

**DISQUALIFICATION FOR CONFLICTS OF INTEREST:  
2007 UPDATE**

Professional Responsibility Institute  
University of Washington School of Law  
Seattle  
December 1, 2007

**Mark J. Fucile**  
**Fucile & Reising LLP**  
**503.224.4895**  
**Mark@frllp.com**  
**www.frllp.com**

**Mark J. Fucile** of Fucile & Reising LLP focuses on legal ethics and products liability defense. In his legal ethics practice, Mark handles professional responsibility, regulatory and attorney-client privilege matters and law firm related litigation for lawyers, law firms and legal departments throughout the Northwest. Mark is a past chair and is a current member of the Washington State Bar Rules of Professional Conduct Committee, is a former member of the Oregon State Bar Legal Ethics Committee and is a member of the Idaho State Bar Professionalism & Ethics Section. Mark was also a member of the WSBA's Special Committee for the Evaluation of the Rules of Professional Conduct, which updated the RPCs to their current set. He is a contributing author/editor for the current editions of the WSBA's Legal Ethics Deskbook and the OSB's Ethical Oregon Lawyer. Mark also writes the quarterly Ethics & the Law column for the WSBA Bar News and the monthly Ethics Focus column for the Multnomah (Portland) Bar's Multnomah Lawyer. In his products liability defense practice, Mark represents national and Northwest manufacturers in cases involving automobiles, building materials and industrial products. He is a member of the Washington Defense Trial Lawyers, the Oregon Association of Defense Counsel, the Defense Research Institute and the International Association of Defense Counsel. Mark is admitted in Washington, Oregon, Idaho, Alaska and the District of Columbia. He received his B.S. from Lewis & Clark College and his J.D. from UCLA.

## **INTRODUCTION**

This paper surveys developments in the law of disqualification over last year and so far this 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 are other decisions that highlight conflict issues that often arise in disqualification litigation.

The initial section reviews cases from Washington. The focus then shifts to regional developments in Alaska, Oregon, Idaho and the Ninth Circuit. The concluding section contains a brief bibliography of Washington disqualification cases over the past nine years.

It is important to note that remedies for conflicts extend well beyond disqualification (and disciplinary sanctions) to include legal malpractice and breach of fiduciary claims and fee disgorgement. For more on those, see my August 2004 WSBA Bar News Ethics & the Law column, "Why Conflicts Matter" available in the *Bar News* archives on the WSBA's web site at [www.wsba.org](http://www.wsba.org) and in the resources section of my firm's web site at [www.frlfp.com](http://www.frlfp.com).

---

<sup>1</sup> The cases discussed were reported through November 1. They are intended to be illustrative rather than encyclopedic. As such, they focus on decisions that are available in at least electronic form. Also, most of the cases discussed in this paper were decided under the former Washington RPCs that were amended effective September 1, 2006. Most of the outcomes discussed would be the same under the amended rules. Potentially different outcomes under the new rules, however, are highlighted. The amended RPCs are available on the WSBA's web site at [www.wsba.org](http://www.wsba.org).

## WASHINGTON<sup>2</sup>

Over the past year, Washington courts issued disqualification decisions that touched on five primary areas: (1) “corporate family” conflicts; (2) former client conflict analysis in the disqualification context; (3) the lawyer-witness rule as a basis for disqualification; (4) standing for purposes of disqualification; and (5) duties to prospective clients.<sup>3</sup>

- ▶ ***Jones v. Rabanco, Ltd.*,  
2006 WL 2237708 (W.D. Wash. Aug. 3, 2006) (unpublished)**
  - **Standards for finding an attorney-client relationship**
  - **“Corporate family” conflicts**

