ETHICS FOR IDAHO BUSINESS LAWYERS & LITIGATORS

Defensive Lawyering in Office and Trial Practice

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I. Introduction

Mirroring the presentation, I have divided this background paper into two distinct sections. *First*, I will discuss several topics of particular interest to business lawyers: engagement letters, managing conflicts and multijurisdictional practice. *Second*, I will then turn to some areas of special interest to litigators: the "no contact with represented parties" rule, inadvertent production of privileged documents and recent trends in disqualification.

With each, there is clearly substantial overlap—business lawyers, for example, face "no contact" issues, too, and litigators also need to manage conflicts. Although the practice settings where these issues arise vary somewhat, the basic principles apply across practice specialties. Further, in both this paper and in the presentation, they will all revolve around the same general theme—"defensive lawyering." For a variety of reasons, lawyers' decisions are increasingly being "second-guessed" and the civil and regulatory consequences of "wrong" decisions are potentially more severe than in past years. One way for lawyers to protect themselves in the face of these trends is "defensive lawyering"—managing your practice in a way that tries to reduce civil and regulatory risk by documenting the key milestones in a representation. Therefore, in addition to addressing substantive ethics law, I will also highlight how lawyers can apply defensive lawyering in a practical way to protect themselves in an increasingly difficult practice environment.

II. Ethics Issues for Business Lawyers

A. Why Engagement Letters Are Your Best Friends

Engagement letters offer four key tools for "defensive lawyering."

1. Defining the Client

At first blush, it might sound odd that you need to say who your client is. In many circumstances, however, you may be dealing with more than one person as a part of the background context of a representation—multiple company founders, a developer and a property owner, one distinct part of a broader corporate group or several family members. In those situations, it is important to make clear to whom your duties will—and will not—flow so that if the other people in the circle you are dealing with are disappointed later, they can't claim you were representing them, too, and didn't look out for their interests.

In Idaho, whether an attorney-client relationship exists in a particular circumstance is a question of fact. *See Warner v. Stewart*, 129 Idaho 588, 593, 930 P.2d 1030 (1997) ("*Warner*"); *accord O'Neil v. Vasseur*, 118 Idaho 257, 262, 796 P.2d 134 (Ct.App. 1990). The Supreme Court in *Warner* discussed twin tests for determining whether an attorney-client relationship exists: (1) what is the client's subjective belief and is that subjective belief reasonable under the circumstances? and (2) was there some clear assent (either express or implied) to the representation by both the client and the lawyer? 129 Idaho at 593-94; *see also Podolan v. Idaho Legal Aid Servs., Inc.*, 123 Idaho 937, 942-43, 854 P.2d 280 (Ct.App. 1993) (examining the question in contractual terms). Although the *Warner* court did not choose one test over the other, both tests contain a key

element: regardless of the client's *subjective* belief, that belief must be *objectively* reasonable. *Id.*[1]

Engagement letters allow you to set out clearly who your client will be in a given representation. Depending on the setting, polite "nonrepresentation" letters to those whom you will not be representing may also be a useful supplement to an engagement agreement to let nonrepresented parties know which side you are on. In the face of an engagement agreement, conduct consistent with that agreement and, depending on the circumstances, nonrepresentation letters, it will be difficult for another party to assert that you were his or her lawyer under the *Warner* tests when, in fact, you were not.[2]

2. Defining the Scope of the Representation

Engagement letters offer an excellent opportunity to define the scope of a representation. As the law has grown in complexity, it is becoming more common for businesses and even some individuals to have more than one lawyer to handle discrete aspects of their legal needs. If you are handling a specific piece of a client's work, it can be very prudent to set that out in the engagement letter. That way, you are less likely to be blamed later if another

[1] The subjective-objective test examined in *Warner* is used in the other Northwest states. *See, e.g., In re Weidner*, 310 Or. 757, 801 P.2d 828 (1990); *Bohn v. Cody*, 119 Wn.2d 357, 832 P.2d 71 (1992).

