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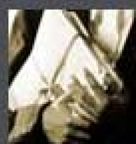
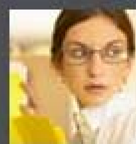

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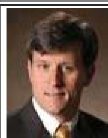

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Featured Articles

Disqualification: Applied Legal Ethics

by Mark J. Fucile

Courts have long exercised regulatory control over the lawyers appearing before them. One form of that regulatory oversight is the authority to disqualify counsel. Disqualification blends court-made procedural law with substantive law in the form of the Rules of Professional Conduct. The former is primarily decisional law and focuses on standing, waiver, and appeal. The latter relies on the professional rules to determine whether an ethics violation warranting disqualification has occurred. In this article, we'll look at both the procedural and substantive elements of disqualification. For a national perspective, we'll examine federal procedure and substantive law under the influential ABA Model Rules of Professional Conduct that form the template for the professional rules in most jurisdictions.

Procedural Law

Although federal courts can exercise disqualification authority on their own motion, the more typical situation is that one of the parties to litigation seeks an order disqualifying opposing counsel. In that scenario, three procedural issues that commonly arise are (1) does the moving party have the requisite standing to make that request? (2) has the moving party waived its right to seek disqualification, typically through delay? and (3) what appellate avenues are available depending on whether the motion is granted or denied?

1. Standing

To have the requisite standing, the moving party on a disqualification motion must generally be either a current or former client of the lawyer or law firm against whom the motion is directed. *See Colyer v. Smith*, 50 F. Supp. 2d 966, 968-973 (C.D. Cal. 1999) (discussing the law of standing nationally in the disqualification context, including circuit variations); *accord FMC Technologies, Inc. v. Edwards*, 420 F. Supp.2d 1153, 1156 (W.D. Wash. 2006). If not a current party to the case involved, intervention is permitted (at the discretion of the trial court) for the limited purpose of moving to disqualify a current or former lawyer or law firm. *See, e.g., Oxford Systems, Inc. v. CellPro, Inc.*, 45 F. Supp. 2d 1055 (W.D. Wash. 1999);

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Exceptions occur when the participation of the lawyer or law firm involved would affect the rights of other parties to the case, with lawyer-witness and discovery issues being common situations in civil litigation in which parties other than a current or former client seek disqualification. *See, e.g., Jamieson v. Slater*, No. CV06-1524-PHX-SMM, 2006 WL 3421788 at *8 (D. Ariz. Nov. 27, 2006) (unpublished) (lawyer-witness rule); *Richards v. Jain*, 168 F. Supp. 2d 1195 (W.D. Wash. 2001) (discovery violations).

2. Waiver

"Waiver" is sometimes used in its classic ethics sense that a client has executed a binding written waiver in accord with the professional rules of an otherwise disqualifying conflict. *See, e.g., Elonex I.P. Holdings, Ltd. v. Apple Computer, Inc.*, 142 F. Supp. 2d 579, 582-83 (D. Del. 2001); *VISA U.S.A., Inc. v. First Data Corp.*, 241 F. Supp. 2d 1100, 1105-1110 (N.D. Cal. 2003). More commonly, however, "waiver" is used in its classic procedural sense that a party is implied to have relinquished an asserted right through delay or other conduct that runs counter to that right. As such, waiver turns heavily on the facts of an individual case. *Contrast Trust Corp. of Montana v. Piper Aircraft Corp.*, 701 F.2d 85, 87-88 (9th Cir. 1983) (two-year delay held waiver) *with Image Technical Service, Inc. v. Eastman Kodak Co.*, 136 F.3d 1354, 1355 (9th Cir. 1998) (two-year delay held not waiver).

Waiver, however, is often an important defense from a practical perspective, because it can highlight the difference between a genuinely outraged current or former client who has moved promptly and a litigation opponent who waited to what it viewed as a more opportune time to play the "disqualification card" solely for tactical reasons.

3. Appeal

Trial court orders granting or denying motions for disqualification are not immediately appealable. *See Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 440, 105 S. Ct. 2757, 86 L. Ed. 2d 340 (1985) (where the trial court had ordered disqualification); *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 379, 101 S. Ct. 669, 66 L. Ed. 2d 571 (1981) (where the trial court had denied disqualification). At the same time, mandamus relief may be available prior to entry of a final judgment at the discretion of the appellate court involved. *See generally In re Bellsouth Corp.*, 334 F.3d 941, 951-966 (11th Cir. 2003) (surveying the federal circuits). Even though in theory available, mandamus remains a discretionary remedy that, in practice, is used very sparingly by the federal appellate courts.

