

## Alerts

### Maine Supreme Court Requires Party Seeking Law Firm Disqualification to Demonstrate Particular, Actual Prejudice From Alleged Ethical Violations

June 8, 2010

*Lawyers for the Profession® Alert*

*Morin v. Maine*, \_\_\_ A.2d \_\_\_, 2010 WL 1643775 (Me. 2010)

#### Brief Summary

The Maine Supreme Court held that a party seeking disqualification of opposing counsel based on alleged violations of ethical rules must establish not only the violation of a particular ethical rule, but also particular and actual prejudice as a result of that violation.

#### Complete Summary

An employee of the Maine Education Association filed a complaint against the association alleging gender discrimination. Prior to this complaint, the association hired a law firm to investigate the employee's assertions, and one of the firm's attorneys interviewed the employee. The firm also represented the association in the later litigation, although the lawyer who conducted the investigation was not involved in the litigation. The employee moved to disqualify the litigation attorneys and the firm because the investigating lawyer was likely to be called as a witness and because he had allegedly misrepresented his role in the investigation by stating that he did not represent the association. The trial court granted the motion and the association appealed.

Although reviewing under a highly deferential standard, the Maine Supreme Court nonetheless vacated and remanded because the employee failed to show, and the trial court did not find, that the employee would suffer any particular, actual prejudice as a result of the lawyer and firm's alleged ethical violations. The only evidence of prejudice was the employee's assertion that she would have been more guarded during her interview had she known the same firm was going to represent the association in litigation. The Court held that such evidence was insufficient, as a matter of law, to establish actual prejudice.

Because disqualification motions are capable of being used for improper tactical purposes, the Court noted that the moving party must produce evidence establishing both particular prejudice and a violation of a specific ethical rule. Further, whether disqualification should be imputed to the whole firm depends on which rule was violated, the Court noted. Because the Court disposed of this appeal under the new prejudice requirement, it did not address whether any ethical violations had occurred.

#### Service Areas

Counselors for the Profession

Lawyers for the Profession®



Justice Warren M. Silver, concurring, opined that in some situations the moving party should not be required to show both prejudice and an ethical violation, and that by requiring express findings of *both*, the Court was infringing on what was supposed to be a deferential standard of review.

Justice Donald G. Alexander, dissenting, opined that the record supported disqualification based on either of the pertinent ethical violations (misrepresentation, or lawyer as a witness), and that prejudice should be presumed because the firm improperly obtained confidential information during the investigation that was relevant to the later litigation.

### **Significance of Opinion**

The Maine Supreme Court's holding that a party must establish actual and particular prejudice represents a significant hurdle for parties seeking disqualification of opposing counsel. The opinion nonetheless is in accord with something of a trend in recent decisions, in which courts seek to determine whether a party can establish prejudice, or in some instances whether the integrity of the adjudicative process and the courts themselves are implicated by the alleged ethics violations.

Identifying an alleged ethics violation, standing alone, increasingly is not going to be sufficient for disqualification absent some demonstrable harm such as the potential use of confidential client information. In a case such as this one, in which the moving party was never the client of the firm whose disqualification was sought, the moving party clearly has a steep hill to climb.

*This alert has been prepared by Hinshaw & Culbertson LLP to provide information on recent legal developments of interest to our readers. It is not intended to provide legal advice for a specific situation or to create an attorney-client relationship.*