fucile & reising | LLP

September 2022 WSBA *Bar News Ethics & the Law* Column

Disqualification: The "Red Card" of Litigation Ethics

By Mark J. Fucile
Fucile & Reising LLP

As in soccer, a court may disqualify a lawyer or law firm from further participation in a case. Disqualification is often described as flowing from the inherent authority of a court to regulate the conduct of counsel appearing before it.[1] The procedural aspects of disqualification are largely court-made. The substantive grounds for disqualification, in turn, typically come from the Rules of Professional Conduct.[2] In this column, we'll survey both the procedural and the substantive elements of disqualification as applied in Washington's state and federal courts.[3]

Before we do, four qualifiers are in order.

First, we'll focus on disqualification in trial courts. Although appellate courts can and occasionally do disqualify counsel, it is much less frequent than in trial courts.[4]

Second, although disqualification is sometimes limited to individual lawyers,[5] the far more common practice is to disqualify entire law firms for the conduct of the lawyer-members involved.[6] By contrast, disqualification is not automatically imputed to co-counsel at separate firms and instead turns on the

particular conduct involved or knowledge actually acquired from the firm disqualified.[7]

Third, although disqualification is a significant remedy, it is not the only "bad thing" that can happen to lawyers and their law firms stemming from the conduct involved. Courts can impose other sanctions within the context of the case concerned[8] and the conduct involved may also lead to related civil claims[9] or regulatory discipline.[10]

Fourth, we'll focus primarily on civil litigation involving private clients. Disqualification of public officers, prosecuting attorneys, public defenders and judges often involve other specialized rules and procedures.[11]

Procedural

Although courts in theory can exercise disqualification authority *sua sponte*,[12] the far more common scenario in practice is that a party seeks an order disqualifying opposing counsel. The procedural rules governing motion practice generally in the court concerned apply with equal measure to disqualification.[13] Courts have also fashioned three areas of decisional law specific to disqualification 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.[14] If not a current party to the case involved, intervention is permitted at the discretion of the court for the limited purpose of seeking disqualification of a current or former lawyer or law firm.[15] Although courts have occasionally found standing by non-client opposing parties when the conduct of the lawyers involved impacts the fundamental fairness of the proceedings, standing on that basis is the exception rather than the rule.[16]

Waiver. When parties become aware of circumstances that may give rise to the remedy of disqualification, they generally must pursue that remedy promptly or risk losing it.[17] In the disqualification context, courts often use the term "waiver"[18] in the procedural sense of "estoppel" or "laches"—a party has impliedly relinquished its asserted right to seek disqualification through delay.[19] Courts' approaches to waiver in disqualification reflect both the traditional notion that procedural rights must generally be exercised in a timely fashion and a degree of practical skepticism if a party seeking disqualification waits until what it views as a more opportune time.[20] There is no uniform yardstick on how long is too long.[21] Rather, waiver turns on the specific facts of a given case.[22]

Appeal. Trial court orders granting or denying motions for disqualification are not immediately appealable as a matter of right.[23] Rather, interlocutory review may be available in state court and mandamus in federal court at the

discretion of the appellate court concerned.[24] Although interlocutory review is granted sparingly, it is usually the only practical path to timely appellate consideration.[25]

Substantive

Because the RPCs regulate the conduct of the lawyers appearing before courts, they also effectively form the substantive law of disqualification. Most disqualification motions turn on alleged conflicts and a smaller number involve other litigation conduct.

Conflicts. Although accurate statistics on the grounds for disqualification motions are not available, even a cursory electronic search quickly reveals that the majority involve asserted multiple-client conflicts. Because such conflicts presuppose a current or former attorney-client relationship, conflict decisions in the disqualification area often examine this question directly or variants such as whether an affiliate of a corporate group should be considered a client for conflict purposes.[26] With current client conflicts, the broad duty of loyalty reflected in RPC 1.7 can mean (absent an enforceable waiver) that if a court finds a current client relationship between the movant and the law firm, disqualification often follows.[27] With former clients, the narrowed duties of loyalty and confidentiality reflected in RPC 1.9 usually result in disqualification proceedings that revolve

around two issues: (1) whether the interests of the current client are materially adverse to those of the former client; and (2) whether the current matter is the "same or substantially related" to a matter the firm handled in the past for the former client.[28]

Litigation Conduct. Although less common, disqualification motions are also occasionally predicated on litigation conduct—such as asserted improper invasion of an opponent's privilege or work product under RPC 4.4(a) that proscribes "methods of obtaining evidence that violate the legal rights" of another.[29] When used in this vein, disqualification is essentially a form of discovery sanction.[30]

Summing Up

A disqualification order may not be quite as colorful as soccer's "red card." For the law firms and parties involved, however, disqualification can have profound consequences both for the litigation at hand and beyond the courthouse.

