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## Disqualification in Oregon State & Federal Courts

By Mark J. Fucile  
Fucile & Reising LLP

Disqualification is a long-standing tool available to courts to regulate the professional conduct of the lawyers appearing before them. *See, e.g., Duke v. Franklin*, 177 Or 297, 305, 162 P2d 141 (1945) (discussing a disqualification motion filed in the trial court). It is a remedy that flows both from courts' inherent authority over counsel and from their ability to enforce the rights of the parties to a proceeding. *See generally State ex rel. Bryant v. Ellis*, 301 Or 633, 636-39, 724 P2d 811 (1986). Disqualification is a blend of court-made procedural law and substantive law in the form of the Rules of Professional Conduct.<sup>1</sup> This article surveys both elements of disqualification law in Oregon's state and federal courts.<sup>2</sup>

### ***Procedural Law***

Although courts in theory can disqualify counsel *sua sponte*, in practice disqualification is much more commonly sought by one of the parties by way of a motion. The procedural rules governing motion practice generally in the court concerned apply with equal measure to disqualification. *See, e.g., Sabrix v. Carolina Cas. Ins. Co.*, No. CV-02-1470-HU, 2003 WL 23538035 at \*1 (D Or Jul 23, 2003) (unpublished) (moving party in disqualification bears the burden of proof); *Columbia Forest Products, Inc. v. Aon Risk Services, Inc. of Oregon*, 164

Or App 586, 590, 993 P2d 820 (1999) (ordinarily no attorney fee recovery on successful motion to disqualify). In addition, however, both state and federal courts have fashioned three rules specific to disqualification through decisional law addressing standing, waiver and appeal.

**Standing.** Generally, the moving party on a disqualification motion must be either a current or former client of the lawyer or law firm against whom the motion is directed. See *State ex rel. Bryant v. Ellis*, 301 Or at 638-39; *Kasza v. Browner*, 133 F3d 1159, 1171 (9th Cir 1998).<sup>3</sup> Exceptions occur when the participation of the lawyer or law firm involved would affect the rights of other parties to the case. *State ex rel. Bryant v. Ellis*, 301 Or at 639 (discussing this alternative basis generally); see, e.g., *Richardson-Merrell, Inc. v. Koller*, 472 US 424, 426-29, 105 S Ct 2757, 86 L Ed2d 340 (1985) (pretrial misconduct resulting in disqualification). Common examples of the exception that are outlined in greater detail later are the lawyer-witness rule (RPC 3.7) and discovery violations that improperly invade an opponent's attorney-client privilege or work product (RPC 4.4).

**Waiver.** "Waiver" is sometimes used in its classic ethics sense that a client has executed a binding written waiver of an otherwise disqualifying conflict. See, e.g., *Unified Sewerage Agency of Washington County v. Jelco*, 646 F2d 1339, 1345-46 (9th Cir 1981) (law firm argued that client had consented to adverse representation); see also *PGE v. Duncan, Weinberg, Miller & Pembroke*,

*P.C.*, 162 Or App at 280-88 (former lawyers and their new firm argued that agreement with former client over permissible adverse representations controlled). More commonly, however, “waiver” in the disqualification context is used in its classic procedural sense of the implied abandonment of a known right through delay or other conduct inconsistent with that right. Waiver, therefore, turns largely on the particular facts of an individual case. *Contrast Trust Corp. of Montana v. Piper Aircraft Corp.*, 701 F2d 85, 87-88 (9th Cir 1983) (two year delay held waiver) *with Image Technical Service, Inc. v. Eastman Kodak Co.*, 136 F3d 1354, 1355 (9th Cir 1998) (two year delay held not waiver). As with other affirmative defenses, the party asserting waiver bears the burden of proof on that issue. *See Paul E. Iacono Structural Engineer, Inc. v. Humphrey*, 722 F2d 435, 442-43 (9th Cir 1983).

