

DISQUALIFICATION AND SANCTIONS: RECENT DEVELOPMENTS IN THE NORTHWEST

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INTRODUCTION

This paper surveys developments in the law of disqualification and sanctions over the past two years in Oregon and Washington. This survey is meant to be illustrative rather than encyclopedic. The cases chosen are designed primarily to highlight some of the more interesting decisions in these areas and to foster discussion during the presentation of this paper.

OREGON

Disqualification Cases

- PGE v. Duncan, Weinberg, Miller & Pembroke, P.C.,
162 Or App 265, 986 P2d 35 (1999)
 - ✓ Disqualification of former in-house counsel
 - ✓ What is a substantially related matter?

Two former in-house counsel at Portland General Electric (PGE) left the utility in 1996 to join a law firm specializing in energy issues, Duncan, Weinberg, Miller & Pembroke, P.C. (Duncan Weinberg). One of Duncan Weinberg's clients was a consortium of large industrial electricity customers, Industrial Customers of Northwest Utilities (ICNU). When the two former PGE lawyers began representing ICNU in then-pending proceedings before the Oregon Public Utility Commission (OPUC) over PGE's merger with Enron, PGE objected on the ground that the lawyers' advice on deregulation and associated cost recovery questions raised former client conflicts under Oregon DR 5-105(C)¹ because they had worked on

¹Oregon DR 5-105(C) provides:

"Except as permitted by DR 5-105(D) [dealing with client consent], a lawyer who has represented a client in a matter shall not subsequently represent another client in the same or a significantly related matter when the interests of the current and former clients are in actual or likely conflict. Matters are significantly related if either:

"(1) Representation of the present client in the subsequent matter would, or would likely, inflict injury or damage upon the former client in connection with any proceeding, claim, controversy, transaction, investigation, charge, accusation, arrest or other particular matter in which the lawyer previously represented the former client; or

"(2) Representation of the former client provided the lawyer with

those same issues while at PGE. The former in-house lawyers and PGE eventually “agreed to disagree” and later in 1996 entered into a “waiver agreement” that specified particular areas in which the former PGE lawyers were, and were not, permitted to work. Under that agreement, the former PGE lawyers could not provide advice adverse to PGE on “disaggregation” (splitting an integrated utility into separate companies focusing on separate functions, such as power generation and distribution) and “stranded cost recovery” (dealing with the recovery of prior investments in utility generating assets once deregulation occurred and those assets had a market value lower than their book value) encompassed within a proposed rate plan for industrial customers called “Schedule 77.” The former PGE lawyers could, however, advise ICNU generally on disaggregation and stranded cost issues not connected with Schedule 77.

In August 1997, PGE filed rate plans with the OPUC dealing with aspects of disaggregation and stranded costs called the “Pilot Program” and the “Customer Choice Program.” The two former PGE lawyers began representing ICNU in this OPUC proceeding. Although the OPUC has a disqualification procedure, PGE instead filed a lawsuit against the lawyers and Duncan Weinberg seeking a declaration that they were violating DR 5-105(C) and an injunction barring them from representing ICNU in the rate proceedings on the ground the Pilot Program and the Customer Choice Program both grew out of Schedule 77 and, therefore, were the same “matter.” Seeking an injunction to restrain a lawyer’s alleged breach of professional or fiduciary obligations is permitted in Oregon under State ex rel Bryant v. Ellis, 301 Or 633, 724 P2d 811 (1986).

The trial court granted the injunction. In doing so, the trial court held that all work relating to disaggregation and stranded costs constituted the same matter and, therefore, found a conflict under DR 5-105(C). Next, the trial court voided the waiver on its own motion as “unworkable.” It then barred the former in-house counsel from representing ICNU in the pending OPUC proceeding and all other proceedings in which these issues might arise if they involved generating assets or contracts that the lawyers had dealt with while employed by PGE.