[2] Defining the client is important when representing individuals or family members. *See, e.g., Allen v. Stoker*, 138 Idaho 265, 266-69, 61 P.3d 622 (2002) (finding that beneficiaries of an estate were not a lawyer's clients); *see also Harrigfeld v. Hancock*, 317 F.3d 1094 (9th Cir. 2003) (certifying a question to Idaho Supreme Court concerning whether the scope of the term "attorney-client relationship" as an element of a malpractice claim includes nonclient beneficiaries of a will). It can often be equally important with corporate clients or insurers. *See generally* ABA Legal Formal Legal Ethics Op. 95-390 (1995) (addressing conflicts of interest in the "corporate family" context); Idaho State Bar Formal Ethics Opinion 136 (1999) (discussing insurance defense representation).

aspect of the client's work that you were not responsible for doesn't turn out to the client's liking.

The Idaho Supreme Court has noted that "[t]he scope of an attorney's contractual duty to a client is defined by the purposes for which the attorney is retained." *Johnson v. Jones*, 103 Idaho 702, 704, 652 P.2d 650 (1982) (examining malpractice liability in terms of the scope of the tasks that the lawyer was hired to perform); *accord Blough v. Wellman*, 132 Idaho 424, 426, 974 P.2d 70 (1999) (quoting *Johnson* approvingly on this point in the context of a breach of fiduciary duty claim). When a lawyer is retained to handle a discrete task or matter, having an engagement letter that sets out the scope of that representation can be very useful later if other aspects of the client's "legal life" for which the lawyer was not responsible fall into disrepair.

3. Documenting Conflict Waivers

Section II.B will address conflict waivers in detail. At this point, however, it is important to note that if you need a conflict waiver, you should document the client's consent at the outset of a representation.[3] Either weaving the waiver into the engagement letter or providing it as a stand-alone supplement offers a way to document both your disclosures to the client and the client's consent.

4. Documenting Rates and Mechanisms for Rate Changes

An engagement letter is an excellent vehicle both to confirm your existing rates and to preserve your ability to modify your rates as a representation progresses. Lawyers have a general duty under Idaho RPC 1.5 to communicate

[3] If conflicts develop later in a representation, it is equally important to document client consent to proceed when the issue arises.

their fee structure to at least new clients when undertaking a matter. But, on a practical level, whether a lawyer is starting a new matter for either an existing or a completely new client, clearly communicating current rates can avoid many misunderstandings once bills begin to come due. Moreover, reserving the right to change rates in the future will generally avoid having to go back to the client for specific consent because the ability to modify the rate as time goes by has been built-in up front.

B. Managing Conflicts

Lawyers have important regulatory responsibilities for managing conflicts in their practices. *See generally* Idaho RPCs 1.7 (current client conflicts), 1.8 (lawyer self-interest conflicts) and 1.9 (former client conflicts). At the same time, conflicts of interest (or alleged conflicts of interest) can also present themselves in other litigation directed against lawyers—including disqualification, malpractice and breach of fiduciary duty claims. *See, e.g., Parkland Corp. v. Maxximum Co.,* 920 F. Supp. 1088, 1090-94 (D. Idaho 1996) (disqualification for former client conflict); *Johnson v. Jones, supra*, 103 Idaho at 704-07 (disposing on other grounds plaintiffs' contention that defendant lawyer had committed malpractice by not disclosing conflicts); *Damron v. Herzog*, 67 F.3d 211, 213-16 (9th Cir. 1995) (applying Idaho law and discussing conflicts as a breach of a lawyer's fiduciary duty of loyalty to a client). Given these risk factors, carefully documenting client consent to conflicts is a key element in "defensive lawyering."

The proposed amendments to the Idaho RPCs that are currently under review would require that conflict waivers for current and former conflicts under,

respectively, RPCs 1.7 and 1.9, be confirmed *in writing*.[4] Even without that *requirement*, written conflict waivers are an important element in "defensive lawyering" because they (1) document the disclosures that the lawyer made to the client and (2) confirm the basis upon which the client granted the waiver. In that context, the more detailed the letter, the better—both from the perspective of fully explaining the issues involved to the client and increasing the likelihood that the client will be held to the waiver.[5]

