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Appellate Procedure—Orders Disqualifying Counsel Are Not Immediately Appealable under the Collateral Order Exception to 28 U.S.C. Section 1291

Troy Anthony Price

APPELLATE PROCEDURE—ORDERS DISQUALIFYING COUNSEL ARE NOT IMMEDIATELY APPEALABLE UNDER THE COLLATERAL ORDER EXCEPTION TO 28 U.S.C. SECTION 1291. *Richardson-Merrell, Inc. v. Koller*, 105 S. Ct. 2757 (1985).

Anne Koller was born in 1979 without normal arms or legs. In May, 1980, Anne's parents filed suit against Richardson-Merrell, Inc., the maker of the anti-nausea drug Bendectin, in the United States District Court for the District of Columbia. The Kollers alleged that Bendectin ingested by Anne's mother during the first trimester of her pregnancy caused Anne's severe limb malformations. Prior to trial, the defendant moved to disqualify the lead law firm representing the Kollers.[1]

The critical issues in the case, which emerged from more than two years of discovery, were whether Anne's mother actually took Bendectin during the crucial first trimester of pregnancy, and whether the drug was capable of causing birth defects. The defendant alleged separate incidents of attorney misconduct involving both of these issues. One of the Kollers' attorneys conducted an interview with the *Washington Post* concerning the case, and released inadmissible "Drug Experience Reports" to the newspaper.[2] Another attorney allegedly attempted to thwart the investigation of a witness.[3] The district court revoked the *pro hac vice* appearances of the lead firm, indicating that the Kollers' other counsel could provide competent representation.[4]

The Kollers appealed the disqualification to the United States Court of Appeals for the District of Columbia Circuit. The appellate court reversed the disqualification order.[5] The court characterized or-

1. The Kollers were originally represented by a Miami law firm and local counsel in Washington. As discovery progressed, the Los Angeles firm of Butler, Jefferson, Dan & Allis took the lead in trial preparation. James Butler and Nicholas Allis were admitted *pro hac vice* to appear in the case.

2. The district court had issued a pretrial ruling excluding collateral evidence relating to children who had birth defects like Anne's.

3. The witness was the attorney's secretary, who twice called the defendant's attorneys and indicated that the suit was fraudulent because Anne's mother had not taken Bendectin during the decisive early months of her pregnancy. The Kollers' attorney subsequently secured his secretary's signature on a typed statement denying her earlier assertion. The secretary later recanted this statement.

4. The district court concluded that conduct that falls short of violation of a Disciplinary Rule of the Code of Professional Responsibility may be sufficiently impermissible to warrant revocation of *pro hac vice* appearances.

5. Koller v. Richardson-Merrell, Inc., 737 F.2d 1038 (D.C. Cir. 1984) (*pro hac vice* counsel,

ders disqualifying counsel as part of that narrow class of exceptions to the final judgment rule for which immediate review is appropriate under *Cohen v. Beneficial Industrial Loan Corp.*[6]

On writ of certiorari, the United States Supreme Court reversed the court of appeals' decision on jurisdiction over the interlocutory appeal. The Court held that disqualification orders are not immediately appealable under the collateral order exception to the final judgment principle of Title 28, section 1291 of the United States Code. *Richardson-Merrell, Inc. v. Koller*, 105 S. Ct. 2757 (1985).

The requirement of a final judgment before appeal is a fundamental characteristic of the federal judicial system.[7] The roots of the principle are in the common law of England.[8] The requirement may have been based on the idea that the record of a case could not be in two places at once.[9] Imported to the United States, the final judgment rule was incorporated into the Judiciary Act of 1789.[10] American courts quickly embraced the concept,[11] and found policy justification for the common law formality.[12] The requirement was adopted for the newly created circuit courts of appeal in 1891.[13] In the same year, the Supreme Court rejected an expanded role in interlocutory appeals for the nation's highest court.[14] By 1940, the final judgment rule was regarded by Justice Frankfurter as a "means of achieving a healthy legal system."[15] In its American incarnation, the principle has been aimed at prevention of the expense and delay of piecemeal review, with the addi-

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once admitted, are not more readily subject to disqualification than are regularly admitted counsel).

