

DISQUALIFICATION FOR CONFLICTS OF INTEREST: THE YEAR IN REVIEW

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INTRODUCTION

This paper surveys developments in the law of disqualification over roughly the past year.¹ As the title implies, the principal focus of the materials collected is on disqualification for conflicts of interest. But, cases of note resulting in disqualification on other grounds are included as 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 and Idaho. The concluding section contains a brief bibliography of Washington disqualification cases over the past seven 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 Mark J. Fucile, "Why Conflicts Matter," *Washington State Bar News*, August 2004, at 36.

¹ The cases discussed were reported through November 25. They are intended to be illustrative rather than encyclopedic. As such, they focus on decisions that are available in at least electronic form. Also, the Washington Supreme Court currently has proposed changes to the Washington RPCs under review. The proposed amendments to the RPCs, together with information on the status of their review, are available on the Washington State Bar's web site at www.wsba.org. The citations to the Washington RPCs in this paper are to the current rules.

WASHINGTON²

Over the past year, Washington courts issued disqualification decisions that touched on five primary areas: (1) the relationship between disqualification and other sanctions against lawyers; (2) former client conflict analysis in the disqualification context; (3) the lawyer-witness rule as a basis for disqualification; (4) expert disqualification; and (5) ineffective assistance standards in criminal cases.

- ▶ ***In re Kronenberg*,
155 Wn.2d 184, 117 P.3d 1134 (2005)**
 - **Disqualification leading to other consequences**

Kronenberg is the latest chapter in a long-running tale in which a lawyer was disqualified for bribing a witness in a criminal case. Kronenberg's client in the criminal case later sued Kronenberg for breach of fiduciary duty and fee forfeiture because Kronenberg, as a result of the disqualification, failed to perform on his fee agreement with the client. See *Cotton v. Kronenberg*, 111 Wn. App. 258, 44 P.3d 878 (2002). In this installment, Kronenberg was disbarred for the witness tampering. Most lawyers who are disqualified will not later be disbarred. *Kronenberg* is, however, a good illustration that other consequences can follow—including, depending on the circumstances, civil actions for breach of fiduciary duty, legal malpractice and fee forfeiture as well as regulatory discipline.

² Several of the disqualification decisions issued by the Washington Court of Appeals this year were unpublished—but are readily available in electronic form. Under RCW 2.06.040 and RAP 12.3(d), an unpublished decision is a matter of public record but does not have “precedential value.”

- ▶ ***Hamlin v. Robinson*,
___ Wn. App. ___, 2005 WL 2503710 (Wn. App. Oct. 11, 2005)
(unpublished)**
 - **Former client conflicts**

Hamlin affirmed the denial of disqualification based on an asserted former client conflict. In doing so, the Court of Appeals relied on a case profiled last year—*Sanders v. Woods*, 121 Wn. App. 593, 89 P.3d 312 (2004)—in setting out the test of whether two matters are “substantially related” under the former client conflict rule, RPC 1.9:

“To determine whether the two representations are substantially related, we must: (1) reconstruct the scope of the facts of the former representation, (2) assume the lawyer obtained confidential information from the client about all these facts, and (3) determine whether any former factual matter is sufficiently similar to a current one that the lawyer could use the confidential information to the client’s detriment. The decision turns on whether the lawyer was so involved in the former representation that he can be said to have switched sides.” 2005 WL 2503710 at *4, *quoting Sanders* at 121 Wn. App. at 598.

Although the former client conflict rule is easy to articulate, gauging whether two matters are substantially related can be very difficult in practice. The test set out in *Sanders* and cited in *Hamlin* offers useful guidance in making this assessment.