Along with conflict waivers, another important—but sometimes overlooked—tool in managing conflicts is the ability to define the scope of a representation in a way that eliminates conflicts in the first place. A conflict exists only when the positions of the multiple current or former clients are "directly" (to use the RPC 1.7 formulation) or "materially" (to use the RPC 1.9 terminology) "adverse." *See Idaho State Bar v. Frazier*, 136 Idaho 22, 29, 28 P.3d 363 (2001) (noting that no conflict existed under RPC 1.7 when the positions of two clients were aligned); *State v. Dye*, 124 Idaho 250, 258-59, 858 P.2d 789 (Ct.App. 1993) (finding no adversity—and, hence, no conflict—between the positions of current and former clients). If a representation is structured in a way that eliminates adversity between the positions of the clients involved, it may be possible to take on work that might otherwise have been precluded outright or that at the least would have required waivers. For example, a manufacturer and

[4]The text of the proposed amendments and a comparative chart prepared by the Idaho State Bar's "Ethics 2000" Committee that proposed them are available on the Bar's web site at www.state.id.us/isb/bc/irpc_review.htm.

[5] At least with clients sophisticated enough to understand them, future or "blanket" waivers are permitted even though all potential adverse representations necessarily cannot be described. *See* ABA Formal Ethics Op. 93-372 (1993); Comment 22 to proposed amended Idaho RPC 1.7.

a distributor in a product liability claim might wish to hire the same lawyer to handle their defense more efficiently. By agreeing to litigate any cross-claims for indemnity in a separate forum with separate counsel, the two clients may have effectively eliminated any potential conflict that would have precluded the single lawyer from defending both.[6]

C. Multijurisdictional Practice

The increased availability of reciprocal admission in the Northwest under Idaho Bar Commission Rule 204A, Oregon Admission Rule 15.05 and Washington Admission to Practice Rule 18 has made it much simpler for lawyers who practice frequently in more than one Northwest venue to become admitted in the other states.[7] A similar set of rules in all three states now offers relatively easy corporate counsel admission throughout the Northwest, too. *See* Idaho Bar Commission Rule 220; Oregon Admission Rule 16.05; Washington Admission to Practice Rule 8(f).

Although the availability of reciprocal admission is of great assistance to lawyers who practice regularly in more than one of the three Northwest states, it does not address some identifiable areas of transitory practice in which the lawyers involved are not called into "out-of-state" matters with sufficient frequency or regularity for it to make practical or economic sense for them to become members of the bar in those other states. In particular, the present mechanisms do not address the comparatively common case of an out-of-state

[6] This also assumes that the two hypothetical defendants do not have inconsistent defenses. At the same time, jointly represented clients should be told as a part of the engagement agreement of the impact of the joint representation on the attorney-client privilege.

[7] Idaho Bar Commission Rule 204A was recently expanded to include reciprocal admission with Utah.

transactional lawyer who is “in-state” on behalf of a “home state” client to negotiate a business transaction involving the “home state” client. *See generally* Restatement (Third) of the Law Governing Lawyers § 3(3) (2000). Unlike transitory litigators who have the ability to become admitted *pro hac vice*, transactional lawyers do not have a similar mechanism accorded under the current versions of either the admission rules or Idaho RPC 5.5 (which governs authorized and unauthorized practice).

The problems in this “gray area” were illustrated in a pair of California court decisions that touched off much discussion of multijurisdictional practice (“MJP”) issues nationally over the past few years. In the first, *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court*, 17 Cal. 4th 119, 949 P.2d 1, 70 Cal. Rptr. 2d 304 (1998), the California Supreme Court, in effect, denied over $1 million in attorney fees to a New York law firm because its lawyers providing services to a California client were not licensed there. In the second, *Estate of Condon*, 65 Cal. App. 4th 1138, 76 Cal. Rptr. 2d 922 (1998), the California Court of Appeal distinguished *Birbrower* and upheld the fees charged by a Colorado lawyer who handled a probate matter in California for a *Colorado client*. The merits of *Birbrower* and *Condon* can—and have—been debated at length nationally. Regardless of their relative merits, however, they illustrate the practical uncertainty that the lack of specific rules engenders and the difficulty courts may have in fashioning consistent authority in the absence of specific rules.

To address this uncertainty, both the ABA and the Idaho State Bar have moved toward creating specific categories of "authorized" MJP.

