

**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.<sup>1</sup> 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 six years.

## WASHINGTON<sup>2</sup>

This year's disqualification decisions in Washington focused primarily on standing and conflicts arising in criminal representation. Of note, however, one of the most interesting regional disqualification cases this year—*In re Jore* from Montana—involved a Washington firm and rules similar to those used in Washington.

- ▶ ***In re Feetham*,  
149 Wn.2d 860, 72 P.3d 741 (2003)**
  - **Standing to assert disqualification**

This case involved the sufficiency of a ballot synopsis and associated charges involving a recall campaign directed against the mayor of Concrete. The chief petitioner was represented by a lawyer who was mayor of another nearby town. The other mayor was quoted by a local newspaper as saying that the recall campaign would be moot if the mayor against whom the campaign was aimed simply resigned. The mayor being recalled did not take kindly to those remarks and moved to disqualify the petitioner's lawyer-fellow mayor based on a variety of alleged violations of the RPCs. The Supreme Court noted that none of the alleged RPC violations went to the issue of whether there was a conflict that warranted disqualification.<sup>3</sup> The Supreme Court, therefore, rejected the suggestion that the lawyer-fellow mayor should be disqualified. Although not saying so explicitly, the Supreme Court's decision highlights that generally only a client or former client of the lawyer involved will have standing to seek disqualification except in circumstances where the conflict would potentially affect the validity of the proceeding as a whole. One of the cases reported later—*State v. Riofta*, 2003 WL 22039947 (Wn. App. Sept. 2, 2003)—illustrates the exception.

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<sup>1</sup> The cases discussed were reported through October 10. They are intended to be illustrative rather than encyclopedic. As such, they focus on decisions that are available in at least electronic form.

<sup>2</sup> 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.”

<sup>3</sup> For a similar case with a similar result, see *Capps v. Gregoire*, 2003 WL 103461 (Wn. App. Jan. 13, 2003) (unpublished).

- ▶ ***Lambert v. Blodgett*,  
248 F. Supp. 2d 988 (E.D. Wash. 2003)**
  - **Co-defendant conflicts in criminal representation**

*Lambert* was a federal habeas corpus proceeding in which petitioner Lambert sought review of his state guilty plea to aggravated murder charges based on ineffective assistance of counsel under the Sixth Amendment. The district court granted the petition on several grounds. One of Lambert’s arguments was that his lawyer who had represented him on the plea had a nonwaivable conflict because another lawyer from the same firm was representing a co-defendant and their respective positions on both culpability and plea negotiations were adverse. On the former, Lambert admitted to firing one shot, but alleged that his co-defendant fired “many.” On the latter, the co-defendant’s plea agreement was conditioned on his testifying against Lambert. Although the district court did not rely on this aspect of Lambert’s argument in granting the petition, its order specifically directed that his trial counsel could not come from the firm involved nor could his new attorney be a member of the same firm as counsel for any co-defendant.

Both of the lawyers involved worked under contract for a law firm that handled public defender work in Grant County. The firm operated that aspect of its practice under a trade name and the two lawyers both apparently appeared on the record under the firm’s trade name. Although the State contended that the lawyers were independent contractors and did not share confidences regarding the two clients, the district court relied on the definition of “law firm” in ABA Model Rule 1.0 and its accompanying comments—which are similar to the one used in the “terminology” section of the Washington RPCs and under RPC 7.5’s discussion of firm and trade names—in concluding that the two lawyers were members of the same firm because they held themselves out as such.

Having found that the lawyers were from the same firm, the district court then imputed their respective conflicts to the firm as a whole under Washington RPC 1.10(a). Although the district court did not specifically mention the Washington current client conflict rule—RPC 1.7—and instead couched its discussion of the conflict largely in Sixth Amendment terms, its result is consistent with RPC 1.7 in light of the conflicting defenses the two firm clients were pursuing and the plea agreement the co-defendant was negotiating adverse to Lambert in the same case.

- ▶ ***State v. Riofta*,  
2003 WL 22039947 (Wn. App. Sept. 2, 2003) (unpublished)**
  - **More conflicts in criminal representation**

Like the *Lambert* case noted above, *Riofta*, too, arose in the context of a criminal case and the Court of Appeals’ analysis is cast largely in Sixth Amendment terms. Defendant Riofta was accused of assault involving an acquaintance. The apparent motive for the assault was to intimidate the acquaintance’s brother, who was a

defendant in a gang-related multiple homicide case and who had agreed to testify against his co-defendants.

