

**DISQUALIFICATION FOR 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. The concluding section contains a brief bibliography of Washington disqualification cases over the past five years.

WASHINGTON²

This year's disqualification decisions in Washington featured a rather eclectic mix of issues, including: disqualification for failure to return privileged e-mails, conflicts involving governmental counsel in criminal and civil proceedings, conflicts arising from threatened bar complaints, timing of disqualification motions and their waiver and disqualification as a basis for fee forfeiture.

- ▶ ***Richards v. Jain*,
168 F. Supp. 2d 1195 (W.D. Wash. 2001)**
 - Disqualification for failure to return opponent's privileged e-mails

The federal district court in Seattle late last year disqualified a law firm for failing to return a litigation opponent's privileged e-mails. This decision was 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.

¹ The cases discussed were reported through October 15. 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² Several of the disqualification decisions issued by the Washington Court of Appeals this year were unpublished—but are readily available in electronic form.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."

The lawyers, in turn, gave the disk to a paralegal at their firm with instructions to review the contents for useful information. Beginning in mid-September 2000, the paralegal first ran a series of key word searches for terms such as 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 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. Supp. 2d 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 v. Alcatel*, 194 F.R.D 678 (E.D. Wash. 2000), Judge Zilly noted that under Washington RPC 5.3³, which governs a law firm’s responsibility for staff,

³ RPC 5.3 reads:

With respect to a nonlawyer employed or retained by or associated with a lawyer:

- (a) A partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person’s conduct is compatible with the professional obligations of the lawyer;

“courts have * * * treated paralegals and other non-attorneys as having the same ethical responsibilities regarding confidential information as attorneys.” 168 F. Supp. 2d 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.

- ▶ ***Eugster v. City of Spokane*,
110 Wn. App. 212, 39 P.3d 380 (2002)**
 - Conflicts involving governmental counsel in civil proceedings

The plaintiff in this case was a member of the Spokane City Council. He sued the City of Spokane, the City Council and four individual City Council members over the process the City Council had used to fill a vacant Council seat. The Spokane City Charter provided that the remaining Council members were to select the new member by majority vote, but did not specify the exact procedures to be employed. The plaintiff disagreed with the process chosen and sought an injunction under (among other theories) the Washington Open Public Meetings Act to stop the selection process.

The defendants were represented jointly by the Spokane City Attorney’s Office. The plaintiff (who was a lawyer and who represented himself *pro se*) moved to disqualify the City Attorney’s Office primarily under Washington RPC 1.7(a)⁴ for an

(b) A lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person’s conduct is compatible with the professional obligations of the lawyer; and

(c) A lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) The lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) The lawyer is a partner in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

⁴RPC 1.7(a) provides:

alleged multiple client conflict. He contended that the City Attorney's Office could not represent both the City and the individual City Council members. The City Attorney's Office withdrew and outside counsel was substituted for the defendants. The plaintiff then renewed his motion against the outside counsel. The trial court denied the motion and the Court of Appeals affirmed.

In doing so, the Court of Appeals noted that the plaintiff had not produced any actual evidence of a conflict between the City and the Council majority. 110 Wn. App. at 229-30. Lacking that, the Court of Appeals implicitly concluded that simply the possibility of a conflict was not sufficient to warrant disqualification of either the City's inside or outside counsel. *Id.*

- ▶ ***State v. Whelchel*, 2002 WL 1067742 (Wn. App. May 30, 2002) (unpublished)**
 - Conflicts involving governmental counsel in criminal proceedings

This was a discretionary review proceeding before the retrial of a murder defendant. The defendant, Whelchel, sought to disqualify the prosecutor because he had formerly represented a co-defendant when he was in private practice. Whelchel also sought to disqualify the entire prosecutor's office on the ground that two lawyers who had worked for his defense counsel later joined the prosecutor's office. The trial court denied the motion and the Court of Appeals affirmed.

On the first point, both the trial court and the Court of Appeals noted that the prosecutor had never represented Whelchel, and, therefore, Whelchel was *not* a former client for purposes of the former client conflict rule—RPC 1.9.⁵ Moreover, both the trial court and the Court of Appeals found that there was no evidence that any of the counsel

(a) 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).