ABOUT THE AUTHOR

Mark J. Fucile of Fucile & Reising LLP handles professional responsibility, risk management and attorney-client privilege issues for lawyers, law firms and corporate and governmental legal departments throughout the Northwest. Mark has chaired both the WSBA Committee on Professional Ethics and its predecessor, the WSBA Rules of Professional Conduct Committee. Mark has

served on the Oregon State Bar Legal Ethics Committee and is a member of the Idaho State Bar Section on Professionalism & Ethics. Mark writes the Ethics Focus column for the Multnomah (Portland) Bar's *Multnomah Lawyer*, the Ethics & the Law column for the WSBA *Bar News* and is a regular contributor on legal ethics to the WSBA *NWSidebar* blog. Mark is the editor-in-chief and a contributing author for the WSBA *Legal Ethics Deskbook* and a principal editor and contributing author for the OSB *Ethical Oregon Lawyer* and the WSBA *Law of Lawyering in Washington*. Before co-founding Fucile & Reising LLP in 2005, Mark was a partner and in-house ethics counsel for a large Northwest regional firm. He also teaches legal ethics as an adjunct for the University of Oregon School of Law at its Portland campus. Mark is admitted in Oregon, Washington, Idaho, Alaska and the District of Columbia. He is a graduate of the UCLA School of Law. Mark's telephone and email are 503.224.4895 and Mark@frllp.com.

---

[1] *See, e.g., In re Marriage of Wixom and Wixom*, 182 Wn. App. 881, 905, 332 P.3d 1063 (2014) ("[S]everal Washington decisions imply that a court has inherent authority to disqualify an attorney."); *Kaiser Steel Corp. v. Frank Coluccio Const. Co.*, 785 F.2d 656, 658 (9th Cir. 1986) ("[T]he district court generally must control the professional conduct of attorneys who practice before it.").

[2] The Washington RPCs have been adopted by local rule in the United States District Courts for the Western and Eastern Districts of Washington. *See* Western District L.C.R. 83.3(a); Eastern District L.Civ.R. 83.3(a).

[3] With counsel admitted *pro hac vice*, courts may also impose the disqualification-equivalent of termination of a lawyer's local admission. *See generally Hallmann v. Sturm Ruger Co.*, 31 Wn. App. 50, 639 P.2d 805 (1982) (discussing standards for revoking *pro hac vice* admission); *Cole v. U.S. Dist. Court for Dist. of Idaho*, 366 F.3d 813 (9th Cir. 2004) (same).

[4] *See, e.g., In re Marriage of Wixom and Wixom*, *supra*, 182 Wn. App. 881 (disqualifying counsel at the appellate level). Disqualification is also a potential remedy in other trial-like forums. *See, e.g., In re Arbitration Between Shulkin Hutton & Bucknell, Inc., P.S. v. Bucknell*, 1997 WL 221663 (Wn. App. May 5, 1997) (unpublished) (discussing disqualification in context of arbitration).

[5] *See, e.g., Ivy v. Outback Steakhouse, Inc.*, 2008 WL 11506622 (WD Wash Apr 14, 2008) (unpublished) (disqualifying lawyer as trial counsel where lawyer would be necessary witness at trial). In the analogous context of a bar proceeding, the Washington Supreme Court noted that a disqualification from being trial counsel under the lawyer-witness rule, RPC 3.7, is better thought of as a limitation on the scope of a lawyer's role at trial rather than disqualification from the case as a whole. *See In re Pfefer*, 182 Wn.2d 716, 725-26, 344 P.3d 1200 (2015). *See also* CR 43(g) (generally precluding lawyer-witness from being trial counsel in a jury case).