6. 337 U.S. 541 (1949).

7. 9 J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 110.06 (2d ed. 1985) (the principle is the dominant rule of federal appellate procedure).

8. *See* Metcalfe's Case, 77 Eng. Rep. 1193 (K.B. 1615) (no writ of error lies until the whole matter is determined); Crick, *The Final Judgment as a Basis for Appeal*, 41 YALE L.J. 539 (1932).

9. Crick, *supra* note 8, at 542.

10. 1 STAT. 73 (1789) (codified at 28 U.S.C. § 1291 (1982)).

11. Crick, *supra* note 8, at 550 n.56 (the American reception of the rule may reflect the post-Revolution emphasis on laying down rules of law for the fledgling judicial system, and a corresponding reluctance to deal with intermediate appeals) (citing Pound, *Organization of Courts*, 6 BULL. AM. JUD. SOC. 1 (1916)).

12. *See, e.g.*, Canter v. Am. Ins. Co., 28 U.S. (3 Pet.) 307, 318 (1830) (review of cases in fragments would produce "very great delays and oppressive expenses.").

13. 26 STAT. 826, ch. 517 (1891) (codified at 28 U.S.C. § 1291 (1982)).

14. McLish v. Roff, 141 U.S. 661, 665 (1891) (legislation governing judiciary reflects the "well settled and ancient rule" against appeal before final judgment, saving the expense and delay of repeated appeals).

15. Cobbledick v. United States, 309 U.S. 323, 326 (1940).

tional consequence of sustaining the authority of the trial court.[16]

Whatever the merits of the rule, the United States Supreme Court has declined to raise an impenetrable barrier to review before a final judgment.[17] In the early case, the Court rejected a strict application of the requirement in favor of "reasonable construction."[18] Later, the Court perceived a "penumbral area" of the final judgment concept, which required flexibility in application.[19]

A definite class of exceptions to the rule began to take shape in *Cohen v. Beneficial Industrial Loan Corp.*[20] The case involved a stockholder's derivative action under a New Jersey statute that required plaintiffs in such cases to give security for the reasonable expenses of the defendants. The district court did not require the plaintiffs to post security. The Supreme Court held that review on this point was proper because the order was a "final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it."[21] The Court pointed out that such exceptions would be limited, however:

> This decision appears to fall in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated.[22]

The Court explained the collateral order exception further in *Eisen v. Carlisle & Jacquelin*,[23] which involved a class action on behalf of all odd-lot traders on the New York Stock Exchange over a certain four-year period. Several brokerage firms were alleged to have violated antitrust and securities laws. The Court held that the district court

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16. *See* 15 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE & PROCEDURE § 3907 (1976).

17. *See generally* Frank, *Requiem for the Final Judgment Rule*, 45 TEX. L. REV. 292 (1966); Redish, *The Pragmatic Approach to Appealability in the Federal Courts*, 75 COLUM. L. REV. 89 (1975); Note, *Toward a More Rational Final Judgment Rule: A Proposal to Amend 28 U.S.C. § 1292*, 67 GEO. L.J. 1025 (1979); Note, *Appealability in the Federal Courts*, 75 HARV. L. REV. 351 (1961).

18. Forgay v. Conrad, 47 U.S. (6 How.) 201, 203 (1848) (order directing defendant to immediately deliver property to assignee in bankruptcy, although not final, was appealable).

19. Radio Station WOW, Inc. v. Johnson, 326 U.S. 120, 124-26 (1945) (order of highest state court directing immediate delivery of physical property is subject to interlocutory review by the United States Supreme Court).

20. 337 U.S. 541 (1949).

21. *Id.* at 546-47.

22. *Id.* at 546.