Substantive Law

State rules of professional conduct typically provide the

substantive law of disqualification for determining whether an ethics violation warranting removal from a case has occurred. Most often, the professional rules employed are those of the forum state—but not always, depending on relevant choice-of-law principles. By far, the most common substantive grounds parties seeking disqualification assert are conflicts, typically current or former client conflicts. On occasion, however, other asserted ethics violations form the basis for disqualification motions.

1. Choice-of-Law

Most federal district courts have local rules adopting the forum state's professional rules as the standards governing lawyers appearing before them. *See, e.g.,* Central District of California L.R. 83-3.1.2; District of Columbia L. Cv. R 83.15(a). Many states now have choice-of-law provisions in their professional codes patterned on ABA Model Rule 8.5(b). Under that rule, litigation matters are generally governed by the rules of the forum unless the conduct at issue or the predominate effect of that conduct arose in another state. Therefore, disqualification motions are usually (but not always) governed by the professional rules of the forum state. *See, e.g., Philin Corp. v. Westhood, Inc.*, No. CV-04-1228-HU, 2005 WL 582695 at *9-*10 (D. Or. Mar. 11, 2005) (unpublished) (using an earlier version of the choice-of-law rule in assessing cross-country lawyer conflicts at issue in a disqualification motion); *see also Apple Corps, Ltd. v. International Collectors Soc.*, 15 F. Supp. 2d 456, 472-73 (D. N.J. 1998) (using ABA Model Rule 8.5(b) to decide choice-of-law issues in the analogous context of contempt motions involving cross-border lawyer conduct).

2. Conflicts

Asserted current or former client conflicts are by far the most common grounds for seeking disqualification of opposing counsel. *See, e.g., Worldspan, L.P. v. Sabre Group Holdings, Inc.*, 5 F. Supp.2d 1356 (N.D. Ga. 1998) (asserted current client conflict); *Talecris Biotherapeutics, Inc. v. Baxter International Inc.*, 491 F. Supp. 2d 510 (D. Del. 2007) (alleged former client conflict). Current, multiple client conflicts are governed by ABA Model Rule 1.7. Former client conflicts, in turn, are governed by ABA Model Rule 1.9.

With both asserted current or former client conflicts, the moving party must first show that there was, in fact, an attorney-client relationship between that party and the lawyer or firm against which disqualification is sought. This predicate question is generally not governed by the professional rules themselves, but, rather, decisional law of the state concerned. ABA Model Rules Scope, ¶ 17; Restatement (Third) of the Law Governing Lawyers §14 (2000). The tests vary from state to state but generally require a dual showing that the client subjectively believes that the lawyer was representing the client and that the subjective belief was objectively reasonable under the circumstances.

Because current clients have very broad rights to prevent "their" lawyer from opposing them on any other matters, disqualification motions based on asserted current client conflicts usually turn on whether a current attorney-client relationship does indeed exist. *See, e.g., Oxford Systems, Inc. v. CellPro, Inc.,* 45 F. Supp. 2d 1055(out-of-state client had no current matters open with firm but used the firm over a period of years when it had in-state cases). With disqualification motions based on former client conflicts, by contrast, the principal battleground is usually whether, in the vernacular of ABA Model Rule 1.9, the current matter is the "same or substantially related" to one the lawyer (or law firm) handled for the former client. *See, e.g., SuperGuide Corp. v. DirecTV Enterprises, Inc.*, 141 F. Supp. 2d 616 (W.D.N.C. 2001) (former national trial on opposite side of former client).

Disqualification motions are also occasionally based on asserted imputed conflicts, such as claimed inadequacies in new-hire lateral screening (*see, e.g., Van Jackson v. Check 'N Go of Illinois, Inc.*, 114 F. Supp. 2d 731 (N.D. Ill. 2000)) or claimed conflicts arising through sharing information between co-counsel or other associated counsel (*see, e.g., Essex Chemical Corp. v. Hartford Acc. & Indem. Co.,* 993 F. Supp. 241 (D. N.J. 1998)).

3. Other Grounds

Although less common, decisions around the country examine, among others, the following grounds for possible disqualification: asserted violations of the "no contact" rule (RPC 4.2), *see, e.g., In re Korea Shipping Corp.,* 621 F. Supp. 164 (D. Alaska 1985); claimed violations of the lawyer-witness rule (RPC 3.7), *see, e.g., Jamieson v. Slater,* 2006 WL 341788; and alleged improper acquisition of an opponent's attorney-client communications (RPC 4.4), *see, e.g., Richards v. Jain*, 168 F. Supp. 2d 1195.

Summing Up

Disqualification is a unique remedy that weaves together court-made procedure with substantive law under the RPCs. It is also a remedy where courts are put in the position of trying to balance one party's choice of counsel with another's claimed rights under the professional rules. That unique mix and those important considerations can produce dramatic practical effects on a case for both the lawyers and the clients involved.

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