DISQUALIFICATION AND CONFLICTS OF INTEREST: The Year in Review

8th Annual Professional Responsibility Institute
University of Washington School of Law
Seattle
December 9, 2000

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INTRODUCTION

This paper surveys developments in the law of disqualification over the past year.[1] 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 related developments of note from around the country over the past year.

A recurring theme in many of the cases reported this year is screening to avoid lateral hire conflicts. Some of the cases discuss fundamental questions about whether screening is permitted in particular situations. But, a surprising–and perhaps disquieting–number deal with situations in which screening is allowed generally in the jurisdictions concerned. In those cases, the disputes focus instead on whether the screens involved were effective in providing the intended insulation from disqualification.

WASHINGTON[2]

This past year, the U.S. District Court for the Eastern District of Washington published a significant disqualification decision validating the use of screening to avoid lateral hire conflicts involving law firm staff. The Washington Court of Appeals also issued several disqualification decisions in criminal cases that have potential application in civil matters involving the lawyer-witness rule and former government lawyer conflicts.

- ❒ ***Daines v. Alcatel*,**
  194 F.R.D. 678 (E.D. Wash. 2000)
  - ✓ Screening to avoid lateral hire conflicts
  - ✓ Availability of screening for non-lawyer staff

The defendants in three related cases were being represented by the Spokane office of a large regional law firm. After the lawsuits had been underway for about a

[1]The cases discussed were reported through November 20. They are intended to be illustrative rather than encyclopedic.

[2]Several of the disqualification decisions issued by the Washington Court of Appeals this year were unpublished–but are readily available in electronic form. Under RCW 2.06.040 and RAP 12.3(d), an unpublished decision is a matter of public record but does not have "precedential value."

year, the law firm hired a paralegal who had formerly worked in a similar capacity for the lead plaintiffs' counsel. The paralegal was given a conflict screening questionnaire before she reported for work at the defense firm. But, she did not complete the form until her first day on the job–April 18. The paralegal listed the litigation at issue and a conflict check was run by the law firm's principal office in Seattle the next day. Following the check, which revealed the conflict, the Seattle office sent a notice out that same afternoon (apparently by e-mail) to all lawyers and staff in all of its offices that the paralegal was to be screened from the *Daines* case. The Spokane office, which was aware of the conflict at the time it hired her, had informally screened the paralegal upon her arrival before the formal screen was implemented under Washington RPC 1.10.[3] There was no evidence that the paralegal discussed the substance of the *Daines* case at any point while at the defense firm nor did she ever work on that case there.

On April 20, the defense firm's Spokane office sent a letter to the paralegal's old firm informing it that the defense firm had hired her. In the letter, the defense firm informed the plaintiffs' firm that it was screening her from any involvement in the *Daines* case and enclosed a copy of an affidavit the paralegal had signed to that effect along with the law firm's internal screening notice. The plaintiffs' firm responded by questioning the effectiveness of the screen and moved to disqualify the defense firm shortly after that. (Ironically, by that time, the defense firm had terminated the paralegal. There was no evidence that she ever worked on the *Daines* case during her relatively short employment at the defense firm.)

In moving to disqualify, the plaintiffs argued that the possibility that the paralegal

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[3]RPC 1.10(b) provides:

> "When a lawyer becomes associated with a firm, the firm may not knowingly represent a person in the same or a substantially related matter in which that lawyer ('the personally disqualified lawyer') * * * had previously represented a client whose interests are materially adverse * * * and about whom the lawyer had acquired confidences or secrets * * * that are material to the matter; provided that the prohibition on the firm shall not apply if:
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> "(1) The personally disqualified lawyer is screened by effective means from participation in the matter and is apportioned no part of the fee therefrom;
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> "(2) The former client of the personally disqualified lawyer receives notice of the conflict and the screening mechanism used to prohibit dissemination of confidential or secret information;
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> "(3) The firm is able to demonstrate by convincing evidence that no confidences or secrets that are material were transmitted by the personally disqualified lawyer before implementation of the screening mechanism and the notice to the former client."

had disclosed their confidential strategy to the defense firm warranted the latter's removal from the case. The defense firm, in turn, contended that Washington RPC 1.10's screening rule applied to non-lawyer staff and that the paralegal had been effectively screened under that rule. Judge Quackenbush agreed with the defense firm and denied the motion.

Judge Quackenbush first considered the question of whether Washington RPC 1.10's screening rule, which is framed in terms of attorneys, applies to non-lawyer staff as well. He found that it did by virtue of RPC 5.3(c)'s[4] injunction that lawyers are responsible for the staff they supervise:

> "This section charges attorneys with the responsibility of ensuring that non-attorney staff members follow the same ethics rules that apply to attorneys. If those non-attorneys violate those ethical obligations, the supervising attorneys can be held responsible. It follows that if a non-attorney possesses confidences acquired in previous legal employment but is not effectively screened by a new employer under RPC 1.10, the new employer may be disqualified." 194 F.R.D. at 682.

