Few things are worse for an attorney than getting a new big matter, starting work on it, and then facing a motion to disqualify. At that point, the attorney is put in the awkward position of either explaining to the client why he or she should pay more money to keep the attorney, or absorbing the fees associated with defending the motion to disqualify.

Motions to disqualify are far from rare occurrences. In recent months, a number of high-profile disqualification motions have been reported. Many disqualification motions are well-founded. Others are nothing more than a litigation tactic, forcing attorneys to scramble to protect valued client relationships. Significantly, the increasing mobility of lateral attorneys (with attorneys rarely spending their entire legal careers at a single law practice or firm) has raised issues that can serve as the basis of a motion to disqualify.

Disqualification motions implicate the most important duties that an attorney owes a client: the duties of confidentiality and loyalty. Under the Colorado Rules of Professional Conduct (Colorado Rules or Colo. RCP), an attorney must safeguard client confidences and secrets, subject to a few exceptions. The attorney is also obligated to elevate the client’s interests above the interests of the attorney and the law firm. Disqualification motions put these obligations directly at issue.

Courts differ on how they address motions to disqualify, especially because such motions are at times simply a litigation tactic by an opposing party in search of a strategic advantage. Additionally, courts are usually reluctant to interfere with a client’s choice of counsel unless the conflict is real and there are few options other than to grant disqualification.

Courts also appear to distinguish between conflicts based on multiple representations and those based on successive representations. After all, parties filing disqualification motions based on multiple representation conflicts are typically strangers to the attorney–client relationship.

The far more common motion to disqualify involves a former client, either of the law firm or of an individual attorney (who may have recently joined the firm). In those circumstances, courts are generally protective of confidences or secrets that the law firm or attorney may possess or to which the firm or attorney has access as a consequence of either the prior or the existing representation. According to the Colorado Supreme Court, however, a court “may not disqualify counsel on the basis of speculation or conjecture.” The moving party’s burden for a motion to disqualify is satisfied only when “the motion to disqualify sets forth specific facts that ‘point to a clear danger that either prejudices counsel’s client or his adversary.”

Conflict violations are not always the focal point for resolution of a motion to disqualify. As the Colorado Supreme
Court has noted, “[v]iolation of an ethical rule, in itself, is neither a necessary nor a sufficient condition for disqualification,” although there typically must be evidence of a violation or potential violation of “attorney ethical proscriptions,” such as those centered on the duties of loyalty and fairness or those intended to protect the integrity of the process.\textsuperscript{8} Often, motions to disqualify turn on the risk that a client’s former attorney or law firm might be able to use against the client the confidences or secrets gained during the prior representation. This is because it “must be presumed” that a client shared confidences with its attorney pursuant to the attorney–client relationship.\textsuperscript{9} Appreciating this distinction is important to successfully making or defeating a motion to disqualify.

In assessing motions to disqualify based on conflicts, Colorado courts also consider (1) a client’s preference for a particular counsel, (2) the client’s right to confidentiality in communications with his or her attorney, (3) the integrity of the judicial process, and (4) the nature of the particular conflict of interest involved.\textsuperscript{10} Below are some important concepts that have emerged in the context of motions to disqualify.\textsuperscript{11}

“Substantially Related” Matters

The Colorado Rules do not bar attorneys from representing current clients against former clients. Instead, Colo. RPC 1.9(a) provides that

> [a] lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person’s interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing. Colo. RPC 1.9 does not define a “substantially related matter,”

although Comment 3 to that Rule provides some context:

> Matters are “substantially related” for purposes of this Rule if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client’s position in the subsequent matter.

More Than “Playbook Knowledge”

Frequently, a former client accuses the attorney of having “insider information” regarding the client that does not rise to the level of a client confidence. Indeed, even if the attorney does not possess any direct information regarding the present lawsuit or transaction, the client may say that the attorney understands how the client thinks and acts. The attorney may know the client’s bottom line for settlement or how the client prefers to approach litigation. This is often referred to as “playbook knowledge”—the attorney knows the client’s paths and approaches.