[6] Many disqualification motions involve asserted conflicts and RPC 1.10(a) generally imputes a law firm lawyer's conflicts to the lawyer's firm as a whole. *See, e.g., REC Solar Grade Silicon, LLC v. Shaw Group, Inc.*, 2010 WL 11561252 at *7 (E.D. Wash. Nov. 5, 2010) (unpublished) (citing RPC 1.10(a) in disqualifying law firm for conflict arising in firm's London office). Similarly, the asserted conflicts or other conduct may involve non-lawyer staff for whom the law firm is responsible. *See, e.g., Daines v. Alcatel, S.A.*, 194 F.R.D. 678 (E.D. Wash. 2000) (seeking disqualification of law firm based on asserted conflicts of lateral-hire paralegal).

[7] *See generally First Small Business Inv. Co. of California v. Intercapital Corp. of Oregon*, 108 Wn.2d 324, 738 P.2d 263 (1987) (discussing standards for disqualification of co-counsel).

[8] *See, e.g., Richards v. Jain*, 168 F. Supp.2d 1195 (W.D. Wash. 2001) (granting motion for protective order directing the return of improperly obtained documents in addition to disqualifying the law firm involved); *see generally In re Firestorm 1991*, 129 Wn.2d 130, 916 P.2d 411 (1996) (discussing disqualification in the context of sanctions generally).

[9] *See, e.g., Cotton v. Kronenberg*, 111 Wn. App. 258, 44 P.3d 878 (2002) (disqualified lawyer later sued on theories of legal malpractice, breach of fiduciary duty and violation of the Consumer Protection Act based on same set of underlying facts).

[10] *See, e.g., In re Kronenberg*, 155 Wn.2d 184, 117 P.3d 1134 (2005) (subsequent disbarment of the lawyer in *Cotton* arising from the same circumstances).

[11] *See, e.g., State v. Nickels*, 195 Wn.2d 132, 456 P.3d 795 (2020) (addressing disqualification of elected prosecutors and associated imputation to their offices); *see also* RPC 1.11, cmt. 2 (noting *Nickels*).

[12] *See, e.g., In re Marriage of Wixom and Wixom, supra*, 182 Wn. App. at 904 (noting that court can disqualify counsel *sua sponte*).

[13] *See, e.g.*, King County Superior Court L.C.R. 7 (civil motions); U.S. District Court/Western District of Washington L.C.R. 7 (same). Courts have struggled with who bears the burden of proof on disqualification motions—especially those arising from asserted conflicts. The U.S. District Court in Seattle, for example, noted recently that "courts in this district typically place the burden on the firm whose disqualification is sought to show that no conflict exists." *United States Fire Insurance Company v. Icicle Seafoods, Inc.*, 523 F. Supp.3d 1262, 1268 (W.D. Wash. 2021). By contrast, the Washington Supreme Court also recently observed that "[w]e join the majority of jurisdictions that place the burden of showing that matters are substantially related on the former client." *Plein v. USAA Casualty Insurance Company*, 195 Wn.2d 677, 687, 463 P.3d 728 (2020). In most situations, these competing views effectively blur because both sides typically proffer evidence and arguments supporting their respective positions.

[14] *See, e.g., Burnett v. State Dept. of Corrections*, 187 Wn. App. 159, 170, 349 P.3d 42 (2015) (discussing standing in the disqualification context); *FMC Technologies, Inc. v. Edwards*, 420 F. Supp.2d 1153, 1155-57 (W.D. Wash. 2006) (same). Although some federal decisions reference Article III of the U.S. Constitution in discussing standing in the disqualification context, standing is more often addressed in terms of whether the movant simply has a requisite stake in the outcome or right being affected. *See Hosseinzadeh v. Bellevue Park Homeowners Association*, 2020 WL 3271819 at *2 n.1 (W.D. Wash. June 17, 2020) (unpublished) (noting differing views of standing).

[15] *See, e.g., Oxford Systems, Inc. v. CellPro, Inc.*, 45 F. Supp.2d 1055 (W.D. Wash. 1999) (permitting intervention and disqualifying counsel).

[16] *See, e.g., Cotton v. Kronenberg, supra,* 111 Wn. App. at 263 (prosecutors moved to disqualify defense counsel with conflicts to protect defendant's Sixth Amendment rights); *Richards v. Jain*, *supra*, 68 F. Supp.2d 1195 (disqualifying law firm as sanction for improper invasion of opponent's privilege).

[17] *See generally Eubanks v. Klickitat County*, 181 Wn. App. 615, 620, 326 P.3d 796 (2014) (compiling cases).