This first installment of a pair of disqualification decisions from the *Jones* case involved a motion to disqualify one of two sets of lawyers (Law Firm) handling an employment case for multiple plaintiffs against defendant Rabanco. Rabanco and a wholly-owned subsidiary, Regional Disposal Corporation (RDC), in turn, were part of a larger corporate family, Allied Waste. The Law Firm had represented RDC in a waste-hauling contract dispute from 2000 to 2002. The earlier litigation was fully completed, but the settlement agreement included a new contract that runs through 2011. That new contract contained a notice provision requiring that the Law Firm be copied on all communications concerning the agreement through its duration. After the settlement was concluded in 2002, many—but not all—of the lawyers who had represented RDC in the dispute left the Law Firm. After their departure, the volume of work being done for

---

<sup>2</sup> Several of the disqualification decisions issued by the Washington Court of Appeals this past 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 case this past year succinctly summarizing related considerations on expert disqualification, see *Harvey v. Jones*, 2006 WL 1889314 (W.D. Wash. Jul. 7, 2006) (unpublished), and for one discussing the related area of contested withdrawal, see *State v. Brady*, 2006 WL 3077727 (Wn. App. Oct. 31, 2006) (unpublished).

RDC declined and there was evidence that the Law Firm had done no work for Rabanco, RDC or Allied since November 2002. In February 2006, the lawyer for the *Jones* plaintiffs (the Lawyer) associated the Law Firm as co-counsel. The Law Firm ran a conflict check the following month<sup>4</sup> and concluded that it had no conflict. During a mediation in May, however, one of the senior executives for Allied recognized that the Law Firm was the one that had represented it and its affiliates in the earlier case. Following an unsuccessful mediation, Rabanco moved to disqualify the Law Firm.

The Law Firm's primary arguments were twofold. First, it contended that RDC was not a current client and, therefore, it did not have a current client conflict under RPC 1.7. Second, it contended that even if RDC was a current client, it was a separate entity from Rabanco and again, therefore, it did not have a conflict. Judge Pechman rejected both arguments and disqualified the law firm.

On the first point, she found that there was a current attorney-client relationship between the Law Firm and RDC. In doing so, she used the classic two-part test under *Bohn v. Cody*, 119 Wn.2d 357, 832 P.2d 71 (1992): (1) Does the client subjectively believe that it is a current client of the law firm? (2) Is that subjective belief objectively reasonable under the circumstances? There was testimony affirming the subjective belief. The court concluded that the subjective belief was objectively reasonable under the circumstances because the Law Firm remained a notice recipient under the earlier settlement contract that remained in effect and had not taken any steps to modify that relationship when the primary lawyers who had represented RDC left the firm in 2002.

---

<sup>4</sup> The Court observed in this regard: "The Court notes that appearing in court and giving notice of representation before a conflicts check has been run is not advisable on any level." *Id.* at \*1 n.1.

On the second point, Judge Pechman found that RDC, Rabanco and Allied were effectively the same entity for conflict purposes and, therefore, the current client conflict extended to the present case. In doing so, she looked primarily to the fact that both the Law Firm and the clients treated RDC, Rabanco and Allied as closely-related entities: the Law Firm's internal correspondence referred to them together and the clients shared employees, office space and (apparently) common management and legal affairs direction. Although the court did not cite to the leading ABA ethics opinion on the subject, ABA Formal Ethics Op. 95-390 (1995), these are some of the same criteria it suggests.<sup>5</sup> Comment 34 to RPC 1.7 as amended effective September 2006 also looks to similar factors in analyzing this question.

Because Judge Pechman found that there was a current client conflict, she did not make alternative findings under the former client conflict rule, RPC 1.9.

- ▶ ***Jones v. Rabanco, Ltd.*,  
2006 WL 2401270 (W.D. Wash. Aug. 18, 2006) (unpublished)**
  - **“No contacts” rule as the basis for disqualification**

This second installment from the *Jones* case involved a companion motion to disqualify the *Jones* plaintiffs' other Lawyer. This motion argued that the Lawyer's investigator had contacted two former Allied human resources employees concerning the events underlying the case and in the course of his interviews with them had solicited and received information that fell within their former employer's attorney-client privilege. Judge Pechman denied this motion.

