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**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A08-1181**

Kari Driste, Appellant,

vs.

Michael Kirscht, defendant and third party plaintiff,  
Respondent,

vs.

Future Mortgage, LLC, et al., third party defendants,  
Respondent,

Banker's Title, third party defendant,  
Respondent,

Bobbijo Gustafson, third party defendant,  
Respondent.

**Filed June 16, 2009  
Affirmed  
Lansing, Judge**

Hennepin County District Court  
File No. 27-CV-08-3330

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Considered and decided by Schellhas, Presiding Judge; Lansing, Judge; and Kalitowski, Judge.

### **U N P U B L I S H E D   O P I N I O N**

**LANSING**, Judge

The district court issued an order disqualifying Kari Driste's attorney from continuing representation because of a conflict of interest with former clients in the same litigation. Driste contends that the conflict in the now-settled litigation did not warrant disqualification and will prejudice her right to choose counsel in future litigation. Because the record at the time of the disqualification supports the district court's order, we affirm. We decline to address the effect of the order in hypothetical future litigation.

### **F A C T S**

This oddly complicated litigation grew out of a real-estate transaction in which Kari Driste borrowed money from Michael Kirscht to use as a down payment for the purchase of a house. Driste secured the loan with a mortgage brokered by Future Mortgage, a company owned by Kerry Anderson. After making several payments, Driste sued Kirscht, alleging that the obligation was usurious. She sought release from the obligation and recovery of the amounts she had paid. Kirscht, in turn, served a third-

party complaint on Future Mortgage and Anderson, alleging that Anderson and her company were obligated under a contribution-and-indemnity theory because they had drafted the note and mortgage for the transaction with Driste.

Attorney Christopher Kalla represented Driste in the usury action. Kalla was at that time also representing Anderson and Future Mortgage. Kirscht moved to disqualify Kalla from representing both Driste and Anderson based on a conflict of interest. Kalla withdrew from representing Anderson and Future Mortgage but continued to represent Driste. Driste opposed the disqualification motion and moved to dismiss the third-party complaint.

Attorney Chanel Melin assumed representation of Anderson and Future Mortgage. Based on a telephone conversation with Kalla, Melin submitted an affidavit to the district court indicating that Kalla might use information that he had obtained from his earlier representation of Anderson and her company to their disadvantage.

The district court denied Driste's motion to dismiss the third-party complaint and granted Kirscht's motion to disqualify Kalla from representing Driste. The district court stayed the disqualification for ten days, to provide Kalla an opportunity to obtain a written conflict waiver from Anderson and Future Mortgage. Kalla did not obtain his former clients' written consent, and the district court issued a second order, allowing Kalla to provide limited representation to Driste while she obtained replacement counsel, but otherwise disqualifying him from taking any action "as [p]laintiff's counsel in the underlying case."

Driste appealed the district court's order disqualifying Kalla from representing her and denying her motion to dismiss the third-party complaint. While this appeal was pending, Kirscht and Driste settled their lawsuit, dismissing all claims against each other with prejudice. The issues raised by the third-party complaint were not settled but, by order of a special-term panel of this court, those issues are not part of this appeal. The only remaining issue is whether the district court abused its discretion by disqualifying Kalla from representing Driste.

## D E C I S I O N

Under the governing caselaw, district courts apply a three-step analysis to determine whether to disqualify an attorney from representation based on direct conflicts of interest with former clients. *Jenson v. Touche Ross & Co.*, 335 N.W.2d 720, 731-32 (Minn. 1983). First, the district court must find a “substantial, relevant relationship or overlap between the subject matters of the [allegedly conflicting] representations.” *Id.* at 731. If this relationship is established, it creates a second step, which is an irrebuttable presumption that the former client conveyed confidences to the conflicted attorney. *Id.* The third step is to weigh the competing equities in resolving the conflict. *Id.* at 732. Within the *Jenson* framework, the rules of professional conduct must also be considered. *Id.* at 731-32 (referring to canons of code of professional responsibility); *Buysse v. Baumann-Furrie & Co.*, 448 N.W.2d 865, 868-69 (Minn. 1989) (applying rule 1.7 and *Jenson*); *cf. Lennartson v. Anoka-Hennepin Indep. Sch. Dist. No. 11*, 662 N.W.2d 125,

133-34 (Minn. 2003) (holding that *Jenson* no longer controls if amendment to rule supersedes it).

