

**DISQUALIFICATION AND CONFLICTS OF INTEREST:
The Year in Review**

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INTRODUCTION

This paper surveys developments in the law of disqualification over roughly the past year.¹ As the title implies, the principal focus of the materials collected is on disqualification for conflicts of interest. But, cases of note resulting in disqualification on other grounds are included as well.

The initial section reviews cases from Washington. The focus then shifts to regional developments from Alaska, California, Idaho and Oregon. The concluding section addresses selected cases from around the country over the past year organized around the ABA Model Rules of Professional Conduct involved.

WASHINGTON²

This year's disqualification decisions in Washington featured a rather eclectic mix of issues, including: standards for disqualification of class counsel, the "who is the client?" question framed against the backdrop of disqualification and the disqualification of co-counsel by virtue of lead counsel's "taint."

- ***In re Firestorm 1991*,
106 Wn.App. 217, 22 P.3d 849 (2001)**
- ✓ **Disqualification standards for class counsel**

This decision is another chapter in the litigation that grew out of a large wildfire near Spokane in 1991.³ Grange Insurance (Grange) was one of approximately 400 in a consolidated class action against several utilities. The case was settled for \$11 million. The settlement was not sufficient to reimburse all of the class members' claims. As a result, the settlement approved by the trial court included a pro rata distribution formula applicable to all class members. The trial court also retained an "evaluator" to act as a special master in calculating and distributing each member's pro rata share. The evaluator initially miscalculated Grange's share, resulting in an overpayment of approximately \$26,000. The overpayment to Grange necessarily meant that six other claimants in Grange's subclass received slightly less. When Grange refused to return the overpayment, the evaluator sought a court order compelling Grange to do so. The trial court agreed and ordered the return. The Court of Appeals affirmed.

¹ The cases discussed were reported through November 1. 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² Several of the disqualification decisions issued by the Washington Court of Appeals this year were unpublished—but are readily available in electronic form.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."

³ For an earlier chapter that also touched on disqualification issues, see *In re Firestorm 1991*, 129 Wn.2d 130, 916 P.2d 411 (1996).

In course of litigating the overpayment, Grange also moved to disqualify the plaintiffs' class counsel. The trial court denied the motion and again, the Court of Appeals affirmed.

Grange asserted two grounds for the disqualification.

First, apparently relying on RPC 1.7(b)⁴, which governs conflicts between a client and a lawyer's own interests, Grange contended that class counsel should be disqualified due to counsel's alleged "personal animosity" toward Grange. Although this might create a conflict in some circumstances, the Court of Appeals noted here that Grange had presented no evidence to support its contention. Therefore, the Court of Appeals dismissed this argument out of hand.

Second, apparently replying on RPC 1.7(a)⁵, which governs multiple client conflicts, Grange contended that there was a conflict between its interest in retaining the overpayment and the interests of its fellow sub-class members in seeing the overpayment returned. The Court of Appeals appeared to implicitly concede this point, but then discounted it in light of the practical difficulties presented in administering complex class actions:

"[B]ecause of the unique nature of a class action, the RPC's cannot be mechanically applied. *In re Agent Orange Prod. Liab. Litig.*, 800 F.2d 14, 18 (2d Cir. 1986). 'Class counsel's duty to the class as a whole frequently diverges from the opinion of either the named plaintiff or other objectors.'

⁴ RPC 1.7(b) provides:

"A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibility to another client or to a third person, or by the lawyer's own interests, unless:

"(a) The lawyer reasonably believes the representation will not be adversely affected; and

"(b) The 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). When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved."

⁵ 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:

"(a) The lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

"(b) Each client consents in writing after the consultation and a full disclosure of the material facts (following authorization from the other client to make such a disclosure)."

Walsh v. Great Atl. & Pac. Tea Co., 726 F.2d 956, 964 (3d Cir. 1983). We recognize frictions are likely to occur especially during the settlement phase. Accordingly, we adopt the federal balancing approach. *Lazy Oil Co. v. Witco Corp.*, 166 F.3d 581, 589, cert. denied, 528 U.S. 874, 120 S. Ct. 178, 145 L.Ed.2d 150 (1999). On balance, we do not view continued class counsel's representation outweighed by the prejudice suggested. *Id.* at 590. Our is not complex. It focuses mainly on actions by the trial court and its chosen Evaluator, not class counsel. *See id.*; *Agent Orange*, 800 F.2d at 19. The mere fact that Grange is a member of the class represented generally weighs heavily in favor of retaining class counsel. *Lazy Oil*, 166 F.3d at 590. The motion is denied." 106 Wn.App. at 222.

- ***State v. Siriani*,
103 Wn.App. 1054, 2000 WL 1867632 (Dec. 21, 2000) (unpublished)
✓ "Who is the client?" in the disqualification context**

This is a criminal case in which the defendant was convicted of murdering his newborn daughter through abuse while his wife had left the infant in his sole care. His wife played no role in the murder and, at least initially, the defendant denied that he had abused the child. When the police began investigating the death, the defendant and his wife sought joint counsel. The attorney they consulted told them that he could only represent one of them and directed the defendant on to the public defender's office. The defendant apparently did not reveal any confidential information during the course of the conversation with the attorney when he was exploring the possibility of joint counsel.

The defendant then traveled to San Diego on vacation. Shortly before he was scheduled to return, the defendant telephoned the attorney's office and told the lawyer's secretary that he had killed the baby and that his wife had no role in the murder. When he did not return as planned, his wife called the security in the hotel in which he was staying. The hotel's security officer discovered what appeared to be a suicide note in the defendant's room that repeated the confession. The defendant was then arrested and returned to Washington for trial.