Having found that RPC 1.10 applied, Judge Quackenbush then turned to the effectiveness of the screen:

> "RPC 1.10 provides, when boiled down to its essence, that an attorney who acquired information about a particular case at one firm can work for an opposing firm without disqualifying the new firm if and only if the new firm effectively screens the attorney from any discussion of that case." *Id.*

Although the defense firm had not implemented its formal screen until after the paralegal had arrived, Judge Quackenbush found that, at least on the facts before him, the screen at issue was effective. In reaching that conclusion, he looked to both the requirement under RPC 1.10(b)(1) that the screen be "effective" and the requirement under RPC 1.10(b)(3) that there be "convincing evidence" that no material confidences or secrets were transmitted:

- "[The lead plaintiff] has not produced any evidence of disclosure but maintains that [the defense firm's] evidence is * * * not

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[4]Washington RPC 5.3(c) provides:

> "A lawyer shall be responsible for conduct of [non-lawyer staff] that would be a violation of the Rules of Professional Conduct if engaged in by the lawyer if * * * [t]he lawyer has direct supervisory authority over the [non-lawyer staff], and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take remedial action."

'convincing.' [The plaintiff] claims that even if [the paralegal] did not have access to the hard copies of the [defense firm's] files, she had access to computer copies of [the defense firm's] documents. Apparently the contention is that [the paralegal] could prejudice [the plaintiff] by simply sneaking a peek at those documents, without more. Yet RPC 1.10(b)(3) is clear that the inquiry is whether [the paralegal] transmitted confidential information to [the defense firm], not whether she learned something that might have helped [the plaintiffs' firm]."
Id. at 683.

- "This leaves the question of whether the screen of [the paralegal] was 'effective.' Although this is apparently a different inquiry than whether there was any information 'transmitted,' the two issues are clearly interrelated. The most effective screen is one that results in no transmission of confidences. The court has already indicated that it is convinced beyond doubt that [the paralegal] did not divulge any confidences.

  "Even if this is not enough to render a screen 'effective,' there are other indications that this screen was such. [The defense firm] implemented the screen within hours of receiving [the paralegal's] conflicts check information. The screen was sent to all personnel in all of the firm's numerous branch offices. In addition, [the defense firm's] records indicate that except for two hours, [the paralegal] worked exclusively on [another case]. The other two hours were spent on cases unrelated to Daines, Alcatel, or the other parties to this litigation. * * * This screen was effective.

  * * * * *

  "Washington law does not require the implementation of a screen before employment, as long as there is convincing evidence that there was no disclosure before the screening and the screen, once implemented, is effective. As already noted, the screen in this case satisfies the Washington requirements." *Id.* at 683-84.

❒ ***State v. Daniels,***
2000 WL 1156871 (Wash. App. Aug. 11, 2000) (unpublished)
✓ The lawyer-witness rule as a basis to disqualify

In this criminal case, Daniels was appealing his conviction for felony harassment. He argued, in pertinent part, that he was denied a fair trial because the

prosecutor should have been disqualified under RPC 3.7[5] because the prosecutor was a potential witness in another case against him. In rejecting this argument (and affirming the conviction), the Court of Appeals noted that RPC 3.7 only applies to the trial of the case at hand and not the trial of another case. Daniels argued in the alternative that the prosecutor should have been disqualified under the "appearance of fairness" doctrine. But the Court of Appeals rejected this argument as well: "[O]ur Supreme Court held that the appearance of fairness doctrine applies only to judicial and quasi-judicial decisionmakers, not prosecutors in their role as advocates. State v. Finch, 137 Wn.2d 792, 808-09, 975 P.2d 967, cert. denied., 120 S.Ct. 285 (1999)." 2000 WL 1156871 at *2.

❒ ***State v. Fleet,***
2000 WL 380551 (Wash. App. Apr. 14, 2000) (unpublished)
✓ Former government lawyer conflicts

Fleet had been convicted of attempted murder and several other felonies. On appeal, he contended, in relevant part, that his conviction should be overturned because his defense counsel had prosecuted Fleet in an earlier welfare fraud case and, therefore, should have been disqualified under RPC 1.11(a).[6] The Court of

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[5]Washington RPC 3.7 provides:

> "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 the likelihood of the lawyer being a necessary witness was not reasonably foreseeable before trial."

A "law firm" is defined in the "Terminology" section of the RPCs to include "a lawyer or lawyers in a private firm, lawyers employed in the legal department of a corporation or other organization and lawyers employed in a legal services organization."

[6]Washington RPC 1.11(a) reads:

> "Except as law may otherwise expressly permit, a lawyer shall not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency consents after consultation. No lawyer in a firm with which that lawyer is associated may

Appeals rejected this argument (and affirmed the conviction), noting: "RPC 1.11(a) provides that an attorney 'shall not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee.' This test is not met merely because defense counsel once prosecuted the defendant in an unrelated matter." 2000 WL 380551 at *5 (footnotes omitted).