---

<sup>5</sup> For more on “corporate family” conflicts, see my March 2006 and August 2007 Ethics & the Law columns in the *Bar News*, respectively, “The Who Is the Client? Question” and “The ‘Who Is the Client? Question’ Revisited” (available at [www.wsba.org](http://www.wsba.org) and my firm's web site at [www.frllp.com](http://www.frllp.com)).

In doing so, she noted that the leading case in Washington on the “no contact” rule in the corporate context, *Wright v. Group Health Hospital*, 103 Wn.2d 192, 691 P.2d 564 (1984), allowed such contact. Although *Wright* was decided under former DR 7-104(A)(1), Judge Pechman found it was controlling under RPC 4.2. That is the same conclusion the amended RPCs reach. Comment 10 to RPC 4.2 now reads: “Whether and how lawyers may communicate with employees of an adverse party is governed by *Wright* ...[.]”

On the alleged invasion of the privilege, Judge Pechman noted that both RPC 4.4 and *In re Firestorm 1991*, 129 Wn.2d 130, 916 P.2d 411 (1996), suggest that the unauthorized invasion of an opponent’s privilege may warrant disqualification in appropriate circumstances. But, she found that under the circumstances of this case there was no invasion of privilege or work product.<sup>6, 7</sup>

- ▶ ***Ali v. American Seafoods Co, Inc.***  
**2006 WL 1319449 (W.D. Wash. May 15, 2006) (unpublished)**
  - **“Matter” for former client conflicts analysis**
  - **Including staff in lateral-hire conflicts analysis**

The disqualification motion in this case was painted against the backdrop of maritime personal injury litigation. Of the six persons working at the plaintiff’s law firm, all but one (an attorney) had formerly worked at the law firm representing the defendant. The defendant argued that although none of the lawyers or staff involved had

---

<sup>6</sup> For more on the “no contact” rule in the corporate context and related discovery ethics issues, see my July 2005 and May 2006 *Bar News Ethics & the Law* columns, respectively, “Who’s Fair Game? Who You Can and Can’t Talk to on the Other Side” and “Discovery Ethics: Playing Fair While Playing Hard” (available at [www.wsba.org](http://www.wsba.org) and my firm’s web site at [www.frlp.com](http://www.frlp.com)).

<sup>7</sup> The motion as originally framed was directed against all of plaintiffs’ counsel. In light of Judge Pechman’s disqualification of the Law Firm on other grounds and her finding that the Lawyer did not receive confidential information, there is no discussion in the opinion of disqualification of co-counsel based on sharing confidential information under *First Small Bus. Inv. Co. of California v. Intercapital Corp. of Oregon*, 108 Wn.2d 324, 738 P.2d 263 (1987).

represented it in the case at hand, they had a former client conflict under RPC 1.9 because they had represented it on other cases and were privy to its general approaches on litigation and settlement.

The plaintiff's counsel argued that the defendant had restructured since they had represented it and, therefore, it was essentially a different client. Judge Pechman, however, found that the current entity had retained substantially all of the liabilities, assets, officers and employees of the former and were the same for conflict purposes.

Judge Pechman's decision disqualifying plaintiff's counsel instead turned on a very broad reading of the term "substantially related matter" under RPC 1.9. She found the earlier work had given plaintiff's law firm unique knowledge of the defendant's litigation and settlement strategy and, as such, constituted a substantially related matter. Comment 3 to RPC 1.9 as amended effective September 2006 notes that "[i]n the case of an organizational client, general knowledge of the client's policies and practices ordinarily will not preclude a subsequent representation[.]" Therefore, the same result might not follow under RPC 1.9 as subsequently amended and supplemented with now official comments.

In analyzing the conflicts involved, Judge Pechman took into account conflicts arising from the lateral movement of both lawyers and staff, citing *Daines v. Alcatel*, 194 F.R.D. 678 (E.D. Wash. 2000), on the latter. Comment 11 to RPC 1.10 as amended in September 2006 reaffirms this and also notes that lateral hire conflicts involving staff can also be screened under that rule.

