 1983 action

Two law firms advised a school board and its superintendent on employment issues involving a principal at one of the district's schools. The board later began discharge proceedings against the principal. The principal first brought a federal civil rights action under 42 U.S.C. § 1983 seeking an injunction to prevent the board from hearing her discharge proceedings on the ground that it was biased. The law firms represented the board and the superintendent in the injunction proceedings. After the trial court allowed the discharge hearing to go forward, the principal then brought a second 1983 action for an injunction disqualifying the law firms from representing the board and its superintendent in the discharge hearing. The trial court granted the injunction based on the "appearance of impropriety" of having the law firms that had advised the board on termination and defended it in the initial injunction proceedings then represent the board and the superintendent in the discharge hearing.

The Idaho Supreme Court agreed. 973 P.2d at 160. It also found that an injunction disqualifying counsel was an appropriate vehicle to protect the principal's due process rights. Id. Finally, because the principal had prevailed on disqualification in the context of a 1983 action, the Supreme Court also held that the principal was entitled to her attorney fees under 42 U.S.C. § 1988. Id.

OREGON

The Oregon Court of Appeals recently addressed disqualification of former in-house counsel litigating against their former corporate employer.

- ❐ PGE v. Duncan, Weinberg, Miller & Pembroke, P.C.,
  162 Or. App. 265, 986 P.2d 35 (1999)
  - ✓ Disqualification of former in-house counsel
  - ✓ What is a substantially related matter?

Two former in-house counsel at Portland General Electric (PGE) left the utility in 1996 to join a law firm specializing in energy issues, Duncan, Weinberg, Miller & Pembroke, PC (Duncan Weinberg). One of Duncan Weinberg's clients

was a consortium of large industrial electricity customers, Industrial Customers of Northwest Utilities (ICNU). When the two former PGE lawyers began representing ICNU in then-pending proceedings before the Oregon Public Utility Commission (OPUC) over PGE's merger with Enron, PGE objected on the ground that the lawyers' advice on deregulation and associated cost recovery questions raised former client conflicts under Oregon DR 5-105(C)[11] because they had worked on those same issues while at PGE. The former in-house lawyers and PGE eventually "agreed to disagree" and later in 1996 entered into a "waiver agreement" that specified particular areas in which the former PGE lawyers were, and were not, permitted to work. Under that agreement, the former PGE lawyers could not provide advice adverse to PGE on "disaggregation" (splitting an 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." The former PGE lawyers could, however, advise ICNU generally on disaggregation and stranded cost issues not connected with Schedule 77.

In August 1997, PGE filed rate plans with the OPUC dealing with aspects of disaggregation and stranded costs called the "Pilot Program" and the "Customer Choice Program." The two former PGE lawyers began representing ICNU in this OPUC proceeding. Although the OPUC has a disqualification procedure, PGE instead filed a lawsuit against the lawyers and Duncan Weinberg seeking a declaration that they were violating DR 5-105(C) and an injunction barring them

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

> "Except as permitted by DR 5-105(D) [dealing with client consent], a lawyer who has represented a client in a matter shall not subsequently represent another client in the same or a significantly related matter when the interests of the current and former clients are in actual or likely conflict. Matters are significantly related if either:
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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
> >
> > "(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."

from representing ICNU in the rate proceedings on the ground the Pilot Program and the Customer Choice Program both grew out of Schedule 77 and, therefore, were the same "matter." Seeking an injunction to restrain a lawyer's alleged breach of professional or fiduciary obligations is permitted in Oregon under State ex rel Bryant v. Ellis, 301 Or. 633, 724 P.2d 811 (1986).

The trial court granted the injunction. In doing so, the trial court held that all work relating to disaggregation and stranded costs constituted the same matter and, therefore, found a conflict under DR 5-105(C). Next, the trial court voided the waiver on its own motion as "unworkable." It then barred the former in-house counsel from representing ICNU in the pending OPUC proceeding and all other proceedings in which these issues might arise if they involved generating assets or contracts that the lawyers had dealt with while employed by PGE.

The Court of Appeals affirmed in part and reversed in part. The Court of Appeals affirmed portions of the trial court's injunction that prohibited the lawyers from handling issues for ICNU that arose directly from either their work for PGE on Schedule 77 or their earlier work involving particular generating assets or contracts. But, the Court of Appeals reversed the broader prohibition on general advice regarding disaggregation and stranded costs. A 2-1 majority found that the new rate proceeding–although it dealt with issues of disaggregation and stranded costs–was not the same "matter" for conflicts purposes that the two lawyers had worked on while employed at PGE. In the majority's view, to be the same "matter" "the core thing sought in the first * * * [representation must be] * * * at the heart of the lawyer's representation in the second matter * * *." 986 P.2d at 46. The third judge concurred in the result, but reasoned that the former PGE lawyers' work on stranded costs did constitute the same matter.