The ABA adopted amendments to its Model Rules in August 2002 to authorize five categories of MJP. The ABA amended Model Rule 5.5, which governs the authorized and unauthorized practice of law, and Model Rule 8.5, which addresses the disciplinary jurisdiction of individual states. The text of the rule changes, an accompanying report by the ABA special commission that developed the amendments and a wide range of background materials (including a resolution of support from the National Conference of Chief Justices) are available at the ABA Center for Professional Responsibility's web site at www.abanet.org/cpr. As noted, the ABA's House of Delegates approved the rule amendments at its annual meeting in August 2002. The amendments will still be subject to review, modification and possible adoption by the individual states that use the ABA Model Rules system—including, in the Northwest, Idaho and Washington.[8]

As amended, ABA Model Rule 5.5 now recognizes the following forms of transitory work as the authorized practice of law:

- "Out-of-state" lawyers are allowed to handle "in-state" matters in association with a local lawyer who participates actively in the representation.

[8] Oregon still uses a system based on the older ABA Model Code of Professional Responsibility. At the time this paper was prepared, a proposal to move to a version of the ABA Model Rules was pending before the Oregon Supreme Court. That version would include a form of MJP rule.

- The practical scope of *pro hac vice* admissions is extended to work, such as pre-filing witness interviews, that occurs before formal *pro hac vice* admission is available and to alternative dispute resolution proceedings that do not have the equivalent of formal *pro hac vice* admission.
- "Out-of-state" lawyers are allowed to handle "in state" matters that arise out of or are reasonably related to the lawyer's practice in the lawyer's "home" state.
- In-house counsel are allowed to provide services to their corporate employers in transitory circumstances that do not otherwise warrant admission under available house counsel rules.
- Legal work specifically permitted by federal law, such as that of federal prosecutors, now falls within the scope of "authorized practice" even if the lawyer involved is not admitted in the jurisdiction involved.[9]

Idaho's proposed amended RPC 5.5 would generally accord similar rights to out-of-state lawyers. At the same time, out-of-state lawyers doing work in Idaho would be subject to Idaho's regulatory jurisdiction under proposed amended Idaho RPC 8.5.

[9] The ABA considered, but ultimately rejected, a much broader "federal law" exception that would have authorized MJP if the matter involved "primarily" federal law. *See* ABA Commission on Multijurisdictional Practice Interim Report (Nov. 2001) (available at the ABA Center for Professional Responsibility's web site at www.abanet.org/cpr.)

III. Ethics Issues for Litigators

A. The "No Contact with Represented Parties" Rule

Idaho RPC 4.2 presently reads as follows:

> "In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so."[10]

Although straightforward on its face, the "no contact" rule can be difficult in application—especially in highly charged litigation contexts. Moreover, actual harm need *not* be shown to find a violation of the rule. *See Runsvold v. Idaho State Bar*, 129 Idaho 419, 421, 925 P.2d 1118 (1996) ("*Runsvold*"). "Defensive lawyering" in this area usually means proceeding with caution and documenting any permission you may have secured to deal directly with an opposing party.

The elements of the rule are:

- *A lawyer representing a client*. The current comments to RPC 4.2 imply and the proposed amended comments make clear that the prohibition applies to both the lawyer and someone acting on the lawyer's behalf. A lawyer, therefore, cannot make an "end run" around the rule by having the lawyer's paralegal or secretary make the prohibited contact. By the same token, although RPC 4.2 does not prohibit direct communications between clients, it does not allow a lawyer to "coach" a client into making an "end run" around

[10] The proposed amendments to the RPCs would only change the word "party" to "person" and add the word "or court order" to the concluding section of RPC 4.2. The comments are expanded somewhat under the amended version, but their substance also remains very similar to the current set for RPC 4.2.

the other side's lawyer either. Finally, *Runsvold* clarified that RPC 4.2's prohibition extends to lawyers representing themselves.

