

Chapter 5

Rules Surrounding Disqualification of Counsel

Mark J. Fucile

Fucile & Reising LLP

503.224.4895

mark@frllp.com

www.frllp.com

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TABLE OF CONTENTS

I.	INTRODUCTION	5-3
II.	PROCEDURAL LAW	5-3
	A. Standing	5-3
	B. Waiver	5-4
	C. Appeal	5-4
III.	SUBSTANTIVE LAW	5-5
	A. Choice-of-Law	5-5
	B. Conflicts	5-6
	C. Other Grounds for Disqualification	5-7

Note: For the past several years, Mark has presented an annual update on disqualification law for the University of Washington School of Law’s Professional Responsibility Institute. Those presentations have focused on disqualification developments in state and federal courts in Washington, Oregon, Idaho and Alaska as well as the Ninth Circuit. Those papers are available in the “Resources” section of Fucile & Reising LLP’s web site at www.frllp.com. For a national survey of disqualification law, see Mark’s article, “Disqualification Motions and the RPCs: Recent Decisions Using Ethics Rules as the Basis for Disqualification,” in the 1999 symposium issue of the ABA *Professional Lawyer*, which is also available on Fucile & Reising LLP’s web site.

I. INTRODUCTION

This paper and the accompanying presentation outline the procedural and substantive elements of disqualification of counsel in federal civil litigation in the Northwest. The former is primarily decisional law and for present purposes focuses on standing, waiver and appeal. This element of disqualification law goes to the heart of the procedural law of disqualification: the courts' inherent authority to regulate the conduct of lawyers appearing before them. The latter relies principally on the Rules of Professional Conduct and related authority interpreting the RPCs. This element, in turn, goes to the heart of the substantive law of disqualification: whether an ethics violation warranting disqualification has occurred.

Although this paper addresses disqualification motions, similar considerations apply to motions seeking revocation of *pro hac vice* admission and, at least as to substantive law, lawsuits seeking injunctions against attorneys based on an asserted breach of a fiduciary duty to prevent them from representing parties adverse to another current or former client. On another related point, a disqualification decision (one way or the other) will typically neither preclude nor necessarily be given preclusive effect (in light of varying standards of proof and elements) regarding other potential actions against the lawyers involved, such as bar complaints, legal malpractice or breach of fiduciary duty claims and fee forfeiture remedies.

II. PROCEDURAL LAW

Federal courts have long exercised regulatory oversight over the lawyers appearing before them. *See generally Gas-A-Tron of Arizona v. Union Oil of California*, 534 F.2d 1322, 1324-25 (9th Cir. 1976). One form of that regulatory oversight is the authority to order the disqualification of counsel. Although federal courts can exercise that authority on their own motion, the more common 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?

A. Standing

In general, 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 to have requisite standing. *See FMC Technologies, Inc. v. Edwards*, 420 F. Supp.2d 1153, 1156 (W.D. Wash. 2006) (discussing the law of standing nationally in the disqualification context). If not a current party to the case involved, intervention is permitted (at the discretion of the trial court) for purposes 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); *Commercial Development Co. v. Abitibi-Consolidated, Inc.*, No. C07-5172-RJB, 2007 WL 4014992 (W.D. Wash. Nov. 15, 2007) (slip copy). 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 issues being the most common situation in civil litigation where parties other than a current or former

client seek disqualification. *See, e.g., Microsoft Corp. v. Immersion Corp.*, No. C07-936RSM, 2008 WL 682246 (W.D. Wash. Mar. 7, 2008) (slip copy).

B. Waiver

The Ninth Circuit has noted: “It is well settled that a former client who is entitled to object to an attorney representing an opposing party on the ground of conflict of interest but who knowingly refrains from asserting it promptly is deemed to have waived that right.” *Trust Corp. of Montana v. Piper Aircraft Corp.*, 701 F.2d 85, 87 (9th Cir. 1983). The same applies to current clients who sit on their rights.¹ What constitutes “promptly” depends heavily on the circumstances of a particular case. In *Trust Corp. of Montana*, for example, the trial court and the Ninth Circuit found a waiver where a former client waited roughly two and a half years to seek disqualification of a former lawyer as the trial approached. In *Paul E. Iacono Structural Engineer, Inc. v. Humphrey*, 722 F.2d 435, 442-43 (9th Cir. 1983), by contrast, the trial court and the Ninth Circuit found that a two-month delay did not constitute waiver. The Ninth Circuit in *Iacono* also noted that the party asserting waiver bears the burden of proof on that issue.