The State brought charges against both the defendant and his wife and they were tried together. At the outset of the case, the defendant tried to disqualify his wife's attorney. He argued that he had retained the attorney as well and, therefore, the attorney had a disqualifying former client conflict under RPC 1.9⁶ in light of the sharply

⁶RPC 1.9 provides:

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

- "(a) Represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the former client unless the former client consents in writing after consultation and a full disclosure of the material facts; or

divergent positions that he and his wife would be pursuing at trial. The trial court denied the motion and the Court of Appeals affirmed (and upheld the defendant's conviction as well).

The Court of Appeals began by noting that for a former client conflict to even arise, *there must have been a former attorney-client relationship*. The Court of Appeals relied on the Supreme Court two-part test articulated in *Bohn v. Cody*, 119 Wn.2d 357, 832 P.2d 71 (1992) for resolving that predicate question: (1) did the client subjectively believe that an attorney-client relationship had been formed? and (2) was that belief objectively reasonable under the circumstances. Here, the Court of Appeals concluded that the defendant did regard the attorney as his attorney at the time of the events at issue, and, if he claimed to the contrary at trial, that contention was not objectively reasonable under the evidence presented. See 2000 WL 1867632, *supra* at 6-7. The Court of Appeals noted pointedly on these issues that the attorney had told the defendant at the outset that he could not represent both him and his wife and, following that admonition, the defendant had sought counsel at the public defender's office as the attorney had suggested. *Id.*

Because the defendant had apparently not revealed any confidential information to the attorney at the initial meeting, the defendant did not raise any contention that even if an attorney-client relationship had *not* been formed, the attorney still had a disqualifying conflict under RPC 1.7(b) under a theory that the attorney remained under a duty to keep that information confidential because it was imparted in the course of an interview over possible representation.

- ***Lugona Invest. Corp. v. Virtual Countries, Inc.*,
Case No. C00-1546P (W.D. Wash) (unpublished)
Order Granting Motion to Disqualify (Dec. 18, 2000),
Order Denying Motion for Reconsideration (Jan. 23., 2001)⁷
✓ Imputed disqualification of co-counsel**

As in the preceding case note, this decision, too, dealt with the issue of whether there was an attorney-client relationship between a law firm and the parties seeking disqualification—but with an unusual twist as it related to another firm that was counsel of record. As its name implies, the plaintiff in this case, Lugona, was an investment fund. The defendants (collectively, VCI) were a start-up company that was to develop web sites and the owners of several internet domain names for which sites were to be developed. Lugona provided the venture capital to VCI for the planned development of the web sites involved in July 2000. In connection with that agreement, Lugona's law firm agreed to provide tax planning for VCI at Lugona's expense and an affiliate of the law firm was "to provide advice and counsel [to VCI] on an as needed basis." Although the facts surrounding the nature of the relationship between the law firm and VCI were

"(b) Use confidences or secrets relating to the representation to the disadvantage of the former client, except as rule 1.6 would permit."

⁷ This decision is not currently available in electronic form.

disputed, the court found that VCI had obtained legal advice from the law firm—including on the issue of the transfer of the domain names involved. The parties deal began unraveling shortly after it was signed—in part over the failure to transfer the domain names as originally contemplated—and by September Lugona had filed suit to rescind the agreement signed two months before.

Lugona's complaint was signed by an attorney with a Seattle firm. But, two attorneys from Lugona's out-of-state law firm that had been involved in both representing Lugona on the deal *and* (so the court found) providing the subsequent advice to VCI were also listed as counsel for Lugona on its complaint. Although neither those two lawyers nor anyone else from the out-of-state firm ever entered an appearance, there was no dispute that it had assisted with the preparation of the complaint. Shortly after the complaint was filed, another Seattle firm was substituted in place of the first Seattle firm as Lugona's counsel of record. When it joined the case, the second Seattle firm consulted with Lugona's out-of-state firm about the background of the dispute, and, although this was again disputed, the court found that the out-of-state firm may have received some information arguably confidential to VCI in those initial briefings.

VCI moved to disqualify both the out-of-state law firm *and* the second Seattle firm. As to the out-of-state firm, VCI argued that it had received legal services from the firm on some facets of the matters at issue in the current case, and, therefore, the out-of-state firm had a disqualifying conflict under RPC 1.9. As to the second Seattle firm, VCI contended that it was "tainted" by its association by the out-of-state firm and should be disqualified as well. Judge Pechman agreed on both points.

As with the case in the preceding headnote, Judge Pechman used the Washington Supreme Court's decision in *Bohn v. Cody*, *supra*, 119 Wn.2d 357, as the principal yardstick on this point. Despite a dispute over the nature of the relationship between the out-of-state firm (and a related dispute over the relationship between the subsidiary), Judge Pechman concluded that there was an attorney-client relationship between the two. Relying on the court's own disqualification decisions in *Oxford Systems, Inc. v. CellPro, Inc.*, 45 F. Supp.2d 1055 (W.D. Wash. 1999), and *Amgen, Inc. v. Elanex Pharmaceuticals, Inc.*, 160 F.R.D. 134 (W.D. Wash. 1994), Judge Pechman, then found that the earlier representation and the current case were substantially related under RPC 1.9 and, therefore, disqualified the out-of-state firm.