❒ ***State v. Laurant,***
2000 WL 963432 (Wash. App. July 12, 2000) (unpublished)
✓ Standards for replacement of court-appointed defense counsel

Laurant was charged with burglary. Laurant and his court-appointed defense counsel had a difficult relationship and the lawyer moved to withdraw. The trial court denied the motion, but allowed another lawyer in the same office to replace him. That lawyer had a better relationship with Laurant and represented him at trial. Shortly before the completion of the trial, the second lawyer learned that Laurant had filed a bar grievance against the first lawyer (which was dismissed during the trial). The second lawyer moved for a mistrial and, in support of that motion, Laurant told the trial judge that he could not trust anyone at that law firm. But, Laurant pointed to no other issues in his representation by the second lawyer. The trial court denied the motion and Laurant was convicted.

On appeal, Laurant argued that his conviction should be reversed because he was denied effective assistance of counsel. The Court of Appeals rejected that argument and affirmed the conviction. In doing so, it summarized the standards for replacement of court-appointed defense counsel:

> "A defendant does not have an absolute, Sixth Amendment right to choose any particular advocate. State v. Stenson, 132 Wn.2d 668, 733, 940 P.2d 1239 (1997), cert. denied, 523 U.S. 1008 (1998). Whether an indigent defendant's dissatisfaction with court-appointed counsel is meritorious and justifies the appointment of new counsel is a matter within the discretion of the trial court. Stenson, 132 Wn.2d at 733; State v. Sinclair, 46 Wn.App. 433, 436, 730 P.2d 742 (1986), review denied, 108 Wn.2d 1006 (1987). Factors to consider in deciding whether to grant or deny a motion to substitute counsel are (1) the reasons given for the dissatisfaction; (2) the court's own evaluation of counsel; and (3) the

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knowingly undertake or continue representation in such a manner unless:

"(1) The disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom; and

"(2) Written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this rule."

effect of any substitution upon the scheduled proceedings. Stenson, 132 Wn.2d at 734. A criminal defendant who is dissatisfied with appointed counsel must show good cause to warrant substitution of counsel, such as a conflict of interest, an irreconcilable conflict, or a complete breakdown in communication between the attorney and the defendant. Stenson, 132 Wn.2d at 734. A general loss of confidence or trust alone is not sufficient to substitute new counsel. Stenson, 132 Wn.2d at 734. Nor is the filing of a formal complaint against an attorney with the state bar association sufficient to disqualify court-appointed counsel. Sinclair, 46 Wn.App. at 436." 2000 WL 963432 at *5.

SELECTED REGIONAL DISQUALIFICATION CASES

ALASKA

The Alaska Supreme Court held earlier this year that having different members of the Attorney General's office act as advisor and prosecutor in the same administrative proceeding did not constitute a conflict.

- ***Skvorc v. State Personnel Board,***
  996 P.2d 1192 (Alaska 2000)

Skvorc was an employee of the Alaska Department of Fish and Game who had been charged administratively with violating numerous provisions of the Alaska Executive Branch Ethics Act. The evidentiary phase of the case was held before the Alaska Personnel Board ("the APB"). The APB eventually found that Skvorc had violated the Ethics Act and recommended his termination. On appeal to the Alaska Supreme Court, Skvorc asserted that APB's decision should be overturned because a lawyer from the Alaska Attorney General's Office had acted as an advisor to the APB while another lawyer from the Attorney General's Office prosecuted the case at the APB. Although the Alaska Supreme Court remanded the case for possible retrial of the charges, it did not find a disqualifying conflict in this context.

The Supreme Court first noted that the Alaska Rules of Professional Conduct do not directly address this issue. 996 P.2d at 1206. But, it then concluded based on the comments to Alaska RPC 1.11(c) ("'Paragraph (c) does not disqualify other lawyers in the agency with which the lawyer in question has become associated.'") and decisions elsewhere (including *Washington State Med. Disciplinary Bd. v. Johnston*, 99 Wn.2d 466, 663 P.2d 457 (1983)) that having different members of the Attorney General's Office act in the dual roles of advisor and prosecutor did not create a conflict. 996 P.2d at 1206.

CALIFORNIA

California again proved to be fertile ground for disqualification issues of all stripes. This year's crop included cases dealing with screening and disqualification of an entire district attorney's office.