**Appeal.** Trial court orders granting or denying motions for disqualification are not immediately appealable. *See State ex rel. Bryant v. Ellis*, 301 Or at 640 (“[N]ormally appeal after judgment will be an adequate remedy[.]”); *Richardson-Merrell, Inc. v. Koller*, 472 US at 440 (where the trial court had ordered disqualification); *Firestone Tire & Rubber Co. v. Risjord*, 449 US 368, 379, 101 S Ct 669, 66 L Ed2d 571 (1981) (where the trial court had denied disqualification). Mandamus relief may be available prior to entry of a final judgment at the discretion of the appellate court involved. *See, e.g., State ex rel. Bryant v. Ellis*, 301 Or at 640; *Unified Sewerage Agency of Washington County v. Jelco*, 646

F2d at 1342-44. Even though in theory available, mandamus remains a discretionary remedy that is used sparingly by both the Oregon Supreme Court and the Ninth Circuit.<sup>4</sup>

***Substantive Law***

ORS 9.490(1) makes the RPCs binding on all lawyers (both those licensed in Oregon and those admitted *pro hac vice*) appearing in Oregon's state courts. Similarly, District of Oregon Local Rule 83.7(a) adopts the Oregon RPCs as its governing professional rules. Oregon's RPCs contain a choice-of-law provision and the result most often is that Oregon's RPCs typically provide the substantive law on whether an ethics violation warranting disqualification has occurred. The most common substantive grounds advanced by parties seeking disqualification are conflicts, typically current or former conflicts. On occasion, however, other asserted ethics violations form the basis for disqualification motions.<sup>5</sup>

***Choice-of-Law.*** RPC 8.5(b) controls choice-of-law issues and in litigation matters generally finds that Oregon's law as the forum governs unless the conduct at issue or the predominant effect of that conduct occurred in another state. *See, e.g., Philin Corporation v. Westhood, Inc.*, No. CV-04-1228-HU, 2005 WL 582695 at \*9-\*10 (D Or Mar 11, 2005) (unpublished) (applying an earlier but similar version of the choice-of-law rule formerly found in the Oregon State Bar Rules of Procedure to cross-country lawyer conduct at issue in a disqualification

motion). RPC 8.5(b) uses the same general approach to assess controlling law for lawyer civil liability outside the regulatory context. See generally *Spirit Partners, LP v. Stoel Rives LLP*, 212 Or App 295, 157 P3d 1194 (2007).

**Conflicts.** Asserted current or former client conflicts are by far the most common grounds for seeking disqualification of opposing counsel. See, e.g., *State ex rel. Bryant v. Ellis*, 301 Or 633 (seeking disqualification for asserted current client conflict); *Collatt v. Collatt*, 99 Or App 463, 782 P2d 456 (1989) (affirming disqualification for former client conflict); *Admiral Ins. Co. v. Mason, Bruce & Girard, Inc.*, No. CV-02-818-HA, 2002 WL 31972159 (D Or Dec 5, 2002) (unpublished) (assessing both). Current, multiple client conflicts are governed by RPC 1.7. Former client conflicts, in turn, are governed by RPC 1.9. RPC 1.10 generally imputes one firm lawyer's conduct to the entire firm under the "firm unit rule."

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 law firm against which disqualification is sought. In Oregon, that determination is a matter of state substantive decisional law rather than the RPCs. The leading case on that point is *In re Weidner*, 310 Or 757, 770, 801 P2d 828 (1990). Under *Weidner*, the test for determining whether an attorney-client relationship exists (or existed) is twofold. The first is subjective: Does the client subjectively believe that the lawyer represents the client? The

second is objective: Is that subjective belief objectively reasonable under the circumstances? Both elements of the test must be met for an attorney-client relationship to exist.

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 exists. See, e.g., *Admiral Ins. Co. v. Mason, Bruce & Girard, Inc.*, 2002 WL 31972159 at \*1-\*2. Disqualification motions based on alleged former client conflicts, by contrast, usually focus on whether, in the vernacular of RPC 1.9, the current matter is the “same or substantially related” to one the lawyer (or the law firm) handled for the former client. See, e.g., *PGE v. Duncan, Weinberg, Miller & Pembroke, P.C.*, 162 Or App at 278-288; *Admiral Ins. Co. v. Mason, Bruce & Girard, Inc.*, 2002 WL 31972159 at \*3.

**Other Grounds.** Although less common, disqualification motions are also sometimes predicated on other asserted violations of the professional rules, such as: violations of the lawyer-witness rule (RPC 3.7), see, e.g., *In re Kluge*, 335 Or 326, 329-331, 66 P3d 492 (2003) (lawyer was disqualified by the trial court under the lawyer-witness rule in a case underlying a subsequent disciplinary proceeding); and discovery violations, particularly those that improperly intrude on opposing counsel’s attorney-client privilege or work product protection (RPC 4.4), see OSB Formal Ethics Op. 2005-150 (2005) at 2, discussing *Richards v.*

*Jain*, 168 F Supp2d 1195 (WD Wash 2001), where a law firm was disqualified for the unauthorized acquisition and use of an opponent's privilege materials. See also *State v. Riddle*, 330 Or 471, 980, 8 P3d 980 (2000) (discussing the scope of permissible contact with an expert who was formerly retained by an opposing party).