Even the court conceded that the disqualification of the second Seattle firm "presents a closer question." The thread connecting the second Seattle firm to the alleged improper conduct of the out-of-state firm was the receipt in the initial briefings of information that was supposedly confidential as to VCI. Without fully resolving the issue of whether the second Seattle firm had actually received such information, the court apparently concluded that it had and also ordered the second Seattle firm's disqualification: "* * * [The second Seattle law firm] could not represent Lugona without using VCI's confidences and secrets that * * * [the out-of-state law firm] * * * obtained during the course of their representation of VCI." Judge Pechman's finding on the

shared information was critical. The leading case in Washington on “imputed disqualification” of co-counsel is *First Small Business Inv. Co. v. Intercapital Corp.*, 108 Wn.2d 324, 328-36, 738 P.2d 263 (1987). There, the Washington Supreme Court found that a party seeking disqualification of co-counsel in such circumstances must present evidence of the actual transmission of the “tainted” information from one co-counsel to the other to warrant the latter’s disqualification as well.⁸

- ***State v. Tjeerdsma*,
104 Wn.App. 878, 17 P.3d 678 (2001)**
 - ✓ **Municipal prosecutor conflicts**

In this case, the Court of Appeals affirmed the conviction of a criminal defendant who was represented at trial by a lawyer who was also a municipal prosecutor in the same county. The defendant was convicted by a Skagit County jury on drug possession and distribution charges. The charges arose from an undercover operation handled by the Skagit County Interlocal Drug Enforcement Unit, which, among its member agencies, included officers from the Mt. Vernon Police Department. In this instance, one of those officers who had been under long-term assignment to the “interlocal unit” since 1996 participated in the Tjeerdsma investigation.

Following his trial, Tjeerdsma learned that his defense counsel was also a municipal prosecutor in Mt. Vernon. He also learned that after his trial, but before sentencing, his trial counsel had been appointed a special deputy state prosecutor to handle a case in which the local county prosecuting attorney’s office had a conflict. Tjeerdsma retained new counsel and moved to set aside both his conviction and his sentence on an ineffective assistance of counsel theory. The trial court dismissed the motion. It found that his trial counsel’s simultaneous representation of the State in the Tjeerdsma case and the City of Mt. Vernon in unrelated municipal cases did not create a conflict. The trial court also found that his counsel’s service as a special deputy state prosecutor did create a conflict because, although the matters were unrelated, he was opposing the State in the Tjeerdsma case while representing it in the special prosecution. Based on the State’s concession of this latter point, the trial court offered Tjeerdsma the opportunity to be resentenced with new counsel. Tjeerdsma, however, declined and appealed instead.

The Court of Appeals affirmed. The Court of Appeals began by summarizing the standard for ineffective assistance:

“The mere possibility of a conflict of interest is not sufficient to “impugn a criminal conviction.” * * * ‘Prejudice is presumed only if the defendant demonstrates that counsel “actively represented conflicting interests” and that “an actual conflict of interest adversely affected his

⁸ For other recent cases dealing with “imputed disqualification,” see *Essex Chem. Corp. v. Hartford Accident & Indem. Co.*, 993 F. Supp. 241 (D. N.J. 1998), *rev’g*, 975 F. Supp. 650 (D. N.J. 1997) (joint defense setting) and *Ex Parte Terminix Intern. Co., L.P.*, 736 So.2d 1092 (Ala. 1998) (co-counsel).

lawyer's performance.” Each of the two prongs much be met.” 104 Wn.App. at 882 (citations omitted).

The Court of Appeals noted that the defendant's trial counsel had represented the City of Mt. Vernon only on misdemeanor criminal prosecutions in unrelated matters. In fact, his contract with Mt. Vernon specifically designated the city, and not the State, as his client. The Court of Appeals concluded, therefore, that Tjeerdsma's attorney had not been representing adverse interests simultaneously.

As for the period when the lawyer was also a special deputy state prosecutor, the Court of Appeals noted that a conflict did exist for that time under the Washington Rules of Professional Conduct. But, the Court of Appeals found that this alone did not necessarily take on a constitutional dimension in terms of ineffective assistance of counsel. Moreover, the Court of Appeals found that, at least from a constitutional viewpoint, Tjeerdsma had waived this objection when, after consulting with new counsel, he declined the trial court's offer of resentencing.

The Washington State Bar addressed the problems associated with representing a municipal government while also representing criminal defendants being prosecuted by the State in the same county in Formal Ethics Opinion 161 in 1975. Although somewhat dated now because it was issued before the adoption of the current RPCs, the WSBA reached the same conclusion that the Court of Appeals did in *Tjeerdsma*. Formal Ethics Opinion 161 is available at the WSBA's Web site at www.wsba.org.

- ***State v. Shelby*,
104 Wn.App. 1042, 2001 WL 337867 (2001) (unpublished)**
 - ✓ **Bar complaint against co-counsel as asserted conflict**

This was a criminal case in which the defendant appealed his murder conviction, in relevant part, on the denial of his request that his own lawyer be disqualified based on an asserted conflict of interest. The Court of Appeals rejected the disqualification argument and affirmed the conviction.

The defendant claimed that his court-appointed lead counsel should have been discharged because the defendant's mother had filed a bar complaint against a co-counsel. Although it is not completely clear from the opinion, it appears that the lead counsel and the co-counsel were *not* from the same firm. The co-counsel had already withdrawn from the case by that point and the WSBA had dismissed the complaint. The trial court denied the request and the Court of Appeals agreed. The Court of Appeals noted that for a conflict of interest to arise under RPC 1.7(b), there must be some showing that the interests of the client and the lawyer diverge. 2001 WL 37867, *supra*, at 2. Like the trial court, the Court of Appeals found that the defendant had made no such showing. *Id.*⁹

⁹ Another recent decision, *State v. Silva*, __ Wn.App. __, 31 P.3d 729 (2001), notes in passing that the criminal defendant involved had sought the disqualification of the public defender handling his case and her entire office because he had filed a bar complaint against her along with a federal civil rights

SELECTED REGIONAL DISQUALIFICATION CASES

ALASKA

The Alaska Court of Appeals this year issued disqualification decisions involving former judicial law clerks and trial counsel who must cross-examine former clients. The court declined to disqualify the lawyers in either case. In doing so, it analyzed Alaska RPC 1.12 in the first case and Alaska RPCs 1.7(b) and 1.9 in the second.

