MEMORANDUM

TO: Norm Hill And Hunter Emerick
FROM: Michael Elliot and Wes Hill
DATE: September 2, 2008
Subject: **Disqualification of Lawyers called as Witnesses and Judges for bias**

QUESTIONS PRESENTED

1. Whether deponent's counsel may terminate a deposition by disqualifying the examining lawyer as a potential witness in the case.

2. Whether a Judge may be disqualified for bias.

SHORT ANSWER

1. No. ORPC 3.7, when applicable at all, only precludes a lawyer who will be called as a witness from acting as an advocate at trial.

2. Yes. A judge may be disqualified under ORS 14.250 when any party or attorney believes that the party or attorney cannot receive a fair or impartial trial or hearing before the Judge assigned.

APPLICABLE STATUTES OR RULES

Lawyer as witness
Oregon Rules of Professional Conduct 3.7
(a) A lawyer shall not act as an advocate at a trial in which the lawyer is likely to be a witness on behalf of the lawyer's client unless:
(1) the testimony relates to an uncontested issue;
(2) the testimony relates to the nature and value of legal services rendered in the case;
(3) disqualification of the lawyer would work a substantial hardship on the client; or
(4) the lawyer is appearing pro se.
(b) A lawyer may act as an advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness on behalf of the lawyer's client.

(c) If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that the lawyer or a member of the lawyer's firm may be called as a witness other than on behalf of the lawyer's client, the lawyer may continue the representation until it is apparent that the lawyer's or firm member's testimony is or may be prejudicial to the lawyer's client.

Defined terms (see rule 1.0);
Firm; denotes a lawyer or lawyers, including "Of Counsel" lawyers, in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a private or public legal aid or public defender organization

Substantial; when used in reference to degree or extent denotes a material matter of clear and weighty importance.

Comparison to ABA Model Rule (provided by OSB General Counsel's office for education and discussion purposes only; the comparisons to the Oregon Code of Professional Responsibility and the ABA Model Rules are not part of the ORPC and are not binding authority).

This rule is similar to the ABA Model Rule; Paragraph (a) of the Model Rule applies only when the lawyer is likely to be a necessary witness. In the Model Rule, Paragraph (b) does not apply if the witness lawyer will be required to disclose information protected by Rule 1.6 or 1.9. Paragraph (c) is not provided for in the Model Rule.

Judge Disqualification for Bias

ORS 14.250 Disqualification of judge; transfer of cause; making up issues;

No judge of a circuit court shall sit to hear or try any suit, action, matter or proceeding when it is established, as provided in ORS 250 to 14.270, that any party or attorney believes that such party or attorney cannot have a fair and impartial trial or hearing before such judge. In such case the presiding judge for the judicial district shall forthwith transfer the cause, mater or proceeding to another judge of the court, or apply to the Chief Justice of the Supreme Court to send a judge to try it; or, if the convenience of witness or the ends of justice will not be interfered with by such course, and the action or suit is of such a character that a change of venue thereof may be ordered, the presiding judge may send the case for trial to the most convenient court; except that the issues in such cause may, upon the written stipulation of the attorneys in the cause agreeing thereto, be made up in the district of the judge whom the cause has been assigned.

ORS 14.260 Affidavit and motion for change of judge; time for making; limit of two changes of judge.

(1) Any party to or any attorney appearing in any cause, matter or proceeding in a circuit court may establish the belief described in ORS 14.250 by motion supported by affidavit that such party or attorney cannot have a fair and impartial trial or hearing before such judge, and that it is made in good faith and not for the purpose of delay.

No specific grounds for the belief need be alleged. Such motion shall be allowed unless the judge moved against, or the presiding judge for the judicial district challenges the good faith of the affiant and sets forth the basis of such challenge. In the event of such challenge, a hearing shall be held before a disinterested judge. The burden of proof shall be on the challenging judge to establish that the motion was made in bad faith or for the purposes of delay.

(2) The affidavit shall be filed with such motion at any time prior to final determination of such cause, mater or proceedings in uncontested cases, and in contested cases before or within five days after such cause, matter or proceeding is at issue upon a question of fact or within 10 days after the assignment, appointment and qualification or election and assumption of office of another judge to preside over such cause, matter or proceeding.