- *Communication*. The rule broadly applies to all forms of communication—in person, by phone and by electronic and surface mail.
- *About the Subject of the Representation.* Not all communication with a party is prohibited. Rather, the communications that are prohibited are those that fall within the "subject" of the representation—which will most often be defined by the pleadings in a litigation context. *See generally* ABA Formal Ethics Opinion 95-396 (1995) (discussing ABA Model Rule 4.2 upon which Idaho RPC 4.2 is patterned). Accordingly, normal social pleasantries during a break in a deposition do not violate RPC 4.2. But, discussions with the opposing party outside the presence (and without the permission) of opposing counsel about the substance of the litigation would. *See, e.g., State v. Robinson*, 115 Idaho 800, 815, 770 P.2d 809 (Ct.App. 1989) (prosecutor confronted a defendant in a courthouse hallway regarding his testimony); *Runsvold*, *supra*, 129 Idaho at 421 (lawyer sent copies of pleading directly to the opposing party).
- *That the Lawyer Knows to Be Represented*. Comment 7 to the proposed amended comments nicely summarizes the knowledge element: "This means that the lawyer has actual knowledge of the

fact of the representation; but such actual knowledge may be inferred from the circumstances."

- *The Other Lawyer Consents*. Consent to the contact has to come from the other party's lawyer rather than from the other party. *See generally* ABA Formal Ethics Op. 95-396, *supra*. It is prudent practice if the other side has consented to direct contact to confirm that permission in writing in case there are any misunderstandings later.

In an organizational setting, both the current comments to RPC 4.2 and the proposed amended set make plain that organizational management and those line-level employees whose conduct the organization is responsible for fall within the ambit of the organization's representation and, as such, are "off limits" to opposing counsel. By contrast, line-level employees who are merely occurrence witnesses are generally "fair game." Finally, all former employees of whatever stripe are "fair game"—with the important caveat that a lawyer cannot invade an organization's attorney-client privilege when interviewing its former employees.

B. Inadvertent Production

The inadvertent production of privileged documents raises both ethical and evidentiary issues. On the ethics side, the question focuses on whether you need to notify your opponent that you have received what may be privileged documents. On the evidentiary side, the question is whether any privilege has been waived.

1. Do You Have to Notify Your Opponent?

There is presently no law in Idaho specifically addressing the notification question—but, there soon may be. Since the early 1990s, the ABA has counseled in two formal ethics opinions that a lawyer who receives what may be the other side's privileged information should generally: (a) notify the sender; (b) follow the sender's instructions regarding the return of the material; and (c) immediately bring any privilege waiver issues before the court. *See* ABA Formal Ethics Ops. 92-368 (1992), 94-382 (1994).[11]

The ABA opinions, however, had difficulty grounding their conclusions in specific ABA Model Rules. When the ABA amended its Model Rules in 2002 as a part of its "Ethics 2000" review, it addressed this situation by adding a comment to ABA Model Rule 4.4 (which concerns duties toward third persons). The new comment confirms that a lawyer at least has a duty to notify the sender: "If a lawyer knows or reasonably should know that such a document was sent inadvertently, then this Rule [*i.e.*, ABA Model Rule 4.4] requires the lawyer to promptly notify the sender in order to permit that person to take protective measures." Comment 2, ABA Model Rule 4.4. The ABA comment is then folded into the new commentary that accompanies the proposed amended Idaho RPCs.[12]

The new ABA comment leaves for further development issues beyond notification such as whether the recipient must always comply with an instruction

[11] Other states in the region have reached similar conclusions—*see, e.g.*, Oregon State Bar Formal Ethics Op. 1998-150 (1998); *Richards v. Jain*, 168 F. Supp. 2d 1195 (W.D. Wash. 2001); Utah State Bar Ethics Advisory Opinion 99-01 (1999).

[12] In the Idaho formulation of RPC 4.4, the ABA commentary is renumbered as Comment 4. Unless adopted by the Idaho Supreme Court, the comments are instructive only.

to return the documents involved or whether privilege has been waived. A recent case from Washington, however, *Richards v. Jain*, 168 F. Supp. 2d 1195 (W.D. Wash. 2001) ("*Richards*"), illustrates that *the use* of another party's confidential materials without first litigating the issue of privilege waiver may put the recipient at disqualification risk. The facts in *Richards* were different from the typical inadvertent production scenario and, therefore, it should be read with that caution. In *Richards*, a law firm's client took a large number of privileged documents with him when he left his employer and gave them to the law firm. The law firm, without notifying either the corporation involved or any court, used the privileged documents in formulating its litigation strategy against the corporation. When the corporation later discovered what had occurred, it moved to disqualify the law firm. The federal district court in Seattle disqualified the law firm as a sanction for its failure to follow the procedure articulated above in the ABA opinions.[13] Although the facts in *Richards* were unusual, it at least suggests that the failure to notify opposing counsel and to either return the documents involved or to tender them into the court pending a determination on whether the privilege was waived may raise a disqualification risk for the recipient.

