

Conflicts of Interest

As part of the lawyer's duty to the client, she may not be involved with other representations or activities that would conflict with the client's interests. Lawyers are required to avoid even the appearance of a conflict. This is related to the confidentiality requirement. For example, a lawyer may represent an auto manufacturer in a defense to a personal injury product defect lawsuit. As a result of the representation, she will learn a great deal about the company's design process. Later on, a different person claiming injury might want to hire her to represent him as plaintiff against the company. The lawyer must refuse, unless the conflict is disclosed to both parties and they give an informed waiver.

Entering into business transactions with clients is a particularly dangerous undertaking, although it may seem perfectly reasonable at the time. A lawyer representing a client in developing a piece of property may believe that the development offers a good chance for profit. At the same time, the client might like to minimize the amount he must pay the lawyer. Thus, they might want to consider giving the lawyer part ownership in return for his waiving his fees. Later, however, if the business goes bad, the interests of the lawyer and the client may come to differ.

The prohibition against conflict of interest even applies to others in the same law firm. Model Rule 1.10 says that if one of the lawyers in the firm would be disqualified from taking the case because of a conflict, all of them are disqualified. For this reason, when lawyers move from one firm to another, the new firm must make sure that hiring the attorney will not cause conflicts with its existing clients. Similarly, when a new potential client comes seeking help, the law firm must first search its records to confirm that taking on the representation will not conflict with its existing obligations. In some cases, if the new client is big enough, the firm may decide to give up its association with the old client. In doing so, however, it must ensure that the needs of the existing client are taken care of by other lawyers. Also, it may not use any information that it gained as a result of its previous relationship against the previous client.

As law firms become larger, the disqualification rules become all the more difficult to monitor. A firm with offices around the globe must maintain a sophisticated computer database of clients and their matters that can be checked for conflicts in a timely manner. With so many lawyers in the United States, another attorney can always be found. That is not always the case in countries that have far fewer members of the bar, where the number of lawyers who can handle complex international business transactions in foreign languages may be few indeed. Such countries often tolerate law firms simultaneously representing competitors, perhaps insisting only on some separation between the attorneys actually responsible for the different clients. This is sometimes called a "Chinese Wall," deriving from analogy to the Great Wall of China.

Doe ex rel. Doe v. Perry Community School Dist.

650 N.W.2d 594 (Iowa 2002)

Streit, J.

Litigants in a civil sexual abuse case against a school district want the court to stop their lawyer's new law firm from representing the school district in the litigation. The law firm, Bradshaw, Fowler, Proctor & Fairgrave, P.C., argues it has implemented a screening mechanism sufficient to prevent the disclosure of confidential information between the disqualified associate, Jason Palmer, and the other members of the firm. The district court found adequate screening procedures were in place to ensure there was no actual conflict between the other members of the firm and its client. Because the representations by Palmer for the plaintiffs and the Bradshaw law firm for the defendants bear a substantial relationship to each other, we reverse and remand.

Russell Alan Gronewold, an eighth-grade teacher at Perry Middle School was convicted of sexually abusing Jane Doe, one of his fourteen-year-old students. Attorney Brent Cashatt of Smith, Schneider, Stiles, Hudson, Serangeli, Mallaney & Shindler served as Doe's guardian *ad litem* in the criminal case. Attorney Jason Palmer was an associate with the Smith law firm at that time and appeared as the Does' attorney.

Doe and her parents retained Cashatt, Palmer, and Jan Mohrfeld to represent them in their civil suit against Gronewold, the Perry Community School District, and principal Arthur Pixler. Palmer attended a pre-petition conference with the clients. He prepared a draft of the petition using the clients' file, including internal memoranda. Palmer signed the petition and it was filed on February 26, 2001.

On March 21, 2001, members of Bradshaw, Fowler, Proctor & Fairgrave, P.C., appeared on behalf of the school district and Pixler. Palmer joined the Bradshaw firm in August 2001. Because of the conflict between Bradshaw's current representation of the defendants and Palmer's prior representation of the Does, Palmer filed a motion to withdraw as counsel for the Does.