As with the “substantial relationship” test, whether an attorney’s playbook knowledge is sufficient for disqualification is heavily dependent on the facts. Thus, there is no bright-line rule or test to determine whether an attorney should be disqualified because of her or his playbook knowledge. However, Comment 3 to Colo. RPC 1.9 sets a minimum baseline: “In the case of an organizational client, general knowledge of the client’s policies and practices ordinarily will not preclude a subsequent representation.”

This comment makes clear that attorneys are permitted, under some circumstances, to engage in representations that
are adverse to a former client. Possessing “general knowledge” about a client may not, by itself, be enough for disqualification. Typically, a former client seeking to disqualify a former attorney from representing an opposing party must identify specific, cogent information that the attorney possesses and show that the information is confidential and implicates the duty of loyalty.

Attorneys should not assume that possession of mere playbook knowledge precludes disqualification. Attorneys should be aware, however, that clients can make a successful case for disqualifying attorneys who had a greatly invested role with the organizational client or where the playbook knowledge is uniquely and particularly relevant to the new representation.

Avoiding the Motion to Disqualify

The best way to deal with motions to disqualify is to prevent them. Two important pre-motion strategies are effective. First, identify and resolve potential conflicts, including both multiple and successive representations, before undertaking a representation or hiring a lateral. Where a conflict exists, an effective written consent is the best defense to a motion to disqualify.

Second, take effective steps to mitigate, if not eliminate, risks that a former client’s confidences and secrets might be accessible to attorneys working on a matter involving the former client. Increasingly, courts nationwide have recognized and accepted timely, effective ethics screens as a positive factor for permitting an attorney to continue the representation, although sometimes a screen is not enough to avoid the ramifications of an imputed conflict. Nonetheless, if the attorneys choose to employ a screen, it is important that it be erected before the involvement of the conflicted attorney in the new representation.

Responding to a Motion to Disqualify

Upon receiving a motion to disqualify, the attorney should promptly notify the client. Attempting to defeat the motion without advising the client is not an acceptable solution.

In addition, if the motion is made by a former client, attorneys should consider providing notice of a potential circumstance to their legal malpractice insurer. Such motions are sometimes followed by either a grievance or a legal malpractice claim.

Finally, assess whether the firm or different counsel should defend the motion to disqualify. Independent counsel, free from the suggestion of economic self-interest, often can more effectively than the attorney press the case for allowing the client to keep its counsel of choice.

Conclusion

Attorneys understandably may feel apprehensive about the threat of a motion to disqualify, given the potential risk and loss of work. However, by understanding the underpinnings of this ethical issue, attorneys will be better prepared to
anticipate, respond to, or even avoid motions to disqualify.

Notes


2. Colo. RPC 1.6.


4. People v. Nozolino, 298 P.3d 915, 919 (Colo. 2013) (“Disqualification of a party’s chosen attorney is an extreme remedy and is only appropriate where required to preserve the integrity and fairness of the judicial proceedings.”) (citation omitted).

5. See, e.g., People v. Shari, 204 P.3d 453, 457 (Colo. 2009) (distinguishing between duties to current clients under Colo. RPC 1.7 and to former clients under Colo. RPC 1.9).


7. Id. (quoting People ex rel. Woodard v. Dist. Ct., 704 P.2d 851, 853 (Colo. 1985)).


10. Shari, 204 P.3d at 460-62. See also Harlan, 54 P.3d at 877 (the Court noted that “[i]n determining whether disqualification is warranted ‘the critical question is whether the litigation can be conducted in fairness to all parties’” and explained that “[d]isqualification should not be imposed unless the claimed misconduct in some way ‘taints the trial or legal system’) (quoting Fed. Deposit Ins. Co. v. Isham, 782 F.Supp. 524, 528 (D.Colo. 1992)).

11. By far the majority of successful motions to disqualify are brought on the basis of a conflict of interest with a former or concurrent client or imputation, but attorneys should also be aware that successful motions to disqualify have been brought on the following bases, among others: (1) lawyer as witness, (2) appearance of impropriety, (3) receipt of confidential data, (4) personal interest, (5) violation of the no contact rules, and (6) misconduct with a witness. See Swisher, “The Practice and Theory of Lawyer Disqualification,” 27 Geo. J. Legal Ethics 71, 77 (Winter 2014).


13. See People v. Perez, 201 P.3d 1220, 1246 n.11 (Colo. 2009).
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