C. 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 depending on the particular circumstances involved. The Ninth Circuit summarized the considerations for mandamus relief in this context in *Cole v. U.S. District Court for the District of Idaho*, 366 F.3d 813, 816-17 (9th Cir. 2004):

“The rule is that a writ of mandamus may be used to review the disqualification of counsel. *See Christensen v. United States Dist. Court*, 844 F.2d 694, 697 & n. 5 (9th Cir. 1988). The reason is because the harm of such disqualification cannot be corrected with an ordinary appeal. *Id.* Whether a writ of mandamus should be granted is determined case-by-case, weighing the factors outlined in *Bauman v. United States Dist. Court*, 557 F.2d 650 (9th Cir. 1977). These are whether (1) the party seeking the writ has no other means, such as a direct appeal, of attaining the desired relief, (2) the petitioner will be damaged in a way not correctable on appeal, (3) the district court’s order is clearly erroneous as a matter of law, (4) the order is an oft-repeated error, or manifests a persistent disregard of the federal rules, and (5) the order raises new and important problems, or issues of law of first impression. *Id.* at 654-55. The *Bauman* factors should not be mechanically applied. *See Admiral Ins. Co. v. United States Dist. Court*, 881 F.2d 1486, 1491 (9th Cir. 1989). Evidence showing that all the *Bauman* factors are

¹ “Waiver” in this sense should be contrasted with situations in which the clients involved may have granted conflict waivers under the applicable RPCs. *See generally Avocent Redmond Corp. v. Rose Electronics*, 491 F. Supp.2d 1000, 1006-07 (W.D. Wash. 2007) (discussing conflict waivers in the disqualification context).

affirmatively presented by a case does not necessarily mandate the issuance of a writ, nor does a showing of less than all, indeed of only one, necessarily mandate denial; instead, the decision whether to issue the writ is within the discretion of the court. *Kerr v. United States Dist. Court*, 426 U.S. 394, 403, 96 S.Ct. 2119, 48 L.Ed.2d 725 (1976).” (Footnote omitted.); accord *Unified Sewerage Agency v. Jelco*, 646 F.2d 1339, 1343-44 (9th Cir. 1981) (applying the *Bauman* factors to mandamus review of an order denying disqualification).

III. 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. See generally *Sabrix, Inc. v. Carolina Cas. Ins. Co.*, No. CV-02-1470-HU, 2003 WL 23538035 at *1-*2 (D. Or. July 23, 2003) (unpublished). Most often, the professional rules employed are those of the forum state—but not always depending on relevant choice-of-law principles. The most common substantive grounds parties seeking disqualification assert are by far conflicts, typically current or former client conflicts. On occasion, however, other asserted ethics violations form the basis for disqualification motions.

A. Choice-of-Law

Under Local Rule 83.7(a), lawyers appearing in the District Court here must comply with the Oregon Rules of Professional Conduct.² Those rules include a choice-of-law provision, RPC 8.5(b):

“Choice of Law. In any exercise of the disciplinary authority of this jurisdiction, the Rules of Professional Conduct to be applied shall be as follows:

“(1) for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise; and

“(2) for any other conduct, the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct. A lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur.”³

The District Court has used the choice-of-law provision in the Oregon professional rules in deciding what state's substantive law to apply in disqualification. See, e.g., *Philin Corporation v. Westhood, Inc.*, No. CV-04-1228-HU, 2005 WL 582695 at *9-*10 (Mar. 11, 2005) (applying an earlier version of choice-of-law rules formerly found in the Oregon State Bar

²Federal district courts in Washington and Idaho have comparable local rules adopting those states' respective Rules of Professional Conduct for lawyers appearing before them.

³ Washington and Idaho have both adopted similar versions of RPC 8.5(b). The Washington and Idaho RPCs are available on their respective state bar web sites at www.wsba.org and www.state.id.us/isb.