23. 417 U.S. 156 (1974).

could not properly impose ninety percent of the cost of notice to 2.25 million class members on the defendants, even though assessing the costs to the plaintiffs would result in dismissal of the suit. The threat to the defendants' rights from the collateral order made interlocutory review permissible.[24] Justice Powell, for the majority, acknowledged a balancing element in the Court's approach to the collateral order exception. He wrote, "The inquiry requires some evaluation of the competing considerations underlying all questions of finality—'the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other.' "[25] The Court concluded that the exception required, at a minimum, a final district court decision on a matter unrelated to the merits.[26]

The Court wove the principles of its previous decisions into the fabric of a three-part test in *Coopers & Lybrand v. Livesay*.[27] According to that decision, an order justifying interlocutory review must (1) conclusively determine the disputed question, (2) resolve an important issue completely separate from the merits of the case, and (3) be effectively unreviewable on appeal from a final judgment.[28] The Court held that a district court's decertification of a suit as a class action was not immediately reviewable. Immediate review was improper in spite of the fact that such an order might sound the "death knell" of the litigation by removing the financial incentive of a possible group recovery.[29] The Court noted that the order was subject to revision by the district court, and thus inherently tentative, rather than conclusively determined.[30] The Court also indicated that class action certification questions are inextricable from the issues of the plaintiffs' cause of action.[31] Finally, such orders are subject to review following a final judgment in the case.[32]

In addition to applying the three-part test, the Court discussed and rejected the view that the economic impact of a decision should enter

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24. *Id.* at 172.

25. *Id.* at 171 (quoting Dickinson v. Petroleum Conversion Corp., 338 U.S. 507, 511 (1950)).

26. 417 U.S. at 172; *see also* 15 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE & PROCEDURE § 3911 (1976).

27. 437 U.S. 463 (1978).

28. *Id.* at 468.

29. *Id.* at 470. *See also* Cohen, *"Not Dead But Only Sleeping;" The Rejection of the Death Knell Doctrine and the Survival of Class Actions Denied Certification*, 59 B.U.L. REV. 257 (1979); Note, *A Final Tolling of the Death Knell: The Doctrine, Its Demise and Current Alternative Methods of Appeal of Class Certification Orders*, 28 DRAKE L. REV. 668 (1979).

30. 437 U.S. at 469.

31. *Id.* at 469 n.12.

32. *Id.* at 469.

into the determination of its appealability under the collateral order exception. Justice Stevens, writing for a unanimous Court, maintained that formulating an appealability rule based on the amount in question would clearly be a legislative function.[33]

The Court first applied the *Coopers & Lybrand* test to attorney disqualification orders in *Firestone Tire & Rubber Co. v. Risjord*.[34] Risjord was lead counsel for the plaintiffs in products liability litigation against Firestone. Firestone moved to disqualify Risjord because the attorney occasionally represented the tire manufacturer's liability carrier. The district court allowed Risjord to continue, with the consent of the plaintiffs and the carrier. Firestone appealed, and the Court of Appeals for the Eighth Circuit determined that the order denying disqualification was not immediately reviewable.[35]

The United States Supreme Court agreed, holding that denial of a motion to disqualify is not subject to immediate review.[36] Applying the *Coopers & Lybrand* test, the Court conceded that a refusal to disqualify counsel would conclusively determine the disputed question, satisfying the first part of the test.[37] Without deciding, the Court assumed that such an issue would be separate from the merits of the case, thus meeting the second requirement.[38] The third part of the test proved dispositive; orders refusing to disqualify counsel were not deemed to be effectively unreviewable on appeal of a final judgment.[39] Notwithstanding Firestone's contention that the trial would be "tainted" by Risjord's participation, the Court chose to strictly construe the requirement that the decision be unreviewable after final judgment. Interlocutory review was said to be appropriate " 'where denial of immediate review would render impossible any review whatsoever.' "[40] The Court indicated that denial of disqualification "will rarely, if ever, represent a final rejection

33. *Id.* at 472.

34. 449 U.S. 368 (1981).