NINTH CIRCUIT

The Ninth Circuit issued two decisions this year that highlight the practical difficulty of obtaining intermediate review of disqualification decisions in federal court.[12]

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[12]For a recent decision highlighting the same practical difficulties with motions for sanctions in federal court, see Cunningham v. Hamilton County, Ohio, 527 U.S. __, 119 S.Ct. 1915, 144 L.Ed.2d 184 (1999).

❒ GATX/Airlog Co. v. U.S. District Court,
__ F.3d __, 1999 WL 742712 (9th Cir. Sept. 24, 1999)
See also GATX/Airlog Co. v. Evergreen Int'l Airlines, Inc.,
8 F.Supp.2d 1182 (N.D. Cal. 1998)
✓ The practical difficulty of obtaining mandamus review

Counsel for GATX/Airlog Co. (GATX) had been disqualified by the trial court (see 8 F.Supp.2d 1182 (N.D. Cal. 1998)) for a conflict. While proceedings at the trial court level continued with new counsel, GATX sought mandamus review of the disqualification order. The Ninth Circuit denied the petition as moot, noting the retention of new counsel below and observing that the vindication of the law firm was not, in and of itself, sufficient to prevent dismissal of the petition:

> "[T]he interest of a disqualified, non-party law firm in vindicating its good name is insufficient to prevent mootness. Reviewing the district court's order by way of mandamus at this stage would not affect the interests of petitioner GATX; it has already acquired new counsel and vindicating the interests of * * * [the law firm] * * * will not result in * * * [the law firm] * * * re-entering this case as GATX's counsel [another of the law firm's other clients had subsequently entered the litigation and was apparently unwilling to waive the conflict involved either]. Thus, it would be inappropriate for us to proceed to the merits of the this case." 1999 WL 742712 at *3.

❒ In re Grand Jury Investigation,
182 F.3d 668 (9th Cir. 1999)
✓ Disqualification orders are not immediately appealable

A lawyer immediately appealed an order disqualifying him from representing multiple clients during a grand jury investigation. The Ninth Circuit noted that the U.S. Supreme Court had already held that orders disqualifying counsel in both civil and criminal cases were not immediately appealable and found no reason for applying a different rule to grand jury proceedings. See Richardson-Merrell Inc. v. Koller, 472 U.S. 424, 430, 105 S.Ct. 2757, 86 L.Ed.2d 340 (1985) (civil cases); Flanagan v. United States, 465 U.S. 259, 270, 104 S.Ct. 1051, 79 L.Ed.2d 288 (1984) (criminal cases). The disqualified lawyer had also asked the Ninth Circuit to treat his appeal as an alternative request for mandamus. Although not totally foreclosing this possibility, the Ninth Circuit made clear that it would not routinely entertain such petitions: "Mandamus is a 'drastic' remedy that generally issues only when the district court has made a clear error of law." 182 F.3d at 670. The Ninth Circuit found no such error in this instance.

OTHER DISQUALIFICATION CASES AND RELATED OPINIONS OF NOTE[13]

❒ ABA Model Rule 1.6: Confidentiality of Information

- Montgomery Academy v. Kohn,
  50 F.Supp.2d 344 (D. N.J. 1999)

The director of a school consulted a lawyer concerning investments that both she personally and the school pension plan had made in what turned out to be a Ponzi scheme. The director was also a trustee of the school's pension fund. During her conversation with the lawyer, the director revealed confidential information about both her personal investments and her activities as a pension fund director. Later, the lawyer told the director that she could not represent her and filed suit for breach of fiduciary duty on behalf of the pension fund against the director. The director moved to disqualify the lawyer. The district court granted the motion. The court found that the lawyer had formed an attorney-client relationship with the director at the time of the consultation, and, even if she had not, she would still have been bound to preserve the confidentiality of the information communicated in the initial interview: "[The lawyer] was not free, under the applicable ethics rules and decisions, to accept this information, choose which client to represent, and then to utilize the information against one of the two prospective clients." 50 F.Supp.2d at 353.