The Court of Appeals affirmed in part and reversed in part. The Court of Appeals affirmed portions of the trial court’s injunction that prohibited the lawyers from handling issues for ICNU that arose directly from either their work for PGE on Schedule 77 or their earlier work involving particular generating assets or contracts. But, the Court of Appeals reversed the broader prohibition on general

confidences or secrets as defined in DR 4-101(A), the use of which would, or would likely, inflict injury or damage upon the former client in the course of the subsequent matter.”

advice regarding disaggregation and stranded costs. A 2-1 majority found that the new rate proceeding—although it dealt with issues of disaggregation and stranded costs—was not the same “matter” for conflicts purposes that the two lawyers had worked on while employed at PGE. In the majority’s view, to be the same “matter,” “the core thing sought in the first * * * [representation must be] * * * at the heart of the lawyer’s representation in the second matter * * *.” 986 P.2d at 46. The third judge concurred in the result, but reasoned that the former PGE lawyers’ work on stranded costs did constitute the same matter.²

- Columbia Forest Products, Inc. v. Aon Risk Services, Inc.,
164 Or App 586, 993 P2d 820 (1999)
 - ✓ No attorney fees on disqualification motions

The Oregon Court of Appeals in *Columbia Forest Products* ruled that, absent specific statutory or contractual authority, attorney fees are not available to the prevailing party on a disqualification motion. The defendant in this insurance coverage case moved to disqualify the plaintiff’s law firm on the ground that it had earlier handled a related matter for the defendant, and, therefore, was violating Oregon’s former client conflict rule—DR 5-105(C). At the hearing on the motion, the trial judge took the matter under advisement. But, after the judge told the parties that he was inclined to grant the motion, the plaintiff’s law firm withdrew. The defendant then moved for an award of its attorney fees under the “‘inherent equitable authority to award fees.’” 164 Or App at 588 (citation omitted). The defendant argued that it was entitled to a fee award because it was conferring a benefit to the general public “‘through its efforts to enforce the Code of Professional Responsibility.’” *Id.* The trial court awarded fees of roughly \$25,000 against the law firm.

The Court of Appeals reversed. It found that the defendant was not primarily vindicating important public rights: “To the contrary, defendant sought to disqualify a law firm representing the opposing party in a private lawsuit based on its own individual claim of conflict of interest. No constitutional rights were asserted, much less any that apply to ‘all citizens without any particular gain’ to defendant.” *Id.* at 590. The Court of Appeals held that on a disqualification motion a prevailing party is entitled to seek attorney fees only if it is claiming them under a specific statute or contract.

²See also ABA Formal Ethics Opinion No. 99-415 (1999), which also deals with former in-house counsel who represent clients in private practice adverse to their former corporate employers.

- State v. Riddle,
330 Or 471, __ P2d __, 2000 WL 1129389 (Or Aug 10, 2000)
 - ✓ Expert disqualification

This was not an attorney disqualification case; rather, it involved an expert witness. The defendant was charged with manslaughter and driving while intoxicated stemming from an automobile accident in which the car he was driving crossed the center line and hit an oncoming car—killing both of the occupants. At trial, the prosecution relied on an accident reconstruction expert who testified that the defendant was driving too fast and had lost control of his car. The defense, in turn, relied on an accident reconstruction expert who testified that the steering mechanism on the defendant’s car had locked. At that point, the prosecution called a third expert in rebuttal—whose theory was consistent with the prosecution’s case but who had been retained originally by the defense. The defense objected on the ground that it had disclosed confidential information to the third expert. The trial court allowed the expert to testify for the prosecution—as long as he did not mention the prior work for the defense or any information he had acquired from the defense. Following his conviction, the defendant appealed—based largely on the trial court’s decision to let the third expert testify. The Court of Appeals, sitting en banc, reversed—finding that “the attorney-client privilege [extends] to the opinions of nontestifying experts who rendered those opinions in anticipation of litigation.” 155 Or App 526, 536, 964 P2d 1056, mod. on recons., 156 Or App 606, 969 P2d 1032 (1998). The Supreme Court, in turn, reversed the Court of Appeals.

The Supreme Court held that the fact that a nontestifying expert had worked earlier for one side in a case did not, in and of itself, prevent the expert from later testifying for the adverse party:

“We conclude that there is no absolute privilege, arising either out of OEC 503 [the attorney-client privilege], the work product doctrine, or this court’s cases, that prevents an expert whom a litigant has employed to investigate a factual problem from testifying for the other side as to the expert’s thoughts and conclusions that are segregated from confidential information.” 2000 WL 1129389 at * 10.

At the same time, the Supreme Court also found that if the confidential information the expert had acquired could not be segregated from the expert’s opinion, then the expert would be disqualified:

“We emphasize the limited nature of our ruling. We hold only that, under OEC 503(2)(a), the lawyer/expert relationship does not

automatically disqualify an expert who was retained by one party from testifying for some other party. That expert is disqualified from testifying, however, if his or her opinion discloses, either directly or indirectly, or is based on, any confidential communication between the lawyer, the client, and/or the expert. If an expert's opinion is so bound up with any such communication that the expert cannot, in the view of the trial court, segregate his or her opinion from some part of the confidential communication, then the expert should not be permitted to testify." *Id.* at * 11.