35. Firestone Tire & Rubber Co. v. Risjord, 612 F.2d 377 (8th Cir. 1980).

36. 449 U.S. 368 (1981). The circuit court had made its decision prospective only, since it overruled prior cases in the circuit. The Supreme Court held that the court of appeals could not properly limit the effect of its decision on jurisdiction in the case to future litigation. *Id.* at 379. *See also* Note, *Civil Procedure—Interlocutory Appeals: Orders Denying Disqualification of Counsel Are Not Appealable Pursuant to the Collateral Order Exception*, 56 TUL. L. REV. 1035 (1982); Note, *Appealability of Orders Denying Attorney Disqualification—A Look Beyond Firestone*, 1982 U. ILL. L. REV. 975.

37. 449 U.S. at 375. (Justice Rehnquist, joined by Chief Justice Burger, declined to accept this conclusion, pointing out that the district court is free to reconsider its ruling at any time. *Id.* at 380-82 (Rehnquist, J., concurring)).

38. *Id.* at 376.

39. *Id.*

40. *Id.* (quoting United States v. Ryan, 402 U.S. 530, 533 (1971)).

of a claim of fundamental right that cannot effectively be reviewed following judgment on the merits."[41]

The Court next applied the collateral order doctrine to disqualification orders in *Flanagan v. United States*.[42] Robert Flanagan and three other Philadelphia police officers were indicted by a federal grand jury for civil rights offenses. The defendants jointly retained a law firm to represent them. Three of the officers subsequently moved to sever their cases. The district court granted the government's motion to disqualify the law firm from its multiple representation.[43] The Court of Appeals for the Third Circuit affirmed.[44] The United States Supreme Court reversed, holding that an order disqualifying counsel in a criminal case is not subject to immediate review.[45]

Justice O'Connor, writing for a unanimous Court, first noted the policy reasons for the final judgment rule: to preserve respect for trial judges by limiting appellate interference, reduce the ability of appellants to harass opponents and clog the courts, and promote efficient judicial administration.[46] The Court then emphasized that the policy of avoiding delay is "at its strongest in the field of criminal law."[47] Because the interests of both the public and the accused are served by speedy resolution of criminal charges,[48] the collateral order exception has been interpreted with "utmost strictness" in criminal cases.[49]

Applying the *Coopers & Lybrand* test, the Court reasoned that at least one of its conditions would make interlocutory review impermissible. If, as in some circumstances, prejudice to the defense is presumed following erroneous disqualification of counsel,[50] the order could be ef-

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41. *Id.* at 377.

42. 465 U.S. 259 (1984).

43. United States v. Flanagan, 527 F. Supp. 902 (E.D. Pa. 1981) (district court entitled to disregard defendants' knowing, voluntary and intelligent waiver of right to separate counsel).

44. Flanagan v. United States, 679 F.2d 1072 (3rd Cir. 1982) (holding the order disqualifying counsel appealable under the collateral order exception to the final judgment rule).

45. 465 U.S. 259 (1984).

46. *Id.* at 263-64.

47. *Id.* at 264 (quoting United States v. Hollywood Motor Car, 458 U.S. 263, 265 (1982)).

48. 465 U.S. at 264-65. Justice O'Connor indicated that the public interest is reflected in the effect of time on the prosecution's ability to meet its burden of proof, the costs of pretrial detention, prolonged anxiety resulting from delays in criminal trials, and prompt acquittal of the wrongly accused—which results in continued prosecutorial investigation.

49. *Id.* at 265.

