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Practical Advice to Address the Rise in Attorney Disqualification Motions

It seems as though every day there is a story in the legal news about a well-known law firm being faced with a disqualification motion. While disqualification motions are being filed with more frequency, that is only half the story.[1]

Such motions are often filed under seal – either by counsel seeking to avoid publicity or clients who do not want to air their dirty laundry (such as employment discrimination claims, white collar criminal matters, etc.) in a public forum. Additionally, law firms may quietly withdraw when initially faced with a well-grounded disqualification motion.

When a lateral partner moves to a competitor, there is a risk of disqualification motions being filed by the partner's former clients, who may become adverse to the new firm. However, the risk may not be realized unless the new client engages in litigation with the lateral partner's prior client, possibly months or years later.

Disqualification motions tend to be more prevalent in intellectual property litigation, particularly in the bioscience and chip technology sectors, because of the relatively small number of practitioners in those highly technical areas.[2]

Given the frequency of corporate – and especially intellectual property – litigation, disqualification motions are often venued in Delaware courts. The state has well-developed law on disqualification and, on balance, is somewhat hostile to such motions.

Delaware is generally less concerned about whether a conflict of interest constitutes an ethics violation, which can be raised in a bar complaint. Rather, the focus is on whether the conflict undermines the legitimacy of the process and causes actual harm to the client.

The risk of disqualification motions can be considerable for clients engaged in high-stakes litigation, including losing their counsel of choice who are familiar with the case and having to retain successor attorneys to get up to speed in a complex matter.

Disqualification can likewise lead to a claim for legal malpractice or breach of fiduciary duty, as illustrated in the April 2022 decision of *RevoLaze LLC v. Dentons* in the Eighth Appellate District of the Ohio Court of Appeals.[3] In the *Dentons* case, the law firm's primary sin allegedly was not telling the client about the risk of disqualification early in the attorney-client relationship.

1 Many of the ideas in this article are from a panel that the author moderated in March of 2024 at Hinshaw & Culbertson LLP's 23rd annual Legal Malpractice and Risk Management Conference on "The Recent Explosion in Disqualification Motions" with panelists John Villa, a prominent legal malpractice litigator from Williams & Connolly, and Laura Giokas, the general counsel at BCLP.

2 For more information see "CONFERENCE REPORT: Stay Ahead of Potential Disqualification Motions."

3 *RevoLaze LLC v. Dentons US LLP,* 2022-Ohio-1392, 191 N.E.3d 475 (Ct. App.).

From a risk management perspective, even when a law firm concludes that a conflict does not exist, it should consider disclosing any issue to the client, which could potentially trigger a disqualification motion, and explain that while the firm does not believe a conflict exists, the firm wants the client to be aware of the issue and offer to discuss any questions or concerns the client may have. That step prevents the client from later claiming that had it known of a conflict, it would have made a different decision.

Disqualification motions can have profound financial implications for law firms that earn large fees in complex and protracted litigation, particularly in the intellectual property field. Thus, law firms seeking to preserve attorney-client relationships in high-profile cases may choose to pay outside counsel themselves to oppose disqualification motions. Alternatively, in close cases of disqualification, clients may be willing to pay the attorney's fees to retain access to their counsel of choice.

To reduce the risk of disqualification motions, some law firms are proactively including advance conflict waivers in their engagement letters. Such waivers are more likely to be effective when dealing with a sophisticated client.[4]

Two recent cases – *IBM Corp. v. Micro Focus (US) Inc.,* decided in May 2023 by the U.S. District Court for the Southern District of New York, and *SuperCooler Technologies Inc. v. The Coca-Cola Co.,* decided in July 2023 by the U.S. District Court for the Middle District of Florida[5] – suggest that such prior consent, obtained via a well drafted advance conflict waiver, can be effective in opposing disqualification.

Law firms need to be aware of the types of conflicts that most often lead to disqualification and the types of attorneys who may be affected.

These two cases identify two elements of an effective prospective conflict waiver: (1) a description of the types of conflicts that might foreseeably arise in the future, and (2) the terms that would allow the law firm to undertake adverse representation that is not substantially related to a prior representation of the client, including taking steps to protect the client's confidential information.

Another risk management best practice is to identify and analyze potential conflicts of interest at the onset of the attorney-client relationship. This is a labor-intensive process that involves reviewing attorney time records and interviewing lawyers to determine the scope of the prior representation and what confidential information the attorneys and law firm may possess.

If a law firm believes that a former client could raise a conflict, it is advisable to tell the new client at the earliest possible time and obtain that client's informed consent going forward.

Careful vetting of lateral attorneys is likewise imperative to reduce the possibility of facing a disqualification motion. Often law firms want to move quickly in onboarding a new partner. However, it pays to complete thorough conflicts checks. Although not common, some law firms go back as far as three to five years.

Law firms should likewise consider including provisions in their engagement letters containing (1) a disclaimer of future duties after termination of the attorney-client relationship, and (2) a sunset provision setting forth that if the law firm has not performed any legal work for the client in 12 months, it will be treated as a former client for conflicts purposes.

Given that concurrent and former conflicts of interest are imputed to entire law firms, it is also prudent to have robust screening protocols to ensure that lawyers with potential conflicts are unable to access confidential client information on a law firm's server. Disqualification may be avoided where a law firm can demonstrate that it had promptly and carefully screened allegedly conflicted counsel.

However, states take different approaches to lateral attorney conflicts, so law firms must be familiar with the imputation rule in the particular jurisdiction in which the lateral practices. Illinois, where I practice, is rare in that law firms can address a lateral conflict via an ethical wall. Some states require a waiver, and others will permit an ethical wall if the lateral had minimal involvement, although each state has its own test for what level of involvement is permitted.[6]

4 ABA Model Rule 1.9, Comment [22].
5 *IBM Corporation v. Micro Focus (US), Inc.,* 2023 U.S. Dist. LEXIS 100246 (S.D.N.Y. May 30, 2023); *SuperCooler Technologies Inc. v. The Coca-Cola Co. et al.,* 2023 U.S. Dist. LEXIS 145316 (M.D. Fla. July 17, 2023).

6 For more information on screening with lateral hires, please see CNA Article "From Here to There: Elements of an Effective Screen When Onboarding a Lateral Hire."

Once a disqualification motion has been filed, it is recommended that a law firm promptly consult with its client, evaluate the chances of prevailing, and obtain its client's informed consent to oppose the motion. If the conflict is serious, it is often best to withdraw. If a decision is made to fight the disqualification, usually affidavits must be submitted to prove the attorney's limited involvement in a prior matter or lack of access to confidential information.

Disqualification motions appear to be proliferating in both public and private forums, including arbitration proceedings. Law firms need to be aware of the types of conflicts that most often lead to disqualification and the types of attorneys who may be affected. The exposure to such motions can be reduced by risk management, including advance conflict waivers and other provisions in engagement letters, careful vetting of lateral attorneys, and promptly implementing screening protocols. Even if a disqualification order is entered, it does not mean that civil liability or attorney discipline will necessarily follow – particularly if the conflict was technical and the client was not harmed.

This article was authored for the benefit of CNA by:

Matthew Henderson

Matthew Henderson is a partner at the Chicago office of Hinshaw & Culbertson LLP where he concentrates his practice in the representation of attorneys in all aspects of professional liability and ethics, including the defense of legal malpractice and breach of fiduciary duty actions, providing risk management and legal ethics advice, defending lawyer disciplinary proceedings, and litigating attorney fee disputes and sanctions motions.

For more information, please call us at 866-262-0034 or email us at lawyersrisk@cna.com