- ▶ ***FMC Technologies, Inc. v. Edwards*,  
420 F. Supp.2d 1153 (W.D. Wash. 2006)**
  - **Standing for raising disqualification motions**
  - **“Matter” for former client conflicts analysis**

Plaintiffs in this case originally sued the defendants for misappropriation of trade secrets in state court. The defendants professed not to have done so and the case settled. One of the defendants, Wattles, then relented and admitted to plaintiffs that they had indeed downloaded the proprietary machinery drawings involved and had given them to his co-defendant and business partner. Plaintiffs then filed a new lawsuit in federal court against the partner, Edwards, and his company. Wattles was not named but it was clear from the outset that he would be the key witness. The same lead law firms were involved on both sides in both cases. In the federal case, plaintiffs moved to disqualify the defendants’ firm because it would need to cross-examine its former client, Wattles, in a new version of essentially the same matter. Wattles (through new counsel) moved to intervene in the federal case for the limited purpose of disqualifying his former counsel.

The firm defended principally on the argument that plaintiffs lacked standing to bring a motion to disqualify because they were not the firm’s former (or current) clients. The court acknowledged that a party opponent who is not a lawyer’s current or former client ordinarily does not have standing to bring a disqualification motion. The court noted, however, that an exception to this general rule occurs when the conflict will affect the integrity of the judicial process or the outcome of the proceeding. It concluded that the standard for the exception was met on these facts and found standing without the necessity of Wattles’ intervention.



Once the court found standing, it concluded that a former client conflict existed under RPC 1.9 because the two matters were directly related and it was clear that the law firm was adverse to its former client in the second round. Of note, the court discussed the term “matter” as applied to the former client conflict rule and articulated a much narrower definition than in the *Ali* case discussed earlier. In doing so, the court’s analysis was also much closer to the interpretation of that term articulated by the new comments to RPC 1.9 noted above.

- ▶ ***Avocent Redmond Corp. v. Rose Electronics*,  
491 F. Supp.2d 1000 (W.D. Wash. 2007)**
  - **More on corporate family conflicts**
  - **“Matter” for former client conflicts analysis**
  - **Electronic files as a source of possible conflicts**

In *Avocent*, the plaintiff in a patent dispute moved to disqualify one of the defense firms on the theory that the firm had formerly represented a “sister” corporation, OSA Technologies, and its “affiliates” and that the earlier matter was substantially related for conflicts purposes. In its analysis on the first point, the court relied heavily on the engagement agreement between the law firm and OSA. Unlike many engagement agreements that attempt to limit representation to the specific entity involved, the engagement agreement in this instance was expansively written to include both an acknowledgement that it was a member of the same corporate family as the plaintiff and included “affiliates” within the scope of the client group being represented. The court also relied on the principal ABA ethics opinion on this subject noted above, Formal Opinion 95-390, for the proposition that in analyzing corporate family conflicts significant weight should be placed on how the contracting parties—the law firm and the client—defined the relationships. Having found a former representation, the court then also

found a substantial relationship between the matters under RPC 1.9 (relying, in part, on the *Jones* and *FMC* cases discussed above) and disqualified the law firm. As an aside, this opinion also has an interesting discussion of the possible impact of a firm's retention of a former client's electronic files as a possible source of disqualifying confidential information about a former client. The court did not draw any firm conclusions on this last point, but it did highlight the need for law firms to analyze this facet of disengaging from a former client in terms of both traditional paper files and newer electronic storage media.

- ▶ ***Avocent Redmond Corp. v. Rose Electronics*,  
\_\_\_ F. Supp.2d \_\_\_, 2007 WL 2978347 (W.D. Wash. Oct. 9, 2007)**
  - **Joint defense/common interest as basis for disqualification**

In this subsequent chapter of the *Avocent* case, the defendant tried to disqualify the plaintiff's law firm on the theory that the firm had represented a co-defendant in earlier litigation and in the course of that case had learned confidential information under a joint defense arrangement that would be material to the present case. The court found that there was neither a joint defense agreement in the earlier case nor was confidential information shared in any event. The court, therefore, denied the motion. The opinion contains a discussion of the joint defense/common interest privilege and the circumstances under which information shared under that kind of arrangement might later present a basis for disqualification.