50. The Court noted that obtaining a reversal following violation of a defendant's right does not require a showing of prejudice where the right reflects constitutional protection of the defendant's free choice, independent of concern for the objective fairness of the proceeding. McKaskle v. Wiggins, 465 U.S. 177, 178 n.8 (1984). Specific prejudice need not be shown where the defendant is denied counsel altogether. Gideon v. Wainwright, 372 U.S. 335 (1963). Prejudice is also presumed where counsel's request to be replaced because of conflict of interest is denied. Holloway v.

fectively reviewed after a final judgment.[51] On the other hand, if a showing of specific prejudice is required, such a disqualification order would fail the second part of the *Coopers & Lybrand* test, since the order would be intertwined with the merits of the case.[52]

Several circuit courts declined to interpret *Flanagan* as precluding immediate appeal of orders granting disqualification in civil cases.[53] The question was expressly left open in *Flanagan; Richardson-Merrell, Inc. v. Koller*[54] resolved it.

In *Koller*, the Court first addressed the policy arguments advanced by the court of appeals. In spite of *Flanagan's* emphasis on delay as anathema in the criminal trial process, the Supreme Court refuted the circuit court's inference that *Flanagan* hinged on concerns unique to criminal cases. The Court noted that preventing delay is a worthwhile objective in civil as well as criminal cases. Yet, the delay occasioned by interlocutory appeal would be the likely result of a rule permitting immediate review of disqualification orders as of right.[55]

The Court recognized that orders granting disqualification result in delay while new counsel becomes familiar with the case. However, this delay is inevitable when the district court decision to disqualify is correct. The delay resulting from the "occasionally erroneous disqualification" which is not redressed until appeal from a final judgment was viewed by the Court as preferable to the delay threatened by piecemeal review.[56]

While the circuit court had expressed concern about the disqualified attorneys' interests, the Supreme Court noted that those interests had not been considered relevant or dispositive in its prior decisions. The Court added that counsel's interests may not always coincide with those of the client. As a matter of ethics, the client's interests should control the litigation.[57] The Court suggested that an attorney whose reputation has been seriously damaged by disqualification may be able

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Arkansas, 435 U.S. 475 (1978).

51. 465 U.S. at 268.

52. *Id.* at 268-69.

53. *See, e.g.*, Interco Systems v. Omni Corporate Services, Inc., 733 F.2d 253 (2d Cir. 1984) (citing Armstrong v. McAlpin, 625 F.2d 433 (2d Cir. 1980) (en banc), *vacated on other grounds*, 449 U.S. 1106 (1981)); *cf.* Gibbs v. Paluk, 742 F.2d 181 (5th Cir. 1984) (*Flanagan* prohibits immediate appeal of disqualification orders in civil cases as well as criminal trials).

54. 105 S. Ct. 2757.

55. *Id.* at 2763.

56. *Id.*

57. *Id.; see also* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-101(A) (1981); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7(b) (1983).

to obtain relief from the Circuit Judicial Council.[58]

The Court did not accept the court of appeals' view that clients might be left without a remedy if interlocutory review were barred pursuant to the final judgment principle. Parties are free to seek certification of important issues for interlocutory review under Title 28, section 1292(b) of the United States Code.[59] The Court added that in extraordinary circumstances, a petition for a writ of mandamus may be proper.[60]

The Court did not find the court of appeals' concern about the tactical use of disqualification motions persuasive. When the district court errs in its task of policing the litigation tactics of counsel, financial hardship for the disqualified attorney and the client may result.[61] However, " '[i]f the expense of litigation were sufficient reason for granting an exception to the final judgment rule, the exception might well swallow the rule.' "[62]

After analyzing the policy considerations, the Court applied the *Coopers & Lybrand* test. The circuit court's application of the test was shaped by its view that reversal on appeal from a final judgment would require both error in the disqualification decision and a "virtually impossible" showing of prejudice from the absence of particular counsel.[63] Justice O'Connor's opinion for the majority pointed out that the Supreme Court "has never held that prejudice is a prerequisite to reversal of a judgment following erroneous disqualification of counsel."[64] The Court declined to decide that question, but noted that the issue in such a case would revolve around the showing required to reverse a final judgment, not the propriety of interlocutory appeal.[65] Indeed, Justice

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58. 28 U.S.C. § 332(d)(1) (1982). The judicial council shall make all necessary and appropriate orders for the effective and expeditious administration of justice in their respective circuits.

