

PROFESSIONAL LIABILITY UPDATE

CONFLICTS
DISQUALIFICATION
ETHICS

By Jennifer A. Becker

***Lynn v. Gateway Unified School District*, 771 F.3d 1135 (9th Cir. 2014)**

The Ninth Circuit holds a disqualification order is not a collateral order subject to immediate appeal.

Jody Thulin's superiors at the Gateway Unified School District decided she was not a good fit for an administrative team and recommended she be returned to a teaching position. Thulin resigned and filed suit against the District in state court. Kendall Lynn worked for the Director of Information and Technology at the District. After he was laid off, he filed suit alleging his termination was due to his race and his support of Thulin. Both employed attorney Robert Thurbon.

Lynn made a backup copy of District email he examined prior to his termination which he believed showed racial bias toward him and illegal conduct toward Thulin. Thurbon determined Lynn had legally acquired the e-mail, and Lynn testified in the state court action about how he acquired it. The District obtained an injunction in state court enjoining Thurbon and Thulin from using the e-mails. Thurbon ignored the injunction and used his knowledge of the emails to request production of emails covered by the injunction. The state court issued an emergency restraining order and preliminary injunction again prohibiting use of the questionably-obtained emails. When Thurbon continued to use his knowledge gained

from the emails to prepare a public records request, the state court judge found Thurbon committed five willful violations of its orders, and he was sanctioned.

In Lynn's federal action, the district court concluded he had stolen the emails. The court opined that a careful attorney would have hired criminal counsel for Lynn, and advised him of his Fifth Amendment rights, and of possible Penal Code violations. Instead, Thurbon used the email in Thulin's lawsuit, and created a clear conflict of interest between his two clients. The District court disqualified Thurbon and his firm from further participation in the case due to his ethical violations, and banned any use of the stolen emails.

The Ninth Circuit determined the disqualification order was not an appealable collateral order. A collateral order is conclusive, resolves an important question separate from the merits of the underlying case, and is effectively unreviewable on appeal. The Supreme Court has held the collateral order doctrine applies to a sanctions order coupled with disqualification of an attorney, because it is unlikely that a sanctions order can be reviewed

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separately from the merits. Further an order disqualifying an attorney is not a final decision subject to appeal. Thus, a sanctions order coupled with disqualification of counsel is doubly un-appealable.

Comment: In this case counsel repeatedly used stolen information from one client to aid another, exposing both clients to sanctions. He paid the price of disqualification, which, as a practical matter precluded his beneficial involvement in the case. This case illustrates the importance of considered conduct in the face of a potential ethical dilemma.