⁵ RPC 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.

for co-defendants in the earlier case had obtained any of Whelchel's confidential information. Accordingly, there was no conflict under RPC 1.7(b)⁶ either.

On the second point, the Court of Appeals noted preliminarily that it had found that a prosecutor's office is a "law firm" for purposes of the RPCs in *State v. Bland*, 90 Wn. App. 677, 680, 953 P.2d 126, *rev. denied*, 136 Wn.2d 1028 (1998). The Court of Appeals found, however, that there was no evidence that either of the two deputy prosecutors had ever worked on his case while associated with Whelchel's defense counsel nor had they obtained any confidential information while employed there either. Therefore, the Court of Appeals concluded that no conflict would be imputed to the prosecutor's office under RPC 1.10(b).⁷

- ▶ ***State v. Dietrich*,
2002 WL 1007591 (Wn. App. May 17, 2002) (unpublished)**
 - Conflicts arising from threatened bar complaints

The defendant in this case, Dietrich, had pled guilty to child molestation charges and received a lengthy sentence. He then moved pro se to withdraw his guilty plea and asked the trial court to appoint new counsel. Dietrich contended that he had lost confidence in his original lawyer and that he intended to file a bar complaint against him. The original lawyer joined in the request for substitution and argued that he had a conflict with Dietrich stemming from Dietrich's expressed intent to file a bar complaint

⁶ RPC 1.7(b) provides:

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

- (1) The lawyer reasonably believes the representation will not be adversely affected; and
- (2) The client consents 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.

⁷ RPC 1.10(b), provides, in part:

(b) 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"), or a firm with which the lawyer was associated, had previously represented a client whose interests are materially adverse to that person and about whom the lawyer had acquired confidences or secrets protected by rules 1.6 and 1.9(b) that are material to the matter * * *.

By the time the motion was litigated, the two lawyers involved had left the prosecutor's office.

against him. The trial court denied the motion for substitution and the Court of Appeals affirmed.

Dietrich is interesting because the Court of Appeals analyzed the conflict issue primarily in terms of Sixth Amendment right-to-counsel cases rather than the RPCs. Using those cases, it concluded that the threat of a bar complaint alone would not constitute a disqualifying conflict under the Sixth Amendment. 2002 WL 1007591 at *3. Although the Court of Appeals noted RPC 1.7(b) in passing (with a “see also” cite), it did not analyze the conflict in terms that rule. If it had, the result might have been different. RPC 1.7(b) governs conflicts between a lawyer’s own interests and those of the lawyer’s client. A dispute between the lawyer and the client that had risen to the level of a threatened bar complaint would seem to meet this threshold. At the same time, conflicts under RPC 1.7(b) are generally waivable. See generally *Janicki Logging & Construction v. Schwabe, Williamson & Wyatt, P.C.*, 109 Wn. App. 655, 659, 37 P.3d 309 (2001) (discussing the somewhat analogous situation in which a lawyer stays on a case after allegedly committing malpractice). In this instance, however, *Dietrich* was clearly not willing to waive the conflict.

- ▶ ***Moss v. Fahey*,
2002 WL 548855 (Wn. App. Apr. 5, 2002) (unpublished)**
 - Timing of disqualification motions and their waiver

This case principally involved a dispute over a roadway easement and related land purchase transactions. The trial court had entered a judgment for approximately \$56,000 against the defendants, the Faheys, for interfering with the roadway easement. The Faheys moved to set aside the judgment, contending, among other things, that plaintiffs’ lawyer had a conflict. They contended that the lawyer’s former law firm had represented them on water rights issues relating to the same property. The trial court denied the motion (on this and substantive grounds as well). The Court of Appeals affirmed.