59. 28 U.S.C. § 1292(b) (1982). The statute provides that a district court may certify an appeal to the circuit court, which will hear an appeal at its discretion. The statute requires that the issue on appeal involve a controlling question of law as to which there is substantial ground for difference of opinion, and that immediate appeal will materially advance the termination of the litigation; *see* Note, *Interlocutory Appeals in the Federal Courts Under 28 U.S.C. § 1292(b)*, 88 HARV. L. REV. 607 (1975).

60. *See* Comment, *Use of Extraordinary Writs for Interlocutory Appeals*, 44 TENN. L. REV. 137 (1976); Note, *Mandamus as a Means of Federal Interlocutory Review*, 38 OHIO ST. L.J. 301 (1977).

61. 105 S. Ct. at 2763-64.

62. *Id.* at 2764 (quoting Lusardi v. Xerox Corp., 747 F.2d 174, 178 (3d Cir. 1984)).

63. *Koller*, 737 F.2d at 1052 (distinguishing *Flanagan* on the basis of the considerable body of law concerning ineffective assistance of counsel from which to gauge the effect of disqualifying counsel in criminal cases).

64. *Koller*, 105 S. Ct. at 2765.

65. *Id.*

O'Connor noted, the circuit court's reversal of the disqualification order before final judgment implied that a showing of prejudice was not required.[66]

Relying on its *Flanagan* reasoning, the Court again indicated that either of the final two conditions of the *Coopers & Lybrand* test would prevent interlocutory review. If the nature of the right to counsel of choice is such that it would be violated without specifically demonstrated prejudice, a pretrial order restricting the right does not meet the third requirement of the test because the disqualification order is not "effectively unreviewable" on appeal from the final judgment.[67] In the alternative, if specifically demonstrated prejudice is a prerequisite to reversal, then the disqualification order cannot be completely separate from the merits of the case.[68] An appellate court could not assess the injury to the client, if any, until the effect of the disqualification on the outcome of the litigation could be determined.[69] Under these circumstances, an appeal of the disqualification ruling would fail if the client received as effective or better representation from the substitute counsel.[70] Yet, the question of whether the client would have received more satisfactory results with different counsel can hardly be extricated from the merits of the case.[71]

In *Koller*, the circuit court determined that the record provided an adequate basis for assessing the disqualification order.[72] However, the Supreme Court pointed out that it had rejected case-by-case determinations of appealability.[73] The Court indicated that disqualification orders, as a class, are not sufficiently separable from the merits of the cases in which they arise to permit interlocutory review.[74]

Acknowledging that its decision might impose hardship on litigants, the Court declined to shape its holding to avoid hardship. Such a policy, it said, could lead to a " 'lack of principled adjudication or perhaps the ultimate devitalization of the finality rule as enacted by Congress.' "[75]

Justice Brennan, in his concurring opinion, wrote that he shared

66. *Id.*
67. *Id.*
68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.*
72. 737 F.2d at 1064.
73. *Koller*, 105 S. Ct. at 2765.
74. *Id.* at 2766.
75. *Id.* (quoting Bachowski v. Usery, 545 F.2d 363, 373-74 (3d Cir. 1976)).

the court of appeals' concern over the "disturbing phenomenon" of the tactical use of disqualification motions.[76] He emphasized, however, that the right to counsel of choice can be protected if appellate courts fulfill their obligation to set aside verdicts when necessary to vindicate a litigant's rights.[77] He also surmised that the Court's holding might cause a party considering an abusive disqualification motion to consider the inherent risk of jeopardizing an ultimately favorable verdict.[78]