### ***Summing Up***

Oregon's courts, like their counterparts nationally, have noted the tension between a party's right to counsel of its choice with the responsibility to supervise the professional conduct of the counsel appearing before them. See, e.g., *Smith v. Cole*, No. CV-05-372-AS, 2006 WL 1207966 (D Or Mar 2, 2006) at \*1-\*2 (magistrate's findings), 2006 WL 1280906 (D Or Apr 28, 2006) (district judge's order) (both unpublished). When they have concluded that the lawyers' conduct warranted the latter taking precedence over the former, they have used the unique blend of procedural and substantive law to disqualify the counsel involved.

### **ABOUT THE AUTHOR**

Mark J. Fucile of Fucile & Reising LLP focuses on legal ethics, product liability defense and condemnation litigation. In his legal ethics practice, Mark handles professional responsibility, regulatory and attorney-client privilege matters and law firm related litigation for lawyers, law firms and legal departments throughout the Northwest. He is a past member of the Oregon

State Bar's Legal Ethics Committee, is a past chair of the Washington State Bar Rules of Professional Conduct Committee, is a member of the Idaho State Bar Professionalism & Ethics Section and is a co-editor of the OSB's Ethical Oregon Lawyer and the WSBA's Legal Ethics Deskbook. Mark also writes the monthly Ethics Focus column for the Multnomah (Portland) Bar's Multnomah Lawyer, the quarterly Ethics & the Law column for the WSBA Bar News and is a regular contributor on risk management to the OSB Bar Bulletin, the Idaho State Bar Advocate and the Alaska Bar Rag. Mark's telephone and email are 503.224.4895 and Mark@frllp.com.

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<sup>1</sup> In the criminal context, Sixth Amendment considerations also apply.

<sup>2</sup> Disqualification closely parallels actions for injunctions by clients (current or former) against their lawyers (current or former) to prevent the lawyers from handling matters adverse to them or assisting with such matters or the revocation of *pro hac vice* admissions based on matters that might have alternatively been framed in a motion to disqualify. See, e.g., *PGE v. Duncan, Weinberg, Miller & Pembroke, P.C.*, 162 Or App 265, 986 P2d 35 (1999) (former client sought injunction against former lawyers and their new law firm); *Tinn v. EMM Labs, Inc.*, 556 F Supp2d 1191 (2008) (seeking to disqualify a lawyer who was not counsel of record from acting as a witness or otherwise assisting one of the parties); *Cole v. U.S. District Court*, 366 F3d 813 (9th Cir 2004) (*pro hac vice* admission revoked in connection with disqualification proceedings).

<sup>3</sup> If a current or former client is not a present party to the litigation concerned, intervention is permitted at the discretion of the trial court for the limited purpose of seeking disqualification. See, e.g., *Oxford Systems, Inc. v. CellPro, Inc.*, 45 F Supp2d 1055 (WD Wash 1999); *Commercial Development Co. v. Abitibi-Consolidated, Inc.*, No. C07-5172RJB, 2007 WL 4014992 (WD Wash Nov 15, 2007) (unpublished).

<sup>4</sup> In federal cases that would be subject to appellate review by the Federal Circuit, such as patent matters, mandamus relief must also be sought in that court. *Picker International, Inc. v. Varian Associates, Inc.*, 869 F2d 578, 580-81 (Fed Cir 1989). However, because disqualification is a procedural matter not unique to patent cases, the Federal Circuit would apply the law of the Ninth Circuit to a mandamus petition seeking review of a disqualification order from the District of Oregon. *Id.*; *accord Atasi Corporation v. Seagate Technology*, 847 F2d 826, 829 (Fed Cir 1988).

<sup>5</sup> Due to varying elements and standards of proof, disqualification findings do not constitute issue preclusion in the event of later Oregon State Bar regulatory proceedings. See, e.g., *In re McMenamain*, 319 Or 609, 879 P2d 173 (1994) (Oregon Supreme Court dismissed disciplinary charges against lawyer who had earlier been disqualified for same conduct).