The Court of Appeals noted pointedly that the Faheys had had ample opportunity to raise this issue well before the post-trial phase. The lawyer filed the lawsuit in April 1998 and the trial took place the following year. The trial court entered its judgment in February 2001. The Faheys did not move to disqualify the lawyer until March 5, 2001—nearly three years after he filed the case. There was no dispute that the Faheys had known of the role of the lawyer’s former law firm well before their motion. The Court of Appeals, therefore, found that regardless of the merits (or the lack thereof) of their conflict issue, the Faheys had waived their ability to seek disqualification by “sitting on their rights.”

- ▶ ***Cotton v. Kronenberg***,
111 Wn. App. 258, 44 P.3d 878 (2002)
 - Disqualification and forfeiture of fees

Cotton is not a disqualification case as such. Rather, it involves a breach of fiduciary duty claim against a lawyer for improperly modifying a fee agreement. The lawyer in *Cotton*, however, had been disqualified by the trial court—for witness tampering of which the client was apparently unaware. The Court of Appeals discussed the general proposition that a lawyer can breach a fiduciary duty to a client by violating the RPCs. 111 Wn. App. at 265. The breach in *Cotton* related to the fee agreement between the lawyer and the client and resulted in a fee forfeiture. In the course of discussing breaches of fiduciary duty by lawyers, however, the Court of Appeals in *Cotton* also noted that such breaches based on RPC violations can result in fee reduction or forfeiture in other contexts as well. See generally *Kelly v. Foster*, 62 Wn. App. 150, 813 P.2d 598 (1991) (discussing breach of fiduciary duties by lawyers and fee forfeiture generally). Therefore, *Cotton* suggests that it is more than a theoretical possibility that a lawyer who was disqualified based on a conflict might be faced with a fee reduction or forfeiture as well.

REGIONAL DEVELOPMENTS

Regionally, one of the most interesting developments over the past year has been the continued movement in California court decisions to recognize lateral-hire screening to avoid disqualification.

California does not have a screening rule like Washington RPC 1.10(b) that allows a hiring firm to avoid having a new-hire's disqualifying conflicts imputed to the hiring firm as a whole if appropriate steps are taken to screen the lawyer from any involvement in or discussion about the matter involved. Therefore, the question of whether a new-hire's disqualifying conflicts will be imputed to the hiring firm has been a fertile source of litigation in California.

In 1999, the California Supreme Court suggested in *dicta* in ***People v. Speedee Oil Change Systems, Inc.***, 20 Cal.4th 1135, 1151, 86 Cal.Rptr.2d 816, 980 P.2d 371 (1999) ("*Speedee Oil*"), that screening *might* be available to "insulate" a hiring firm from disqualification:

In any event, we 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.

Seizing on this *dicta*, the Ninth Circuit in ***In re County of Los Angeles***, 223 F.3d 990, 995 (9th Cir. 2000), found the following year that *Speedee Oil* signaled a sea change in California's approach to screening and relied on *Speedee Oil* in affirming the denial of a disqualification motion where the firm involved had effectively screened the new-hire:

We read Speedee Oil as sending a signal that the California Supreme Court may well adopt a more flexible approach to vicarious disqualification.

This year the California Court of Appeal joined the Ninth Circuit in predicting that the California Supreme Court would ultimately approve lateral-hire screening in ***Panther v. Park*, 101 Cal.App.4th 69, 123 Cal.Rptr.2d 599, rev. granted (2002)**. Relying on both *Speedee Oil* and *In re County of Los Angeles*, Panther found that an effective screen would insulate a hiring firm from disqualification in this context:

We conclude that the better view is that law firms, whether they hire or otherwise associate former government attorneys or private attorneys, should be able to rebut the presumption of shared confidences within a firm and therefore avoid disqualification by showing that effective screening procedures were implemented to prevent the passing of information between the tainted lawyer and other members of the firm. 123 Cal.Rptr.2d at 604.

The California Supreme Court granted review in *Panther* on October 23. It remains to be seen if the Ninth Circuit and the California Court of Appeal have deciphered the California Supreme Court's *dicta* in *Speedee Oil* correctly. But, if they have, it will offer law firms with cases or operations in California a very effective way to protect themselves from disqualification.