- ▶ ***Bryan v. PFAU, Inc.*,
2005 WL 2757237 (E.D. Wash. Oct. 24, 2005) (unpublished)**

***State v. D.R.*,
128 Wn. App. 1037, 2005 WL 1607449 (July 11, 2005) (unpublished)**

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

***State v. Schmitt*,
124 Wn. App. 662, 102 P.3d 856 (2004)³**
 - **The lawyer-witness rule**

All four of these cases involve RPC 3.7, the lawyer-witness rule. RPC 3.7 will change in several respects if the Supreme Court approves the new rules currently

under review (most notably permitting another lawyer at the lawyer-witness' firm to try the case involved if the lawyer-witness' testimony will not conflict with the position their client is taking). These four cases, however, all deal with an aspect of the rule that will not change: the moving party must demonstrate that the lawyer involved will be a "necessary witness" at trial. In general, courts equate "necessary witness" with one who will supply evidence that is otherwise unobtainable.

These four cases also illustrate an unusual facet of the lawyer-witness rule in the disqualification context. With most disqualification motions, the moving party must show standing in the form of being a current or former client of the lawyer the moving party is seeking to disqualify. With the lawyer-witness rule, however, courts allow a party-opponent to raise such challenges regardless of whether the target of the motion has ever been the moving party's lawyer. The rationale for the differing approaches is that with the lawyer-witness rule the lawyer's testimony will affect the proceeding at hand and a party-opponent, therefore, has the requisite standing to seek disqualification.

Schmitt also deals with the issue of whether an entire prosecutor's office is subject to disqualification if one of its deputy prosecutors is disqualified. Although the Court of Appeals affirmed the disqualification of the deputy prosecutor involved, it reversed as to the entire prosecutor's office. The Court of Appeals held that in these circumstances a deputy prosecutor affected could be screened instead and the case could still be prosecuted by other lawyers in the prosecutor's office. It is important to

³ *Schmitt* was decided on December 14, 2004, and, therefore, was not included in last year's summary.

note that this judicially-approved conflict screening mechanism is *not* available in civil practice outside the new-hire context. See, e.g., RPC 1.10.

- ▶ ***Endrody v. M/Y Anomaly*,
2005 WL 2207007 (W.D. Wash. Sept. 9, 2005) (unpublished)**

- In re Angelo H.*,
124 Wn. App. 578, 102 P.3d 822 (2004)⁴**
 - ***Expert disqualification***

These two cases do not involve disqualification of lawyers. Rather, they deal with disqualification of experts. *Angelo H.* examines the subject primarily from the perspective of the expert's qualifications. *Endrody* looks at that, too; but, it focuses primarily on the criteria for disqualifying experts based on their prior affiliation with the opposing party: "Courts exercising this authority [to disqualify] have employed a two-prong analysis to determine whether disqualification is necessary. Disqualification based on a prior relationship with an adversary is warranted only if: (1) the moving party possessed an objectively reasonable basis to believe that a confidential relationship existed between that party and the expert witness; and (2) confidential or privileged information was in fact provided to the expert by the moving party." 2005 WL 2207007 at *2.

Endrody does not address a potentially related issue: what if the expert has passed the other side's confidential information to the lawyer who has retained the expert in the new case? Using the logic of *Richards v. Jain*, 168 F. Supp. 2d 1195 (W.D. Wash. 2001), where a law firm was disqualified for improper acquisition and use of the other side's confidential documents, an argument could be made that a lawyer who knowingly solicits the other side's privileged communications by retaining an expert

who became privy to that information while working for the other side has put himself or herself at disqualification risk.

- ▶ ***Lambert v. Blodgett*, 248 F. Supp. 2d 988 (E.D. Wash. 2003), reversed in part, affirmed in part, 393 F.3d 943 (9th Cir. 2004)⁵**
 - **Co-defendant conflicts in criminal representation**