Riofta hired the same law firm as defense counsel that was representing one of the defendants in the murder case. The prosecution moved to disqualify the law firm in the *Riofta* case. The State argued that the law firm had a conflict because any negotiations over a plea in *Riofta* would be aimed at soliciting his assistance as a witness against the defendants in the murder case—including the defendant that the law firm was representing there. The trial court agreed and the Court of Appeals affirmed. In doing so, the Court of Appeals noted that although the Sixth Amendment guarantees an effective advocate for criminal defendants it does not guarantee that the defendant will always have the right to choose a specific lawyer.

As noted earlier, *Riofta* also highlights an interesting issue on standing to assert disqualification. Normally, the party seeking disqualification must be the client or former client of the lawyer. In some limited circumstances, however, the opposing party has standing to seek disqualification where the nature of the conflict has the potential to affect the validity of the proceedings themselves. A prosecutor concerned about a possible post-conviction ineffective assistance argument that might overturn a conviction is an excellent example of such “third party” standing.

## **REGIONAL DEVELOPMENTS<sup>4</sup>**

### **Alaska**

- ▶ ***Richard B. v. State*,  
71 P.3d 811 (Alaska 2003)**
  - **Alaska rejects lateral-hire screening**

The Alaska Supreme Court rejected screening earlier this year as a tool to insulate a law firm from disqualification. *Richard B.* involved a lawyer who had represented a client on a child molestation charge while working for a public defender agency. The client pled to the charge and was sentenced to five years in prison. Shortly after that, the lawyer left the public defender and joined a local law firm. At around that same time, the firm took on a contract to represent parents in termination of parental rights proceedings. One of the cases included representing a mother in a termination proceeding. The father, whom the firm did not represent, was the client in the earlier criminal case. When the firm realized that the father was involved in the termination proceeding, it immediately screened the lawyer who had represented the father earlier.

The father, however, moved to disqualify the law firm. He argued that the lawyer had a former client conflict because the termination proceeding was substantially

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<sup>4</sup> As noted earlier, the compilation of regional cases in this section is intended to be illustrative and not encyclopedic.

related to the earlier criminal case under Alaska RPC 1.9, the father's criminal conviction was being used adversely to him by the mother in the subsequent parental rights proceeding and the conflict was imputed to the law firm as a whole under Alaska RPC 1.10. The trial court concluded that regardless of any former client conflict on the individual lawyer's part, the law firm's screen prevented that conflict from being imputed to the firm as a whole. The trial court, therefore, denied the motion. The Alaska Supreme Court reversed.

In doing so, the Supreme Court first found that the individual lawyer had a former client conflict under Alaska RPC 1.9. Like its counterparts based on the ABA Model Rules in other jurisdictions (including Washington), Alaska RPC 1.9 prohibits a lawyer (without consent) from representing a current client against a former client in either the same or a substantially related matter or where the lawyer would be required to use the former client's confidential information adverse to the former client. Here, the Supreme Court concluded that the two matters were substantially related, the mother was using the earlier criminal conviction adverse to the father in the later termination proceeding and the lawyer likely held confidential information from the former client that would be material to the new representation.

Next, the Supreme Court held that the lawyer's conflict would be imputed to the law firm as a whole under Alaska RPC 1.10. Again like its counterparts based on the ABA Model Rules in other jurisdictions (including Washington), Alaska RPC 1.10 generally imputes one firm member's conflicts to the law firm as a whole.

Finally, the Supreme Court concluded that screening was not available to "insulate" the law firm from the lawyer's conflict. It noted as a preliminary matter that the screening tool for former government lawyers under Alaska RPC 1.11 was not available in this instance because the public defender agency involved was not classified as governmental representation. At the same time, the Supreme Court noted that Alaska did not have a specific screening rule applicable to non-government lawyers moving from firm to firm in private practice. Absent such a rule, the Supreme Court declined to read a screening mechanism into Alaska RPC 1.10 and concluded that the law firm should have been disqualified.

*Richard B.* highlights both the uncertainty that occurs when lateral-hire screening for private practice is not included by rule like those in Washington (RPC 1.10(b)) and Oregon and the utility of screening in those jurisdictions that have adopted it.

