

November 7, 2007

Issue No.262

Juan C. Araneda

Jennifer A. Becker

David Borovsky

Robert J. Buccieri

Chip Cox

Kim O. Dincel

Kathleen Ewins

Howard M. Garfield

Jason A. Geller

J. Michael Higginbotham

John B. Hook

Helen Kim

Jessica R. MacGregor

Joseph P. McMonigle

Douglas J. Melton

Glen R. Olson

Jordan Rojas

Steven Sharafian

John B. Sullivan

Jennifer W. Suzuki

Jeanette Traverso

Beth A. Trittipio

Karen L. Uno

Kevin Whittaker

Irene K. Yesowitch

## DISQUALIFICATION

California Law

By Jennifer A. Becker

***Roush v. Seagate Technology, LLC*** (2007) 150 Cal. App. 4th 210 (rev. den. 07/25/07)

*The Sixth District holds that clients sharing the same attorney who are adverse to the same defendant are not “joint clients” entitled to a shared attorney client privilege. Thus, disqualification is not proper when one client agrees with defendant to waive his own attorney client privilege.*

After receiving slights from a supervisor, Patricia Roush was told by her immediate superior Kilgor that the supervisor did not like her “lifestyle.” At the same time Kilgor claimed he was being harassed and retaliated against due to his reports about financial improprieties and Roush’s treatment. Kilgor resigned and retained the Markowitz Law Group, LLP (Markowitz) to represent him. After Roush resigned Kilgor introduced her to Markowitz, who she engaged to represent her. Kilgor had a falling out with Markowitz and he retained new counsel.

Kilgor settled his suit and would no longer speak to Markowitz voluntarily, insisting upon a subpoena. Kilgor also signed two declarations. Roush then filed a motion to disqualify Seagate's counsel Morrison and Foerster, LLP (Morrison) based on provisions in the Seagate – Kilgor settlement agreement where Kilgor agreed to waive any attorney-client privilege with respect to his own discussions and dealings with

Markowitz related to claims or allegations made in Ms. Roush's case.

Roush claimed that she and Kilgor enjoyed a joint privilege that could not be waived absent consent from both of them. Morrison therefore improperly obtained Roush’s confidential information. Markowitz stated that the prior representation was a “joint representation” and that he had informed both clients that information could be shared without losing its privileged nature. He claimed that he shared each client’s confidential information separately with the other client and that at one lunch meeting they had discussed Roush’s case.

Morrison countered that there was no showing that Roush and Kilgor were joint clients or that they otherwise could have shared attorney-client information without waiving the privilege. Defendants also argued that they had no notice that Kilgor might have possessed protected information.

Morrison pointed out that Roush's discovery responses made no reference to a "joint client" situation and that she had responded that only Kilgor could waive his attorney-client privilege. Morrison represented that Kilgor denied signing an agreement with Markowitz or that he had any joint discussions with Markowitz. Kilgor's post-settlement declarations described his interactions with Roush while they were both employed at Seagate and refuted some of the allegations Roush had made about her treatment at Seagate, although he confirmed that he had heard the "lifestyle" remark. Morrison represented that aside from the information in the declarations, there was no other information from Kilgor. The trial court denied the motion.

The Court of Appeal noted that disqualification motions implicate the client's right to choice of counsel, the attorney's interest in representing a client, the financial burden of replacing a disqualified attorney, and tactical abuse that may underlie the motion. The paramount concern in granting disqualification is the preservation of public trust in the scrupulous administration of justice and the integrity of the bar. Disqualification however, is a drastic course of action that should not be taken simply out of hypersensitivity to ethical nuances or the appearance of impropriety.

Counsel may be disqualified where he or she has obtained the secrets of an adverse party in some manner, such as through support staff changing firms or an expert who has been consulted by both parties. Such a situation implicates the attorney's ethical duty to maintain the integrity of the judicial process. Mere exposure to the confidences of an

adversary does not, standing alone, warrant disqualification because that would result in disqualification any time inadvertence or devious design transmitted confidential information to an opposing attorney.