- Morris v. Margulis,
  718 N.E.2d 709 (Ill.App. 1999)

This case is not a disqualification case. But, it addresses issues under Illinois' version of RPCs 1.6, 1.7 and 1.9 that could all easily arise in the disqualification context. The former director of a failed savings and loan sued a law firm and several of its partners for breach of fiduciary duty. The former director had used the law firm for his personal legal matters for several years. The law firm also represented the savings and loan as its corporate counsel and one of its lawyers was a director as well. The savings and loan was eventually taken over by the Office of Thrift Supervision. In the

[13] This section is not intended to represent a comprehensive survey of disqualification cases nationally. Rather, as the section title implies, the cases reported here simply represent some of the more interesting cases and opinions in this area released over the past year.

aftermath, the former director was investigated by the SEC and prosecuted on criminal charges. The law firm declined to represent the former director in the SEC and criminal investigations, but did represent the lawyer-director. It also continued to represent the former director in other personal matters. Further, the law firm's attorney for the lawyer-director had several conversations with the former director about the investigations before the firm declined to represent him and later provided his wife (who was also a lawyer at the firm) with advice and forms to assist the former director in the investigation. During the former director's criminal trial, the law firm's attorney for the lawyer-director drafted cross-examination questions for the government to use against the former director that contained detailed information about the former director. The trial court granted summary judgment to the law firm. But, the Illinois Court of Appeals reversed and remanded the case for trial. It found that the former director had created a fact issue on the question of whether he had an attorney-client relationship with the law firm and, therefore, summary judgment was improper. The Court of Appeals also noted that, even if an attorney-client relationship had not been formed, the law firm would still have been under a duty to preserve the confidentiality of the information communicated to it when the former director initially sought out its assistance.

❐ **ABA Model Rule 1.7: Conflict of Interest: General Rule**

- Cincinnati Insurance Company v. Wills,
  717 N.E.2d 151 (Ind. 1999)

A trial court had disqualified an insurance company's "captive" law firm for, among other reasons, an asserted current client conflict under Indiana's version of RPC 1.7 (which is based on the ABA model rule). The Indiana Supreme Court reversed. It held that, absent a specific conflict such as a coverage dispute, a lawyer working at a "captive" law firm could normally represent both the insurer and the insured with consent.

❐ **ABA Model Rule 1.9: Former Client Conflicts**

- Associated Wholesale Grocers, Inc. v. Americold Corp.,
  975 P.2d 231 (Kan. 1999)

This was an insurance coverage case arising from a fire at large cold

storage facility. The plaintiffs, the facility's tenants who had taken an assignment of the owner's claim against its excess insurance carrier, attempted to disqualify the excess carrier's trial counsel on the ground that in an earlier case stemming from the same fire one of its attorneys had represented two subrogated insurers on bailment claims against the owner and, in the course of that representation, had entered into an "information exchange agreement" with other parties pursuing claims against the owner. The plaintiffs argued that the information exchange agreement created an implied attorney-client relationship with them, and, as such, the law firm was precluded under Kansas RPC 1.9 (which is similar to ABA Model Rule 1.9) from handling what they contended was a substantially-related matter against them. The trial court agreed and disqualified the law firm. The Kansas Supreme Court reversed. It held that under the terms of the information exchange agreement no implied attorney-client relationship had been created (and that no confidential information had been shared). Having found no attorney-client relationship (or other obligation imposing confidentiality), the Kansas Supreme Court held that there could be no former client conflict.

- Shorter v. Shorter,
  740 So.2d 352 (Miss.App. 1999)

  Stowell v. Bennett,
  __ A.2d __, 1999 WL 684196 (Vt. 1999)

Both of these cases deal with the very fact-specific issue of what constitutes the same "matter" under RPC 1.9's "substantial relationship test." Both decisions found that the matters involved were unrelated, and, therefore, disqualification was not warranted. In Shorter, the Mississippi Court of Appeals concluded that the earlier preparation of joint wills for both spouses would not prevent the husband's lawyer from later representing him against the wife in a separate maintenance proceeding. In Stowell, the Vermont Supreme Court found that the plaintiff's lawyer's earlier representation of the defendant in a criminal matter would not prevent him from representing the plaintiff in the present mobile home repossession proceeding.

- ABA Model Rule 1.10: Imputed Conflicts & Disqualification

- Koulis v. Rivers,
730 So.2d 289 (Fla.App. 1999)

The Florida Court of Appeal found that Florida Bar Rule 4-1.10(b) (which is patterned generally on ABA Model Rule 1.10(b)) applied to legal secretaries as well as lawyers moving to new firms. Therefore, when the secretary for the plaintiff's lead counsel in this medical malpractice case took a job with the defendant's law firm, the Court of Appeal disqualified the defendant's law firm despite the fact that it had screened the secretary.[14]

- Kassis v. Insurance and Annuity Association,
93 N.Y.2d 611, 717 N.E.2d 674, 695 N.Y.S.2d 515 (1999)

The New York Court of Appeals held that screening was not available under New York DR 5-105 to avoid disqualification through imputed conflicts when a lawyer who acquired confidential information material to a case in the course of the lawyer's work at one firm joined a law firm on the other side of the same case. In this instance, an associate who had participated actively in the prosecution of a property damage case at one law firm joined the firm defending the case. Although he was screened from any participation in this case when he joined the defense firm, the Court of Appeals ruled that disqualification was required as a matter of law because screening was not available to prevent the imputation of his personal conflict to the firm.