## California

- ▶ ***VISA U.S.A., Inc. v. First Data Corp.*,  
241 F. Supp. 2d 1100 (N.D. Cal. 2003)**
  - **"Blanket" waivers upheld in the face of disqualification**

Earlier this year, the U.S. District Court in San Francisco upheld the use of advance, or "blanket," waivers in the face of disqualification. In denying a motion to disqualify the law firm in *VISA* that was relying on the advance waiver, the court offered

both a useful summary of California law on the subject and a broader discussion of the circumstances where advance waivers are most likely to be upheld.

Plaintiff VISA was a long term and significant client of the law firm. In 2001, defendant First Data, which processed transactions for VISA, was sued in a patent matter in Delaware that was unrelated to its work for VISA. First Data asked the law firm to represent it in the Delaware patent litigation. The law firm was willing to undertake the representation as long as First Data agreed to an advance waiver that would preserve the law firm's ability to take on other unrelated matters adverse to First Data. Because the law firm was aware of the relationship between VISA and First Data, it mentioned VISA specifically in the waiver. But, in other respects, the waiver simply gave First Data's broad consent to the law firm taking on future work adverse to First Data provided it was unrelated to the Delaware patent matter and it would not call on the law firm to use First Data's confidential information. First Data consented to the waiver and the law firm began defending First Data in the Delaware patent case.

About a year later (and while the Delaware patent case was still underway), VISA asked the law firm to file a lawsuit in San Francisco against First Data for trademark infringement and breach of contract. The issues involved were not related to the Delaware patent case, and, therefore, the law firm moved forward with the lawsuit for VISA against First Data.

Despite the future waiver, First Data moved to disqualify the law firm. First Data primarily contended that it had not been fully informed by the law firm about the possibility that the law firm might take on matters against it as a result. Alternatively, First Data argued that the law firm was required under California law to seek reaffirmation of the waiver at the point it actually wanted to take on a matter adverse to First Data. The court rejected both arguments and denied the motion.

The court began by holding that advance waivers are clearly permitted under California law—relying primarily on the California Supreme Court's decision in *Maxwell v. Superior Court*, 30 Cal.3d 606, 180 Cal.Rptr. 177 639 P.2d 248 (1982), and a subsequent ethics opinion by the California State Bar, 1989-115. The court noted that such waivers do not need to state specifically the exact nature of the future conflict as long as the party granting the waiver was fully informed of its broad nature. In this instance, the court noted that the waiver at issue easily met that standard because in addition to its general disclosures (which the court found would have been adequate in and of themselves) the waiver also included specific mention of the law firm's work for VISA. The court next rejected First Data's alternative argument and found that there was no requirement under the California Rules of Professional Conduct to reaffirm the consent obtained under the circumstances presented.

More broadly, the court cited national authority—including ABA Formal Legal Ethics Opinion 93-372, Comment 22 to ABA Model Rule 1.7 (which governs multiple client conflicts) and Comment "d" to Section 122 of the new Restatement of the Law Governing Lawyers—in observing that the relative sophistication of the party granting

the waiver should be taken into account in determining whether its consent to a waiver was fully informed. Here, the court noted that First Data was a “Fortune 500” company with a large and knowledgeable legal department—in short, First Data knew what it was doing when it granted the waiver. The court, citing another recent case denying disqualification on similar grounds—*Elonex I.P. Holdings, Ltd. v. Apple Computer, Inc.*, 142 F. Supp. 2d 579 (D. Del. 2001)—also relied on the fact that the law firm had discussed the waiver with First Data’s internal counsel—again, drawing the conclusion that First Data knew what it was doing.

As noted, the *VISA* decision contains a useful summary of California law on future waivers. But, it is also a good tutorial in the circumstances in which an advance waiver will most likely be upheld—against relatively sophisticated consumers of legal services who at least have access to independent counsel (including inside corporate counsel) if they choose to use it in assessing whether to grant an advance waiver.

- ▶ ***Certain Underwriters at Lloyds v. Argonaut Ins. Co.*, 264 F. Supp. 2d 926 (N.D. Cal. 2003)**
  - **Disqualification in affiliate representation**

One of the most difficult issues in current client conflict analysis is whether all of the members of a “corporate family” should be considered as one client for conflict purposes. The U.S. District Court in San Francisco took on this question earlier this year in the disqualification context in *Certain Underwriters*. Although this issue is inherently fact-specific, *Certain Underwriters* offers a good view of how courts approach this question.