- ***Bradley v. State,***
16 P.3d 187 (Alaska App. 2001)
✓ **Former judicial law clerks & Alaska RPC 1.12**

This case involved the interplay between a long-standing Alaska appellate rule and the more recent Alaska Rules of Professional Conduct. Alaska Appellate Rule 104 states a seemingly broad rule of disqualification prohibiting former law clerks from handling a matter that was pending before an appellate court during their clerkship. Alaska RPC 1.12, by contrast, draws a narrower circle of disqualification for former judicial personnel which only those who “personally and substantially” participated in a case are subject to disqualification (along with their new firms, unless screened or the conflict is waived).¹⁰ The State’s attorney in this case was a former law clerk with the Alaska Court of Appeals. Although he was at the court when the appeal was filed, the former clerk had not worked on the case and left the court for the Attorney General’s Office shortly after that. The former clerk then sought to represent the State in this criminal appeal and the State moved for confirmation of that role.

Although Appellate Rule 104 suggested disqualification even in this circumstance, the Court of Appeals concluded that the more recent RPC 1.12 superseded the older rule. Accordingly, it held that the State’s attorney was not disqualified because he had not “personally and substantially” participated in the case at hand while he was a clerk.

suit. The trial court in *S/iva* granted the request at the point that the defendant filed the civil rights action against the public defenders’ office. *Id.* at 730.

¹⁰ Alaska RPC 1.12 is generally similar to its Washington and ABA Model Rule counterparts.

- ***Daniels v. State,***
17 P.3d 75 (Alaska App. 2001)
 - ✓ **Cross-examination of former clients & Alaska RPCs 1.7 & 1.9**

This very thorough decision examines both Alaska RPCs 1.7(b) and 1.9¹¹ where a lawyer is called on to cross-examine a former client. The defendant's lawyer in this murder case had represented the principal witness to the crime 10 years before on an unrelated assault charge. There was no doubt that their present positions were adverse—the defense was that the witness had committed the murder rather than the defendant. The defendant, through independent counsel, had waived any current conflict. The witness conceded that the current and former representations were unrelated and would not require the defense attorney to use his former client's confidences adversely to her. Nonetheless, the State, evidently concerned about the possibility of a mistrial or a post-trial attack based on effective assistance of counsel, moved to disqualify the defense lawyer. The trial court, apparently sharing those concerns, granted the motion. The Alaska Court of Appeals reversed.

The Court of Appeals began with the current client. It noted that Alaska RPC 1.7(b) allowed a current client to waive a conflict arising from possible duties to a former client and that, following consultation with independent counsel, the defendant had done so voluntarily here. The court then moved on to the former client. It found preliminarily that the present case was not, in the phraseology of Alaska RPC 1.9(b), “the same or substantially related” to the earlier matter in which the defense counsel had represented the witness. The Court of Appeals next concluded that there had been no showing that the defense lawyer had gained any confidential information from the witness during that earlier representation that would be used adversely to the former client in cross-examining her in the current case. Finally, the court held that, given the defendant's effective waiver and the lack of a former client conflict with the witness, the integrity of the proceedings had not been compromised in a constitutional sense either.¹²

CALIFORNIA

As always, California continued to supply a number of interesting disqualification decisions. This year, the appellate courts continued to suggest that screening would be appropriate to “cure” conflicts brought to a firm by lateral hires. And, the Court of Appeal issued a very interesting decision on the extent to which a former in-house counsel could reveal a former corporate employer's confidential information to employment litigation counsel without risking the latter's disqualification.

¹¹ Alaska RPCs 1.7(b) and 1.9 are generally similar to the corresponding provisions of the Washington RPCs and the ABA Model Rules.

¹² For another recent case reaching the same conclusion on similar facts, see *United States v. Penn*, 151 F. Supp.2d 1322 (D. Utah 2001).

- ***Adams v. Aerojet-General Corp.*,
86 Cal. App.4th 1324, 104 Cal. Rptr.2d 116 (2001)**
 - ✓ **Lateral hire disqualification**

The California Court of Appeal in this environmental case addressed two significant issues in the “lateral hire” disqualification context. A law firm had advised defendant Aerojet-General (Aerojet) for several years in the mid-1980s on compliance issues relating to a waste disposal site. A lawyer who was then at the firm but who had *not* worked on the Aerojet project during that time later left the firm in 1989 to start a new firm. In 1998, the lawyer and his new firm filed a lawsuit against Aerojet on behalf of a large group of plaintiffs living near the disposal site who alleged that it had been improperly managed since 1951 and that, as a result, they had been exposed to a variety of hazardous chemicals. Aerojet moved to disqualify the plaintiffs’ firm. It argued that under California RPC 3-301(E) the plaintiffs’ lawyer had a former client conflict by virtue of his old firm’s work for Aerojet while he was a partner there, and that even though he had not personally worked on the Aerojet project, the imputation of that conflict to him under the “firm unit rule” *remained* after he left his old firm. The trial court agreed and ordered the new law firm’s disqualification. The Court of Appeal reversed.