- United States Filter Corp. v. Ionics,
189 F.R.D. 26 (D. Mass. 1999)

Massachusetts' version of RPC 1.10 allows screening to avoid imputed disqualification where a lateral-hire did not have "substantial involvement nor substantial material information relating to the matter" from which the lawyer will be screened.[15] A lawyer at the

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[14]Contrast Washington RPC 1.10(b)'s screening procedure to avoid disqualification from imputed conflicts when hiring new personnel.

[15]Contrast Washington RPC 1.10(b) and Oregon DR 5-105(I), which allow screening of new-hires as a matter of right without this limitation.

defendant's law firm began negotiating for employment with a law firm representing one of the plaintiffs and sought an order of the district court approving a screen–apparently anticipating that the defendant would move to disqualify the hiring law firm if it did not obtain the court's preemptive approval. The district court found, however, that the lawyer had substantially participated in the case. Therefore, it refused to approve the use of a screen to avoid the imputed conflict if the lawyer was hired by the plaintiff's law firm.

❐ **ABA Model Rule 1.11: Successive Government & Private Employment**

- Osborne v. Osborne,
  589 N.W.2d 763 (Mich. 1999)

Although the Michigan Supreme Court ultimately held that disqualification had not been timely raised, both the Supreme Court and the Michigan Court of Appeals analyzed the substantive issue of disqualification under Michigan RPC 1.11(c) (which is based on ABA Model Rule 1.11(c)) where a government attorney in a termination of parental rights case had earlier represented one of the parents in a related proceeding.

- Commonwealth of Kentucky v. Maricle,
  1999 WL 680150 (Ky. Aug. 26, 1999) (unpublished)

An assistant county prosecutor in a murder case left the prosecutor's office shortly before the trial to join the defendant's law firm. The Kentucky Supreme Court found that the defense law firm had inadequately screened her from participation in the case under Kentucky's version of ABA Model Rule 1.11 and directed the law firm's disqualification.

❐ **ABA Model Rule 1.12: Former Judge or Arbitrator**

- Fields-D'Arpino v. Restaurant Associates, Inc.,
  39 F.Supp.2d 412 (S.D.N.Y. 1999)

The parties in this employment discrimination case participated by agreement in an informal prelitigation mediation conducted by an attorney at the defendant's regular outside law firm. When the mediation was unsuccessful and the plaintiff later filed suit, the law firm appeared on behalf of the defendant. The district court granted

the plaintiff's motion to disqualify. In doing so, it relied on New York EC 5-20 (which provides, in pertinent part: "A lawyer who has undertaken to act as an impartial arbitrator or mediator should not thereafter represent in the dispute any of the parties involved.") and a Utah federal district court case (Poly Software Int'l, Inc. v. Su, 880 F.Supp. 1487 (D. Utah 1995)) that reached the same conclusion under Utah RPC 1.12.[16]

❒ **Ethics Opinions**

- **ABA Formal Ethics Opinion 99-414 (1999): "Ethical Obligations When a Lawyer Changes Firms"**

As the title implies, this opinion deals primarily with the obligations of departing lawyers to their clients and former firms as opposed to conflicts created by joining new firms. Nonetheless, in an era of increasing movement of lawyers among firms, some of the issues that this opinion discusses could be played out in the context of disqualification motions.

- **ABA Formal Ethics Opinion 99-415 (1999): "Representation Adverse to Organization by Former In-House Lawyer"**

This opinion addresses situations in which former internal counsel enter private practice and then represent clients adverse to their former corporate employers. The opinion generally uses ABA Model Rule 1.9 dealing with former client conflicts as its framework of analysis. Therefore, it finds that a former internal counsel must obtain the former employer's consent if a new representation is either substantially related to a matter that the lawyer worked on for the corporation or if the lawyer had acquired confidential information material to the new matter while employed by the corporation.[17]

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[16]Washington RPC 1.12 specifically includes mediators. It allows screening to avoid imputing a mediator's individual conflict to the mediator's law firm.

[17]ABA Formal Ethics Opinion 97-409 (1997) addresses similar issues in the context of former governmental counsel.

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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 very 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 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 later will not be able to exploit a perceived deficiency for narrow tactical purposes.