*Certain Underwriters* involved a motion by a group of Lloyds underwriters challenging the selection of an arbitrator in a coverage proceeding with Argonaut. The law firm handling the motion for the underwriters was also representing one of Argonaut’s subsidiaries on other matters. Argonaut moved to disqualify the law firm based on a current client conflict under California RPC 3-310(C)—which governs multiple current client conflicts. Although it conceded that the Argonaut subsidiary was a client, the law firm argued that Argonaut itself was not, and, therefore, no conflict existed. The court disagreed and disqualified the law firm.

In doing so, the court first noted that California law typically treats members of a corporate family as separate entities. The court noted, however, that a corporation and an affiliate may be treated as the same for conflict purposes when they have a “unity of interests.” In recognizing a “unity of interests” in this instance, the court looked primarily to the extent to which the two shared common management of their operations generally and their legal affairs in particular. The court concluded that because the Argonaut subsidiary’s general and legal management were handled by the parent’s staff, it should be treated as one and the same with the parent for conflict purposes. Given that unity, the court found that a conflict existed and disqualified the law firm.

*Certain Underwriters* is consistent with both ABA and California ethics opinions on the subject—ABA Formal Ethics Opinion 95-390 and California State Bar Formal Ethics Opinion 1989-113. Like *Certain Underwriters*, the ABA and the California Bar found that while members of corporate families may generally be treated as separate entities, they should be considered the same for conflict purposes when they share management generally and legal management in particular.

## Idaho

- ▶ ***State v. Cherry*,  
\_\_\_ P.3d \_\_\_, 2003 WL 22071498 (Idaho App. Sept. 8, 2003)**
  - **Public-sector lateral-hire conflict doesn't result in disqualification**

The defendant in *Cherry* was accused of first degree murder. He was represented by two public defenders. Before trial, one of the public defenders took a job with the prosecutor's office. The new prosecutor did not work on the case and executed an affidavit saying, in essence, that he had screened himself from the case. *Cherry* moved to disqualify the prosecutor's office—contending that the former public defender's conflict was imputed to the prosecutor's office as a whole under Idaho RPC 1.10, which governs imputed conflicts generally. The trial court denied the motion, and, on appeal following the defendant's conviction, the Idaho Court of Appeals affirmed.

The Court of Appeals held that Idaho RPC 1.11(c)(1)—which specifically governs lateral moves to and from government employment—was controlling in this instance rather than RPC 1.10 because the lawyer was moving from private practice to governmental employment. It found that although the individual former public defender was disqualified from further work on the case that disqualification did not apply to the prosecutor's office as a whole.<sup>5</sup>

## Montana

- ▶ ***In re Jore Corp.*,  
\_\_\_ B.R. \_\_\_, 2003 WL 22048517 (Bankr. D. Mont. July 28, 2003)**
  - **Disqualification coupled with fee disgorgement**

In July, the U.S. Bankruptcy Court in Montana disqualified a Washington law firm serving as debtor's counsel for undisclosed and unwaived conflicts. The court also ordered the firm to disgorge over \$600,000 in fees that it had already received *and* disallowed another \$1 million in fees that it had incurred.

*Jore* involved a complex and contentious commercial bankruptcy. The facts surrounding the disqualification and disgorgement, however, are much simpler. *Jore* was a manufacturer of power tool drill bits that had fallen on hard times. By the spring of 2001, it was actively considering Chapter 11 bankruptcy and retained the law firm,

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<sup>5</sup> For another Idaho criminal case that discusses disqualifying conflicts primarily in Sixth Amendment terms rather than under the professional rules, see *State v. Lovelace*, \_\_\_ P.3d \_\_\_, 2003 WL 21697869 (Idaho July 23, 2003).



which was an experienced bankruptcy counsel. Jore's biggest creditor was a major bank. The bank was also a six-figure client of the law firm.

Mounting financial pressures forced Jore into bankruptcy in May 2001. The law firm submitted an application to become debtor's counsel at that same time. The law firm listed the bank as a client on unrelated matters in its application. The following month, it forwarded a written conflict waiver letter to the bank. The waiver included a limitation that later proved central to the court's order on both disqualification and disgorgement: the law firm agreed that it would not represent Jore in "litigation directly adverse" to the bank. The bank signed and returned the waiver later in June. Although the law firm informed the court that it had obtained a waiver from the bank, it did not disclose the "no litigation" proviso until a year later.

