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Applied Legal Ethics: Disqualifying Counsel in Idaho State and Federal Courts

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Disqualification is a long-standing remedy available to state and federal trial courts to regulate the conduct of counsel appearing before them.[1] The remedy of disqualification flows both from the courts' inherent authority over counsel and their ability to enforce the rights of parties to a proceeding. Disqualification is blend of court-made procedural law and substantive law in the form of the Rules of Professional Conduct. This article surveys both facets of disqualification law in Idaho's state and federal courts.

Procedural Law

Although courts in theory can exercise disqualification authority on their own motion, the far more common scenario in practice is for one of the parties to seek an order disqualifying opposing counsel.[2] The procedural rules governing motion practice generally in the court concerned apply with equal measure to disqualification. In addition, both state and federal courts have fashioned three rules specific to disqualification addressing standing, waiver and burden.

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. As the federal district court put it in *Greenfield v. City of Post Falls Municipality*, No. 2:13-cv-00437-CWD, 2013 WL 6388488 (D. Idaho Dec. 6,

2013) (unpublished) at *3: "[A moving party on a disqualification motion] must show that she either currently is or formerly was represented by . . . [the lawyer involved] . . . or, under Idaho R. Prof. Conduct 1.10, a member of his firm[.]" The principal exceptions are 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 where parties other than a current or former client may seek disqualification. Idaho's appellate courts have cautioned, however, that motions by someone other than a current or former client warrant heightened scrutiny to ensure that they are not simply being advanced as a litigation tactic. The Court of Appeals in *Weaver v. Millard*, 120 Idaho 692, 698, 819 P.2d 110 (Ct. App. 1991), outlined a test for standing in this latter scenario that the Supreme Court subsequently adopted in *Foster v. Traul*, 145 Idaho 24, 32-33, 175 P.3d 186 (2007) (quoting *Weaver*):

> "(1) Whether the motion is being made for the purposes of harassing the . . . [opposing party], (2) Whether the party bring the motion will be damaged in some way if the motion is not granted, (3) Whether there are any alternative solutions, or is the proposed solution the least damaging possible under the circumstances, and (4) Whether the possibility of public suspicion will outweigh any benefits that might accrue to continued representation."

Waiver. "Waiver" is sometimes used in its legal ethics sense that a client has executed a binding written waiver of an otherwise disqualifying conflict. In *Unified Sewerage Agency of Washington County v. Jelco, Inc.*, 646 F.2d 1339, 1345-46 (9th Cir. 1981), for example, the Ninth Circuit affirmed the trial court's

denial of a disqualification motion, in relevant part, because the client had consented to the adverse representation involved. More commonly, however, "waiver" in the disqualification context is used in its 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 the case concerned. In *Trust Corp. of Montana v. Piper Aircraft Corp.*, 701 F.2d 85, 87-88, (9th Cir. 1983), for example, the Ninth Circuit held that a two-year delay constituted waiver of a disqualification motion—but in *Image Technical Service, Inc. v. Eastman Kodak Co.*, 136 F.3d 1354, 1355 (9th Cir. 1998), the same court concluded that a two-year delay was not a waiver. Courts cast an especially skeptical eye on motions that are filed shortly before trial when based on information that was available long before. In *Sadid v. Idaho State University*, No. 4:11-cv-00103-BLW, 2013 WL 6388567 (D. Idaho Dec. 6, 2013) (unpublished), for example, the court denied a disqualification motion filed two weeks before trial that was based on deposition testimony taken in the case 18 months earlier.

Burden. In both state (*Weaver v. Millard*, 120 Idaho at 697) and federal (*Parkland Corp. v. Maxximum Co.*, 920 F. Supp. 1088, 1091 (D. Idaho 1996)) court, the moving party bears the burden of proof on disqualification. The Supreme Court noted in *Foster v. Traul* (145 Idaho at 32) that "[t]he decision to grant or deny a motion to disqualify counsel is within the discretion of the trial

court." This is the same standard used in federal court (*Unified Sewerage Agency of Washington County v. Jelco, Inc.*, 646 F.2d at 1351). Although many disqualification motions are decided on the briefs and supporting declarations, the trial court may hold an evidentiary hearing to help decide disputed facts. In *Balivi Chemical Corp. v. JMC Ventilation Refrigeration, LLC*, No. CV-07-353-S-BLW, 2008 WL 131028 (D. Idaho Jan. 10, 2008) (unpublished), 2008 WL 313792 (D. Idaho Feb. 1, 2008) (unpublished), for example, the timing of potentially overlapping representations was central to the disqualification issues involved and the court held an evidentiary hearing to resolve those fact questions before ultimately denying the motion.