SELECTED BIBLIOGRAPHY OF WASHINGTON DISQUALIFICATION CASES

The following list of cases—arranged in alphabetical order—is not meant to be a comprehensive summary of Washington disqualification law. Rather, it simply notes some of the more interesting decisions over the past five years.

- ▶ ***Daines v. Alcatel*,
194 F.R.D. 678 (E.D. Wash. 2000)**
 - **Screening**

Daines affirms the use of screening under Washington RPC 1.10(b) to avoid lateral-hire conflicts involving nonlawyer staff. *Daines* also contains a discussion of a lawyer's responsibility for supervising nonlawyer staff that was later cited in the *Richards v. Jain* case reported earlier in this paper.

- ▶ ***Estate of McCorkle v. England*,
1998 WL 295896 (Wn. App. June 5, 1998) (unpublished)**
 - **Standing to raise disqualification motions**

McCorkle discusses the important, but often overlooked, point that a party moving to disqualify counsel must generally be or have been the law firm's current or former client to have standing to seek disqualification.

- ▶ ***In re Firestorm 1991*,
106 Wn. App. 217, 22 P.3d 849, rev. denied, 144 Wn.2d 1021 (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. *See also In re Firestorm 1991*, 129 Wn.2d 130, 916 P.2d 411 (1996) (touching on the issue of disqualification based on ex parte contact with an opponent's experts). This latest decision deals with disqualification standards for class counsel.

- ▶ ***Miller v. Robertson*,
1999 WL 65638 (Wn. App. Feb. 12, 1999) (unpublished)**
 - **Former client conflicts as a basis for disqualification**

Miller deals primarily with the application of the former client conflict rule, RPC 1.9, in the context of disqualification arising in a lawsuit involving a "squeeze out" of a minority shareholder in a closely held corporation. It focuses on the issue of what constitutes a "substantially related matter" under RPC 1.9(a).

- ▶ ***Oxford Systems, Inc. v. CellPro, Inc.*,
45 F. Supp. 2d 1055 (W.D. Wash. 1999)**
 - **Current/former client conflicts as a basis for disqualification**

The *CellPro* case contains one of the most comprehensive discussions of the current and former client conflict rules in recent Washington disqualification litigation. It also addresses the question of whether a "periodic" out-of-state client is a current or former client. The court in *CellPro* also allowed the parties to present expert testimony (by affidavit) on the questions of whether a conflict existed and, if so, whether disqualification was appropriate.

- ▶ ***State v. Bland*,
90 Wn. App. 677, 953 P.2d 126 (1998)
State v. Daniels,
2000 WL 1156871 (Wn. App. Aug. 11, 2000) (unpublished)**
 - **Lawyer-witness rule and disqualification**

Bland and *Daniels* both discuss the lawyer-witness rule, RPC 3.7, in the context of a prosecutor's office. In doing so, both classify a prosecutor's office as a "law firm" for purposes of the lawyer-witness rule.

- ▶ ***State v. Shelby*,
2001 WL 337867 (Wn. App. Feb. 9, 2001) (unpublished)**
 - **Bar complaints and disqualification**

Like the *Dietrich* case reported in the main section, *Shelby* dealt with conflicts arising from bar complaints—in this instance a complaint filed against co-counsel. Unlike *Dietrich*, *Shelby* analyzes the issue under RPC 1.7(b).

- ▶ ***State v. Siriani*,
2000 WL 1867632 (Wn. App. Dec. 21, 2000) (unpublished)**
 - **"Who is the client?" for purposes of disqualification**

This case deals with the "who is the client?" question in the context of disqualification. Relying on *Bohn v. Cody*, 119 Wn.2d 357, 832 P.2d 71 (1992), *Siriani* examines the issue of whether a former client relationship existed as a predicate to deciding whether a former client conflict warranting disqualification was present.

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

Tjeerdsma addresses the problems associated with representing a municipal government while also representing criminal defendants being prosecuted by the State in the same county. The Court of Appeals found that because the lawyer's contract as a municipal prosecutor designated the city and not the State as his client, there was no conflict. *See also* Washington State Bar Formal Ethics Opinion 161 (1975).