Justice Stevens dissented. The author of the Court's opinion in *Coopers & Lybrand* characterized orders granting disqualification motions as "squarely within the classic formulation of an appealable collateral order."[79] Justice Stevens maintained that prejudice to the right of counsel of choice is suffered as soon as a disqualification order is granted. To hold otherwise, he indicated, would leave the aggrieved party with the practically impossible task of demonstrating that a final outcome had been determined by the disqualification order rather than some other variable.[80] Yet, Justice Stevens was disturbed by the prospect of a rule which would require a reversal of a final judgment even when there was no showing of impact on the outcome from the error.[81] By permitting interlocutory review, Justice Stevens would neither require the appellate court to link the outcome to the error, nor insist that the circuit court reverse a final judgment in spite of the absence of such a connection.[82] Justice Stevens would assume inherent prejudice resulting from disqualification of counsel, and by permitting interlocutory review, avoid reversing final judgments when the disqualification is improper.[83]

As a practical matter, *Koller* raises the stakes involved in the tactic of moving to disqualify opposing counsel.[84] Immediate reaction to the decision suggested that plaintiffs' attorneys would bear most of the hardship in civil cases.[85] *Koller* may also become a factor in decisions

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76. *Koller*, 105 S. Ct. at 2767 (Brennan, J., concurring).

77. *Id.*

78. *Id.*

79. *Id.* at 2767-68 (Stevens, J., dissenting).

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *See* Crocker, *The Ethics of Moving to Disqualify Counsel for Conflict of Interest*, 1979 DUKE L.J. 1310.

85. Austern, *Disqualification Motions*, 21 TRIAL 15 (1985) (although plaintiffs' attorneys occasionally file disqualification motions, most of these motions are filed by defendants; the motions delay discovery and trial, which is rarely in the plaintiff's interest).

of whether to litigate in state or federal courts.[86] Apart from the obvious effect on attorneys who lose a potential fee, *Koller* is likely to have considerable effect on the capability and willingness of some plaintiffs to continue litigation, or withstand settlement overtures. In addition, lower courts may perceive the Supreme Court's mention of certification of appeals and mandamus[87] as an invitation to expand the roles of those procedures, where disqualification orders are concerned.

Koller also indicates that the *Coopers & Lybrand* test cannot be applied in a detached and uniform fashion to provide complete answers to collateral order exception questions. If the test were dispositive, or subject to the rigid line-drawing required for uniform application, the extensive discussion of policy considerations which marks *Koller* would have been unnecessary. The difficulties of a mechanical application of the collateral order exception doctrine are suggested by Stevens' dissent. The author of the Court's opinion in *Coopers & Lybrand* maintained that orders disqualifying counsel present exactly the kind of situations for which the exception was designed.[88] Since the majority and the dissent purport to apply the same test, it is clear that the strictness with which the test is applied is critical, and is to be determined only after a preliminary balancing of competing policy concerns.[89]

While the Court declined to decide whether prejudice must be shown to support reversal following disqualification of counsel, the question must ultimately be addressed. Justice Stevens' discomfort with the implications of a decision on that point seems warranted, and it appears that some fine-tuning of the inferences to be drawn from *Koller* will be necessary.

Troy Anthony Price

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86. In Herron v. Jones, 276 Ark. 483, 637 S.W.2d 569 (1982), the Arkansas Supreme Court noted the difficulties posed by disqualification orders in federal courts. The court addressed the issue of interlocutory appeal by amending the Arkansas Rules of Appellate Procedure to make orders disqualifying counsel subject to immediate review. ARK. R. APP. P. 2(a)(8).

87. In American Protection Ins. v. MGM Grand Hotel-Las Vegas, 765 F.2d 925 (9th Cir. 1985), the court of appeals noted that *Koller* did not find the attorneys' interests dispositive, and concluded that the circumstances did not warrant the extraordinary response of issuing a writ of mandamus; *cf.* In re American Cable Publications, Inc., 768 F.2d 1194 (10th Cir. 1985), in which the circuit court treated an appeal pending at the time *Koller* was decided as an application for writ of mandamus, and granted the writ to overturn a district court decision refusing to allow the defendant in a contract case to be represented by his law partner.

88. *Koller*, 105 S. Ct. 2767-68.

89. This analysis conforms with the Court's approach in Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 171 (1974); *see supra* note 25 and accompanying text.