(3) No motion to disqualify a judge shall be made after the judge has ruled upon any petition, demurrer or motion other than a motion to extend time in the cause, matter or proceeding. No motion to disqualify a judge or a judge pro tem, assigned by the Chief Justice of the Supreme Court to serve in a county other than the county in which the judge or judge pro tem resides shall be filed more than five days after the party or attorney appearing in the cause receives notice of the assignment.

(4) In judicial districts having a population of 100,000 or more, the affidavit and motion for change of judge shall be made at the time and in the manner prescribed in ORS 14.270

(5) No party or attorney shall be permitted to make more than two applications in any cause, matter or proceeding under this section.

ORS 14.270 Time of making motion for change of judge in certain circumstances; limit of two changes of judge.

An affidavit and motion for change of judge to hear the motions and demurrers or to try the case shall be made at the time of the assignment of the case to a judge for trial or for hearing upon a motion or demurrer. Oral notice of the intention to file the motion and affidavit shall be sufficient compliance with this section providing that the motion and affidavit are filed not later than the close of the next judicial day. No motion to disqualify a judge to whom a case has been assigned for trial shall be made after the judge has ruled upon any petition, demurrer or motion other than a motion to extend time in the cause, mater or proceeding; except that when a presiding judge assigns to the presiding judge any cause, matter or proceeding in which the presiding judge has previously ruled upon any such petition, motion or demurrer, any party or attorney appearing in the cause, matter or proceeding may move to disqualify the judge after assignment of the case and prior to any ruling on such petition, motion or demurrer heard after such assignment. No party or attorney shall be permitted to make more than two applications in any action or proceeding under this section.

Oregon Code of Judicial Conduct
Judicial Rule 2-106

(A) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality reasonably may be questioned, including but not limited to instances when

(1) the judge has a bias or prejudice concerning a party or has personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) the judge served as a lawyer in the matter or controversy, or a lawyer with whom the judge previously was associated served during the association as a lawyer in the matter, or the judge or the lawyer has been a material witness in the matter;

(3) the judge knows that the judge, individually or as a fiduciary, or the judge's spouse, parent or child, wherever residing, or any other person residing in the judge's household has a financial interest in the subject matter in controversy, is a party to the proceeding or has any other interest that could be substantially affected by the outcome of the proceeding;

(4) the judge, the judge's spouse, parent or child wherever residing, or any other person residing in the judge's household

(a) is a party to the proceeding, or an officer, director, partner or trustee of a party;

(b) is acting as a lawyer in the proceeding;

(c) is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding; or

(d) is, to the judge's knowledge, likely to be a material witness in the proceeding.

See attached copy of Judicial Rules 1 and 2 for further definitions and discussion of the rule.

DISCUSSION

1. Disqualification of Lawyer as witness.

It is improper to stop a deposition by insisting that an examiner's questions revealed facts that would render the examining lawyer a witness in the case. This issue may arise, for example, when the examining lawyer also represented a party in a transaction that ultimately became disputed in litigation. Opposing counsel, under those circumstances, may be tempted to use the ethical rules as a sword rather than the shield that the rules were intended to be. However, ORPC 3.7 provides no basis to stop a deposition. The rule, when applicable at all, only precludes a lawyer who will be called as a witness from acting as an advocate **at trial**. ORPC 3.7(a)(emphasis supplied). The rule does not prevent a lawyer from conducting a discovery deposition or participating in other pretrial matters. See Oregon State Bar Ethics Opinion 2005-8, attached hereto.

The Oregon Rules of Professional Conduct ("ORPC") require lawyer disqualification if they are going to be a witness in the trial they are conducting. ORPC 3.7(a). A strict application of this rule means that any lawyer who has any knowledge of the events at issue in the trial should be disqualified from continuing on as counsel at trial. WILLIAM H. FORTUNE, RICHARD H. UNDERWOOD, EDWARD J. IMWINKELRIED, MODERN LITIGATION AND PROFESSIONAL RESPONSIBILITY HANDBOOK: THE LIMITS OF ZEALOUS ADVOCACY, 170 (2000) available at: http://books.google.com/books?id=vNrcclfukVgC&pg=PA169&lpg=PA169&dq=model+rules+professional+conduct+3.7&sour

ce=web&ots=kWVlWyl8xR&sig=7lzGfsWylxGbTyRJMubAJ3go2h8&hl=en&sa=X&oi=book_result&resnum=7&ct=result#PPA170,M1 (hereinafter "Professional Responsibility Handbook"). This could lead to unnecessarily harsh results, if one side is using this rule solely to gain a tactical advantage.