Rules of Procedure). RPC 8.5(b) employs the same general approach used to assess the controlling law for lawyer civil liability outside the disciplinary context under the Oregon Court of Appeals' decision last year in *Spirit Partners, LP v. Stoel Rives LLP*, 212 Or. App. 295, 157 P.3d 1194 (2007).⁴

B. Conflicts

Asserted current or former client conflicts are by far the most common grounds for seeking disqualification of opposing counsel. *See, e.g., Admiral Ins. Co. v. Mason, Bruce & Girard, Inc.*, No. CV-02-818-HA, 2002 WL 31972159 (D. Or. Dec. 5, 2002) (unpublished) (assessing both); *Philin Corporation*, 2005 WL 582695 (same); *Smith v. Cole*, No. CV-05-372-AS, 2006 WL 1207966 (D. Or. Mar. 2, 2006) (magistrate's findings), 2006 WL 1280906 (D. Or. Apr. 28, 2006) (adoption of findings) (both unpublished). Current, multiple client conflicts are governed by RPC 1.7. Former client conflicts, in turn, are governed by RPC 1.9. In addition, RPC 1.8 governs business and personal conflicts and RPC 1.18 governs conflicts arising from prospective clients.

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. *Id.* In Oregon, that determination is a matter of state substantive decisional law rather than the RPCs. The leading case in Oregon on that point (cited, for example, in both *Admiral Ins.* and *Philin*) is *In re Weidner*, 310 Or. 757, 770, 801 P.2d 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 the client's subjective belief objectively reasonable under the circumstances. Both elements of the test must be met for an attorney-client relationship to exist. *Id.*⁵

Disqualification motions are also occasionally based on asserted imputed conflicts, such as claimed inadequacies in new-hire lateral screening (*see, e.g., Daines v. Alcatel, S.A.*, 194 F.R.D. 678 (E.D. Wash. 2000)) or claimed conflicts arising through sharing information between co-counsel or other associated counsel (*see, e.g., Avocent Redmond Corp. v. Rose Electronics, Inc.*, 516 F. Supp.2d 1199 (W.D. Wash. 2007)).

Although an extended discussion of Oregon conflict law is beyond the scope of this paper and the accompanying presentation, the Oregon State Bar's *Ethical Oregon Lawyer* addresses the standards for assessing whether an attorney-client relationship exists in Chapter 5 and current and former client conflicts in Chapter 9. The Oregon State Bar's formal ethics opinions, which are available on the OSB's web site at www.osbar.org, both interpret the Oregon RPCs and summarize relevant case law doing the same. Similar resources are available in Washington in the form of the Washington State Bar Association's *Legal Ethics Deskbook* and the WSBA's on-

⁴ For general choice-of-law principles in Washington and Idaho, see, respectively, *Zenaida-Garcia v. Recovery Systems Technology, Inc.*, 128 Wn. App. 256, 259-260, 115 P.3d 1017 (2005), and *Grover v. Isom*, 137 Idaho 770, 772-73, 53 P.3d 821 (2002).

⁵ Washington and Idaho employ similar formulations. *See Bohn v. Cody*, 119 Wn.2d 357, 832 P.2d 71 (1992); *Warner v. Stewart*, 129 Idaho 588, 930 P.2d 1030 (1997).

line database of formal (issued by the Board of Governors) and informal (issued by the Rules of Professional Conduct Committee) ethics opinions on its web site at www.wsba.org. Although Idaho does not have a resource comparable to the *Ethical Oregon Lawyer* or the *Legal Ethics Deskbook*, as noted earlier its RPCs and associated guidance are available on the Idaho State Bar's web site at www.state.id.us/isb. Unlike Washington and Idaho, Oregon has not adopted formal comments to its RPCs. Both the Oregon Supreme Court in case decisions and the OSB in formal ethics opinions, however, have looked to the comments to the American Bar Association's influential Model Rules of Professional Conduct, upon which Oregon's RPCs are patterned, for further interpretive guidance. The ABA Model Rules, the accompanying comments and the ABA's formal ethics opinions are available on the ABA Center for Professional Responsibility's web site at www.abanet.org/cpr.

C. Other Grounds for Disqualification

Although less common, decisions in the comparatively recent past around the Northwest examine, among others, the following grounds for possible disqualification: asserted violations of the "no contact" rule (RPC 4.2), *see, e.g., Jones v. Rabonco, Ltd.*, No. C03-3195P, 2006 WL 2401270 (W.D. Wash. Aug. 18, 2006) (unpublished); claimed violations of the lawyer-witness rule (RPC 3.7), *see, e.g., Microsoft v. Immersion Corp.*, 2008 WL 682246; alleged improper acquisition of an opponent's attorney-client communications (RPC 4.4), *see, e.g., Richards v. Jain*, 168 F.Supp.2d 1195 (W.D. Wash. 2001); and asserted improper contact with an opposing party's expert (RPC 3.4), *see, e.g., In re Firestorm 1991*, 129 Wn.2d 130, 916 P.2d 411 (1996).