Sanctions Cases

- Toth-Fejel v. Kramer & Toth-Fejel Law Firm,
1999 WL 1012870 (D Or Nov 3, 1999)
 - ✓ Over \$100,000 awarded for frivolous bankruptcy filing

Late last year, the U.S. District Court in Portland upheld the bankruptcy equivalent of Rule 11 sanctions totaling over \$100,000 against a lawyer. The lawyer, Toth-Fejel, represented a debtor, Des Chuttes Investments, Inc. (Des Chuttes), in filing a Chapter 11 bankruptcy petition that was later dismissed. The Chapter 11 case grew out of a residential construction loan that a man named Eqbal had obtained from Cupertino National Bank (Cupertino) in California in 1997. Cupertino later learned that Eqbal made material misrepresentations on his loan application and declared the loan in default. By that point, Cupertino and three other creditors had liens against Eqbal's Fremont, California home. Eqbal attempted to shield his home from Cupertino's planned foreclosure sale through Des Chuttes, which was owned by his mother. Des Chuttes first purchased two of the junior liens against the Fremont property. It then retained Toth-Fejel to file a Chapter 11 proceeding in Oregon. Toth-Fejel took the position that the automatic bankruptcy stay barred Cupertino's pending efforts to foreclose its senior lien because it would affect the junior liens which were assets of the bankruptcy estate. Cupertino informed Toth-Fejel of the history its dealings with Eqbal and that it considered the bankruptcy filing to be in bad faith. Nonetheless, Toth-Fejel obtained an order enforcing the automatic stay against Cupertino's foreclosure sale. He then filed a motion seeking the approval of a "settlement agreement" which Eqbal had written that sought a further order of the bankruptcy court forcing Cupertino to sell its Eqbal note and trust deed to Si-Va Tech—which was a subsidiary of another company owned by Eqbal's wife. Cupertino filed motions for dismissal of the Chapter 11 proceeding and for sanctions against Des Chuttes, Toth-Fejel and his law firm.

The bankruptcy court dismissed the Chapter 11 proceeding and awarded sanctions against both Des Chuttes and Toth-Fejel (but not his law firm). The court found that sole purpose of the bankruptcy filing was to fraudulently evade Cupertino's foreclosure. It then found that "[a]lthough the fraud did not originate with Toth-Fejel, his unprofessional representation of Des Chuttes and Eqbal was essential to that fraud." 1999 WL 1012870 at *3. The bankruptcy court held that because Toth-Fejel had "wilfully breached his duty to investigate * * * the legitimacy of Des Chuttes' bankruptcy petition", the "safe harbor" provision (requiring a party seeking sanctions to give the party against whom sanctions are being sought 21 days notice of intent to seek sanctions and the opportunity to withdraw the offending pleading in the interim) of Rule 11 and its bankruptcy equivalent did not apply as they would to subsequent filings. It therefore imposed sanctions for the filing itself. The court awarded Cupertino over \$105,000, which was apparently its attorney fees and related costs.

Toth-Fejel appealed both the imposition and amount of the sanctions to the district court, which in this instance was sitting in an appellate capacity. Cupertino appealed as well, arguing that Toth-Fejel's law firm should have been held jointly and severally liable. Judge Jones affirmed. He agreed with the imposition of sanctions and found that the bankruptcy court had properly assessed all of Cupertino's costs as the sanction because they all stemmed from the frivolous filing. He also agreed that "exceptional circumstances"—specifically, that Toth-Fejel's law partner practiced in an entirely different substantive area and that Toth-Fejel had not told him of the Des Chuttes case until after the bankruptcy court's sanctions hearing—warranted not extending the sanctions award to Toth-Fejel's law firm.

- ❑ Pacific Harbor Capital, Inc. v. Carnival Airlines, Inc.,
210 F3d 1112 (9th Cir 2000)
 - ✓ Standard for courts imposing sanctions on their own motion under 28 USC § 1927

This Ninth Circuit decision came in the context of 28 USC § 1927, which authorizes sanctions against a lawyer who "wrongfully proliferates" a case. The plaintiff, which was based in Oregon, had leased an airplane to the defendant, which was based in Florida. Carnival fell behind in its lease payments and Pacific Harbor filed an action in the U.S. District Court for Oregon to repossess the plane. Carnival then obtained an ex parte temporary restraining order in Florida state court barring Pacific Harbor from recovering the plane. Carnival's attorneys neither informed Pacific Harbor's counsel of the TRO hearing nor did they tell the Florida state court judge of the federal proceeding in Oregon.