The Court analogized the fact pattern to the expert witness and prior employee cases. A common thread is that the attorney obtains confidential information from a source who could not ethically disclose the information without consent from the adversary. The party seeking disqualification has the burden to show that the expert possesses material confidential information. Then a rebuttable presumption arises that the information has been used or disclosed in the current employment. Roush therefore had the initial burden to show that Kilgor possessed Roush's material confidential information. Roush also had to show that by disclosing information to Kilgor she did not waive her claim of confidentiality.

The Court was not persuaded by Markowitz's declaration that he shared Roush's confidential information with Kilgor. His declaration merely stated that he "discussed" Roush's case at a joint meeting. The content of those discussions was not privileged merely because counsel was present. Markowitz's admission that he shared strategies, evidence and witnesses did reflect the sharing of information potentially protected by the attorney-client privilege or the attorney work-product rule. Roush needed to show that those privileges remained despite the disclosure to Kilgor. Both attorney-client confidences and attorney work product do not remain confidential if they are disclosed to third parties not necessary to further the representation.

This publication is intended for general information purposes only and does not constitute nor is it intended to constitute legal advice. None of the material is intended to imply or establish standards of care applicable to any attorney in any particular circumstance. The reader must consult with counsel to determine how the concepts and decisions discussed herein may apply to specific circumstances.

Joint clients are two or more persons who have retained one attorney on a matter of common interest to all of them, such as where the attorney represents both an insurer and its insureds. One client may not waive the privilege without the consent of the other. In a true “joint client” situation, there is no waiver with respect to communications to both clients. Roush and Kilgor were not represented in a single action. They retained Markowitz at different times to pursue different claims that were not matters of common interest and relied on separate legal theories. Each was a likely witness in the other's case. One case did not hinge on the success of the other. There is no authority that two clients in such a situation would have a joint attorney-client privilege.

There is no waiver where there is a disclosure to individuals to further the interest of the client in the consultation, or one that is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted. This doctrine protects the information disclosed to expert consultants or counsel's employees. When this concept is applied to protect the sharing of information among co-litigants it is called the “common interest doctrine.” However there is no common interest *privilege* in California. The common interest doctrine does protect shared communications when they further the attorney-client relationship, but this does not include communications where the parties merely have “overlapping interests.”

The common interest doctrine is applied on a case-by-case basis. Roush's assumption that her overlapping case

This publication is intended for general information purposes only and does not constitute nor is it intended to constitute legal advice. None of the material is intended to imply or establish standards of care applicable to any attorney in any particular circumstance. The reader must consult with counsel to determine how the concepts and decisions discussed herein may apply to specific circumstances.

with Kilgor gave her license to freely share her confidential information without waiving privilege is contrary to the law. Roush needed to show that sharing her confidential information with Kilgor was reasonably necessary to advance her case. The court could not discern the necessity for sharing confidential attorney-client and attorney work product information with Kilgor, a percipient witness in Roush's case.

Nor would the court conclude that Morrison breached any ethical duty. Kilgor's agreement to assist Seagate and to waive *his* attorney-client privilege with respect to any communications he had with Markowitz about Roush's case was not inherently improper. Kilgor, as Roush's former supervisor, would have personal knowledge about her case that Morrison was duty-bound to investigate. Kilgor was free to waive his own attorney-client privilege.

Morrison had no notice of circumstances that might have made it improper to seek information from Kilgor. Kilgor had no written agreement with Markowitz and Kilgor denied any joint discussions with Markowitz and Roush. Roush did not make reference to joint discussions with Kilgor in her discovery responses and Markowitz had disclaimed any special relationship that would prevent Morrison from seeking information directly from Kilgor. Kilgor's declarations reflected only his personal knowledge of the case.

*Comment:* While it is tempting to share information between clients with the same adversary or who face similar legal issues, attorneys should keep in mind their separate ethical duties to each client and take steps to protect the attorney client privilege.