In the meantime, relations between Jore and the bank continued to be difficult as Jore's financial situation deteriorated and the sale of the business at a significant loss to the bank became more likely. By December 2001, the bank challenged Jore's plan to use "cash collateral" to sustain its operations in a hearing and later filed an appeal when the court granted Jore's motion. The law firm represented Jore at the hearing and on the appeal against the bank. Following continued skirmishing between Jore (represented by the law firm) and the bank on a variety of fronts, Jore's assets were eventually sold in April 2002. After the sale, the law firm sought an "acknowledgement" from the bank that its original waiver would also cover remaining issues regarding professional fees (including the law firm's) in the case. The bank refused, reminded the law firm of the "no litigation" limitation in the original waiver and questioned the law firm's compliance with the limitation. Despite the bank's position, the law firm still did not report the "no litigation" limitation to the court or that the bank had questioned the continued validity of the waiver in light of that limitation. Relations between the bank and the law firm eroded further as the bank continued to question the law firm's compliance with the "no litigation" limitation provision in the original waiver. In June 2002, the law firm finally revealed the "no litigation" clause to the court and told the court that the bank was challenging the law firm's adherence to the waiver—albeit describing the bank's challenge as "without merit."

At that point, the United States Trustee began investigating the circumstances surrounding the waiver. When the law firm filed its final application for fees, the Trustee moved to disqualify the law firm, to require the firm to disgorge the fees that it had been paid and to disallow any further fee payments to the firm. By that point, the law firm had incurred \$1.6 million in fees and had been paid roughly \$625,000. The court agreed.

The court's analysis focuses primarily on the law firm's failure to comply with F.R.B.P. 2014(a), which requires a lawyer's application for employment as counsel to disclose conflicts so that the court can determine whether the firm is "disinterested" as required by 11 U.S.C. § 327(a). The law firm's lead attorneys on the case "both testified that it did not occur to them to disclose the no litigation exception to \* \* \* [the bank's] \* \* \* conflicts waiver because they did not think it important." 2003 WL 22048517 at \*20. The court thought otherwise. The court also found that the law firm had a serious

unwaived conflict under RPC 1.7, which governs current client conflicts in Montana. The court held: “By failing to disclose \* \* \* [the bank’s] \* \* \* limitations to its conflict waiver, \* \* \* [the law firm] \* \* \* failed to disclose an actual conflict of interest with the largest creditor in the case involved in arguably the most important issue in the entire case \* \* \*.” *Id.* at \*24. Apparently concerned because the law firm had continued to deny that there was any problem, the court added in conclusion: “[S]uch a failure to disclose an actual unwaived conflict of interest with the largest creditor involved in the most important issue in the case \* \* \* gives the Court further reason to impose full harsh penalties of disqualification \* \* \* from employment, and denial and disgorgement of all fees.” *Id.* at \*25.

Although the court in *Jore* relied on bankruptcy procedure in ordering disgorgement, that remedy is not limited to bankruptcy. For example, in *Cotton v. Kronenberg*, 111 Wn. App. 258, 44 P.3d 878 (2002), the Washington Court of Appeals held that fee disgorgement was an appropriate remedy for a breach of fiduciary duty claim by a client against his former lawyer who had been disqualified in the underlying litigation. States vary in their treatment of a lawyer’s ability to recover (or retain) fees under quantum meruit when they have breached a fiduciary or other professional duty to a client. While *Jore* was unusual in the sense that the disqualification and disgorgement occurred in the same proceeding, the remedy of disgorgement is a real possibility in subsidiary litigation between the disqualified lawyer and the client whose financial investment in the lawyer’s work may have largely evaporated with the lawyer’s disqualification.

## Oregon

- ▶ ***Admiral Insurance Company v. Mason, Bruce & Girard, Inc.*, 2002 WL 31972159 (D. Or. Dec. 5, 2002)**
  - **Disqualification and the “periodic” client**