❒ ***In re County of Los Angeles,***
223 F.3d 990 (9th Cir. 2000)
✓ Screening to avoid lateral hire conflicts

Perhaps the most intriguing disqualification case this year is a Ninth Circuit[7] decision that interprets California law on screening. *Los Angeles* is a police brutality case filed in U.S. District Court there. The plaintiff was represented by a law firm specializing in such cases. One of the partners at the firm is a retired United States Magistrate. While he was still on the bench, the former magistrate had mediated another police brutality case five years before involving two of the same defendants–Los Angeles County and one of its deputy sheriffs. When the magistrate joined the law firm in November 1999, the law firm screened him from any involvement in the present case. Nonetheless, the defense moved to disqualify the plaintiff's law firm under the theory that when the former magistrate conducted the mediation in the unrelated case five years before he had become privy to confidential information regarding the County and the particular deputy sheriff who was again a defendant. The trial court denied the motion. The defendants then sought a writ of mandamus from the Ninth Circuit. The Ninth Circuit denied the petition.

The Ninth Circuit began by noting that ABA Model Rule 1.12, which provides lateral hire screening to avoid conflicts being imputed when a former judge or arbitrator joins a law firm, focuses on adjudicators rather than mediators.[8] *See* 223 F.3d at 993-94. Next, the Ninth Circuit noted that on the current record, it could not determine whether the present matter was related to the earlier matter, and, therefore, simply assumed they were. *Id.* at 994-95. The Ninth Circuit then noted that California's Supreme Court had long been silent on the issue of screening and its intermediate appellate courts had generally rejected screening as a cure to lateral hire conflicts. *Id.* at 995. But, the Ninth Circuit concluded that the California Supreme Court had "recently cast doubt on this approach" with its decision in *People ex rel. Dep't of Corps. v. Speedee Oil Change Sys., Inc.*, 20 Cal. 4th 1135, 86 Cal. Rptr. 2d 816, 890 P.2d 371 (1999). 223 F.3d at 995. *Speedee Oil* involved the disqualification of a law firm which

[7]Other Ninth Circuit decisions that do not deal so closely with state law issues are reported later in this paper.

[8]Washington RPC 1.12, by contrast, covers judges, arbitrators *and mediators*.

had hired a lawyer as "of counsel." No screening had even been attempted in *Speedee Oil*, and, indeed, the case focused on a short period of time where the "of counsel" and his new firm were on opposite sides of the same case. Nonetheless, the Ninth Circuit seized on the California Supreme Court's discussion of screening in *Speedee Oil* as signaling a new direction on this issue in California:

> "The supreme court * * * held that it 'need not consider whether an attorney can rebut a presumption of shared confidences, and avoid disqualification, by establishing that the firm imposed effective screening procedures' * * * because the firm had failed to set up an effective screen. Observing that federal decisions have taken 'a more lenient approach to conflicts disqualification than prevails in California,' * * * the court left open the possibility that screening can rebut the presumption of shared confidences within the firm. We read Speedee Oil as sending a signal that the California Supreme Court may well adopt a more flexible approach to vicarious disqualification." 223 F.3d at 995 (citations omitted).

The Ninth Circuit concluded that "[a]n ethical wall, when implemented in a timely and effective way, can rebut the presumption that a lawyer has contaminated the entire firm." *Id.* at 996. It held that the screen involved here was both timely and effective and, therefore, denied the mandamus petition. *Id.* at 996-97.

❒ ***San Gabriel Basin Water Quality Auth. v. Aerojet-Gen. Corp.*, 105 F. Supp. 2d 1095 (C.D. Cal. 2000)**
✓ More on screening

In this decision issued before the Ninth Circuit's ruling in *Los Angeles*, the U.S. District Court in Los Angeles also upheld the use of screening to avoid lateral hire conflicts. The *San Gabriel* decision principally involved a lawyer who had worked on an environmental insurance coverage case for Aerojet-General Corporation ("Aerojet") involving the rocket fuel maker's Sacramento facility. During the course of the coverage case, the lawyer had received confidential information from the carriers–including some information falling within the scope of the attorney-client privilege as provided by a special California statute governing coverage cases–under a protective order. The lawyer subsequently left the law firm and joined a new firm that was then handling the present environmental remediation case against Aerojet involving its Azusa facility in Southern California. The lawyer joined his new firm's San Francisco office. The Azusa litigation was being handled by the firm's Los Angeles office. When the lawyer joined his new firm, he was screened from any involvement in the Azusa litigation. Nonetheless, Aerojet moved for his disqualification–arguing that he had acquired confidential information in the coverage case under the protective order that was material to the ongoing Azusa litigation. The trial court denied the

motion.