When Pacific Harbor learned of the TRO, it removed the Florida state court case and the federal court there dissolved the TRO and transferred the case to the U.S. District Court in Oregon for consolidation with the already pending matter. Pacific Harbor then moved for a TRO of its own prohibiting Carnival from flying the plane. Judge Marsh granted the TRO, which was effective immediately. Carnival continued to use the plane in the face of Judge Marsh's order. When Pacific Harbor sought to hold Carnival in contempt, Carnival's Florida attorneys claimed that they were "confused" about when the TRO was to go into effect. Even after Judge Marsh reiterated the effective date of the TRO to Carnival's Florida counsel, Carnival continued to use the engines from the plane on another aircraft. At that point, Judge Marsh found both Carnival and its lead Florida attorney in contempt. Judge Marsh ordered the Florida counsel to remain in Oregon until Carnival had complied with the TRO and told him that the United States Marshals would arrest him if the aircraft's engines were not produced to Pacific Harbor by the next morning. Although the Florida attorney avoided jail, Judge Marsh barred him from ever appearing in his court and required other members of his firm to attach a copy of the sanction order to any future pro hac vice application filed with the District of Oregon.

The Ninth Circuit affirmed, with the exception of the threat to jail the lawyer if his client did not produce the engines. In reaching its conclusion, the Ninth Circuit discussed both the substantive basis for imposing sanctions under 28 USC § 1927 and the procedures required when a trial court is imposing such sanctions on its own motion:

- "The district court issued sanctions pursuant to its inherent powers, 28 U.S.C. § 1927. Section 1927 authorizes the imposition of sanctions against any lawyer who wrongfully proliferates litigation proceedings once a case has commenced. * * * The imposition of sanctions under § 1927 requires a finding of bad faith. * * * 'We assess an attorney's bad faith under a subjective standard. Knowing or reckless conduct meets this standard.' * * * " 210 F3d at 1118 (citations omitted).
- "[A]n attorney subject to discipline is entitled to procedural due process, including notice and an opportunity to be heard.' * * * However, an opportunity to be heard does not require an oral or evidentiary hearing on the issue. * * *." Id. "The usual method for resolving factual issues under § 1927 is by affidavit * * * . That would appear to be a perfectly adequate mechanism in many instances for providing counsel with an

opportunity to be heard where the judge has effectively witnessed the offenses.’” *Id.* at n.11 (citations omitted).

- Pham v. SLC Technologies, Inc.
2000 WL 1036360 (D Or July 26, 2000)
 - ✓ Dismissal as a discovery sanction

The plaintiff, despite an order from Judge King compelling discovery, failed to respond to the defendant’s discovery requests. Judge King dismissed the plaintiff’s case with prejudice. In doing so, he reviewed the standards applicable to dismissal as a discovery sanction:

“Fed.R.Civ.P. 37(b)(2)(C) allows the court to dismiss an action filed by a party who fails to obey an order compelling discovery. The court is to consider five factors when determining whether a dismissal or default is an appropriate Rule 37 sanction:

‘(1) the public’s interest in expeditious resolution of litigation; (2) the court’s need to manage its dockets; (3) the risk of prejudice to the other party; (4) the public policy favoring disposition of cases on their merits; and (5) the availability of less drastic sanctions.’ *Adriana Int’l Corp. v. Thoeren*, 913 F.2d 1406, 1412 (9th Cir. 1990), cert. denied, 498 U.S. 1109 (1991).

If a court order is violated, the first and second factors support sanctions and the fourth factor opposes sanctions. *Id.* Prejudice is established if a party’s conduct impairs the opponent’s ability to go to trial or interferes with the rightful decision of the case. Delay alone is insufficient to establish prejudice but failure to produce documents is considered sufficient prejudice. *Id.* The court should warn of the possibility of dismissal or default before imposing a sanction that severe. *Id.* at 1413.” 2000 WL 1036360 at * 1.