Late last year, the U.S. District Court in Portland disqualified a law firm for opposing a “periodic” client. In *Admiral*, the plaintiff’s law firm had represented an officer/shareholder of the closely-held defendant “off and on” for over 20 years. The representation, however, was not continuous and in early 2002 the law firm had no open matters for the officer/shareholder. At that time, the officer/shareholder contacted the primary lawyer at the firm that he had worked with over the years for advice on his company’s and his own exposure on a possible coverage reimbursement claim by the plaintiff insurer against the defendant company. According to the client, he shared the defendant’s positions and strategies with the lawyer because he believed that he had an attorney-client relationship with him and his firm. The lawyer recollected speaking generally with the client, who was also a personal acquaintance, about the possible litigation but did not believe that the conversation took place as a part of an attorney-client relationship and did not open a new matter in the firm’s conflict system. Later that year, the law firm began representing the plaintiff insurer and filed a lawsuit against the defendant company over the reimbursement issue. The defendant company moved to disqualify the law firm—citing the existence of an attorney-client relationship on the

matters at issue in the lawsuit and a corresponding conflict. The court agreed on both points and ordered disqualification.

The court relied primarily on the “reasonable expectations of the client test” articulated by the Oregon Supreme Court in *In re Weidner*, 310 Or. 757, 801 P.2d 828 (1990), for determining whether there had been an attorney-client relationship between the client and the law firm on the matters involved. There are two elements to that test: (a) the client must *subjectively* believe that the attorney is representing the client; and (b) that subjective belief must be *objectively* reasonable under the circumstances. The court found that the client subjectively believed that that the lawyer was representing him when he disclosed confidential information on the company’s strategy and his possible personal exposure. The court next noted that although the client and the lawyer had somewhat different recollections about the nature and extent of their conversations, they intersected “on the core fact that \* \* \* [they] \* \* \* shared several conversations about the underlying litigation and the possibility that plaintiff might sue MGB.” 2002 WL 31972159 at \*2. The court concluded, therefore, that *no matter what the lawyer thought*, the client’s belief that an attorney-client relationship existed was objectively reasonable under the circumstances.

Having found that an attorney-client relationship existed and that the relationship extended to both the individual officer/shareholder and the company, the court concluded that a multiple client conflict existed. Because the law firm and the client had parted company as a result of the lawsuit, the court analyzed the situation under Oregon’s former client conflict rule—DR 5-105(C). Under Oregon’s rule, which is similar to ABA Model Rule 1.9 used in other states, a lawyer is prohibited from opposing a former client in a matter that is either the same or significantly related to one that the lawyer represented the client on before. Here, the court concluded that the matters were significantly related because the subjects the client discussed with the lawyer involved some of the same issues being litigated in the lawsuit. The court then disqualified the firm.

*Admiral* has echoes of a Washington disqualification case—*Oxford Systems, Inc. v. CellPro, Inc.*, 45 F. Supp. 2d 1055 (W.D. Wash. 1999). *Oxford*, too, involved a “periodic” law firm client that sought the firm’s disqualification when it began handling the other side of a related matter. And, like *Admiral*, the federal district court in Seattle used the Washington equivalent of the “reasonable expectations of the client test”—*Bohn v. Cody*, 119 Wn.2d 357, 832 P.2d 71 (1992)—to determine that the client and the law firm had an attorney-client relationship on the matter involved. Again like *Admiral*, the *Oxford* court used Washington’s multiple client conflict rules to disqualify the law firm.

## Utah

- ▶ ***Spratley v. State Farm*, \_\_\_ P.3d \_\_\_, 2003 WL 22175989 (Utah Sept. 23, 2003)**
  - **Disqualification and representing former in-house counsel**

In late September, the Utah Supreme Court issued an interesting decision that addressed the question of whether trial counsel for former in-house counsel should be disqualified because his clients had imparted to him their former corporate employer's confidential information in the course of prosecuting their employment-related claims against the former corporate employer. The Utah Supreme Court said "no"—on the facts before it. Along the way, the court put Utah in the "two client" camp for insurance defense and held that a former in-house counsel can bring a wrongful discharge claim against the lawyer's former corporate employer even if prosecuting the claim may involve the disclosure of the former employer's confidential information.

*Spratley* involved two Salt Lake City lawyers who had worked for the defendant insurer as "claims litigation counsel" and in that role represented the carrier's policyholders in a wide variety of insurance defense litigation. Given their in-house role, the two lawyers had also provided some legal services directly to their former corporate employer. The lawyers left the insurer in 2000 and later sued it on several wrongful discharge theories, arguing, in part, that it allegedly required them to violate ethical duties. The insurer denied the allegations and moved to disqualify the lawyers' trial counsel on the ground that they had shared its confidential information with him in formulating the lawyers' employment claims. The trial court disqualified their lawyer. On interlocutory appeal, the Utah Supreme Court reversed the disqualification.