The Does filed a motion to disqualify the Bradshaw firm based upon Palmer's prior representation of the Does in the same lawsuit. The district court denied the motion. The court presumed confidences were divulged by the Does to Palmer in the prior representation which may be relevant to the current representation. However, the court found it was clear Bradshaw ensured there was no actual conflict by creating a "Chinese Wall." The court further noted to disqualify Bradshaw at this stage of the proceedings would deny the defendants counsel of their choice and place them at a disadvantage in the lawsuit. We granted the Does' application for interlocutory appeal.

This case presents an issue of first impression in Iowa. We must determine whether a screening mechanism known as a Chinese Wall is sufficient to allow a law firm to eliminate the conflict of an attorney who switched sides of representation during the same case. In general, an attorney must be disqualified from representing

a party against a former client if the two representations bear a “substantial relationship” to each other. Here, Bradshaw contends its implementation of a Chinese Wall is sufficient to avoid disqualification of the entire law firm.

The Does do not need to show confidences were actually disclosed by Palmer to prove a conflict exists. To show the Bradshaw firm must be disqualified, the Does must only prove there is a substantial relationship between the former and the present representation. In determining whether a substantial relationship exists, we consider: (1) the nature and scope of the prior representation; (2) the nature of the present lawsuit; and (3) whether the client might have disclosed a confidence to her attorney in the prior representation which could be relevant to the present action. The former client must be given the presumption confidences were disclosed.

Bradshaw admits a substantial relationship exists between the two representations. Palmer’s former representation of the Does and Bradshaw’s current representation of the defendants involve the same case. Palmer filed a motion to withdraw from the current litigation because of his previous participation in the Does’ case. The pending lawsuit includes allegations that the school district and principal knew Gronewold molested Doe but did nothing to stop the continual harassment and abuse. Such issues necessarily involve sensitive and confidential information. The Does likely disclosed confidences to Palmer in the prior representation which would certainly be relevant in Bradshaw’s defense of the school district and principal. As such, we conclude there is a substantial relationship between the former and the present representations. This determination alone requires disqualification of the Bradshaw firm.

Because of the strong appearance of impropriety, once we conclude a substantial relationship exists between the two representations, disqualification cannot be avoided.

The extent of Palmer’s involvement in the prior representation is clear. Palmer first appeared in this case as Does’ attorney. On one occasion, Palmer met with Mr. and Mrs. Doe to discuss whether the Does should file a civil law suit. Palmer had telephone conversations with the Does. He signed pleadings and entered his appearance on behalf of the Does. Brent Cashatt, Jane Doe’s guardian *ad litem*, testified “confidences were exchanged.” Paige Fiedler joined the Smith attorneys in the lawsuit only a few days prior to the date the Does filed their lawsuit. Cashatt stated that prior to Fiedler taking over, Palmer had done most of the work on the case. Palmer drafted the petition in the civil suit. In drafting the petition, Palmer had access to the entire case file, including all internal memoranda, correspondence to and from the Does, and attorney notes from confidential meetings, and telephone calls with the Does. The Smith law firm ultimately filed Palmer’s draft of the petition with some revisions. Though there is some question regarding whether Palmer drafted the exact petition filed, there is no doubt Palmer signed the filed petition.

Given these circumstances, we find a reasonable layperson would conclude Bradshaw’s current representation would compromise the integrity of the trial and would

harm the Does. This conflict before us did not arise as the result of Palmer's prior representation in a different, unrelated matter. Rather, Palmer's firm now stands as adversary against the Does in the very litigation in which Palmer first served as their trusted attorney. When Palmer left the Smith firm, he stopped advocating for the Does by taking a new position clearly adverse to their best interests.

To analogize to baseball, [Palmer] has not only switched teams, he has switched teams in the middle of the game after learning the signals. That [Palmer] has been benched by his new team does little to ameliorate the public perception of an unfair game.

For a lawyer to represent the Does today, and the defendant school district and principal tomorrow in the same litigation "creates an unsavory appearance of a conflict of interest that is difficult to dispel in the eyes of the lay public or even the bench and bar." Despite the attempted screening, continued representation constitutes a threat to the adversarial process and creates an undeniably strong appearance of impropriety.

