

THE ARKANSAS SUPREME COURT HOLDS THAT
DISQUALIFICATION OF DEFENSE COUNSEL DUE TO A CONFLICT
OF INTEREST IS IMPROPER WHEN THE STATE’S ALLEGATIONS
OF A CONFLICT BETWEEN A CURRENT CLIENT AND A FORMER
CLIENT IN THE SAME MATTER ARE CONCLUSORY AND THE
STATE OFFERS NO EVIDENCE THAT A CONFLICT EXISTS OR
THAT THE SERIOUS POTENTIAL FOR A CONFLICT EXISTS.

In *Samontry v. State*,¹ the Arkansas Supreme Court addressed an interlocutory appeal regarding the disqualification of defendants’ counsel due to a conflict of interest.² On May 12, 2010, “Samontry and Phouangmany were arrested for prostitution and for promoting prostitution.”³ “Samontry’s ex-husband was also arrested and charged with promoting prostitution.”⁴ Samontry and Phouangmany were represented by Dan Hancock, and Richard was represented by Reggie Koch.⁵ All three defendants were tried on October 4, 2010, and Samontry and Phouangmany were found guilty of prostitution.⁶ Richard was acquitted of all charges.⁷ “Samontry and Phouangmany then retained Koch as their [counsel] and appealed the convictions.”⁸

“Koch entered an appearance as counsel for [the two] defendants,” and the State moved to disqualify him as counsel, asserting that, because Koch represented Samontry’s ex-husband in the original proceedings, it would be impossible for him to avoid a conflict of interest, particularly when cross-examining Richard in his representation of Phouangmany.⁹ The State further argued that the interests of Richard, Koch’s former client, were directly adverse to those of Koch’s current clients, which required disqualification of Koch.¹⁰ The circuit court granted the State’s motion to disqualify Koch, but the discussion therein took place in the judge’s chambers off the record.¹¹

Koch continued to act as counsel for the defendants, and the circuit court “granted [the defendants’] request for a stay pending an interlocutory appeal from the decision to disqualify Koch as [defendants’] counsel.”¹² On appeal, the sole issue was “whether the circuit court erred in disqualifying

1. 2012 Ark. 105, 387 S.W.3d 178 (2012).
2. *Id.* at 1, 387 S.W.3d at 180.
3. *Id.* at 2, 387 S.W.3d at 180.
4. *Id.*
5. *Id.*
6. *Id.*
7. *Samontry*, 2012 Ark. 105, at 3, 387 S.W.3d at 180.
8. *Id.*
9. *Id.*, 387 S.W.3d at 180–81.
10. *Id.*, 387 S.W.3d at 181.
11. *Id.* at 4, 387 S.W.3d at 181.
12. *Id.* at 5, 387 S.W.3d at 181.

Koch as counsel for Samontry and Phouangmany.”¹³ Samontry’s interlocutory appeal was not properly brought before the court and was thus dismissed.¹⁴ The Court therefore only addressed the issue of disqualification of Koch in response to the interlocutory appeal brought by Phouangmany.¹⁵

“A circuit court’s decision to disqualify an attorney [is reviewed] under an abuse-of-discretion standard.”¹⁶ “Rules of Professional Conduct are applicable in disqualification proceedings,”¹⁷ and “disqualification is [a remedy available] to a circuit court ‘to protect and preserve the integrity of the attorney-client relationship.’”¹⁸

Phouangmany argued that Koch should not have been disqualified. Phouangmany argued that there was no conflict of interest in Koch’s representation of her and Richards and that, if there was a conflict, it had been waived by her.¹⁹ She also contended that, even if there had been a conflict, there were less drastic measures available to the court than disqualification of Koch as defendant’s counsel.²⁰ As for the issue of waiver, the Arkansas Supreme Court upheld the lower court’s refusal to accept the waiver and ruled that the court had not abused its discretion on that point.²¹

The primary argument focused on by the Arkansas Supreme Court was Phouangmany’s claim that the State was unable to point to any evidence that Richard’s interests were adverse to hers. The Eighth Circuit Court of Appeals ruled in one case that “disqualification on the basis of the attorney’s receipt of privileged information from a codefendant formerly represented by that attorney should only be considered upon a clear showing that the present and former clients’ interests are adverse.”²²

Phouangmany stated in her brief in opposition to the State’s motion to disqualify that Koch would state on the record that he knew of no confidential information he received from Richard, his former client, that would likely lead to any conflict of interests between Richard and the defendants.²³ Additionally, the State admitted in its brief that Richard’s testimony may not

13. *Samontry*, 2012 Ark. 105, at 5, 387 S.W.3d at 181.

14. *Id.* at 5–6, 387 S.W.3d at 182.

15. *Id.* at 6, 387 S.W.3d at 182.

16. *Id.* at 5, 387 S.W.3d at 182.

17. *Id.* at 5, 387 S.W.3d at 182 (citing *Wilburn v. State*, 346 Ark. 137, 56 S.W.3d 365 (2001)).

18. *Id.*, 387 S.W.3d at 182 (citing *Craig v. Carrigo*, 340 Ark. 624, 633, 12 S.W.3d 229, 235 (2000) (quoting *Burnette v. Morgan*, 303 Ark. 150, 794, S.W.2d 145 (1990))).

19. *Samontry*, 2012 Ark. 105, at 6, 387 S.W.3d at 182.

20. *Id.*

21. *Id.* at 7, 387 S.W.3d at 182.

22. *Id.* at 11–12, 387 S.W.3d at 185 (quoting *U.S. v. Agosto*, 675 F.2d, 965, 973 (8th Cir. 1982)).

23. *Id.* at 11, 387 S.W.3d at 184.

be directly damaging to Phouangmany.²⁴ Furthermore, Richard was considered by Phouangmany herself as a strong witness for the defense, and Phouangmany pointed out that Richard had always maintained, to the police and prosecution, his own innocence as well as Phouangmany's innocence.²⁵ Thus, Phouangmany argued that the potential of a conflict of interest was not serious.²⁶

Criminal defendants have the right to effective assistance of counsel, and there is a presumption in favor of a party's choice of counsel, though that presumption may be overcome by a showing of an existing conflict of interest or the serious potential for a conflict of interest.²⁷ The Court ruled that the State's assertions that there was a conflict of interest were conclusory and not sufficient to establish a clear showing that Phouangmany and Richard's interests were adverse.²⁸

The Court found that the State failed to meet its burden of proof to support disqualification of Koch.²⁹ Thus, the Court ruled that the circuit court had abused its discretion when it disqualified Koch as counsel for Phouangmany and reversed and remanded for further proceedings.³⁰

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24. *Id.* at 11–12, 387 S.W.3d at 185.

25. *Samontry*, 2012 Ark. 105, at 11–12, 387 S.W.3d at 185.

26. *Id.*

27. *Id.*

28. *Id.* at 12, 387 S.W.3d at 185.

29. *Id.* at 12, 387 S.W.3d at 185.

30. *Id.*