



## Alerts

### Expert Witness Work Leads to Conflict of Interest, Imputed Disqualification

March 25, 2010

*Lawyers for the Profession® Alert*

*Outside the Box Innovations, LLC v. Travel Caddy, Inc.*, 2010 WL 364220 (Fed. Cir. 2010)

#### Brief Summary

A law firm was disqualified on appeal because one of the firm's partners submitted a declaration as an expert witness on attorney fees for the opposing party at trial.

#### Complete Summary

An attorney acted as an expert witness on attorney fees for plaintiff at trial. Defendant then sought to retain the attorney's firm, King & Spalding, for appellate work on the same matter. Plaintiff moved to disqualify the firm based on Georgia's conflict of interest rule, GRPC 1.7.

Plaintiff argued that its position on appeal would rely in part on the attorney's expert testimony. Therefore, if the attorney's firm were representing defendant, it potentially would have to challenge the testimony of one of its own attorneys in order to adequately represent the defendant.

Before applying GRPC 1.7, the court stated that it doubted the attorney, who had testified as an expert witness only on attorney fees, had an attorney-client relationship with the plaintiff. The court nonetheless held that the prospect of the firm needing to challenge its own attorney could materially and adversely affect the firm's representation of defendant. Even assuming this conflict was waivable, the court disqualified the firm because there had been no showing that defendant had received written information about the material risks, or that defendant was given an opportunity to consult with independent counsel, or that defendant had, in fact, waived the conflict.

#### Significance of Opinion

Regardless of whether a lawyer serving as an expert witness has established an attorney-client relationship with the party for whom she testifies, the lawyer's firm has to be cognizant of the real potential for imputed conflicts. This opinion serves as a stark reminder that conflicts of interest can arise when circumstances may compromise the representation for a range of possible reasons, other than multiple client conflicts, and that at a minimum the lawyer or firm would be well advised to obtain informed consent before undertaking the

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