In doing so, the court first noted that the lawyer acknowledged that the protective order prevented him from disclosing any of Aerojet's confidential information, his new firm had effectively screened him from the Azusa litigation adverse to Aerojet and Aerojet had produced no evidence that the screen had been violated. *See* 105 F. Supp. 2d at 1103. The court found that any imputation of a lateral hire's conflict to a new firm only applied when the lawyer had actually represented the party involved and not when the lawyer had simply acquired the information involved under a protective order while representing an adversary. *Id.* Accordingly, it held that screening was an effective vehicle to insure that any such information remained with the affected lawyer and would neither be transferred nor imputed to the new firm as a whole. *Id.*

- ❒ ***People v. Choi,***
  80 Cal. App. 4th 476, 94 Cal. Rptr. 2d 922 (2000)
  - ✓ Disqualification of entire district attorney's office
  - ✓ Still more on screening

This was a murder prosecution being handled by the San Francisco District Attorney's Office. The defendants were charged with killing a man named Tran. The Tran murder had occurred within minutes of a nearby murder of a man named Natali. Natali was a close personal friend of the San Francisco District Attorney ("the DA"). The DA believed that the two murders were related. Although the DA was screened from the *Choi* case and it was being handled solely by his deputies, the DA repeatedly made statements in the local press of his belief that the *Choi* defendants had also murdered his friend Natali. The defendants moved to disqualify the entire San Francisco District Attorney's Office under a California statute that directs the recusal of a prosecutor (or an entire office) when "the circumstances of a case evidence that the DA's office may not exercise its discretionary function in an evenhanded manner." 80 Cal. App. 4th at 480 (citation omitted). The trial court initially denied the motion; but, when the DA persisted in his statements to the press, the court reconsidered and granted the motion. The Court of Appeal for the First District affirmed.

The Court of Appeal noted that the DA "was in effect serving two masters–attempting to seek justice for the death of Natali while prosecuting defendants on unrelated crimes." *Id.* at 483. In an analysis of the statute reminiscent of RPC 1.7(b) ("A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities * * * to a third person, or by the lawyer's own interests * * *."), the Court of Appeal found that "'[a] public prosecutor must not be in a position of "attempting at once to serve two masters, the People at large and a private person or entity with its own particular interests in the prosecution." *Id.* The Court of Appeal held that the screen that had been attempted was ineffective to prevent the DA from sharing his opinions on the case with his deputies, and, given his role as

overall supervisor of the office, his conflict would be imputed to his office as a whole.

IDAHO

The Idaho Supreme Court ruled this year in a declaratory judgment context that the Idaho Attorney General's Office was not disqualified from representing the private insureds of the Idaho State Insurance Fund.

- ❒ ***Selkirk Seed Co. v. Forney,***
  134 Idaho 98, 996 P.2d 798 (2000)

This case addressed the question of whether the Idaho Attorney General's Office could represent a private insured of the State Insurance Fund ("SIF") in a workers compensation proceeding over the insured's objection. By way of background, Idaho had adopted a "Legal Services Unification Act" which generally required that all representation of all state agencies be handled by the Attorney General's Office. The Attorney General subsequently determined that SIF fell within the definition of a state agency and began assigning assistant attorneys general to defend SIF's private insureds in workers compensation proceedings. Selkirk Seed Company objected to this arrangement and filed a declaratory judgment proceeding to, in essence, disqualify the Attorney General's office from representing SIF's private insureds. The Idaho Supreme Court found that the Attorney General did have authority to represent private parties in conjunction with its representation of state agencies and that SIF was a state agency. Therefore, it concluded that the Attorney General's office could represent SIF's private insureds in workers compensation proceedings.

OREGON

Although slightly beyond "this year," the Oregon Court of Appeals ruled on December 29 of last year that attorney fees are generally not recoverable on disqualification motions. In the closely related area of expert disqualification, the Oregon Supreme Court held that the fact that a nontestifying expert had worked earlier for one side in a case did not, in and of itself, prevent the expert from later testifying for the adverse party.

- ❒ Columbia Forest Products, Inc. v. Aon Risk Services, Inc.,
  164 Or. App. 586, 993 P.2d 820 (1999)
  - ✓ No attorney fees on disqualification motions

The Oregon Court of Appeals in *Columbia Forest Products* ruled that, absent specific statutory or contractual authority, attorney fees are not available to the prevailing party on a disqualification motion. The defendant in this insurance coverage case moved to disqualify the plaintiff's law firm on the ground that it had earlier handled

a related matter for the defendant, and, therefore, was violating Oregon's former client conflict rule–DR 5-105(C)-(D).[9] At the hearing on the motion, the trial judge took the matter under advisement. But, after the judge told the parties that he was inclined to grant the motion, the plaintiff's law firm withdrew. The defendant then moved for an award of its attorney fees under the "'inherent equitable authority to award fees.'" 164 Or. App. at 588 (citation omitted). The defendant argued that it was entitled to a fee award because it was conferring a benefit to the general public "'through its efforts to enforce the Code of Professional Responsibility.'" *Id.* The trial court awarded fees of roughly $25,000 against the law firm.

The Court of Appeals reversed. It found that the defendant was not primarily vindicating important public rights: "To the contrary, defendant sought to disqualify a law firm representing the opposing party in a private lawsuit based on its own individual claim of conflict of interest. No constitutional rights were asserted, much less any that apply to 'all citizens without any peculiar gain' to defendant." *Id.* at 590 (citation omitted). The Court of Appeals held that on a disqualification motion a prevailing party is entitled to seek attorney fees only if it is claiming them under a specific statute or contract.