The first significant element of the Court of Appeal’s decision was that it did not take the same draconian approach to former client conflicts that the trial court did. Rather, the Court of Appeal found that for a conflict to follow a lawyer after leaving a firm, there must be a showing that “confidential information material to the current representation would normally have been imparted to the attorney during his tenure at the old firm.” 104 Cal. Rptr.2d at 127. The Court of Appeal noted that it would be extremely difficult for any lawyer to change firms were it otherwise because the lawyer would be “tainted” by a wide variety of former client conflicts with which the lawyer had no actual involvement.

The second significant facet of the *Aerojet* decision concerned screening. Unlike Washington (see RPC 1.10(b)), California does not have a “black letter” rule allowing a firm to “insulate” itself from a lateral-hire’s former client conflicts by effectively screening the new-hire. Although dicta, the Court of Appeal, citing the California Supreme Court’s own dicta in *People v. Speedee Oil*, 20 Cal.4th 1135, 86 Cal. Rptr.2d 816, 980 P.2d 371 (1999), implied that screening would have “cured” the conflict:

“It is now firmly established that where the attorney is disqualified from representation due to an ethical conflict, the disqualification extends to the entire firm * * * **at least where an effective ethical screen has not been established[.]**” *Id.* at 122. (Citations omitted and emphasis added.)¹³

¹³ The Ninth Circuit also recently read *Speedee Oil* as opening the door to avoid lateral hire conflicts in California. See *In re County of Los Angeles*, 223 F.3d 990 (9th Cir 2000).

- ***Fox Searchlight Pictures, Inc. v. Paladino*, 89 Cal. App.4th 294, 106 Cal. Rptr.2d 906 (2001)**
 - ✓ **No disqualification for speculative conflicts**
 - ✓ **No disqualification for confidential information obtained in handling wrongful termination claims by in-house counsel**

This case involved a series of charges and countercharges by a former in-house counsel, Paladino, and her former employer, Fox Searchlight Pictures (FSP). FSP declined to renew Paladino's employment agreement at the conclusion of a film project to which Paladino had been assigned. Paladino, by contrast, felt that she had effectively been terminated for her use of pregnancy leave. She retained counsel and her lawyers forwarded a draft complaint to FSP. FSP believed that the complaint contained information about FSP that was privileged and that Paladino had apparently revealed to her lawyers to prepare her lawsuit. At that point, FSP sued Paladino for disclosing the allegedly privileged material. Paladino followed with her wrongful termination claim. FSP then moved to disqualify Paladino's lawyers.

FSP advanced two theories on the disqualification. First, it contended that the lawyers had a former client conflict because they had once done intellectual property and toxic tort work for FSP while at another law firm. Second, FSP argued that the lawyers' receipt of its confidential information disqualified them as well. The trial court disagreed and the Court of Appeal affirmed.

On the first point, the Court of Appeal noted that FSP had not shown that there was any relationship between the earlier work that the lawyers had done for FSP and the current case. Similarly, FSP had made no showing that the lawyers possessed confidential information from the earlier work that was relevant to the current case either. Rather, it simply invited the court to speculate that the lawyers had such conflicts. The Court of Appeal refused. Lacking any evidence on either facet of the California former client conflict rule, the Court of Appeal concluded tersely that "[w]e find Fox's scenarios too speculative to justify disqualification." 106 Cal. Rptr.2d at 913.

On the second point, the Court of Appeal relied primarily the California Supreme Court's decision in *General Dynamics Corp. v. Superior Court*, 7 Cal.4th 1164, 32 Cal. Rptr.2d 1, 976 P.2d 487 (1994). *General Dynamics* had held that "a former in-house counsel may sue her employer for wrongful termination so long as she does not publicly disclose information the employer is entitled to keep secret." *Id.* at 915. The Court of Appeal reasoned that if a former in-house counsel could prosecute such a claim that relied, at least in part, on confidential information, then the in-house counsel's lawyers could not be disqualified from receiving such information in the course of their representation. *Id.* at 913-26.

IDAHO

- ***State v. Aguilar*,
135 Idaho 894, 26 P.3d 1231 (2001)**
 - ✓ **Lawyer-witness issues & Idaho RPC 3.7**

The defendant in this criminal case sought the disqualification of both the prosecutor in his case and the entire local prosecuting attorney's office. He contended before trial that the prosecutor in his case was a necessary witness because he had negotiated a plea agreement with the informant who supplied the evidence that led to the defendant's arrest. The defendant apparently also contended that the individual prosecutor's disqualification should be imputed to the local prosecuting attorney's office as a whole. The trial court denied the motion. Ultimately, the defendant did not call the prosecutor as a witness. Following his conviction, he appealed on several grounds, including, in pertinent part, the denial of the disqualification motion.

The Idaho Court of Appeals affirmed the conviction. The Court of Appeals found that the prosecutor was not a "necessary witness" as that term is used in Idaho RPC 3.7¹⁴ because the information sought about the plea agreement with the informant was readily available from other sources. Having concluded that there was no basis to disqualify the individual prosecutor, the Court of Appeals agreed that there was no basis to disqualify the balance of the prosecutor's office either.

OREGON

There were no significant reported disqualification decisions this year in Oregon. Washington lawyers practicing south of the border, however, should be aware of an important conflict waiver case that the Oregon Supreme Court issued late last year—***In re Brandt/Griffin*, 331 Or. 113, 10 P.3d 906 (2000)**. *In re Brandt/Griffin* was a disciplinary case. But, because the Oregon Supreme Court's decision went to the issue of what constitutes an effective conflict waiver, *In re Brandt/Griffin* could very well find its way into a disqualification context as well.