[18] Disqualification decisions also sometimes use "waiver" in its classic ethics sense of a written waiver of an otherwise disqualifying conflict. *See, e.g., R.O. by and through S.H. v. Medalist Holdings, Inc.*, 2021 WL 672069 (Wn. App. Feb. 22, 2021) (unpublished) (examining enforceability of waiver in disqualification context).

[19] *See generally Eubanks v. Klickitat County*, *supra*, 181 Wn. App. at 620.

[20] *Id*.

[21] *Contrast Trust Corp. of Montana v. Piper Aircraft Corp.*, 701 F.2d 85, 87-88 (9th Cir. 1983) (two-year delay constituted waiver) with *Image Technical Service, Inc. v. Eastman Kodak Co.*, 136 F.3d 1354, 1355-57 (9th Cir. 1998) (two-year delay not waiver).

[22] As with other affirmative defenses, the party asserting waiver bears the burden of proof on that issue. *See Paul E. Iacono Structural Engineer, Inc.*, 722 F.2d 435, 443 (9th Cir. 1983) (classifying waiver as a defense of "avoidance" and putting the burden on the party asserting it).

[23] *See Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 379, 101 S. Ct. 669, 66 L. Ed.2d 571 (1981) (holding order denying disqualification lacked "finality" for immediate appeal); *accord Richardson-Merell, Inc. v. Koller*, 472 U.S. 424, 440-41, 105 S. Ct. 2757, 86 L. Ed.2d 340 (1985) (same holding as to orders granting disqualification).

[24] *See, e.g., First Small Business Inv. Co. of California v. Intercapital Corp. of Oregon, supra*, 108 Wn.2d at 328 (discretionary review); *Cole v. U.S. Dist. Court for Dist. of Idaho*, supra, 366 F.3d at 816-18 (mandamus). Depending on the circumstances, disqualified lawyers may have standing to seek appellate review. *See Harris v. Griffith*, 2 Wn. App.2d 638, 646, 413 P.3d 51 (2018) (discussing lawyer standing).

[25] *See, e.g., RWR Management v. Citizens Realty Company*, 133 Wn. App. 265, 280, 135 P.3d 955 (2006) ("The [trial] court's . . . [disqualification] decision was not presented for discretionary appellate review. Consequently, we question the viability of the issue now that the matter has been tried with able counsel.").

[26] *See, e.g., Oxford Systems, Inc. v. CellPro, Inc.*, *supra*, 45 F. Supp.2d 1055 (examining whether movant was current client of law firm); *Cascade Yarns, Inc. v. Knitting Fever, Inc.*, 2010 WL 11442917 (W.D. Wash. Aug. 30, 2010) (unpublished) (examining whether movant had been a client of law firm); *Atlantic Specialty Insurance Company v. Premera Blue Cross*, 2016 WL 1615430 (W.D. Wash. Apr. 22, 2016) (unpublished) (examining whether law firm represented corporate group of related affiliates). For the general test on whether an attorney-client relationship exists, *see Bohn v. Cody*, 119 Wn.2d 357, 363, 832 P.2d 71 (1992) (examining client's subjective belief and whether that is objectively reasonable under the circumstances).

[27] *See, e.g., Avocent Redmond Corp. v. Rose Electronics*, 491 F. Supp.2d 1000 (W.D. Wash. 2007) (disqualifying law firm after finding current attorney-client relationship); *Jones v. Rabanco, Ltd.*, 2006 WL 2237708 (W.D. Wash. Aug. 3, 2006) (unpublished) (same).

[28] See, e.g., *Plein v. USAA Casualty Insurance Company*, *supra*, 195 Wn.2d 677 (concluding no substantial relationship and reversing disqualification); *Oxford Systems, Inc. v.*

CellPro, Inc., supra, 45 F. Supp.2d 1055 (finding substantial relationship and disqualifying). *See generally* ABA Formal Op. 497 (2021) (conflicts involving materially adverse interests).

[29] *See, e.g., Richards v. Jain, supra*, 168 F. Supp.2d 1195 (disqualification for improper invasion of privilege); *In re Firestorm 1991, supra*, 129 Wn.2d 130 (reversing disqualification while discussing it as a potential remedy for improper invasion of work product).

[30] *See Foss Maritime Co. v. Brandewiede*, 190 Wn. App. 186, 359 P.3d 905 (2015) (remanding disqualification order based on finding of improper invasion of privilege to trial court for further sanctions analysis).