WASHINGTON

Disqualification Cases

- Oxford Systems, Inc. v. Cell Pro, Inc.
45 F Supp2d 1055 (WD Wash 1999)
 - ✓ Standards for disqualification
 - ✓ Current or former client?
 - ✓ Disqualification for current client conflict under RPC 1.7
 - ✓ Disqualification for former client conflict under RPC 1.9 & 1.10
 - ✓ Use of expert testimony in disqualification litigation

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

A Seattle firm had represented Becton Dickinson (Becton) for 13 years in a variety of advisory and litigation matters. Since 1990, the Seattle firm had been Becton's exclusive Washington counsel. But, the Seattle firm's work for Becton was not continuous. Rather, it was on a case or project specific basis. In April 1998, the Seattle firm had no open files for Becton when it began defending a California law firm in a Washington securities fraud case brought by the shareholders of a company called Cell Pro for which the California firm had done IP work. The securities fraud suit grew out of patent infringement litigation that Becton was then prosecuting in Delaware against Cell Pro in which the California law firm's opinion on the validity of the patents involved was a central element of Cell Pro'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 1.7³ because Becton's interests were adverse to the California law firm's due to the overlap between the issues in the patent and securities cases. Becton asserted, therefore, that the Seattle firm should be disqualified.

Judge Zilly agreed. He found that the length, scope and general continuity of the relationship between Becton and the Seattle firm supported Becton's belief that it remained a current client of the Seattle firm. In doing so, Judge Zilly relied on the Washington Supreme Court's decision in *Bohn v. Cody*, 119 Wash2d 357, 832 P2d 71 (1992) and the Washington Court of Appeals' opinion in *Teja v. Saran*, 68 Wash App 793, 846 P2d 1375, rev denied, 122 Wash2d 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 reasonably formed under the surrounding circumstances. Having found that Becton was a current client of the Seattle firm, Judge Zilly then used RPC 1.7 to conclude that a conflict existed and ordered disqualification.

Although the principal issue in *Oxford* was whether Becton was a current client, Judge Zilly's opinion also addresses several other facets of disqualification litigation:

³Washington RPC 1.7(a) provides:

"A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

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

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

- Judge Zilly used Washington RPC 1.9⁴ to conclude that even if Becton was a former client, the Seattle firm could only have undertaken the new representation with Becton's consent because the securities fraud litigation was substantially related to the earlier patent case that the Seattle firm had handled.
- Although the partner who handled the Washington phase of the Becton patent case had left the firm, several lawyers remained at the firm who had assisted with that case and who Judge Zilly found had acquired Becton's confidences during the earlier representation. Therefore, Judge Zilly found that RPC 1.10's exception to the former client conflict rule when the lawyer who handled the earlier related matter has left the firm was inapplicable.⁵
- In hearing the motion, Judge Zilly allowed the parties to present expert testimony by affidavit on the questions of whether a conflict existed and, if so, whether disqualification was appropriate.

⁴Washington RPC 1.9 reads:

"A lawyer who has formerly represented a client in a matter shall not thereafter:

"(a) Represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents in writing after consultation and a full disclosure of the material facts; or

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

⁵Washington RPC 1.10(c) provides:

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

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

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

- **Daines v. Alcatel, S.A.,**
194 FRD 678 (ED Wash 2000)
 - ✓ Screening to avoid lateral hire conflicts
 - ✓ Availability of screening for non-lawyer staff

The defendants in three related cases were being represented by the Seattle and Spokane offices of a large regional law firm. After the lawsuits had been underway for about a year, the law firm's Spokane office hired a paralegal who had formerly worked in a similar capacity for the lead plaintiffs' counsel. The paralegal was given a conflict screening questionnaire before she reported for work at the defense firm. But, she did not complete the form until her first day on the job—April 18. The paralegal listed the litigation at issue and a conflict check was run by the law firm's principal office in Seattle the next day. Following the check, which revealed the conflict, the Seattle office sent a notice out that same afternoon (apparently by e-mail) to all lawyers and staff in all of its offices that the paralegal was to be screened from the Daines case. The Spokane office, which was aware of the conflict at the time it hired her, had informally screened the paralegal upon her arrival before the formal screen was implemented under Washington RPC 1.10.⁶ There was no evidence that the paralegal discussed the substance of the Daines case at any point while at the defense firm nor did she ever work on that case there.

⁶Washington RPC 1.10(b) provides:

“When a lawyer becomes associated with a firm, the firm may not knowingly represent a person in the same or a substantially related matter in which that lawyer (‘the personally disqualified lawyer’) * * * had previously represented a client whose interests are materially adverse * * * and about whom the lawyer had acquired confidences or secrets * * * that are material to the matter; provided that the prohibition on the firm shall not apply if:

- “(1) The personally disqualified lawyer is screened by effective means from participation in the matter and is apportioned no part of the fee therefrom;
- “(2) The former client of the personally disqualified lawyer receives notice of the conflict and the screening mechanism used to prohibit dissemination of confidential or secret information;
- “(3) The firm is able to demonstrate by convincing evidence that no confidences or secrets that are material were transmitted by the personally disqualified lawyer before implementation of the screening mechanism and the notice to the former client.”