The first question the Supreme Court addressed was whether the former in-house counsel had an attorney-client relationship with the insurer. Although they had been its employees and had given occasional advice to it directly, the lawyers had spent most of their time as the functional equivalent of outside insurance defense counsel. The Supreme Court, therefore, focused on this aspect of their relationship with the insurer. States vary in the way they categorize the insurance defense relationship. Some, such as Oregon, use a "two client" model and consider both the insured and the insurer to be the defense counsel's clients. Others, such as Washington<sup>6</sup>, use a "one client" approach in which only the insured is the client and the insurer is simply a third party payor. In *Spratley*, the Utah Supreme Court adopted the "two client" approach.

Having found that the two lawyers had an attorney-client relationship with the insurer under the "two client" model, the Utah Supreme Court next looked at the question of whether the lawyers had breached their corresponding duty of confidentiality by disclosing the insurer's confidential information to their litigation counsel in developing their wrongful discharge claims. The Supreme Court, citing a recent ABA ethics opinion (01-424), noted that there are currently two competing views nationally on whether a former in-house counsel can bring a claim against a former employer where

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<sup>6</sup> See *Tank v. State Farm*, 105 Wn.2d 381, 715 P.2d 1133 (1986); Washington State Bar Association Formal Ethics Opinion 195 (1999).

doing so involves disclosing the former employer's confidential information. Some states, such as Illinois, hold that these claims are barred in deference to the attorney-client privilege and the client's right to discharge counsel freely. Others, such as California, allow them to accord in-house counsel roughly the same rights as other corporate employees. The Supreme Court held that such claims are permitted in Utah as a matter of law but are subject to strict limitations on the disclosure of the former corporate employer's confidential information. In doing so, the Supreme Court found that wrongful discharge theories fell within Utah RPC 1.6(b)(3)'s exception to the duty of confidentiality where a lawyer is prosecuting a claim against a former client. At the same time, the Supreme Court emphasized that this exception was narrow and the lawyer involved must minimize the disclosure of the former corporate employer's confidential information. The Supreme Court concluded that the limited disclosure of the insurer's confidential information to the two former in-house counsel's lawyer was permitted, and, therefore, reversed the trial court's disqualification order.

## **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 six years.

- ▶ ***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 involved a breach of fiduciary duty claim against a lawyer seeking, among other things, the return of the client's fees because the lawyer had been disqualified. *Cotton*, like the *Jore* case reported earlier, suggests fee forfeiture as a possible subsidiary remedy for disqualification that results in the client's loss of its financial investment in the lawyer when the lawyer is disqualified. 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).

- ▶ ***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 discussed below.

- ▶ ***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 clients to have standing to seek disqualification.

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

*Eugster* involved a situation where the city attorney was representing both the city and individual city council members in a dispute with another council member. The city attorney withdrew from representing the city council members before the trial court issued a ruling on disqualification. The plaintiff renewed the motion against the outside law firm substituted for the council members. The trial court denied the motion and the Court of Appeals affirmed—implicitly concluding that simply the possibility of a conflict was not sufficient to warrant disqualification.

- ▶ ***In re Firestorm 1991*,  
106 Wn. App. 217, 22 P.3d 849, rev. denied, 144 Wn.2d 1021 (2001)**
  - **Disqualification of 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**

*Oxford* 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 *Oxford* court 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.

- ▶ ***Richards v. Jain*,  
168 F. Supp. 2d 1195 (W.D. Wash. 2001)**
  - **Disqualification as a sanction for failure to return privileged communications**

In *Richards*, the plaintiff had provided his lawyers with over 900 privileged communications that he had taken with him when he left his corporate employer for use in prosecuting his claim over stock options against the former employer. Relying primarily on an ABA ethics opinion—94-382—the court found a duty to notify the privilege holder, to return them and to quickly seek the court’s intervention to resolve any issues over waiver. On another note, the communications in *Richards* were e-mails. The court, however, looked to the substance of the communications rather than their form in determining that they were privileged.

- ▶ ***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 in the context of prosecutor’s offices. In doing so, both classify a prosecutor’s office as a “law firm” for purposes of RPC 3.7’s lawyer-witness rule.

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

*Shelby* dealt with conflicts arising from bar complaints—in this instance a complaint filed against co-counsel. *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 Association Formal Ethics Opinion 161 (1975).