2. <u>Has Privilege Been Waived?</u>

As the new comment to ABA Model Rule 4.4 and its proposed Idaho counterpart make plain, any ethical duty to notify the sender of the receipt of what may be privileged documents does *not* mean that the recipient cannot still contend that the inadvertent production waived the privilege. Idaho privilege law

[13] *Richards* also relied in part on *Matter of Firestorm 1991*, 129 Wn.2d 130, 916 P.2d 416 (1996), which discusses disqualification of counsel as a remedy for the unauthorized access to another party's privileged information.

is to that same effect. *See Farr v. Mischler*, 129 Idaho 201, 207, 923 P.2d 446 (1996) (interpreting Idaho Evidence Rule 502 and discussing inadvertent production generally). ABA Formal Ethics Op. 92-368, although not addressing privilege law directly, contains a useful summary of the factors usually cited by courts nationally in ruling on inadvertent production issues: "(1) The reasonableness of the precautions taken to prevent inadvertent disclosure in view of the extent of the document production; (2) the number of inadvertent disclosures; (3) the extent of the disclosure; (4) any delay and measures taken to rectify the disclosures; and (5) whether the overriding interests of justice would be served by relieving a party of its error." *Accord U.S. ex rel Bagley v. TRW, Inc.*, 204 F.R.D. 170, 177-85 (C.D. Cal. 2001) (summarizing these factors in reviewing district court decisions within the Ninth Circuit).

C. Recent Trends in Disqualification

Disqualification law is a blend of applied ethics rules and its own distinct subset of procedure. In ruling on disqualification motions, courts look to the Rules of Professional Conduct as, in essence, substantive law. *See Parkland Corp. v. Maxximum Co., supra*, 920 F. Supp. at 1091. They then rely on procedural case law to decide such considerations as whether a party has standing to seek disqualification, who has the burden proof on a given issue and whether a party has waived a motion by the failure to timely seek disqualification. *See generally Weaver v. Millard*, 120 Idaho 692, 697, 819 P.2d 110 (Ct.App.

1991); *Crown v. Hawkins, Co., Ltd.*, 128 Idaho 114, 122-23, 910 P.2d 786 (Ct.App. 1996).[14]

As teaching vehicles, two recent cases—one from Washington and one from Montana—are excellent examples of conflict issues that were played out in the context of disqualification. The first, *Oxford Systems, Inc. v. CellPro, Inc.*, 45 F. Supp. 2d 1055 (W.D. Wash. 1999) ("*Oxford*"), addresses the question of whether a "periodic" client is a current or former client for conflict purposes. The second, *In re Jore*, 298 B.R. 703 (Bankr. D. Mont. 2003) ("*Jore*"), examines the issue of whether a law firm should forfeit its fees if it has a disqualifying conflict.

1. The "Periodic" Client

If a lawyer doesn't currently have a file open for an out-of-state company that has periodically sent the lawyer work for years, is the company a current or former client? In *Oxford*, the U.S. District Court in Seattle disqualified a law firm for opposing a "periodic" client.[15]

A Seattle firm had represented Becton Dickinson ("Becton") for 13 years in a variety of advisory and litigation matters. Since 1990, the Seattle firm had been Becton's exclusive Washington counsel. But, the Seattle firm's work for Becton was not continuous. Rather, it was on a case or project specific basis. In April 1998, the Seattle firm had no files open for Becton when it began defending a California law firm in a Washington securities fraud case brought by the shareholders of a company called CellPro for which the California firm had done

[14] In the criminal context, disqualification motions may also involve Sixth Amendment considerations. *See, e.g., State v. Lovelace*, ___ Idaho ___, 2003 WL 21697869 (Idaho July 23, 2003).

