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## **Federal Court Rules Tardy Disqualification Motion Waived**

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The federal district court in Seattle recently issued a pointed reminder on disqualification motions: move promptly or risk waiver. *Olson Kundig, Inc. v. 12th Avenue Iron, Inc.*, 2022 WL 14664715 (W.D. Wash. Oct. 25, 2022) (unpublished), involved patent and trademark claims between the plaintiff designer and the defendant manufacturer. The plaintiff's law firm had done transactional work in the past for the defendant, but that work had concluded and the defendant was a former client of the law firm.

When the law firm sent a termination letter on the plaintiff's behalf in April of this year to the defendant, the defendant's current lawyer suggested that the plaintiff's law firm had a former client conflict. The plaintiff's law firm disagreed—responding that the earlier work was unrelated. After that initial exchange, the plaintiff filed a lawsuit in June, the parties attempted mediation and substantial motion practice followed. After losing the round of motions, the defendant filed a motion to disqualify the plaintiff's law firm in late September—raising the same arguments it had in April.

The plaintiff's law firm again contended that the work that it had done for the defendant was unrelated to the present dispute and, therefore, no former client conflict existed under Washington RPC 1.9. The law firm also argued that

the defendant had waived its right to seek disqualification by not timely raising the issue with the court. The court agreed that the defendant had waived its motion through delay and, as a result, never reached the merits.

The court succinctly summarized its view:

During the five months between May 6 and September 22, the parties negotiated through counsel, participated in a mediation through counsel, held a Federal Rule of Civil Procedure 26(f) conference between counsel, and fully briefed motions for preliminary injunction and to dismiss. . . Indeed, as . . . [the plaintiff] . . . points out, . . . [the defendant] . . . did not move to disqualify until after mediation failed and the court granted . . . [the plaintiff's] . . . motion for a preliminary injunction . . . In this context, the court finds the disqualification motion to be a thinly veiled litigation tactic.

*Id.* at \*3.

Although there is no uniform standard for waiver in the disqualification context, *Olson Kundig* illustrates that seeking disqualification sooner is generally better than later.

## **ABOUT THE AUTHOR**

Mark J. Fucile of Fucile & Reising LLP advises lawyers, law firms and legal departments throughout the Northwest on professional responsibility and risk management. 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 a contributing author and the editor-in-chief for the WSBA *Legal Ethics Deskbook*

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