

PROFESSIONAL LIABILITY UPDATE

CONFLICTS DISQUALIFICATION

By Jennifer Becker

Radcliffe v. Hernandez (9th Cir. 2016) 818 F.3d 537

The Ninth Circuit holds courts need not apply conflict of interest automatic disqualification rules applicable to individual litigant cases in class actions in favor of a more flexible “balancing of interests” approach.

“White Plaintiffs,” named class members, were represented by “White Counsel.” A different set of class representatives in a related separate case, the “Hernandez Plaintiffs,” were represented by “Hernandez Counsel.” Hernandez Counsel was appointed lead counsel after the cases were consolidated.

A proposed settlement included incentive awards for each named class representative who did not object to the settlement. White Counsel asserted the incentive settlement awards created a conflict of interest between the class representatives and the absent class members. In a prior appeal the Ninth Circuit agreed, because the incentive award motivated the class representatives to maximize receipt of an incentive award over protecting absent class members. The conflict extended to class counsel, who simultaneously represented clients with conflicting interests.

The settlement was set aside, including the awards of attorneys’ fees and costs. The district court was ordered that if the conflict

continued under a future settlement agreement it should exercise its discretion to decide whether, and to what extent, class counsel was entitled to fees.

On remand, White Counsel moved to disqualify Hernandez Counsel and to serve as lead class counsel. The district court denied the disqualification motion and granted Hernandez Counsel’s motion to be reappointed lead counsel.

In cases of successive representation of clients with conflicting interests the primary client right protected is the attorney’s duty of confidentiality. Disqualification is warranted only if the two representations are substantially related. This protects against the attorney’s use of confidential information from the prior relationship in the latter matter.

Concurrent conflicts of interest as existed in *Radcliffe* generally lead to automatic disqualification under California Rule of Professional Conduct 3-310(C). Concurrent conflicts primarily implicate the attorney’s

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duty of loyalty. Policy justifications for the automatic disqualification rule in individual litigant suits are not fully transferrable to class actions.

The California Supreme Court has never analyzed concurrent conflict automatic disqualification in class actions, or the unique class action ethical and conflict issues. California Appellate cases show a willingness to apply disqualification rules flexibly to promote the effectiveness of class action litigation. Federal Rule of Civil Procedure 23 permits appointment of class counsel despite conflicted representatives.

In individual litigant cases, a client who learns that his or her lawyer is also representing a litigation adversary, even in an unrelated case, cannot sustain the level of confidence and trust necessary to the professional relationship. While traditional conflict rules promote the salutary ends of confidentiality and loyalty in individual litigant cases, they would have a serious adverse effect on class actions. Although class action clients share interests adverse to the defendant, often these plaintiffs develop divergent interests regarding how to prevail on their shared claims in the litigation.

Yet, class actions are often the only practical way for plaintiffs with small individual claims to protect their rights. The class's attorneys, not the class members, have substantial familiarity with the prior proceedings. Having those most familiar with the case be automatically disqualified whenever class members have conflicting interests would substantially diminish the efficacy of class actions.

Frequently one or more class representatives will object to a settlement and become adverse to the rest of the class. If this created automatic disqualification objectors

would enjoy undue leverage, and many fair and reasonable settlements would be undermined.

Although the due process rights of absent class members are important, this does not support the adoption of per se disqualification rules. A class representative has a duty to fairly and adequately protect the interests of absent class members. District courts have discretion to deal with the unique complexities and ethical concerns in class action lawsuits. A pragmatic approach allows courts to protect the best interests of absent class members.

California law employs a "balancing of interests" test to decide whether disqualification is appropriate. The court must weigh, on one hand, a party's right to counsel of choice; an attorney's interest in representing a client; the financial burden on a client of replacing disqualified counsel; and any tactical abuse underlying a disqualification proceeding. On the other hand, the court considers the fundamental principle that fair resolution of disputes within our adversary system requires vigorous representation of parties by independent counsel unencumbered by conflicts of interest. The district court properly balanced these interests under California law.

The district court was not precluded by the Ninth Circuit's decision in the prior appeal. The Court did not assume Hernandez Counsel was automatically disqualified following their creation of a conflict of interest. The Court instructed the district court to exercise its discretion in awarding fees, and there is precedent for fashioning a fee award to deny fees for periods when class counsel represent conflicting interests, but award fees for the periods no conflict exists.

It was proper to maintain Hernandez Counsel as lead counsel. Under Federal Rule of Civil Procedure 23(g) the court must consider: the work counsel has done in identifying or investigating potential claims in the action; counsel's experience in handling class actions, other complex litigation, and the claims asserted in the action; counsel's knowledge of the law; and the resources that counsel will commit to representing the class. The court may also consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class.

Both Hernandez Counsel and White Counsel were adequate to represent the class. The prior conflict of interest was a relevant and significant concern, but did not render Hernandez Counsel inadequate because it was temporary and had been cured. Hernandez Counsel was best able to represent the class based on its greater experience in handling class actions and its greater knowledge of the law.

Neither precedent nor policy supported White Counsel's contention that potential civil liability for the prior conflict rendered Hernandez Counsel inadequate. The possibility of suit by an unhappy client inheres in any lawsuit, class action or otherwise, and there is no way to determine when that prospect becomes relevant under an adequacy analysis. The specter class action counsel will be willing to accept a quick settlement, and the fees that come with it, over a more favorable result for the class, exists in every class action.

The Court rejected White Counsel's argument it, not Hernandez Counsel, was best able to represent the class. The district court made its determination based on the Hernandez Counsel's greater experience in the area of law and in class actions. The

district court found Hernandez Counsel had effectively neutralized the effect of the ethical violation by associating new counsel, disclaiming any fees for the conflicted representation, and agreeing to accept the costs of re-notice. The district court was within its discretion in agreeing with Hernandez Counsel that White Counsel had placed an unreasonably high valuation on the case.

Comment: The complexities of class actions warrant a more flexible approach to conflicts. Hernandez Counsel, although rebuked in the first appeal for its conflict-creating settlement incentives, turned the tide. It took aggressive measures upon remand to cure the effect of the conflict it created, and to ensure it did not profit during the period the conflict existed.