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Applied Legal Ethics: Disqualification in Washington Courts

By Mark J. Fucile
Fucile & Reising LLP

When we think of the regulatory aspects of law practice, discipline as enforced through the Bar Association usually comes to mind. Disqualification, however, is an equally long-standing and often more direct way that clients and other litigants enforce the Rules of Professional Conduct. In this column, we'll look at this unique form of "applied legal ethics." Disqualification is a blend of procedural law supplied by the courts and substantive law supplied by the RPCs. We'll survey both as applied in Washington courts.

Disqualification Procedure

Although courts in theory can exercise disqualification authority on their own motion, the far more common scenario in practice is that one of the parties seeks an order disqualifying opposing counsel. 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 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 FMC Technologies, Inc. v. Edwards*, 420 F.Supp.2d 1153, 1155-58 (W.D. Wash. 2006). If not a current party to the case involved, intervention is

permitted at the discretion of the trial court for the limited purpose 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, 1058 (W.D. Wash. 1999). Exceptions occur, however, 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 in civil litigation where parties other than a current or former client may seek disqualification. *See, e.g., Barbee v. Luong Firm, P.L.L.C.*, 126 Wn. App. 148, 107 P.3d 762 (2005) (lawyer-witness); *Richards v. Jain*, 168 F.Supp.2d 1195 (W.D. Wash. 2001) (discovery).

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., Avocent Redmond Corp. v. Rose Electronics*, 491 F.Supp.2d 1000, 1006-07 (W.D. Wash. 2007). More commonly, however, "waiver" is used in its classic procedural sense that a party is implied to have relinquished an asserted right through delay or other conduct running counter to that right. As such, waiver turns heavily on the facts of an individual case. *Contrast Trust Corp. of Montana v. Piper Aircraft Corp.*, 701 F.2d 85, 87-88, (9th Cir. 1983) (two year delay held waiver) *with Image Technical Service, Inc. v. Eastman Kodak Co.*, 136 F.3d 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 F.2d 435, 442-43 (9th Cir. 1983).

Appeal. Trial court orders granting or denying motions for disqualification are not immediately appealable as a matter of right. *See First Small Business Inv. Co. of California v. Intercapital Corp. of Oregon*, 108 Wn.2d 324, 328, 738 P.2d 263 (1987) (discretionary review); *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). Discretionary review may be available in state court and mandamus may be available prior to entry of a final judgment in federal court, but each is used sparingly by the appellate courts. *See First Small Business*, 108 Wn.2d at 328; *Cole v. U.S. District Court*, 366 F.3d 813, 816-18 (9th Cir. 2004). At the same time, this discretionary remedy is often the only practical path available. *See RWR Management, Inc. v. Citizens Realty Co.*, 133 Wn. App. 265, 279-280, 135 P.3d 955 (2006) (noting the practical futility of appeal of disqualification after the case has been tried by able replacement counsel).

Substantive Disqualification Law

The RPCs control the professional conduct of lawyers appearing in both Washington's state and federal courts. *See* GR 1 (state court); U.S. District Court, Western District GR 2(e); U.S. District Court, Eastern District LR 83.3(a).

Therefore, the RPCs supply the substantive law on whether an ethics violation warranting disqualification has occurred. The substantive aspects of the RPCs applied in disqualification include choice-of-law, conflicts and other asserted ethics violations that may impact the litigation involved.

Choice-of-Law. The 2006 amendments to the RPCs included a choice-of-law provision, RPC 8.5(b). Under that provision, litigation is most often controlled by the law of the forum. In some instances where specific conduct or its predominant effect occurred in another jurisdiction, however, the other state's substantive law may apply using Washington's choice-of-law provision.

Conflicts. Asserted current or former conflicts are by far the most common grounds for seeking disqualification of opposing counsel. *See, e.g., Oxford Systems, Inc. v. CellPro, Inc.,* 45 F.Supp.2d 1055 (disqualification sought based on asserted current client conflict); *FMC Technologies, Inc. v. Edwards,* 420 F.Supp.2d 1153 (disqualification sought based on asserted former client conflict). 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 conflict 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 Washington, that question is a matter of state substantive decisional law rather

than the RPCs. The leading case on that point is *Bohn v. Cody*, 119 Wn.2d 357, 363, 832 P.2d 71 (1992). Under *Bohn*, the test for determining whether an attorney-client relationship exists (or existed) is twofold. The first element 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 block "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., Oxford Systems, Inc. v. CellPro, Inc.*, 45 F.Supp.2d 1055 (whether periodic client was a current client); *Avocent Redmond Corp. v. Rose Electronics*, 491 F.Supp.2d 1000 (whether current client conflict existed by virtue of representation of affiliated corporation). 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., State v. Hunsaker*, 74 Wn. App. 38, 41-48, 873 P.2d 540 (1994) (finding no substantial relationship); *FMC Technologies, Inc. v. Edwards*, 420 F.Supp.2d 1153 (finding a substantial relationship). 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., First Small Business*, 108 Wn.2d 324; *Avocent Redmond Corp. v. Rose Electronics, Inc.*, 516 F.Supp.2d 1199 (W.D. Wash. 2007)).

Other Grounds. Although less common, disqualification motions are also predicated on other asserted violations of the professional rules, such as: claimed violations of the lawyer-witness rule (RPC 3.7), *see, e.g., Barbee v. Luong Firm, P.L.L.C.*, 126 Wn. App. 148; and alleged discovery violations, particularly those that intrude on opposing counsel's attorney-client privilege or work product protection (RPC 4.4), *see, e.g.*, *In re Firestorm 1991*, 129 Wn.2d 130, 916 P.2d 411 (1996) (unauthorized contact with opposing expert); *Richards v. Jain*, 168 F.Supp.2d 1195 (unauthorized access to opponent's privileged communications).

Summing Up

Disqualification is a unique blend of procedural and substantive law that applies legal ethics precepts directly in litigation. This form of "self help" does not foreclose other relief, such as bar discipline or breach of fiduciary duty claims (*see, e.g., In re Kronenberg*, 155 Wn.2d 184, 117 P.3d 1134 (2005) (disciplinary proceeding against disqualified lawyer); *Cotton v. Kronenberg*, 111 Wn. App. 258, 44 P.3d 878 (2002) (breach of fiduciary duty claim for same conduct)), but it

offers a very direct remedy to remove opposing counsel for violations of the RPCs.

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.