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A Delicate Subject: Judicial Disqualification

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In June, the U.S. Supreme Court issued a widely publicized judicial disqualification decision, *Caperton v. A.T. Massey Coal Co.*, __ US __, 129 S Ct 2252, 173 L Ed2d 1208 (2009). The facts in *Caperton* were extreme. Caperton had obtained a $50 million judgment against Massey in a West Virginia state trial court. Massey's chairman then contributed over $3 million to a little known candidate opposing a sitting member of the West Virginia Supreme Court. Massey's candidate won and then cast the deciding vote in overturning the judgment. Caperton had attempted to disqualify the justice, but the justice refused to recuse himself. The U.S. Supreme Court reversed and remanded, finding that these extreme facts violated Caperton's federal due process rights.

Most of us will never face a situation as unusual as *Caperton*. At the same time, it would not take too many trips to trial call in our own Presiding Court to learn that judicial disqualification occurs relatively often. In this column, we'll survey judicial disqualification in Multnomah County Circuit Court. (With that focus, it is important to note that procedures vary in other courts—including state trial courts in smaller judicial districts (by statute those under 100,000 in population), state appellate courts and federal courts.) Oregon draws a distinction between disqualification "for prejudice" and disqualification "for cause."

See Hanson v. Oregon Dept. of Revenue, 294 Or 23, 27, 653 P2d 964 (1982). The former is governed by ORS 14.250 and is by far the more common variant. The latter is governed by ORS 14.210.

Disqualification "For Prejudice." ORS 14.250 allows a party to seek disqualification of an assigned judge if the party or the party's attorney "believes that such party or attorney cannot have a fair and impartial trial or hearing before such judge." In *State ex rel. Kafoury v. Jones*, 315 Or 201, 205, 843 P2d 932 (1992), the Supreme Court emphasized that the requisite "belief" is subjective, "not the objective truth of that belief." Under an accompanying provision, ORS 14.260(1), the moving party must simply file a supporting affidavit made on "good faith and not for the purpose of delay" mirroring the operative language quoted from ORS 14.250. In that event, disqualification follows unless the judge involved or the presiding judge of the district concerned "challenges the good faith of the affiant and sets forth the basis of such challenge." A hearing then takes place before a disinterested judge, with the judge whose disqualification is sought bearing the burden of proving "that the motion was made in bad faith or for the purposes of delay."

In practice, the threshold for disqualification "for prejudice" is very low, with the Supreme Court describing it last year in *State v. Pena*, 345 Or 198, 203, 191 P3d 659 (2008), as an "exercise of legislative grace." Timing, however, is another matter. Under ORS 14.270, motions must be made "at the time of the

assignment of the case to a judge for trial or for hearing upon a motion or demurrer." Oral notice must be given at the time of assignment and the motion and supporting affidavit must be filed by the close of the next judicial day. Multnomah County SLR 7.045(1) specifies that the motion must be made at either trial call or the case scheduling conference depending on how the judge is first assigned to the case. (SLR 7.045(2) addresses disqualification of judges assigned to motions.) ORS 14.270 bars motions once "the judge has ruled upon any petition, demurrer or motion other than a motion to extend time in the cause[.]" *See, e.g., In re Kluge*, 335 Or 326, 341-42, 66 P3d 492 (2003). These deadlines are construed strictly, with the Supreme Court in *Pena* finding that a motion filed a day late was time-barred. A party is only allowed two disqualification motions "for prejudice" per case by ORS 14.270.

Disqualification "For Cause." ORS 14.210 outlines standards for disqualification "for cause," principally conflicts ranging from financial or other personal interests of the judge to the judge's prior work as an attorney on the matter involved. The statutory categories in ORS 14.210 generally parallel those included in the conflict provisions of the Code of Judicial Conduct (JR 2-106) and the conflict laws applying to public officials (ORS 244.120(1)(b)). Because conflicts triggering disqualification "for cause" either may not have arisen or may not be known at the time a judge is first assigned to a case, the timing and procedures discussed above controlling disqualification "for prejudice" do not

apply. *See Lamonts Apparel, Inc. v. SI-Lloyd Associates*, 153 Or App 227, 235, 956 P2d 1024 (1998). JR 2-106(D) permits waiver of conflicts by the parties upon disclosure if they agree that "the judge's relationship is immaterial or that the judge's financial interest is insubstantial[.]"

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