Lambert was a federal habeas corpus proceeding in which petitioner Lambert sought review of his state guilty plea to aggravated murder charges based on ineffective assistance of counsel under the Sixth Amendment. The District Court granted the petition on several grounds. One of Lambert’s arguments was that his lawyer who had represented him on the plea had a nonwaivable conflict because another lawyer from the same firm was representing a co-defendant and their respective positions on both culpability and plea negotiations were adverse. Both of the lawyers involved worked under contract for a law firm that handled public defender work in Grant County. The firm operated that aspect of its practice under a trade name and the two lawyers both apparently appeared on the record under the firm’s trade name. Although the State contended that the lawyers were independent contractors and did not share confidences regarding the two clients, the District Court relied on the definition of “law firm” in ABA Model Rule 1.0 and its accompanying comments—which are similar to the one used in the “terminology” section of the Washington RPCs and under RPC 7.5’s discussion of firm and trade names—in concluding that the two lawyers were members of the same firm because they held themselves out as such. Having found that the

⁴ *Angelo H.* was decided on December 9, 2004, and, therefore, was not included in last year’s materials.

⁵ The Ninth Circuit’s decision in *Lambert* was issued on December 28, 2004, and, therefore, was not included in last year’s materials.

lawyers were from the same firm, the District Court then imputed their respective conflicts to the firm as a whole under Washington RPC 1.10(a). Nonetheless, the District Court concluded that this imputed conflict did not constitute ineffective assistance of counsel. The Ninth Circuit agreed with the District Court in both its analysis and conclusion on this issue.

REGIONAL DEVELOPMENTS⁶

Alaska

- ▶ ***Lampley v. State*, 2005 WL 388277 (Alaska App. Feb. 16, 2005) (unpublished)**
 - **Ineffective assistance of counsel and disqualification**

Lampley involved a petition for post-conviction relief predicated, in part, on asserted conflicts by the petitioner's trial and appellate counsel that the petitioner asserted constituted ineffective assistance of counsel under the United States and Alaska Constitutions. *Lampley* argued that his trial (and, by implication, his appellate counsel from the same defender organization) supposedly had disqualifying conflicts because the same defender organization was representing another inmate with whom *Lampley* had an altercation in an unrelated proceeding and because the trial counsel had witnessed yet another altercation involving *Lampley* that was also unrelated to the charges on which the trial counsel was defending *Lampley*. Both the trial court and the Alaska Court of Appeals concluded that these asserted conflicts *Lampley* perceived did not constitute ineffective assistance of counsel.

⁶ As noted earlier, the compilation of regional cases in this section is intended to be illustrative and not encyclopedic.

Idaho

- ▶ ***Freiburger v. J-U-B Engineers, Inc.*,
141 Idaho 415, 111 P.3d 100 (2005)**
 - **Former client conflicts**

Freiburger was a declaratory judgment proceeding by a former employee, Freiburger, of defendant J-U-B to invalidate a non-complete clause in his employment contract. Freiburger was represented by a lawyer who had done regulatory consulting work for J-U-B on one of its engineering projects five years earlier. J-U-B moved to disqualify Freiburger's lawyer for a former client conflict.

J-U-B conceded that the two matters were factually distinct. Instead, it argued that the lawyer had obtained confidential information about how J-U-B handled its litigation generally. The trial court concluded that this alone did not constitute confidential information and, therefore, no former client conflict existed. It denied J-U-B's disqualification motion on that basis. The Idaho Supreme Court agreed. Like the trial court, the Idaho Supreme Court found that J-U-B's practice of being "aggressive" in its litigation was not confidential information.

The Idaho Supreme Court did not cite to the comments to Idaho RPC 1.9. But, comment 2, which is also patterned on the analogous ABA Model Rule commentary, is in accord with *Freiburger* and notes that "a lawyer who recurrently handled a type of problem for a former client is not precluded from later representing another client in a factually distinct problem of that type even though the subsequent representation involves a position adverse to the prior client." Although a lawyer who had managed a large series of cases for a long period of time might acquire sufficient confidential information for a former client conflict to arise—see *generally* ABA Formal Ethics

Opinion 99-415 (discussing former in-house counsel who take on matters adverse to their former corporate employers) and *In re McMEnamin*, 319 Or. 609, 879 P.2d 173 (1994) (dissenting opinion)—the lawyer in *Freiburger* wasn't in this position.

