

Business Ethics Issues in Oregon and Washington: A Tale of Three Cases

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This paper discusses three recent Washington disqualification cases that highlight a number of current Washington legal ethics issues and illustrate the application of the Washington Rules of Professional Conduct to those issues. The first, *Oxford Systems, Inc. v. CellPro, Inc.*, 45 F Supp2d 1055 (WD Wash 1999), outlines the standard in Washington for defining the attorney-client relationship and the application of the current and former client conflict rules. The second, *Daines v. Alcatel*, 194 FRD 678 (ED Wash 2000), discusses the availability of “screening” to avoid lateral-hire conflicts in private practice. The third, *Richards v. Jain*, 168 F Supp2d 1195 (WD Wash 2001), finds that e-mail is generally entitled to the same protections as other forms of communication under the attorney-client privilege.

Although these cases arise in the litigation context of disqualification, their treatment of the underlying rules has equal application to both business lawyers and litigators. Further, as will be discussed in more detail in the accompanying presentation,

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the outcomes in the cases concerned would likely have been the same if they had been decided under the analogous Oregon rules.

- ▶ ***Oxford Systems, Inc. v. CellPro, Inc.*,
45 F Supp2d 1055 (WD Wash 1999)**
 - Current or former client?
 - Disqualification for current client conflict under RPC 1.7
 - Disqualification for former client conflict under RPC 1.9 & 1.10

If a lawyer doesn't currently have a file open for an out-of-state company that has periodically sent the lawyer work for years, is the company a current or former client?

The U.S. District Court in Seattle disqualified a law firm recently for opposing a "periodic" client in *Oxford*.

A Seattle firm had represented Becton Dickinson (Becton) for 13 years in a variety of advisory and litigation matters. Since 1990, the Seattle firm had been Becton's exclusive Washington counsel. But, the Seattle firm's work for Becton was not continuous. Rather, it was on a case or project specific basis. In April 1998, the Seattle firm had no files open for Becton when it began defending a California law firm in a Washington securities fraud case brought by the shareholders of a company called CellPro for which the California firm had done IP work. The securities fraud suit grew out of patent infringement litigation that Becton was then prosecuting in Delaware against CellPro in which the California law firm's opinion on the validity of the patents involved was a central element of CellPro's defense. Although the Seattle firm had been local counsel for Becton in an earlier phase of the patent litigation pending in Washington in 1992 and 1993 and continued to assist with local aspects of the patent dispute after the litigation had been transferred to Delaware, the partner who had represented Becton in that matter had left the Seattle firm in 1996. The Seattle firm ran

a conflict check when it opened the securities fraud case in 1998, but the check did not reveal a problem because Becton was not a party to that case.

When Becton learned of the Seattle firm's involvement in the securities fraud case, it intervened in *Oxford* to seek the Seattle firm's disqualification. Becton argued that its longstanding, albeit periodic, use of the Seattle firm demonstrated an ongoing attorney-client relationship. Becton contended that the Seattle firm had a current client conflict under RPC 1.7² because Becton's interests were adverse to the California law firm's due to the overlap between the issues in the patent and securities cases. Becton asserted, therefore, that the Seattle firm should be disqualified.

Judge Zilly of the Western District agreed. He found that the length, scope and general continuity of the relationship between Becton and the Seattle firm supported Becton's belief that it remained a current client of the Seattle firm. In doing so, Judge Zilly relied on the Washington Supreme Court's decision in *Bohn v. Cody*, 119 Wn2d 357, 832 P2d 71 (1992), and the Washington Court of Appeals' opinion in *Teja v. Saran*, 68 WnApp 793, 846 P2d 1375, *rev denied*, 122 Wn2d 1008 (1993), holding that the question of whether an attorney-client relationship exists turns primarily on the client's subjective belief as long as that subjective belief is objectively reasonable under the surrounding circumstances. Having found that Becton was a current client of the

²RPC 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:

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

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

Seattle firm, Judge Zilly then used RPC 1.7 to conclude that a conflict existed and ordered disqualification.

Although the principal issue in *Oxford* was whether Becton was a current client, Judge Zilly's opinion addresses Washington's former client conflict rules as well:

- Judge Zilly used Washington RPC 1.9³ to conclude that even if Becton was a former client, the Seattle firm could only have undertaken the new representation with Becton's consent because the securities fraud litigation was substantially related to the earlier patent case that the Seattle firm had handled.
- Although the partner who handled the Washington phase of the Becton patent case had left the firm, several lawyers remained at the firm who had assisted with that case and who Judge Zilly found had acquired Becton's confidences during the earlier representation. Therefore, Judge Zilly found that RPC 1.10's exception to the former client conflict rule when the lawyer who handled the earlier related matter has left the firm was inapplicable.⁴

³RPC 1.9 reads:

"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 interests of the former client unless the former client consents in writing after consultation and a full disclosure of the material facts; or

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

⁴RPC 1.10(c) provides:
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(Oregon under *In re Weidner*, 310 Or 757, 770, 801 P2d 828 (1990), uses a test similar to the one used in Washington under *Bohn v. Cody*, *supra*, 119 Wn2d 357, to determine whether an attorney-client relationship exists. Further, Oregon DR 5-105(E)-(F), which govern current client conflicts, and DR 5-105 (C)-(D), which govern former client conflicts, would likely lead to the same result had *Oxford* arisen here.)