❒ ***State v. Riddle*,**
330 Or. 471, 8 P.3d 980 (2000)
✓ Expert disqualification

This was not an attorney disqualification case; rather, it involved an expert witness. The defendant was charged with manslaughter and driving while intoxicated stemming from an automobile accident in which the car he was driving crossed the center line and hit an oncoming car–killing both of the occupants. At trial, the prosecution relied on an accident reconstruction expert who testified that the defendant was driving too fast and had lost control of his car. The defense, in turn, relied on an accident reconstruction expert who testified that the steering mechanism on the defendant's car had locked. At that point, the prosecution called a third expert in rebuttal–whose theory was consistent with the prosecution's case but who had been retained originally by the defense. The defense objected on the ground that it had disclosed confidential information to the third expert. The trial court allowed the expert to testify for the prosecution–as long as he did not mention the prior work for the defense or any information he had acquired from the defense. Following his conviction, the defendant appealed–based largely on the trial court's decision to let the third expert testify. The Court of Appeals, sitting *en banc*, reversed–finding that "the attorney-client privilege [extends] to the opinions of non-testifying experts who rendered those opinions in anticipation of litigation." 155 Or. App. 526, 536, 964 P.2d 1056, *mod. on recons.*, 156 Or. App. 606, 969 P.2d 1032 (1998). The Supreme Court, in turn,

[9]Oregon DR 5-105(C)-(D) is similar in substance to Washington RPC 1.9.

reversed the Court of Appeals.

The Supreme Court held that the fact that a nontestifying expert had worked earlier for one side in a case did not, in and of itself, prevent the expert from later testifying for the adverse party:

> "We conclude that there is no absolute privilege, arising either out of OEC 503 [the attorney-client privilege], the work product doctrine, or this court's cases, that prevents an expert whom a litigant has employed to investigate a factual problem from testifying for the other side as to the expert's thoughts and conclusions that are segregated from confidential information." 330 Or. at 486.

At the same time, the Supreme Court also found that if the confidential information the expert had acquired could not be segregated from the expert's opinion, then the expert would be disqualified:

> "We emphasize the limited nature of our ruling. We hold only that, under OEC 503(2)(a), the lawyer/expert relationship does not automatically disqualify an expert who was retained by one party from testifying for some other party. That expert is disqualified from testifying, however, if his or her opinion discloses, either directly or indirectly, or is based on, any confidential communication between the lawyer, the client, and/or the expert. If an expert's opinion is so bound up with any such communication that the expert cannot, in the view of the trial court, segregate his or her opinion from some part of the confidential communication, then the expert should not be permitted to testify." *Id.* at 487.

NINTH CIRCUIT

In addition to the *Los Angeles* decision discussed earlier under the section on California, the Ninth Circuit issued a decision this year of general application on the potential for disqualifying conflicts arising from joint defense agreements. Also, a federal district court decision this year summarized the law within the Ninth Circuit on the question of federal procedural standing by a non-client to raise a disqualification motion against an opposing party's lawyers.

❒ ***United States v. Henke*,**
222 F.3d 633 (9th Cir. 2000)
✓ Disqualification and the joint defense privilege

This case involved the federal criminal prosecution of three California

businessmen for securities fraud and several related offenses. The three were each represented by separate counsel. But, the lawyers for all three participated in several joint defense meetings in which information confidential to each was discussed. Shortly before trial, one of the three defendants reached a plea agreement with the Government under which he became a witness against the other two. The lawyers for the other two moved to withdraw because their continuing duty to preserve the confidences of the third defendant under the joint defense arrangement was in conflict with their duty to cross-examine him based on the matters they had learned in the context of their joint pretrial meetings. The trial court, however, denied the motion. The remaining two defendants were convicted based, in part, on the third defendant's testimony. On appeal, the defendants argued that their convictions should be set aside due to the conflict. The Ninth Circuit agreed. Without citing the ethics rules of any specific jurisdiction (in Washington, *see* RPC 1.7(b)), the Ninth Circuit found that a lawyer's obligations arising from a joint defense agreement can create a disqualifying conflict:

> "'Just as an attorney would not be allowed to proceed against his former client in a cause of action substantially related to the matters in which he previously represented that client, an attorney should also not be allowed to proceed against a co-defendant of a former client wherein the subject matter of the present controversy is substantially related to the matters in which the attorney was previously involved, and wherein confidential exchanges of information took place between the various co-defendants in preparation of a joint defense.'" 222 F.3d at 637 (citation omitted).