Oregon

► ***In re Knappenberger*,
338 Or 341, 108 P.3d 1161 (2005)**

***Philin v. Westhood, Inc.*,
2005 WL 582695 (D. Or. Mar. 11, 2005) (unpublished)**

- **Do a conflicts check**

Knappenberger and *Philin* are an odd pair of bookends. The lawyer in *Knappenberger* is a solo practitioner. The lawyer in *Philin* is a partner of a multi-office national firm. Despite these differences, they share a common thread: the lawyers involved did not do conflict checks.

Knappenberger involved a family law practitioner. The husband in a divorce proceeding consulted the lawyer about representing him in that and also discussed a related restraining order proceeding. Ultimately, the husband retained other counsel. The lawyer sent the husband a bill for the consultation and the Oregon Supreme Court later found that the husband was the lawyer's client for that limited period. About a month later, the wife consulted the same lawyer and hired the lawyer to represent her in both proceedings. The lawyer didn't use a conventional conflicts checking system—relying only on his memory and his address list. He didn't recall meeting with the husband and his "conflict checking" system didn't catch the earlier contact with the husband either. Although he later withdrew when the husband's new lawyer threatened a disqualification motion, the Oregon Supreme Court disciplined the lawyer for a former client conflict.

Philin, by contrast, involved a commercial dispute over investments in a golf course. In 2002, one of the defendant's directors sought legal advice from a partner of the Boston office of a major national law firm. In a meeting lasting about an hour, he discussed the assertions that the plaintiff's predecessor in interest was making concerning the defendant with the lawyer. The lawyer apparently did not run a conflict check or open a new file at that time. The lawyer had no further contact with the director until September 2004, when the director contacted the lawyer again to let him know that it appeared that litigation over the dispute might be imminent. The lawyer acknowledged the earlier discussion, but again did not run a conflict check or open a new file. Meanwhile, the law firm's Portland office had taken on the plaintiff as a client in 2003 and filed a complaint against the defendant in September 2004. Before opening the matter, the Portland office ran a conflict check using the law firm's computerized system. Because the Boston partner never entered the client in the system, however, the conflict check did not reveal a problem. Once the complaint was served, the defendant raised the conflict with the plaintiff's firm and then moved to disqualify the plaintiff's firm when it did not withdraw. The District Court found that an attorney-client relationship had been formed in 2002 between the defendant and the law firm and disqualified the law firm regardless of whether the current or the former client conflict rule was applied.

Although the firm structures were vastly different in *Knappenberger* and *Philin*, the parallels are striking: short, exploratory conferences with potential clients that were later held to have constituted attorney-client relationships; no conflict checks on in-take; and later disqualifying conflicts when the other side in the disputes became clients of

the lawyer and law firms involved. With each, the results could have been avoided simply by entering the initial consultations in a conflict database.

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 seven years.

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

Cotton is not a disqualification case as such. Rather, it involved a breach of fiduciary duty claim against a lawyer seeking, among other things, the return of the client's fees because the lawyer had been disqualified. *Cotton* 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.⁷ 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.

⁷ For a similar case with a similar result, see *Capps v. Gregoire*, 2003 WL 103461 (Wn. App. Jan. 13, 2003) (unpublished).

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

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

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

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

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

In *Richards*, the plaintiff had provided his lawyers with over 900 privileged communications that he had taken with him when he left his corporate employer for use in prosecuting his claim over stock options against the former employer. Relying primarily on an ABA ethics opinion—94-382—the court found a duty to notify the privilege holder, to return them and to quickly seek the court’s intervention to resolve any issues over waiver. On another note, the communications in *Richards* were e-mails. The court 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 as was representing one of the defendants in the murder case. The prosecution moved to disqualify the law firm in the *Riofta* case. The State argued that the law firm had a conflict because any negotiations over a plea in *Riofta* would be aimed at soliciting 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(b).

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

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

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

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