In Oregon, conflict waivers must be based on "full disclosure" by the lawyer. "Full disclosure" is a defined term under Oregon Disciplinary Rule 10-101(B):

- "(1) 'Full disclosure' means an explanation sufficient to apprise the recipient of the potential adverse impact on the recipient, of the matter to which the recipient is asked to consent.

¹⁴ Idaho RPC 3.7 is identical to the ABA Model Rule. As such, it is somewhat broader than Washington RPC 3.7 because even if an individual firm lawyer is disqualified, it allows other lawyers in the same office to handle the trial unless they are otherwise precluded by current or former client conflicts under RPCs 1.7 and 1.9.

- “(2) As noted in [the conflict waiver rules], ‘full disclosure’ shall also include a recommendation that the recipient seek independent legal advice to determine if consent should be given and shall be contemporaneously confirmed in writing.”

The Oregon Supreme Court in *In re Brandt/Griffin* arguably rewrote four key elements of this definition to void a conflict waiver. First, although the definition of “full disclosure” on its face imposes a subjective test (*i.e.*, did the client understand?) of whether the client understands the conflict involved, the court appeared to interpret the requirement as imposing an objective standard (*i.e.*, was the disclosure sufficient for a “reasonable client” to understand?). Second, although the court reaffirmed the formalistic requirement that “full disclosure” must contain a recommendation to seek independent counsel on the waiver, the court appeared to conclude that the lawyer seeking the waiver gets no “credit” if the client follows that advice, obtains independent counsel and further discussions with that independent counsel take place. Third, reflecting its objective standard and its view that a lawyer gets no “credit” for subsequent discussions or disclosures (to either the client or independent counsel and whether in writing or not), the majority may have read a requirement into the rule that all disclosures be reflected in the *first* letter to the client. Finally, again appearing to read a new requirement into the rule, the majority arguably found that the lawyer’s conflict waiver letter must not simply “confirm” (to use the DR 10-101(B)’s term) that an oral disclosure and consent have taken place, it must also “corroborate” (to use the court’s term) it in very specific detail.

The full contours of *In re Brandt/Griffin* remain to be seen. But for now, this decision casts a long shadow over any conflict waiver executed in Oregon that may find its way into a disqualification context.

OTHER DISQUALIFICATION CASES OF NOTE NATIONALLY¹⁵

ABA Model Rule 1.7: Current Client Conflicts

- ***Elonex I.P. Holdings, Ltd. v. Apple Computer, Inc.*, 142 F. Supp.2d 579 (D. Del. 2001)**

This decision has echoes of the *Brandt/Griffin* issue discussed in the preceding case note. Apple Computer, Inc. (Apple) had granted a “blanket” waiver of future conflicts to a law firm as a condition of the law firm’s representation of Apple in a licensing matter in Massachusetts. While that matter was ongoing, the law firm was retained by the plaintiff in this patent infringement action in Delaware adverse to Apple. Apple sought the law firm’s

¹⁵ 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 decisions in this area over the last year.

disqualification under the Delaware equivalent of ABA Model Rule 1.7(a), which governs current multiple client conflicts. Apple contended that its in-house counsel who had negotiated the earlier advance waiver had not understood that the scope of that waiver extended to litigation as well as transactional work. The Delaware court concluded otherwise based on both the waiver itself and the surrounding circumstances—particularly the fact that the in-house counsel knew that the Elonex dispute was then brewing but had not yet been filed. Accordingly, the court found that Apple had effectively waived the concurrent client conflict under Delaware RPC 1.7(a) and denied the motion.

- ***Santacroce v. Neef*,
134 F. Supp.2d 366 (D. N.J. 2001)**

This case is an excellent example of the “hot potato rule.” Under that rule, a lawyer cannot drop one current client “like a hot potato” to “cure” a conflict with another current client. In this instance, a law firm had represented a wealthy investor for a number of years in his personal and business dealings. At the request of the wealthy investor (and at his expense), the law firm also began handling some minor matters for his companion, Santacroce. While that representation was on going, the wealthy investor died. His estate retained the law firm as well. The wealthy investor had left nothing to Santacroce in his will she (through other counsel) filed a “palimony” case against the estate. At that point, the law firm sent Santacroce a letter expressing its “regrets” that it “must withdraw” from her representation because she had sued the wealthy investor’s estate. Santacroce moved to disqualify the law firm. The trial court agreed. As the court put it: “The ‘Hot Potato Doctrine’ has evolved to prevent attorneys from dropping one client like a ‘hot potato’ to avoid a conflict with another, more remunerative client. * * * Upon review of the undisputed facts and the inferences drawn therefrom, the Court concludes that this is exactly what happened to plaintiff * * *.” The court, therefore, disqualified the law firm under New Jersey’s current multiple client conflict rule, which is based on ABA Model Rule 1.7(a). (For good measure, the court also disqualified the law firm under the former client conflict rule as well to the extent that Santacroce was now the law firm’s former client.)

- ***Clark Capital Management Group v. Annuity Investors*,
149 F. Supp.2d 193 (E.D. Pa. 2001)**

Like several other cases described earlier, the disqualification issues in this case turned established between the party moving for

the disqualification and the lawyer whose disqualification it sought. Plaintiff Clark Capital Management Group (Clark) had brought a trademark infringement action against defendant Annuity Investors (Annuity). Annuity's lead defense attorney called an attorney to inquire of his firm's potential availability to be local counsel (Local Counsel). Although they had at least two preliminary conversations, Annuity's attorney ultimately appears to have selected another firm as local counsel. Later, another attorney from Local Counsel joined plaintiff Clark's litigation team. At that point, Annuity sought the law firm's disqualification. The trial court concluded that no attorney-client relationship had ever existed between Annuity and the law firm. Although not specifically citing to ABA Model Rules 1.6 or 1.7(b) or their Pennsylvania equivalents, the trial court then examined whether anything that Local Counsel had learned in the initial exploratory conversations might in some way require disqualification. The trial court found that there was no evidence that Annuity's lead defense attorney had imparted any of Annuity's confidences to Local Counsel in the course of those preliminary discussions, and, accordingly, denied disqualification on this basis as well.