- ▶ ***Omni Innovations, LLC v. Ascentive, LLC*,  
2006 WL 3486806 (W.D. Wash. Nov. 29, 2006) (unpublished)**

***In re Marriage of Bal and Sahota*,  
2006 WL 763696 (Wn. App. Mar. 27, 2006) (unpublished)**

- **Duties to prospective clients**

*Omni* and *Bal* arose under very different factual and practice contexts. The former was an internet “anti-spam” case and the latter was a family law case. They both share the common thread of lawyers being consulted by one side and then ending up on the other. In both, the courts involved concluded that attorney-client relationships had been formed and disqualified the lawyers under the former client conflict rule, RPC 1.9. The operative facts in each took place before the RPCs were amended effective September 2006. The amendments to the RPCs brought with them RPC 1.18, which deals specifically with duties toward prospective clients even if no attorney-client relationship is formed. The new rule includes a screening mechanism to avoid the imputation of conflicts to a law firm as a whole. But, barring that, it raises the specter of disqualification in situations similar to *Omni* and *Bal* where confidential communications occur but no attorney-client relationship is formed.

- ▶ ***Munro v. Swanson*,  
2007 WL 512533 (Wn. App. Feb. 20, 2007) (unpublished)**

***State v. Beale*,  
2006 WL 3018106 (Wn. App. Oct. 24, 2006) (unpublished)**

***Bonneville v. Kitsap County*,  
2006 WL 1705900 (W.D. Wash. Jun. 14, 2006) (unpublished)**

- **Lawyer-witness rule**

All three of these cases, two in a civil litigation context and one in a criminal law setting, involve the lawyer-witness rule. They deal with facets of when a lawyer will be a necessary witness at trial. *Munro* looks at the temporal issue: when does it become

“likely” that a lawyer will be a “necessary” witness at trial and frames the answer largely in terms of reasonable foreseeability. *Beale* and *Bonneville*, in turn, examine the substantive issue: what is a “necessary” witness and frames the answer largely in terms of whether the information can be obtained anywhere else. The operative facts in all three occurred before the RPCs were amended effective September 2006. The amendments brought with them a significant change to RPC 3.7 potentially of great significance to disqualification litigation. Under former RPC 3.7, if a firm lawyer was a necessary trial witness, then the lawyer’s firm was generally barred from acting as trial counsel. Under the new version of RPC 3.7, a firm is allowed to remain as trial counsel even if one of its lawyers will be a witness at trial as long as the firm lawyer’s testimony will be consistent with its client’s trial position.<sup>8</sup>

- ▶ ***RWR Management, Inc. v. Citizens Realty Company*,  
133 Wn. App. 265, 135 P.3d 955 (2006)**
  - **Practical timing of appeal**

In *RWR*, plaintiff’s original counsel was disqualified. After trial, RWR based its appeal, in part, on the disqualification. The Court of Appeals not only affirmed the trial judge but also raised a very practical question: “[W]e question the viability of the issue now that the matter has been tried with able counsel.” *Id.* at 280.

---

<sup>8</sup> For more on the lawyer-witness rule, see my October 2007 Ethics & the Law column in the *Bar News*, “The Lawyer-Witness Rule: What It Is & What It Isn’t” (available at [www.wsba.org](http://www.wsba.org) and my firm’s web site at [www.frllp.com](http://www.frllp.com)).