- ❒ ***Decaview Distribution Co., Inc. v. Decaview Asia Corp.,* 2000 WL 1175583 (N.D. Cal. Aug. 14, 2000) (unpublished)**
  - ✓ Federal procedural standing for a non-client to assert a disqualification motion against the opposing party's counsel

This case is obviously not from the Ninth Circuit. But, this decision from the U.S. District Court for the Northern District of California deals with the federal procedural issue of a non-client's standing to assert a motion to disqualify the opposing party's counsel in the Ninth Circuit. Decaview Asia Corporation ("DAC") is a Taiwan-based distributor of computer screens. It had established an American affiliate, Decaview Corporation ("DVC"), to purchase screens from DAC and then to resell them in the United States. Shortly after DVC was established, however, it appeared that two of DVC's officers had been diverting DVC's receivables to their own accounts rather than using them to reimburse DAC for the screens it had supplied for those resales. The two DVC officers had also formed yet another corporate entity–this time in their own name–called Decaview Distribution Co. ("DDC"). DAC sued DVC and the two officers in California state court seeking a TRO and the appointment of a receiver. A San Francisco law firm, Berg & Parker, represented both DVC and the two officers in the

California state court litigation. Later, Berg & Parker filed a counterclaim against DAC and a cross-claim against DVC (without withdrawing in the first representation) on behalf of one of the officers. Still later, DDC filed its own lawsuit against DAC that was eventually transferred to the U.S. District Court for the Northern District of California. All of the litigation arose out of the same set of facts. Berg & Parker represented DDC in this second lawsuit as well. DAC moved to disqualify Berg & Parker in the federal action on the theory that its representation of DDC was adverse to the interests of DVC, which it had formerly represented in essentially the same matter.

Before reaching the conflict issue, the court first analyzed the issue of whether DAC–which had never been represented by Berg & Parker–had standing to assert a motion for disqualification. The court noted that on this preliminary issue of standing it would apply federal procedural law rather than California state substantive ethics law. 2000 WL 1175583 at *4. The court then found that the Ninth Circuit had not addressed the issue of whether a non-client had standing to seek the disqualification of the opposing party's counsel. *Id.* at *4-*5; *see also Kasza v. Browner*, 133 F.3d 1159 (9th Cir. 1998). After surveying precedent from both inside and outside the Ninth Circuit, the court found that a non-client did have standing to assert such a motion in very narrow circumstances. *Id.* at *5-*10. Relying principally on *Colyer v. Smith*, 50 F. Supp. 2d 966 (C.D. Cal. 1999), the court concluded:

> "Thus, the Colyer court adopted the majority rule that allows only former and current clients standing to raise an objection to opposing counsel. Colyer also incorporated the exception to that strict rule, however, * * * which allows a third party standing if the litigation will be so infected by the presence of the opposing counsel as to impact the moving party's interest in a just and lawful determination of its claims." *Id.* at *10 (citation omitted).

Applying this standard, the court found that DAC had standing and then, relying on California substantive ethics law, disqualified Berg & Parker for its former client conflict with DVC.

OTHER DISQUALIFICATION CASES AND RELATED ETHICS OPINIONS OF NOTE NATIONALLY[10]

ABA Model Rule 1.7: Conflict of Interest: General Rule

- ***Lewis v. State*,**
  757 A.2d 709 (Del. 2000)

  This case involved the joint representation at trial of two criminal defendants. On appeal, the convicted defendant argued that he was denied effective assistance of counsel because, in this instance, the lawyer had a conflict of interest and should have been disqualified. The Delaware Supreme Court agreed. In doing so, it reviewed Delaware RPC 1.7 (which is similar in this regard to ABA Model Rule 1.7) and other authorities at length on the problems inherent in the joint representation of criminal defendants and the standards for an effective waiver in this situation.

- ***Robertson v. Wittenmyer*,**
  736 N.E.2d 804 (Ind. Ct. App. 2000)

  This was a negligence case where a passenger was suing the driver of a car involved in a multiple vehicle accident. The plaintiff passenger's lawyer had both formerly represented the defendant driver in an action against one of the other drivers in this "chain reaction" accident and currently represented the defendant on another unrelated matter. The trial court disqualified the plaintiff's lawyer and the Indiana Court of Appeals affirmed. In reaching its decision under Indiana RPC 1.7 (which is based on the ABA Model Rule), the appellate court relied on both the lack of an effective waiver by both parties and the fact that the two cases were essentially the same matter. More interestingly, the Court of Appeals took a very narrow view of a lawyer's ability to ask for a waiver from at least an unsophisticated individual client even if the matters involved are unrelated.

[10]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.

ABA Model Rule 1.9: Former Client Conflicts

- ***Smith & Nephew, Inc. v. Ethicon, Inc.*,**
  98 F. Supp. 2d 106 (D. Mass. 2000)

  The disqualification motion in this case arose out of a patent dispute. The plaintiff claimed ownership of a series of medical device patents developed by two individual defendant inventors who had formerly worked for the plaintiff's corporate predecessors. The defendant inventors contended that their employment contracts with the predecessors allowed them to keep the patent rights involved. Their former lawyer who had negotiated the contracts had since gone to work for the plaintiff's law firm. Although their former lawyer was not involved in the present dispute, the defendant inventors moved to disqualify the plaintiff's law firm under Massachusetts RPC 1.9 (which is patterned on ABA Model Rule 1.9). The plaintiff's firm attempted to argue that the firm had effectively screened the lawyer under Massachusetts' version of RPC 1.10–which allows limited screening to avoid imputed conflicts if the screened lawyer has no confidential information material to the new representation nor had substantial involvement in the earlier matter. The district court found that the lawyer had both confidential information and had been substantially involved in the earlier matter. As a result, the court ordered the law firm's disqualification.