Though Bradshaw concedes there is a substantial relationship between the prior and current representations, it attempts to minimize the degree of Palmer's involvement in the plaintiff's case and emphasizes the steps it took to lessen his contact with the defense. Specifically, Bradshaw argues the use of a Chinese Wall allows the firm to avoid imputed disqualification. Bradshaw contends it has taken precautionary measures to prevent disclosure of confidential information. The firm asserts Palmer, now at the Bradshaw firm, has no involvement in or access to the Does' case. Bradshaw contends it has taken and will continue to take "appropriate safeguards to completely isolate Mr. Palmer from involvement in or knowledge about this case."

The presence or absence of a Chinese Wall does not enter into our analysis of whether there is a substantial relationship between two representations. We consider whether a substantial relationship exists based upon the nature and scope of the prior representation, the nature of the present lawsuit, and whether confidences may have been disclosed. If we determine a substantial relationship exists, then unequivocally, the law firm must be disqualified. This is such a case. This is not a case where Palmer did not have involvement in the case prior to his switch to Bradshaw. As discussed above, Palmer's involvement was substantial, significant, and intimate. A Chinese Wall will not prevent the conclusion that a substantial relationship exists and Palmer's new firm cannot continue to represent the defendants.

It appears Bradshaw implemented the Chinese Wall only *after* the Does filed their petition to disqualify the firm. There is no evidence to suggest Bradshaw took any steps to prevent Palmer from divulging the Does' confidences to the other Bradshaw attorneys prior to that time. There is also little evidence to prove Bradshaw implemented procedures to prevent the other Bradshaw attorneys from discussing sensitive matters regarding the present lawsuit. We presume Palmer and the Bradshaw lawyers will act within the confines of our rules of ethics and professional responsibility. However, confidence in attorneys alone does not overcome the strong

appearance of impropriety in cases such as this where the litigation involves sensitive and confidential matters.

We approve of the use of Chinese Walls under certain circumstances to overcome imputed disqualification of a law firm. Such circumstances do not exist in this case. There is a substantial relationship between the former and present representations. Accordingly, it is improper for Bradshaw to continue its representation and it must be disqualified. We conclude the district court abused its discretion in denying Does' petition to disqualify Bradshaw. We reverse and remand for further proceedings consistent with this opinion.

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Topics for Further Discussion

1. The lawyer who changed law firms was an associate in the first firm and became an associate in the second. He was not a partner of the law firm. Should this make any difference?

2. Could the second law firm have done anything more to prevent being disqualified from representing the school district?

3. Ordinarily, a party may only appeal from a lower court judgment once the final judgment has been entered. In some cases, an interlocutory appeal (a provisional appeal) will be allowed to resolve a critical point in advance. The issue of who could represent the school district would affect the entire trial; thus, it was appropriate for an interlocutory appeal.

Simpson Performance Products, Inc. v. Robert W. Horn, P.C.

92 P.3d 283 (Wyo. 2004)

Voigt, J.

The appellant, Simpson Performance Products, Inc. (SPP), hired the appellee, Robert W. Horn (Horn), to conduct an investigation and to provide legal counsel regarding a possible lawsuit by SPP against the National Association of Stock Car Auto Racing (NASCAR). Upon completing his work, Horn submitted a bill to SPP for \$40,383.29 for legal fees and costs. SPP paid Horn \$20,000.00, but refused to pay the balance. Horn sued SPP to collect the outstanding amount. The district court found in favor of Horn. SPP now appeals, claiming that Horn is not entitled to the entire fee because his representation of E.J. "Bill" Simpson (Simpson), individually, violated Rule 1.9 of the Wyoming Rules of Professional Conduct for Attorneys at Law (Rule 1.9). Finding no violation of Rule 1.9, we affirm.

Horn represented SPP in investigating a possible lawsuit against NASCAR. He then represented Simpson, who had recently resigned as the CEO of SPP, in a lawsuit against NASCAR involving the same facts and cause of action. The issue presented