[15] For a similar "periodic" client case from the Northwest with a similar result, *see Admiral Ins. Co. v. Mason, Bruce & Girard, Inc.*, 2002 WL 31972159 (D. Or. Dec. 5, 2002) (unpublished).

IP work. The securities fraud suit grew out of patent infringement litigation that Becton was then prosecuting in Delaware against CellPro in which the California law firm's opinion on the validity of the patents involved was a central element of CellPro's defense. Although the Seattle firm had been local counsel for Becton in an earlier phase of the patent litigation pending in Washington in 1992 and 1993 and continued to assist with local aspects of the patent dispute after the litigation had been transferred to Delaware, the partner who had represented Becton in that matter had left the Seattle firm in 1996. The Seattle firm ran a conflict check when it opened the securities fraud case in 1998, but the check did not reveal a problem because Becton was not a party to that case.

When Becton learned of the Seattle firm's involvement in the securities fraud case, it intervened in *Oxford* to seek the Seattle firm's disqualification. Becton argued that its longstanding, albeit periodic, use of the Seattle firm demonstrated an ongoing attorney-client relationship. Becton contended that the Seattle firm had a current client conflict under Washington RPC 1.7, which is very similar to the analogous Idaho rule, because Becton's interests were adverse to the California law firm's due to the overlap between the issues in the patent and securities cases. Becton asserted, therefore, that the Seattle firm should be disqualified.

The court agreed. The court found that the length, scope and general continuity of the relationship between Becton and the Seattle firm supported Becton's belief that it remained a current client of the Seattle firm. In doing so, the court relied on the Washington Supreme Court's decision in *Bohn v. Cody*,

119 Wn.2d 357, 832 P2d 71 (1992), and the Washington Court of Appeals' opinion in *Teja v. Saran*, 68 Wn. App. 793, 846 P2d 1375, *rev denied*, 122 Wn2d 1008 (1993), holding that the question of whether an attorney-client relationship exists turns primarily on the client's subjective belief as long as that subjective belief is objectively reasonable under the surrounding circumstances.[16] Having found that Becton was a current client of the Seattle firm, the court then used RPC 1.7 to conclude that a conflict existed and ordered disqualification.

Although the principal issue in *Oxford* was whether Becton was a current client, the *Oxford* opinion addresses former client conflict issues as well:

- The court used Washington RPC 1.9, which is also similar to its Idaho counterpart, to conclude that even if Becton was a former client, the Seattle firm could only have undertaken the new representation with Becton's consent because the securities fraud litigation was substantially related to the earlier patent case that the Seattle firm had handled.
- Although the partner who handled the Washington phase of the Becton patent case had left the firm, several lawyers remained at the firm who had assisted with that case and who the court found had acquired Becton's confidences during the earlier representation. Therefore, the court found that Washington RPC 1.10's (which, again, is similar on this point to the Idaho rule) exception to the former client conflict

[16] *See Warner v. Stewart*, 129 Idaho 588, *supra*, and *Podolan v. Idaho Legal Aid Services, Inc.*, 123 Idaho 937, *supra*, for the Idaho counterparts.

rule when the lawyer who handled the earlier related matter has left the firm was inapplicable.

2. <u>Disqualification and Disgorgement</u>

In July, the U.S. Bankruptcy Court in Montana disqualified a Washington law firm in *Jore* 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, 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. The court agreed. By that point, the law firm had incurred $1.6 million in fees and had been paid roughly $625,000.

The court's analysis focused 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." 298 B.R. at 726. 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 * * *." 298 B.R. at 730. 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 the full

harsh penalties of disqualification * * * from employment, and denial and disgorgement of all fees." *Id.* at 731-32.

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.[17] 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.

[17] *Continental Casualty v. Brady*, 127 Idaho 830, 907 P.2d 807 (1995), was a coverage dispute between a malpractice insurance carrier and an attorney over its duty to defend him from, in pertinent party, a claim for breach of fiduciary duty in which the plaintiffs in the underlying case sought disgorgement of fees as the remedy. The Idaho Supreme Court held that there was no coverage under the policy involved, but did not address the contours of fee disgorgement in Idaho.