RPC 1.10(b) is modeled on Oregon DR 5-105(H) and (I).

On April 19, the defense firm's Spokane office sent a letter to the paralegal's old firm informing it that the defense firm had hired her. In the letter, the defense firm informed the plaintiffs' firm that it was screening her from any involvement in the Daines case and enclosed a copy of an affidavit the paralegal had signed to that effect along with the law firm's internal screening notice. The plaintiffs' firm responded by questioning the effectiveness of the screen and moved to disqualify the defense firm shortly after that. (Ironically, by that time, the defense firm had terminated the paralegal. There was no evidence that she ever worked on the Daines case during her relatively short employment at the defense firm.)

In moving to disqualify, the plaintiff argued that simply the possibility that the paralegal had disclosed its confidential strategy to the defense firm warranted the latter's removal from the case. The defense firm, in turn, contended that Washington RPC 1.10's screening rule applied to non-lawyer staff and that the paralegal had been effectively screened under that rule. Judge Quackenbush agreed with the defense firm and denied the motion.

Judge Quackenbush first considered the question of whether Washington RPC 1.10's screening rule, which is framed in terms of attorneys, applies to nonlawyer staff as well. He found that it did by virtue of RPC 5.3(c)'s⁷ injunction that lawyers are responsible for the staff they supervise:

“This section charges attorneys with the responsibility of ensuring that non-attorney staff members follow the same ethics rules that apply to attorneys. If those non-attorneys violate those ethical obligations, the supervising attorneys can be held responsible. It follows that if a non-attorney possesses confidences acquired in previous legal employment but is not effectively screened by a new employer may be disqualified.” 194 FRD at 682.

Having found that RPC 1.10 applied, Judge Quackenbush then turned to the effectiveness of the screen:

⁷Washington RPC 5.3(c) provides:

“A lawyer shall be responsible for conduct of [a nonlawyer] that would be a violation of the Rules of Professional Conduct if engaged in by the lawyer if * * * has direct supervisory authority over the [nonlawyer], and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take remedial action.”

“RPC 1.10 provides, when boiled down to its essence, that an attorney who acquired information about a particular case at one firm can work for an opposing firm without disqualifying the new firm if and only if the new firm effectively screens the attorney from any discussion of that case.” *Id.*

Although the defense firm had not implemented its formal screen until after the paralegal had arrived, Judge Quackenbush found that, at least on the facts before him, the screen at issue was effective. In reaching that conclusion, he looked to both the requirement under RPC 1.10(c)(1) that the screen be “effective” and the requirement under RPC 1.10(c)(3) that there be “convincing evidence” that no material confidences or secrets were transmitted:

- “[The plaintiff] has not produced any evidence of disclosure but maintains that [the defense firm’s] evidence is * * * not ‘convincing.’ [The plaintiff] claims that even if [the paralegal] did not have access to the hard copies of the [defense firm’s] files, she had access to computer copies of [the defense firm’s] documents. Apparently the contention is that [the paralegal] could prejudice [the plaintiff] by simply sneaking a peek at those documents, without more. Yet RPC 1.10(b)(3) is clear that the inquiry is whether [the paralegal] transmitted confidential information to [the defense firm], not whether she learned something that might have helped [the plaintiffs’ firm].” *Id.* at 683.
- “This leaves the question of whether the screen of [the paralegal] was ‘effective.’ Although this is apparently a different inquiry than whether there was any information ‘transmitted,’ the two issues are clearly interrelated. The most effective screen is one that results in no transmission of confidences. The court has already indicated that it is convinced beyond doubt that [the paralegal] did not divulge any confidences.

“Even if this is not enough to render a screen ‘effective,’ there are other indications that this screen was such. [The defense firm] implemented the screen within hours of receiving [the paralegal’s] conflicts check information. The screen was sent to all personnel in all of the firm’s numerous branch offices. In addition, [the defense firm’s] records indicate that except for two hours, [the paralegal] worked exclusively on [another

case]. The other two hours were spent on cases unrelated to Daines, Alcatel, or the other parties to this litigation. * * * This screen was effective.

* * * * *

“Washington law does not require the implementation of a screen before employment, as long as there is convincing evidence that there was no disclosure before the screening and the screen, once implemented, is effective. As already noted, the screen in this case satisfies the Washington requirements.”
Id. at 683-84.