- ▶ ***Daines v. Alcatel*,
194 FRD 678 (ED 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 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

“(c) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer unless:

“(1) The matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

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

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 had disclosed their confidential strategy to the defense firm warranted the latter's

³RPC 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:

- "(1) The personally disqualified lawyer is screened by effective means from participation in the matter and is apportioned no part of the fee therefrom;
- "(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;
- "(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 notice to the former client."

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 of the Eastern District 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)'s⁴ 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 FRD 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

⁴Washington 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 reasonable remedial action.”

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 ‘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.

(If this case had arisen here in Oregon, the result would likely have been the same. Oregon, too, allows screening to avoid lateral-hire conflicts under DR 5-105(H)-(I). Like Washington, the Oregon rule is framed in terms of lawyers. But, it would likely afford the same protection in the case of non-lawyer staff.)

- ▶ ***Richards v. Jain,***
168 F Supp2d 1195 (WD Wash 2001)
 - Protection of e-mail communications

The federal district court in Seattle last year disqualified a law firm for failing to return a litigation opponent's privileged e-mails. This decision was again by Judge Zilly of the Western District. The case arose under rather unusual circumstances. The principal plaintiff, Richards, was a former senior executive of a high tech company, Infospace. The underlying lawsuit involved a dispute over stock options that Richards claimed he was due from Infospace.

During Richards' five-year tenure at Infospace, he saved virtually every e-mail he ever sent or received—which amounted to over 100,000 e-mails. The e-mails, by Judge Zilly's count, included at least 972 privileged communications with both internal and outside counsel. Although he had a nondisclosure agreement with Infospace, Richards copied the e-mails to a portable, high-capacity disk when he began exploring the possibility of suing Infospace over the stock options in the Summer of 2000. Richards then gave the disk to his lawyers during an initial meeting concerning his planned claim.

The lawyers, in turn, gave the disk to a paralegal at their firm with instructions to review the contents for useful information. Beginning in the mid-September 2000, the paralegal first ran a series of key word searches for terms such the principals at

Infospace and the words “stock” and “options.” That first cut yielded several thousand e-mails. The paralegal then began reviewing each of these resulting e-mails and sorting them into two groups: “relevant” and “not relevant.” During this review, the paralegal read the 972 privileged e-mails. Many of these were either marked “Attorney-Client Privileged” or were clear from their source or contents that they were attorney-client communications. At least some of the privileged e-mails concerned issues directly involved in Richards’ claim.

The paralegal then gave the “relevant” e-mails—including the privileged ones—to an attorney at the firm for further review later that Fall. The attorney used the “relevant” documents—apparently including the privileged communications—in preparing Richards’ complaint, which was filed in December 2000, and in formulating the plaintiffs’ litigation strategy. When Richards eventually had his deposition taken in June 2001, defense counsel inquired about documents that Richards had taken with him when he left Infospace. Richards revealed the existence of the disk and the fact that he had turned it over to his attorneys almost a year before. When the defense demanded the return of the disk, Richards’ attorneys refused. At that point, Infospace filed a motion to disqualify Richards’ counsel based on their failure to immediately return the disk upon discovery of the privileged materials and the law firm’s subsequent use of those materials against Infospace.

Judge Zilly agreed and disqualified the plaintiffs’ counsel in a stinging opinion.

Judge Zilly began by relying on an ABA ethics opinion—94-382—to find define the standard of conduct for a lawyer who receives another party’s privileged materials: “An attorney who receives privileged documents has an ethical duty upon notice of the

privileged nature of the documents to cease review of the documents, notify the privilege holder, and return the documents.” 168 F Supp2d at 1200-01.

Having found a duty to notify and to return privileged documents, Judge Zilly then considered whether it made any difference that the first person at the law firm who encountered the material was a paralegal rather than a lawyer. He concluded that it did not. Relying on *Daines*, Judge Zilly noted that under Washington RPC 5.3, which governs a law firm’s responsibility for staff, “courts have * * * treated paralegals and other non-attorneys as having the same ethical responsibilities regarding confidential information as attorneys.” 168 F Supp2d at 1201. Therefore, Judge Zilly imputed the paralegal’s conduct to the law firm as a whole. In doing so, he was particularly critical of the law firm’s failure to instruct the paralegal on what to do if he encountered privileged material—especially where, in Judge Zilly’s view, Richards’ position with Infospace and the sheer number of e-mails involved made it likely that the disk would contain privileged communications.

One facet of the case that did not draw much attention from Judge Zilly was the fact that the privileged materials here were e-mails. Although there has been much hand-wringing in recent years about whether e-mails should be accorded any different treatment than their paper counterparts, Judge Zilly looked to the *content* of the communications rather than the *form*. As such, he did not draw a distinction between paper and electronic communications.

(Although Oregon has not yet seen precisely the same kind of case, an Oregon State Bar formal ethics opinion, 1998-150, generally reaches the same conclusions that the ABA ethics opinion did upon which Judge Zilly relied on the return of an opponent’s

privileged documents. Like Judge Zilly, an Oregon court, too, would likely look beyond the form of the communications involved to their content in assessing whether they were entitled to the protections afforded by the attorney-client privilege. Another ABA ethics opinion, 99-413, reached this conclusion recently regarding e-mail.)