ABA Model Rule 1.9: Former Client Conflicts

- ***Superguide Corporation v. DIRECTV Enterprises, Inc.*, 141 F. Supp.2d 616 (W.D.N.C. 2001)**

This case concerns the scope of the term "matter" for purposes of disqualification under the former client conflict rule. This was a patent infringement case in which the plaintiff, Superguide Corporation (Superguide) alleges that a group of direct satellite television broadcasters had infringed on its patents. The broadcasters, in turn, brought a third party complaint against Gemstar under the theory that they had obtained licenses for the technology involved from Gemstar as Superguide's exclusive licensor. A primary question in the case was whether the license between Gemstar and Superguide extended to satellite television broadcasters. Superguide claimed that it did not, while Gemstar asserted that it did. Superguide's lead trial counsel had represented Gemstar for many years before they parted company in 1999. Although he was not involved in the original negotiations between Superguide and Gemstar over the license, he had litigated the licensing agreement repeatedly for Gemstar against other, non-satellite broadcasters and was intimately familiar with its terms and Gemstar's approach to it. Gemstar, therefore, moved to disqualify the lawyer under North Carolina's version of ABA Model Rule 1.9. It alleged that because the lawyer's earlier representation touched

on various aspects of the licensing agreement and the present case did, too, he had a former client conflict. The trial court agreed and disqualified the lawyer and his law firm (which was a different one than where the lawyer had handled the earlier work). In doing so, the court took a broad view of the term “matter”—extending it to the licensing agreement as a whole rather than the narrower question at hand concerning possible exclusions for satellite broadcasters.¹⁶

- ***Colorpix Systems of America v. Broan Mfg. Co., Inc.*, 131 F. Supp.2d 331 (D. Conn. 2001)**

This case, too, involved the issue of the scope of the term “matter” under Connecticut’s version of ABA Model Rule 1.9. The plaintiffs in this product liability action were suing the manufacturer of a bathroom ventilating fan on the theory that it was defective and had caused a fire as a result. The plaintiffs’ lawyer had formerly represented the defendant’s parent and another operating unit in defending fire-related product liability claims arising out of the affiliate’s heating and air-conditioning units. The defendant moved to disqualify the plaintiffs’ law firm with a two fold argument. First, the defendant manufacturer contended that it should be considered part of the same corporate family as its parent and affiliate for conflict purposes due the close practical identity among all three and the common management of their legal affairs by the parent’s legal department. Second, the defendant argued that the current case involved the same general “matter” as the earlier litigation because they both involved the same general family of devices and the same basic legal strategy. The trial court agreed and ordered disqualification. Like the *Superguide* case discussed in the preceding case note, the court in *Colorpix* took a very broad measure of the term “matter” in applying the former client conflict rule.

¹⁶ For a recent case closer to home that also wrestles with the scope of the term “matter” under the former client conflict rule, see *PGE v. Duncan, Weinberg, Miller & Pembroke, P.C.*, 162 Or. App. 265, 986 P.2d 35 (1999).

ABA Model Rule 1.10: Imputed Disqualification

- ***Zimmerman v. Mahaska Bottling Company*,
270 Kan. 810, 19 P.3d 784 (2001)**

***Clinard v. Blackwood*,
46 S.W.3d 177 (Tenn. 2001)**

In both of these cases, the courts involved rejected lateral-hire screening despite the fact that there was no evidence that the screened personnel—in the first instance a secretary and in the second a lawyer—shared any confidential information with their new employers. In *Zimmerman*, the Kansas Supreme Court held that because screening was not available to avoid lateral-hire conflicts with lawyers, screening was not available for support personnel either.¹⁷ In *Clinard*, the Tennessee Supreme Court adopted a formal bar opinion *allowing* screening. But, it then disqualified the hiring law firm *anyway* on the ground that despite the fact that the screen had been implemented flawlessly the hiring still created an “appearance of impropriety.” (Go figure . . .)

ABA Model Rule 1.13: Organization as Client¹⁸

- ***Home Care Industries, Inc. v. Murray*,
154 F. Supp.2d 861 (D. N.J. 2001)**

This case presents a cautionary tale for corporate counsel. A law firm had been plaintiff Home Care Industries, Inc. (HCI) outside corporate counsel for some time. Later, HCI hired defendant Murray as its president. Murray’s tenure was both short and tumultuous—both apparently because of Murray’s erratic management style. During the time Murray was president, the law firm handled several employment disputes for HCI stemming from actions Murray took as president. HCI and Murray eventually reached an apparently oral agreement over a “voluntary”

¹⁷ For a recent Washington case holding that the Washington screening rule—RPC 1.10(b)—applies to support personnel as well as lawyers, see *Daines v. Alcatel*, 194 F.R.D. 678 (E.D. Wash. 2000).