- ▶ ***Moorman v. Heyden*,  
2007 WL 2039104 (Wn. App. Jul. 17, 2007) (unpublished)**

- Reinertsen v. Rygg*,  
2007 WL 1977240 (Wn. App. Jul. 9, 2007) (unpublished)**
  - **More on former client conflicts & disqualification**

*Moorman* and *Reinertsen* both touch relatively briefly on aspects of the former client conflict rule, RPC 1.9, as a basis for disqualification. *Moorman* notes that as a predicate for such a motion, a moving party must show that the party is, in fact, a former client of the lawyer (which the plaintiff in *Moorman* was unable to show). *Reinertsen* tracks the elements of the former client conflict rule in finding that a moving party must show either (or both) that the lawyer against whom a motion is targeted must have either represented the former client before on the same or a substantially related matter or must have confidential information from the former representation that is material to the current one (which the defendant in *Reinertsen* was unable to show).

- ▶ ***State v. Myers*,  
2006 WL 2262028 (Wn. App. Aug. 8, 2006) (unpublished)**
  - **Screening**

*Myers* arose in the related context of a motion for severance in a criminal case based on an asserted lateral-hire conflict when a co-defendant's counsel hired the former deputy prosecutor who had charged defendant Myers. The former deputy prosecutor, however, was effectively screened and the Court of Appeals found no error. In its opinion, the Court of Appeals specifically discussed—and approved—the screening methods employed, which included limiting access to both paper and computer files. In doing so, *Myers* offers useful guidance on effective screening methods—especially in a small firm setting where screening can be practically difficult. The amendments to the RPCs that became effective in September 2006 retained

lateral-hire screening under RPC 1.10 and added detailed Comments 9 through 13 discussing the history and practical application of this very useful mechanism.

- ▶ ***State v. Rial*,  
2007 WL 3076941 (Wn. App. Oct. 23, 2007) (unpublished)**
  - **Conflicts with witnesses**

*Rial* analyzes witness conflicts in the context of post-trial ineffective of counsel arguments. Although fact-specific, the Court of Appeals examined the issues involved under both the former (toward the witness) and current (toward the client) conflict rules.

## **REGIONAL DEVELOPMENTS**<sup>9</sup>

### **Alaska**

- ▶ ***Douglas v. State*,  
166 P.3d 61 (Alaska App. 2007)**
  - **Personal conflicts with appointed defense counsel**

The Alaska Court of Appeals found that a physical assault by a criminal defendant on his appointed defense counsel did not automatically constitute a disqualifying conflict.

### **Oregon**

- ▶ ***Smith v. Cole*,  
2006 WL 1207966 (D. Or. Mar. 2, 2006)  
(magistrate's decision; unpublished),  
2006 WL 1280906 (D. Or. Apr. 28, 2006)  
(district court affirmance; unpublished)**
  - **Disqualification after joint representation**

*Smith* is a good illustration of the potential perils of joint representation when there is no advance agreement on what happens if a conflict develops. A law firm

---

<sup>9</sup> As noted earlier, the compilation of regional cases in this section is intended to be illustrative and not encyclopedic.

represented both an individual defendant and his company. Later, the two had a falling out, the law firm chose one of the two and both defendants filed cross-claims against the other. At that point, the now-former client moved to disqualify its former law firm. Applying Oregon's former client conflict rule, Oregon RPC 1.9, which is similar to its Washington counterpart, the court disqualified the law firm.

- ▶ ***State v. Taylor*,  
207 Or. App. 649, 142 P.3d 1093 (2006)**
  - **Bar complaint against criminal defense counsel**

In *Taylor*, a criminal defendant filed a bar complaint against his lawyer and then sought new counsel. The trial court denied the request and the Oregon Court of Appeals affirmed. In doing so, it agreed with the trial court that his complaint lacked merit and that continuing with his counsel under those circumstances did not abridge his constitutional rights. The Oregon Court of Appeals relied, in part, on the Washington Court of Appeals' decision in *State v. Sinclair*, 46 Wn. App. 433, 730 P.2d 742 (1986).