Substantive Law

The Idaho Rules of Professional Conduct control the conduct of lawyers appearing in both Idaho's state (Idaho Bar Commission Rule 500) and federal (U.S. District Court Loc. Civ. R. 83.5(a), Loc. Cr. R. 1.1(f)) courts. Therefore, the RPCs effectively supply the substantive law on whether an ethics violation warranting disqualification has occurred. The substantive aspects of the RPCs applied in disqualification principally include conflicts and other asserted ethics violations that may impact the litigation involved.

Conflicts. Alleged current or former conflicts are by far the most common grounds for seeking disqualification of opposing counsel. *Wicklund v. Page*, No. CV 09-671-S-EJL-CWD, 2010 WL 2243614 (D. Idaho June 2, 2010)

(unpublished), is an example of the former and *Freiburger v. J-U-B Engineers, Inc.*, 141 Idaho 415, 111 P.3d 100 (2005), illustrates the latter. The focus with current client conflicts under RPC 1.7 in the disqualification context is usually on whether there is simultaneous representation by the law firm involved of clients whose interests are adverse. With former client conflicts under RPC 1.9, the focus is usually on whether the matter in which disqualification is sought is, in the phraseology of the rule, the "same or substantially related" to a matter the law firm involved handled earlier for the former client seeking disqualification. As noted earlier, the analysis in conflict-based motions may also turn on whether the client seeking disqualification granted a waiver (*Unified Sewerage Agency of Washington County v. Jelco, Inc.*, 646 F.2d at 1345-46) or whether an attorney-client relationship still exists (*Balivi Chemical Corp. v. JMC Ventilation Refrigeration, LLC*, 2008 WL 131028 at *2-*4). Similarly, lateral movement of lawyers who worked for a firm or agency can also trigger disqualification motions if the lawyer moves to a firm on the other side of a matter. In *United States v. Obendorf*, No. 1:15-cr-00254-BLW, 2016 WL 1595347 (D. Idaho Apr. 20, 2016) (unpublished), for example, the court examined whether a former assistant U.S. attorney who had gone into private practice had sufficient contact with the matter involved from his governmental work to create a former client conflict. *Foster v. Traul*, 145 Idaho 24, by contrast, assessed the adequacy of lateral-hire screening in defense of a disqualification motion.

Other Grounds. Although less common, disqualification motions are also sometimes predicated on other asserted violations of the professional rules or alleged discovery violations. *McNelis v. Craig*, No. 1-12-cv-00007-CWD, 2015 WL 1525903 (D. Idaho Apr. 2, 2015) (unpublished), *Saetrum v. Raney*, No. 1-13-425-WBS, 2014 WL 2155210 (D. Idaho May 22, 2014) (unpublished), and *Pesky v. United States*, No. 1:10-186-WBS, 2011 WL 3204707 (D. Idaho July 26, 2011) (unpublished), are all relatively recent illustrations of attempts at disqualification based on asserted violations of RPC 3.7's lawyer-witness rule. *Legault v. Amalgamated Sugar Co., LLC*, No. CV 03-210-E-LMB, 2005 WL 6733650 (D. Idaho Feb. 10, 2005) (unpublished), in turn, involved a request to use disqualification as a sanction for asserted improper conduct with witnesses.

Summing Up

The Idaho Court of Appeals in *Crown v. Hawkins Co., Ltd.*, 128 Idaho 114, 123, 910 P.2d 786 (Ct. App. 1996), noted that in the disqualification context "[t]he goal of the court should be to shape a remedy which will assure fairness to the parties and the integrity of the judicial process." With its court-centric focus, disqualification is a unique form of applied legal ethics.

ABOUT THE AUTHOR

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[1] Appellate courts also have the authority to disqualify but disqualification of appellate counsel is rare. *See, e.g., In re Marriage of Wixom and Wixom*, 332 P.3d 1063 (Wn. App. 2014) (disqualifying lawyer on appeal). Disqualification is not an exclusive remedy and the same conduct giving rise to disqualification may be subject to both regulatory discipline and civil damage claims. *See generally Damron v. Herzog*, 67 F.3d 211, 213 (9th Cir. 1995) (surveying remedies). Disqualification can also affect a lawyer's ability to claim attorney fees. *See, e.g., Kuhn v. Coldwell Banker Landmark, Inc.*, 150 Idaho 240, 256, 245 P.3d 992 (2010) (remanding to deny fees for work done after disqualification); *In re Greystone on Payette, LLC*, 410 B.R. 900, 903 (Bankr. D. Idaho 2009) (denying fees to disqualified counsel).

[2] *See generally Cole v. U.S. Dist. Court for Dist. of Idaho*, 366 F.3d 813 (9th Cir. 2004) (discussing *sua sponte* disqualification). When appropriate, nonparties are permitted to intervene for the purpose of seeking disqualification. *See, e.g., Oxford Systems, Inc. v. CellPro, Inc.,* 45 F. Supp.2d 1055 (W.D. Wash. 1999).