We review disqualification decisions for abuse of discretion. *See Buysse*, 448 N.W.2d at 869 (holding that district court “did not exceed the bounds of proper discretion” in denying disqualification motion); *M.M. v. R.R.M.*, 358 N.W.2d 86, 90 (Minn. App. 1984) (finding “no abuse of discretion” in denial of disqualification). Questions of fact are reviewed for clear error. *Prod. Credit Ass’n of Mankato v. Buckentin*, 410 N.W.2d 820, 822 (Minn. 1987). And we review de novo the interpretation of a rule of professional conduct. *Id.* at 823.

The district court applied *Jenson* and found that a substantial, relevant relationship and overlap existed between the subject matters of Kalla’s current representation of Driste and his prior representation of Anderson and Future Mortgage. The record supports that finding. Kalla’s representation of his former and present clients links to the same lawsuit that is grounded on the same mortgage transaction in which they all were involved. The relationship and overlap is substantial and relevant.

This relationship triggers the presumption, under *Jenson*’s second step, that Kalla had possession of his former clients’ confidences. The district court is, therefore, obligated under step three, to balance the equities.

In balancing the equities, the district court considered the “entire landscape of the litigation and the interrelated claims and defenses.” It noted the potential hardship that disqualification could cause Driste and weighed the cost, delay, and prejudice of other options. The district court specifically noted that Kalla’s conflict would not be

eliminated even if Kirscht's claim against Anderson and Future Mortgage were relegated to a separate suit, and the third-party complaint were dismissed.

Weighing the equities, the district court found that the possible detrimental impact on Kalla's former clients outweighed the potential detriment to Driste. The district court's conclusion on the competing detrimental effects was not an abuse of discretion, but instead demonstrates careful consideration of the effect on public confidence in the legal profession, which is the paramount element in disqualification questions. *See Lennartson*, 662 N.W.2d at 131 (suggesting that purpose of rules of professional conduct is to "instill confidence in the legal profession"). The district court also minimized the impact on Driste by allowing Kalla to continue to assist her with a number of important issues that were currently pending.

The evaluation under *Jenson* also relied on Minn. R. Prof. Conduct 1.9(a), which addresses direct conflicts involving former clients. The rule is short and straightforward:

A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

*Id.* The rules define "informed consent" to mean "agreement by a person to a proposed course of conduct" after the lawyer has adequately provided "information and explanation" about the risks and alternatives. Minn. R. Prof. Conduct 1.0(f). The rules define "confirmed in writing" according to its plain meaning, while also allowing an attorney to meet the definition by promptly transmitting a written confirmation to the client after consent is given orally. Minn. R. Prof. Conduct 1.0(b).

Although the district court did not compare each of rule 1.9(a)'s provisions to Kalla's representation of Driste, it nevertheless found, under *Jenson*, that a substantial, relevant relationship and overlap existed between Kalla's successive representations. This is equivalent to a finding, under the rule, that the former and current clients have "materially adverse" interests in a "substantially related matter." See *Lennartson*, 662 N.W.2d at 132 (noting conclusion in *Buckentin* that rule 1.9 codified *Jenson* analysis). Kirscht's claim for indemnity and contribution against the former clients pitted their financial interests directly against those of Driste. And the conflicted clients were not merely involved in "substantially related" litigation; they were involved in exactly the same litigation.

The district court expressly found that Kalla had not obtained written informed consent from his former clients. This finding is supported by the record. Melin's affidavit states that Anderson initially agreed orally to consent to Kalla's continued representation of Driste, but that consent was withdrawn when they learned that information might be used adversely to their interests. Driste argues that this acknowledgement of oral consent is sufficient under the rule. Oral consent, however, is "confirmed in writing" only when the conflicted attorney provides the client a writing confirming consent promptly after it is given. Minn. R. Prof. Conduct 1.0(b). Kalla provided no writing to Anderson or her company after she consented orally. The statement in Melin's affidavit refutes, rather than establishes, that the consent was "confirmed in writing" under the rule.

Based on the findings and on the authority of *Jenson* and rule 1.9(a), the district court's disqualification order was not an abuse of discretion. On appeal, Driste argues that the order will have future application that will deprive her of Kalla's services in lingering disputes between Kirscht and Kalla's former clients. But Driste has offered no proof that she will be deposed, called to testify, or named as a party in any live controversy.

In the event that Driste is drawn into a controversy involving Kalla's former clients, the court presiding over that litigation may revisit the disqualification in light of the circumstances as they exist at that time. Because these circumstances do not exist at the current time and are, therefore inherently hypothetical, we decline to address them. *See State ex rel. Sviggum v. Hanson*, 732 N.W.2d 312, 321 (Minn. App. 2007) (describing non-justiciable advisory opinion as one based on hypothetical facts). We express no opinion on future disqualification but commend to Kalla's careful attention the governing rules of professional conduct and his independent and ongoing duty to comply with those rules.

**Affirmed.**