

That Motion to Disqualify

Trying to get rid of the opposing counsel may cause worse problems.

When it's warranted, a motion to disqualify the opposing counsel can be a potent weapon. But lawyers should use that weapon rarely and should resist the temptation, or a client's importuning, to use it merely as harassment.

The temptation to file a motion to disqualify is often strongest in contentious civil litigation in which bitterness between the parties runs high. In such "grudge matches," for example, litigation between former business partners—each of whom feels betrayed by the other—or in lawsuits alleging fraudulent conduct, a motion to disqualify offers an attorney the allure of striking a pose as the enforcer of virtue, placing the ethics and integrity of the other side up to scrutiny.

Embittered litigants are sometimes enticed by the prospect that such a motion will sow dissension between an adversary and the adversary's lawyer, or otherwise disrupt an adversary's litigation plans. Unfortunately, some litigants love this kind of pyrotechnics and urge their lawyers to charge forward, eager to wreak havoc on their opponents.

Courts recognize that these motions are sometimes grounded in less lofty motives than a desire to uphold high ethical standards in the bar. Many courts over the past 20 years have echoed the comment of former Supreme Court Justice William Brennan in *Richardson-Merrell v. Koller* (1985). Brennan wrote that "the tactical use of attorney-misconduct disqualification motions is a deeply disturbing phenomenon in modern civil litigation." As a result, judges often demand to be shown the likelihood of demonstrable harm before they will grant such disruptive relief.

ENGENDERING HOSTILITY

Tactically, filing such a motion and having it denied is far worse than not filing it at all. The moving party's credibility

with the court may suffer, and the moving lawyer will have to spend the remainder of the case with an opposing lawyer whose integrity he has publicly questioned. Beginning a case by engendering such hostility is not smart.

In view of these problems, how does an attorney presented with the possibility of filing a motion to disqualify distinguish a worthy motion from an unworthy one?

One overrated cause for filing a motion is when the opposing counsel may be a fact witness in the case. Rule 3.7 of the Rules of Professional Conduct does impose limits on a lawyer's participation in a case in which he is likely to be called as a fact witness. But the rule is rather narrow in scope and has important exceptions.

For example, Rule 3.7, even when applicable, only precludes a lawyer-witness from participating as *trial* counsel. That same lawyer can still conduct depositions, argue motions, or engage in any other *pretrial* activities. Second, unlike many other ethical rules, the bar on the participation of the attorney applies only to the individual lawyer who will be a witness, and generally will not apply to other members of that lawyer's firm. And finally, among the exceptions to the rule is a broad one for a party who would otherwise suffer "substantial hardship" by being deprived of counsel of his choice.

Another common ground for seeking disqualification is a purported conflict of interest based on allegations by a party that his adversary's lawyer previously represented him. Here, before filing a motion, a lawyer should explore whether his client's perception of a conflict of interest is supported by the facts. Even if a conflict of interest exists, the lawyer should also assess whether the conflict is merely of the technical "gotcha" variety or is likely to cause real prejudice to his client if the opposing counsel is not removed.

Specifically, before filing a motion, a lawyer should determine whether there is adequate proof that a perceived prior attorney-client relationship between his client and the opposing counsel in fact existed. For example, the lawyer should inquire whether there was a retainer agreement establishing this prior attorney-client relationship, and who paid the attorney fees. The

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lawyer should also explore all other facts that would either prove or disprove the existence of the attorney-client relationship.

Second, even if the agreement established that there was an attorney-client relationship between the opposing counsel and a lawyer's current client, the lawyer should find out whether his client provided the opposing counsel with confidential communications during that earlier representation. And if there were such communications, the lawyer should further determine whether those confidential communications related to an important issue in the present lawsuit so as to potentially cause prejudice to his client. The lawyer should also ascertain whether the prior representation was recent enough that the opposing counsel is likely to remember such confidential communications.

If a lawyer is unable to verify all these factors, he should not pursue a motion to disqualify.

This analysis is based on an alleged *prior* representation by the opposing counsel. But there is an important distinction between a conflict of interest based on an alleged *prior* representation and one based on a *current* representation of a party by the opposing counsel or a member of the opposing counsel's firm. The rules are far more strict when the opposing counsel or a member of his firm currently represents the adverse party, and a motion to disqualify will likely be granted under such circumstances.

So much for the merits of a motion to disqualify. Apart from the merits, there are tactical factors a lawyer should consider and discuss with his client before deciding to file a motion, even if the motion is likely to be granted. Aside from the "feel-good" component of scoring a point, a lawyer should weigh as a practi-

cal matter whether his client will be better off in the end if the adversary must retain new counsel. The lawyer should carefully consider, for example, whether the adversary's bitterness at having been compelled to hire a new lawyer will poison any chance for a settlement. Or whether a new attorney who is unfamiliar with the case will be less able to assist when it comes time to hammer out a complex and comprehensive settlement.

DON'T WAIT

Once a lawyer and his client decide to file the motion, the motion should be filed as early as possible. Any grounds supporting such a motion become stale very rapidly or may even be deemed to have been waived. Furthermore, any disruption that a disqualification would cause is likely to grow quickly as the case moves forward.

Finally, a lawyer should not file the motion before presenting the issue to the targeted lawyer and providing him an opportunity to justify his continued appearance in the case. An informal discussion can lead the opposing counsel to voluntarily withdraw from the case, thereby avoiding the need for a motion.

As with any situation in which a lawyer calls into question the ethics of another lawyer, the former should be satisfied that he stands on firm ground and should treat opposing counsel as he would expect to be treated—even if his client urges him to do otherwise.

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