- Miller v. Robertson,
1999 WL 65638 (Wash App Feb 12, 1999) (unpublished)
 - ✓ Standard of review
 - ✓ Conflicts as a basis for reversal of a judgment
 - ✓ Former client conflict: Substantial relationship test

A minority shareholder in a closely-held corporation sued the majority shareholder and the corporation for breach of fiduciary duty and wrongful termination after he had allegedly been forced out by the majority shareholder. The minority shareholder, Miller, moved to disqualify the defendants’ law firm on the ground that one of its attorneys had formerly represented him in several facets of his involvement with the corporation—principally advice on a related building ownership partnership and a right of first refusal for corporate stock. The trial court denied the motion. It later held for the defendants on the merits as well. Miller sought reversal on, among other grounds, the trial court’s failure to disqualify the law firm.

The Court of Appeals first addressed the standard of review: “[W]hether an attorney has violated the Rules of Professional Conduct * * * [is] * * * a question of law * * * [that we] * * * review * * * de novo.” 1999 WL 65638 at *6. It then noted that “to obtain reversal of a judgment in a case where there has been a violation of the conflict of interest rules, the former client must show prejudice.”
Id. at *7.

Miller did not allege that the law firm had used confidential information adverse to him under RPC 1.9(b). Therefore, the Court of Appeals focused on whether the law firm’s former representation of Miller was a “substantially related matter” under RPC 1.9(a):

“In deciding whether the current and former matters are substantially related, the underlying question is ‘whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question.’” *Id.* at * 6, quoting *Teja v. Saran*, *supra*, 68 Wash App at 798.

The Court of Appeals concluded that the advice on the building partnership was not a substantially related matter because the present case did not involve the building partnership directly. *Id.* at * 7. But, the Court of Appeals found that the right of first refusal presented a much closer question:

“We find that * * * [the lawyer’s] * * * involvement in drafting the Rights of First Refusal as to ownership in both the corporation and the partnership more problematic. Both Miller and Robertson [the majority shareholder] were to sign these documents and * * * [the lawyer] * * * spoke with Miller regarding suggested revisions. These matters appear substantially related to the present lawsuit, but Robertson contends that * * * [the lawyer] * * * was not representing Miller at the time. This assertion is consistent with * * * [the lawyer’s] * * * testimony, but the circumstances are ambiguous.

“Because the trial court made no findings as to * * * [the lawyer’s] * * * representation, we cannot determine whether there was an RPC violation. * * * We observe, however, that if * * * [the lawyer] * * * had been representing both Miller and Robertson when drafting the rights of first refusal, RPC 1.9(a) would have prohibited * * * [the lawyer] * * * from representing Robertson in this lawsuit. And if that were the case, RPC 1.10⁸ would have prohibited the * * * [law] firm also from representing Robertson, and the trial court would have erred in denying Miller’s motion for disqualification.” *Id.*

⁸RPC 1.10(a) imputes one law firm member’s conflicts to the balance of the firm:

“Except as provided in section(b) [which permits lateral-hire screening], while lawyers are associated in a firm none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by rules 1.7, 1.8(c), 1.9 or 2.2.”

Sanctions Cases

- Doe v. Gonzaga Univ.,
99 Wash App 338, 992 P2d 545 (2000)
 - ✓ Discovery sanctions
 - ✓ Duty to investigate when preparing discovery responses

The Washington Court of Appeals recently addressed the discoverability of work product and the duty to inquire when responding to discovery requests. Doe v. Gonzaga Univ. involved a civil rights claim by a former student asserting that Gonzaga University (Gonzaga) employees defamed him when he was applying for a teaching certificate. During the certification process, Gonzaga discovered allegations that the plaintiff had sexually assaulted another student and, as result, refused to issue a “moral character affidavit” required for teacher licensing in Washington. The plaintiff eventually received a jury verdict of over \$1 million. On review, the Court of Appeals considered a host of issues—including two key discovery rulings.

The first concerned a chronology that two Gonzaga administrators had prepared at the request of the university’s corporate counsel during the internal investigation of the underlying charges against the student. Gonzaga had argued to the trial court that the chronology was protected from discovery by the attorney-client privilege because it had been prepared at the request of the university’s inside counsel. The trial court rejected that argument and characterized the chronology as work product. The trial judge then found that the plaintiff met the “substantial need” test under Washington Civil Rule 26(b)(4) for the discoverability of work product because the plaintiff’s defamation claim focused on the precise chain of the allegedly defamatory statements and he was unable to obtain equivalent information by alternate means. The Court of Appeals agreed on both counts. It, too, rejected the argument that a fact witness can be converted into a lawyer’s agent for purposes of the attorney-client privilege simply by receiving directions from the lawyer. The Court of Appeals also agreed with the trial judge that, because this chronology related directly to the defamation claim at issue, the plaintiff made the requisite showing of both need and hardship to overcome the protection from discovery normally afforded by the work product rule.