¹⁸ Washington did not adopt this ABA Model Rule. There is no suggestion in the legislative history of Washington’s adoption of the Rules of Professional Conduct, however, that the rejection of ABA Model Rule 1.13 also signaled a rejection of the “entity theory” of representation included in that rule. See Rationale of WSBA Task Force as to Proposed Amendments to MRPC Rule 1.13 (WSBA Archive); see *generally* Robert H. Aronson, “An Overview of the Law of Professional Responsibility: The Rules of Professional Conduct Annotated and Analyzed,” 61 Wash. L. Rev. 823, 829-830 (1986). Rather, the legislative history, although not extensive on this point, indicates that the task force that reviewed the ABA Model Rules concluded that the “who is the client question?” in organizational settings was better left for development in case law rather than by rule.

separation. They soon disagreed over the terms of that agreement, however, and HCI sued for a declaration of the parties respective rights under that agreement. The law firm filed the declaratory judgment action for HCI. Murray moved to disqualify the corporate counsel. He contended that the law firm had been acting as his individual counsel as well in the disputes underlying his de facto termination (none of which appear to have resulted in formal litigation). Somewhat surprisingly, the trial court agreed and disqualified the law firm. In doing so, the court found that the law firm had not taken sufficient steps under the New Jersey equivalent of ABA Model Rule 1.13(d) to inform Murray that it was only acting as corporate counsel in the disputes and not as his individual lawyer as well. The court, therefore, implied an attorney-client relationship between the law firm and Murray. Next, it concluded that the current dispute was “substantially related” to the earlier ones under New Jersey’s version of the former client conflict rule found in ABA Model Rule 1.9. The court disqualified the law firm on that basis.

- ***City of Kalamazoo v. Michigan Disposal Service*, 125 F. Supp.2d 219 (W.D. Mich. 2000) (magistrate’s findings), *aff’d*, 151 F. Supp.2d 913 (W.D. Mich. 2001)**

This pair of opinions explores the scope of disqualification based on joint defense agreements. This was an environmental case for the costs of responding to a release of hazardous materials from a land fill. The law firm representing the plaintiffs had formerly represented a group of defendants in a similar case involving another nearby landfill. One of the defendants in the current case that had also been a member of the defense group in the earlier case moved to disqualify the law firm from acting as plaintiff’s counsel in the second case. The law firm argued that, under Michigan’s version of ABA Model Rule 1.13(a), its earlier representation had been of the defense group as a whole rather than its individual members and, therefore, it was free to oppose the defendant in this second case. Both the magistrate and the district court disagreed and ordered disqualification. In doing so, they first distinguished the law firm’s role as “common counsel” for the earlier joint defense group from that of individual counsel for members of a joint defense group. In this instance, the joint defense agreement had specifically designated the law firm as “common counsel” for those issues that affected all of its constituent members. By contrast, the members had separate counsel for issues that affected them individually. At the same time, both the magistrate and the district court found that the joint defense group did not rise to the level of an unincorporated

association so that, under Michigan RPC 1.13(a), it could be said that the law firm had represented the group only and not the constituent members as well. Rather, the magistrate and the district court concluded that the law firm had represented the individual members jointly on those issues for which it was “common counsel.” Having found an attorney-client relationship between the law firm and the individual defendants in the earlier case, both the magistrate and the district court also found that the former and current matters were substantially related under Michigan’s version of the former client conflict rule, which is based ABA Model Rule 1.9. The magistrate, therefore, recommended disqualification and the district court affirmed.

ABA Model Rule 3.7: The Lawyer-Witness Rule

- ***Zurich Insurance Company v. Knotts*, 52 S.W.3d 555 (Ky. 2001)**

This was a “bad faith settlement” case stemming from a personal injury. The plaintiff’s attorney had handled all settlement negotiations with an insurer. The insurer refused to settle and the case proceeded to trial. The plaintiff received a substantial jury award. The plaintiff then sued the insurer under Kentucky’s “unfair claims settlement practices act” for the failure to investigate and settle the claim. The insurer moved for summary judgment. The plaintiff’s attorney then filed an affidavit asserting that factual issues precluded summary judgment. Because he plaintiff’s lawyer had handled the negotiations at issue, the insurer moved to disqualify him under Kentucky’s version the lawyer-witness rule—which is based on ABA Model Rule 3.7. The trial agreed. The Court of Appeals reversed on a writ of mandamus and the Kentucky Supreme Court then affirmed the writ. The Supreme Court found that, despite the plaintiff’s attorney’s role in the settlement negotiations, the evidence involved was available from other sources and he was not scheduled to testify for the plaintiff at trial. It concluded, therefore, that simply filing an affidavit in opposition to summary judgment was not sufficient to invoke the prohibitions of Rule 3.7.

ABA Model Rule 4.2: Communications with Represented Parties

- ***McCarthy v. SEPTA*, 772 A.2d 987 (Pa. Super. 2001)**

The trial court in this personal injury case disqualified the plaintiff’s counsel for conducting ex parte interviews with the defendant

regional transit agency's employees. The trial court imposed disqualification as a form of sanction, and, in doing so, relied in part on Pennsylvania's version of the "no contact" rule—which is based on ABA Model Rule 4.2. The appellate court reversed. Although it conceded that such conduct could under some circumstances constitute a basis for disqualification, the appellate court found that the trial court had inadequately documented whether the employees involved actually fell within the scope of those represented by the defendant's counsel.¹⁹

¹⁹ For a recent pair of articles examining the scope of Washington RPC 4.2 by the Washington State Bar Association's Chief Disciplinary Counsel, Barrie Althoff, see "Communicating with Represented Persons" and "Communicating with a Represented Governmental Client" in, respectively, the February 2000 and the June 2001 issues of the Washington State Bar News. Both articles are available from the Bar News' on-line archive at www.wsba.org.