The ORPC provides two ways for a lawyer to avoid disqualification, especially if disqualification is used for tactical advantage. First, ORPC 3.7 only applies if the lawyer is likely to be called as a witness. ORPC 3.7(a). This means that if the lawyer has third parties, such as investigators, paralegals or secretaries that also witness various transactions, then the lawyer should not be disqualified from continuing at trial. Professional Responsibility Handbook, 177. Although there may be questions on bias if the lawyer uses one of their staff members, the lawyer will not automatically be disqualified. *Id.* The lawyer may take reasonable steps to ensure that someone else has the same information such that it is not likely the lawyer will be called as a witness. Under this circumstance, the lawyer's testimony would be unnecessary. *See Bronson v. Oregon Dept of Revenue*, 265 Or 211, 214 (1973)(citing ABA Code of Professional Responsibility, Ethical Considerations EC 5-10).

The other means to avoid disqualification is by showing that the client would suffer substantial hardship. ORPC 3.7(a)(3); ORCP 1.0 (defining the term "substantial"). *See also, In Re Lathen*, 294 Or 157, 165 (1982)(construing the term substantial hardship). This can include situations where the client is an individual or smaller and the lawyer has built up a strong relationship with the client. Brian M. Altman, Jordan M. Smith, *Utilizing the Substantial Hardship Exception to Model Rule 3.7*, GEO. J. LEGAL ETHICS, Summer 2002, available at: http://findarticles.com/p/articles/ mi_qa3975/is_200207/ai_n9129789/pg_1?tag=artBody;col1 (hereinafter "Substantial Hardship Exception"). This can also include situations where the

lawyer's testimony is not likely to conflict with other witness' testimony. Professional Responsibility Handbook, 174. The key to using this exception is to show that prejudice to the opposing party is outweighed by prejudice to client. Substantial Hardship Exception, 1. A decision of whether the public perception of the legal system will suffer if disqualification is not granted must also be made to use this exception. *Id.* If the lawyer can show the public will not suffer and neither will opposing counsel, then the substantial hardship exception can be invoked. Professional Responsibility Handbook, 174.

Even if one lawyer in the firm is disqualified for likelihood of being called as a witness, another member of the firm may try the case as long as the original lawyer or a member of the firm will not be called to provide testimony that is prejudicial to the lawyer's client. ORPC 3.7(b)-(c).

The question remains regarding whether a lawyer should use this rule for a tactical advantage. Generally this should be considered unprofessional. The ORPC are written to prevent such an abuse. First, the ORPC provide for the two exceptions already mentioned above. Underpinning these exceptions is the concept that lawyer disqualification can be used to delay, harass and cause needless expense for the client. Professional Responsibility Handbook, 170; Statement of Professionalism (2006) available at: http://www.osbar.org/_docs/forms/Prof-ord.pdf. The Statement of Professionalism suggests that this type of tactical advantage should not be used. Because disqualifying a lawyer will lead to delay of the trial and could cause unnecessary expenses for the client, this tactic runs directly counter to the Statement of Professionalism. *Id.* In that statement, which all incoming Oregon lawyers sign, the lawyer aspires to not "delay harass or drain the financial resources of any party" including the opposing party. *Id.*

2. Judge Disqualification for Bias.

Effectively, there are two avenues for judge disqualification under our rules. First, Judges must disqualify themselves in the specific situations described in JR 2-106. The rule is provided above for convenient reference. A complete copy of Judicial Rule 1 (Maintaining the Integrity of the Judicial System) and Judicial Rule 2 (Impartial and Diligent Performance of Judicial Duties) is attached hereto for additional reference. These rules provide a basis for Judges to disqualify themselves from a case or cause so that we as a profession may guard against public perceptions of judicial partiality and promote the integrity of our system of justice.

The second avenue for disqualification involves the parties or attorneys involved in the case or cause, allowing them to ask for a change of Judge in the case. In addition to the reasons for disqualification described in the two judicial rules above, ORS 14.250-14.270 provides a means for judge disqualification by a party or attorney.