- ▶ ***United States v. Stringer*,  
408 F. Supp.2d 1083 (D. Or. 2006)**
  - **More on the risks of joint representation**

*Stringer* involved three corporate executives who were charged with criminal securities fraud alleging that they had inflated their company's revenue through a series of fraudulent transactions and accounting practices. The executives had earlier been the subject of a civil investigation by the SEC. The executives were not told that they were the targets of a parallel criminal investigation at the same time they were cooperating with the civil investigation and the court eventually dismissed their indictments largely on that basis. In doing so, the court also focused on what it described as a "blatant conflict" on the part of the law firm which had represented the

company and one of the accused executives in the SEC investigation. The court said that the government attorneys involved had a duty to seek the law firm's disqualification to protect the defendants Fifth Amendment rights when their own law firm had not.

## **Idaho**

- ▶ ***State v. Cook*,  
\_\_\_ P.3d \_\_\_, 2007 WL 2892941 (Idaho App. Oct. 5, 2007)**
  - **Conflicts in public defender offices**

This decision discusses conflicts in public defender offices where one lawyer represents a defendant and another represents a potential prosecution witness. The Idaho Court of Appeals declined to state a bright line rule, but its opinion left open the possibility of permitting this kind of dual representation by the same office. The opinion does not address Idaho RPC 1.0(c), which defines "firm" broadly to include legal service organizations.

- ▶ ***Paradis v. Brady*,  
2007 WL 925285 (D. Idaho Mar. 27, 2007) (unpublished)**
  - **Seeking to disqualify co-counsel**

This case presents the unusual procedural posture of one of the plaintiff's lawyers moving to disqualify co-counsel who refused to withdraw after being discharged by the plaintiff. The court noted that clients are always free to discharge their lawyers and granted the motion.



## Ninth Circuit

- ▶ ***Aguon-Schulte v. Guam Election Com'n.*,  
469 F.3d 1236 (9th Cir. 2006)  
*United States v. Ensign*,  
491 F.3d 1109 (9th Cir. 2007)**
  - **Appellate review**

*Aguon-Schulte* discusses and reaffirms the rule that orders denying disqualification are generally not immediately appealable under federal appellate procedure. For more on the mandamus relief when disqualification motions are granted in federal courts, see *Christensen v. United States Dist. Court*, 844 F.2d 694, 697 (9th Cir. 1988), and *Cole v. United States Dist. Court*, 366 F.3d 813, 816-17 (9th Cir. 2004). *Ensign* holds that an individual attorney lacks sufficient standing to invoke appellate jurisdiction when a district court has denied *pro hac vice* admission.

### **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 nine years.

- ▶ ***Barbee v. The Luong Firm, P.L.L.C.*,  
126 Wn. App. 148, 107 P.3d 762 (2005)**
  - **Lawyer-witness rule**

*Barbee* makes the point that simply the *possibility* of a lawyer being the witness is not sufficient to warrant disqualification. Rather, mirroring the rule itself, the lawyer must be a “necessary” witness at trial.

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

*Feetham* 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 lawyer-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>10</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.

- ▶ ***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.

- ▶ ***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.

---

<sup>10</sup> For a similar case with a similar result, see *Capps v. Gregoire*, 2003 WL 103461 (Wn. App. Jan. 13, 2003) (unpublished).

- ▶ ***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 looked to the substance of the communications rather than their form in determining that they were privileged.

- ▶ ***Sanders v. Woods*,  
121 Wn. App. 593, 89 P.3d 312 (2004)**
  - **Former client conflicts**

*Sanders* examines what constitutes a “substantially related matter” under RPC 1.9’s former client conflict rule. Relying on *State v. Hunsaker*, 74 Wn. App. 38, 873 P.2d 540 (1994), *Sanders* adopted a “factual context” test, that, as its name suggests, looks primarily at the overlap between the facts in the former case and the current one in deciding whether they are substantially related.

- ▶ ***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. Riofta*,  
2003 WL 22039947 (Wn. App. Sept. 2, 2003) (unpublished)**
  - **Conflicts in criminal representation**

Riofta hired the same law firm to be his defense counsel that was representing one of the defendants in a 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 Riofta’s 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.

- ▶ ***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.

- ▶ ***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).