ABA Model Rule 1.10: Imputed Conflicts & Disqualification

- ***Van Jackson v. Check 'N Go of Illinois, Inc.*,**
  114 F. Supp. 2d 731 (N.D. Ill. 2000)

  The local rules of the federal district involved include a screening provision to prevent the imputation of lateral hire conflicts. In this instance, an associate who had worked on this case for the plaintiff joined the four-lawyer law firm representing the defendants. Although the associate had been screened at the new firm, the court found that the screen had been comparatively porous. More interesting, though, is the discussion of the practical problems of implementing an effective screen in a small firm. The judge ultimately concluded that the associate had not been effectively screened and disqualified the defense firm.

ABA Model Rule 1.11: Successive Government & Private Employment

- ***Blumhagen v. State*,**
  11 P.3d 889 (Wyo. 2000)

  The defendant in this criminal case argued that the entire district attorney's office should have been disqualified after his initial defense counsel joined the district attorney's office. The trial court denied the motion, however, because the lawyer had been screened from any involvement in the prosecution. The Wyoming Supreme Court agreed. In doing so, it relied on Wyoming RPC 1.11 (which is based on the ABA Model Rule) in finding that there was no imputation of a conflict when a lawyer moved from the private sector to the government–especially where, as here, the lawyer was screened.

ABA Model Rule 1.12: Former Judge or Arbitrator

- ***Smith v. Campbell*,**
  26 S.W.3d 139 (Ark. Ct. App. 2000)

  The defendant tenant in this unlawful detainer action moved to disqualify the plaintiff landlord's lawyer on the ground that he was a former judge. The trial court denied the motion and the Arkansas Court of Appeals affirmed. The Court of Appeals noted that the prohibition under Arkansas RPC 1.12 (which is analogous to ABA Model Rule 1.12) only extends to matters in which the former judge "participated personally and substantially" while on the bench. Both the trial court and the appellate court found that the defendant tenant failed to make such a showing.

ABA Model Rule 4.2: Communications with Represented Parties

- ***Weeks v. Independent School District No. I-89*,**
  230 F.3d 1201 (10th Cir. 2000)

  ***Andrews v. Goodyear Tire & Rubber Co.*,**
  191 F.R.D. 59 (D. N.J. 2000)

  These two cases both involve motions to disqualify predicated on allegedly unauthorized contacts with represented parties under variants of ABA Model Rule 4.2. Both involved unauthorized contacts with mid-level management personnel. The result was

disqualification in *Weeks* but not in *Andrews.* The differing results turned on contrasting rules on who constitutes a "represented party" in a corporate setting. In *Weeks*, which involved Oklahoma's version of RPC 4.2, a represented party for purposes of the rule included all persons with managerial responsibility. In *Andrews*, by contrast, only those employees falling within a narrow "litigation control group" under New Jersey's version of RPC 4.2 were considered to be represented.

Ethics Opinions and Related Developments

- **Proposed ABA Model Rule 1.10(c): Screening for Lateral Hires in Private Practice**

  The ABA's Ethics 2000 Commission has released its report and includes a recommendation that ABA Model Rule 1.10 be amended to include a lateral hire screening provision that would apply to lawyers in private practice. The Ethics 2000 Commission's report and the full text of the proposed revision to Rule 1.10 is available at the ABA Center for Professional Responsibility's Web site at www.abanet.org/cpr.

- **ABA Formal Ethics Opinion 00-418 (2000): "Acquiring Ownership in a Client in Connection With Performing Legal Services"**

  This opinion addresses the emerging trend of taking stock in clients either in lieu of or in addition to fees. It discusses the conflicts that can arise in this kind of arrangement at both the outset of a representation and later. Although the opinion does not deal with disqualification directly, the full contours of the potential conflicts posed by these relationships remain to be played out in the context of disqualification.

- **Oregon State Bar Formal Legal Ethics Opinion 2000-158 (2000) "Multiple Client Conflicts of Interest"**

  Although set against the backdrop of automobile accident litigation, this opinion contains a general review of current client conflicts law in Oregon–including its "actual" (*i.e.,* non-waivable) conflict rule.

- **DC Ethics Opinion No. 296 (2000):**
  "Joint Representation: Confidentiality of Information"

  This opinion, which is apparently based on an actual experience, deals with the difficult issues counsel face if they undertake joint representation of a corporate employee and the corporate employer and interests of the two materially diverge later in the representation.