ORS 14.250 *et seq.*, procedures to disqualify a judge, apply to disqualification based on the situation that exists when the judge is first assigned to a case. *Lamonts Apparel, Inc. v. SI-Lloyd Assoc, LLP*, 153 Or App 227, 235 (1998). Disqualification requires only a showing that the party seeking disqualification has a good faith belief that it would not receive a fair and impartial trial. *Id.* It is no longer necessary to allege specific grounds for that belief. *See id* (citing ORS 14.260(1)).

Simply put, if a party or attorney believes it is not possible to get a fair and impartial hearing before a particular judge, supported by the appropriate affidavit, the motion "shall" be granted, unless the judge challenges the affiant's good faith. *In re Phelps*, 122 Or App 410, 414 (1993). The trial judge does not have authority to rule on the substantive validity of a motion to disqualify that same trial judge. *State ex rel Ray Wells, Inc.*, 306 Or 610, 613 (1988). In the case where the original judge challenges the motion for bad faith the presiding judge must require a hearing on that issue before a disinterested judge. *Id.* The judge challenging the motion bears the burden of proving that the motion is being made in bad faith or for purposes of delay. *Id* (citing ORS 14.260(1)).

The current rules for judicial disqualification for bias were amended in 1987. *Id.* In so amending the rules, the legislature eliminated three requirements from the prior rules as established by Oregon common law and the previous statute. First, the legislature eliminated the requirement for the affiant to allege "circumstances" leading to the belief that a fair and impartial trial cannot be had before the challenged judge. *Id.* at 614. Second, the legislature struck the requirement for alleging that the challenged judge was "prejudiced." *Id.* at 614. So now the affiant must only allege the subjective belief that a fair and impartial hearing cannot be had before the challenged judge. *Id.* at 614. Finally, the legislature shifted the burden of proof onto the challenged judge to prove bad faith at the hearing requested by the judge. *Id.* at 614. Previously, the burden had been on the affiant to prove that the motion was made in good faith and not for purposes of delay. *Id* (comparing *State ex rel Lovell v. Weiss*, 250 Or 252 (1968) with the current statute as amended). Ostensibly, the policy shift reflects the legislature's attempt to ease potential tensions between bench and bar regarding judicial disqualification while strengthening perceptions of judicial integrity and impartiality.

The potential problem with easing the burdens on the affiant, is that an affiant may use judicial bias as a sword instead of a shield. With these less restrictive rules, the affiant may state a belief in bias without revealing the basis of the belief. *Ray Wells*, 306 Or at 624 (Peterson, J., dissenting). This can result in mere statements of bias to gain tactical advantage. The judge is then forced on the defensive and required to prove a negative which is "no mean feat, especially when the facts giving rise to the belief relate to the state of mind of a party or attorney and are known to the affiant but likely not to the judge." *Id.* Judges with large caseloads may be reticent to expend judicial resources to disprove their bias giving the party its tactical advantage.

Such advantages, however, decrease the overall professionalism of the bench and bar. Disqualifying a judge without a good faith belief in the judge's bias could result in delaying the trial and harassing the opponent, not to mention the judge. This is against the statement of professionalism and, while it may gain short term advantage, would be detrimental to the profession as a whole.

CONCLUSION

There are many instances where an attorney or a judge should disqualify themselves to preserve and promote the integrity of the judicial system. In these cases the rules of ethics are properly used as a shield to prevent abuse of the system. However, when an opposing party attempts to use these ethical rules as a sword, then abuse may still result.

Lawyers have several defenses to opposing parties attempting to gain such a tactical advantage. First so long as they are not likely to be called as a witness at trial, they can continue to represent clients in litigation when they know material facts. Second, even if a lawyer is likely to be called as a witness at trial, if that would cause substantial hardship to the client and not prejudice either the public or the opposing party, then the lawyer may continue in the representation. Further the lawyer facing disqualification may remind opposing counsel that such tactics are no favored by the Statement of Professionalism.

Judges must recuse themselves for not only actual bias, but perceived bias as well. This is important to maintain the system's integrity and the public perception of fair and impartial adjudication. The legislature, in an effort to ease the tension between bench and bar, eased the requirements of a party requesting a new judge. The unintended result may be allowing for easier use of these rules to gain tactical advantage. However, the professional lawyer, should not resort to short term gain at the expense of long term harm to the system.