The second discovery ruling also related to the chronology. Based on his own investigation, the plaintiff had pieced together his own rough chronology of Gonzaga’s meetings and communications regarding the assault charges. The plaintiff served a copy of his own chronology on the university in an interrogatory and asked Gonzaga to identify any meetings and communications not listed.

Gonzaga’s outside counsel apparently did not ask the university whether it had its own chronology. Rather, the outside counsel simply responded that the request was “unduly burdensome and oppressive” and assured the plaintiff he already had all of the information he needed. The plaintiff discovered the existence of Gonzaga’s chronology several years later. When Gonzaga finally produced the chronology after losing its work product argument, the plaintiff discovered that it contained significantly more detail than his own. At that point, he moved for sanctions against the university. The trial court denied the motion, but the Court of Appeals reversed. In doing so, the Court of Appeals noted that under *Physicians Ins. Exch. v. Fisons Corp.*, 122 Wash2d 299, 858 P2d 1054 (1993), the question of whether an attorney responding to a discovery request has made a “reasonable inquiry” of the client is judged by an objective standard. The Court of Appeals found that the university’s outside counsel had failed to make a reasonable inquiry in response to the interrogatory and, as a result, the university’s response was misleading. The Court of Appeals remanded the case to the trial court for the imposition of an “appropriate sanction.”

- ☐ Schumacher v. Watson,
100 Wash App 208, 997 P2d 399 (2000)
 - ✓ Standards for imposing sanctions for a frivolous appeal

This case involved an appeal following the modification of a child support order. The Court of Appeals affirmed the trial court’s modification. At that point, the wife sought sanctions against the husband for filing a frivolous appeal. In considering the request for fees, the Court of Appeals noted that “[a]n appeal is not frivolous if it presents debatable issues upon which reasonable minds could differ and there is a possibility of reversal.” 997 P2d at 405. Finding such a possibility in this instance, the Court of Appeals denied the motion for sanctions.

- ☐ Herrera v. Singh,
103 F Supp 2d 1244 (ED Wash 2000)
 - ✓ Court’s inherent authority to sanction litigants

In this case, 10 migrant farm workers had sued an orchard owner for violations of federal and state statutes governing agricultural workers. The workers prevailed, and, following trial, they moved for sanctions against the defendant for improperly delaying the trial (and thereby increasing the plaintiffs’ attendant litigation costs) by allegedly claiming to have suffered a heart attack while in India that prevented him from returning to the United States for the scheduled trial. Because the sanctions were sought against the defendant directly based on his failure to produce sufficient corroborating records of his supposed hospitalization in India and not his attorney, the plaintiffs did not rely on either

FRCP 11 or 28 USC § 1927. Rather, they sought sanctions under the court's inherent power to punish litigants for bad faith conduct. In awarding such sanctions here, the court outlined the standards to be applied:

“The scope of a federal court's inherent power to sanction a litigant for bad faith conduct was explored in *Chambers v. NASCO, Inc.*, 501 U.S. 32, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991) (holding a district court properly invoked its inherent power in assessing as a sanction attorney's fees and related expenses for a party's bad faith conduct). The inherent authority to sanction a party's conduct is not a broad power, but rather a narrow, implied power that must be exercised with restraint and discretion. *Id.* at 42, 44, 111 S.Ct. 2123. Nonetheless, it is firmly established that a court's implied authority to sanction a party's conduct exists. *Id.* at 44, 111 S.Ct. 2123. There are several defined circumstances in which a court can use its power to assess fees and costs despite the 'American rule' generally prohibiting fee-shifting. Relevant to the instant case are two of these exceptions. First, 'a court may assess attorney's fees as a sanction for the willful disobedience of a court order.' * * * The power to punish for contempt reaches both conduct before the Court and conduct beyond the Court's confines because the underlying concern giving rise to the power generally was disobedience to orders of the judiciary. * * * Second, 'a court may assess attorney's fees when a party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons.' * * * When imposing a sanction on this basis, a court must make a finding of bad faith. * * * Such a finding may relate to delay or disruption of litigation, hampering enforcement of a court order, or a fraud practiced on the court. * * *” 103 F Supp 2d at 1255-56 (citations omitted).