



Protecting Attorney Disqualification Orders From Reversal

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Attorney disqualification can be a powerful tool for protecting client confidences and preserving attorney loyalty. But winning an attorney disqualification order in the trial court is only half of the battle. The other half is defending the order on appeal.

A disqualification order is immediately reviewable, through a regular appeal or a writ petition. *State Water Resources Control Bd. v. Superior Court*, 97 Cal. App.4th 907, 913 (2002). And this review is rigorous: Recognizing the heavy burden that disqualification imposes on a client, appellate courts scrutinize disqualification rulings closely.

Because of the close scrutiny that a disqualification order receives, it's critical that any disqualification motion accurately identify the relevant law and include evidence that will support disqualification under that law. Where an attorney is disqualified for having acquired information about the other party from a prior representation, that means showing not only that the attorney has the information, but also that it is both *confidential* and *material*. Two recent cases illustrate what it takes to make this showing.

DeLuca v. State Fish Co., Inc., 2013 DJDAR 8519 (Cal.App. 2d Dist. June 27, 2013) stemmed from a dispute over who owned a fish storage, packing, and processing plant. The two parties who claimed ownership, DeLuca and State Fish, sued each other. The trial court granted a mistrial on DeLuca's claim and entered judgment for State Fish on its claims. The Court of Appeal reversed, finding that DeLuca was entitled to judgment as a matter of law on State Fish's claims and remanding for a retrial on DeLuca's mistried complaint.

On remand, DeLuca indicated that he would be using a real estate expert who had testified for State Fish in the original trial—not entirely surprising, given that the expert's testimony had bolstered DeLuca's own position regarding the value of the property at issue. State Fish moved to disqualify DeLuca's counsel on the ground that the expert had confidential information about State Fish and, by implication, had given that information to DeLuca's counsel. The trial court granted the motion, but the Court of Appeal reversed.

DeLuca explained that to disqualify DeLuca's counsel for contact with State Fish's expert, State Fish would have

to establish that the expert "possesses confidential information materially related to the proceedings before the court." State Fish's evidence did not meet that standard.

State Fish had presented some evidence: Its attorney declared that he had disclosed to the expert "some of [his] own impressions, conclusions, opinions and theories about certain issues" in the case, and that the expert possessed "confidential, proprietary information of State Fish, regarding how State Fish conducts its business, and what its real estate needs are in connection with conducting its business." But the Court of Appeal held that this was not enough. It concluded that whatever "impressions, conclusions, opinions and theories" State Fish's attorney had conveyed to the expert "were very likely revealed during the course of the initial trial," and so were not confidential by the time that DeLuca's counsel retained the expert on remand. State Fish's declarations apparently did not show otherwise.

The court found similarly lacking State Fish's attorney's declaration that the expert knew his views on "certain issues" in the case. The

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declaration did not specify *which* issues he had discussed with the expert. Only one issue (unlawful detainer) was in play on remand. Any confidential information that the expert had relating to other, now-resolved issues therefore was not “materially related” to the case that was pending by the time of the disqualification motion. Because the attorney declaration did not state that the confidential information related to the single remaining issue, it was not evidence that the information was *material*—the standard for disqualification. It therefore was error for the trial court to disqualify DeLuca’s counsel based on contact with the expert.

Khani v. Ford Motor Co., 215 Cal.App.4th 916 (2013) offers another example of what it takes to create a record that will withstand appeal.

A car buyer sued Ford, alleging that his car was a “lemon.” Ford moved to disqualify the plaintiff’s attorney on the ground that he had previously defended lemon law cases for Ford and knew Ford’s strategies when it came to such cases. The trial court granted the motion, disqualifying the attorney on the ground that he knew Ford’s litigation “playbook”—that is, how Ford handles lemon law cases. As in *DeLuca*, the Court of Appeal reversed.

Khani explained that a party seeking to disqualify its former attorney must show that the former representation is substantially related to the current case. If there is such a relationship, the court will presume that the attorney possesses confidential information requiring disqualification. But establishing a “substantial relationship” may not be easy. It is not enough, for example, that the two representations involve the same legal issue. The trial court must closely analyze the connection between the two cases, considering “precisely” whether they are factually and legally similar. That means comparing *both* the legal issues involved *and* how confidential information learned during the first representation would be material to the second representation.

In the *Khani* Court of Appeal’s view, the facts that both representations involved

lemon law claims and that the attorney may have known Ford’s general “playbook” for lemon law cases did not themselves warrant disqualification. To be entitled to relief, Ford would also have to present evidence that the same confidential information was relevant to both cases. Such evidence might include, for example, that the cases involved the same car; that the “policies, practices, or procedures” Ford used to evaluate, settle, or litigate lemon law cases when the attorney represented it were the same as Ford’s current practices; or that the same decision makers who called the shots in the prior case were also the decision makers in the current case. Absent such evidence, *Khani* held, disqualification was an abuse of discretion.

Although *Khani* and *DeLuca* arose out of different factual scenarios, they share a common theme: A party seeking to disqualify opposing counsel based on a claim that the attorney has been privy

to confidential information faces a high bar. Even if the trial court grants the motion, the appellate court will scrutinize the record for evidence that the attorney has confidential information, *and* that the information is material to the issues being tried. It therefore is crucial not only to draft a motion that explains the relevant law and why disqualification is warranted, but also to create a detailed factual record that shows, as specifically as possible, that the attorney has information that is both confidential and material.

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