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# Legal Disqualification Standards: Civil, Criminal, Judicial

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Legal Standards for Disqualification





In contemporary legal discourse, the issue of disqualifying individual attorneys, legal offices or firms, and judicial officers has gained prominence and relevance. The proceedings in Georgia concerning District Attorney Fani Willis, the attempts to disqualify New York trial court justice Juan Merchan in the Trump criminal case, and in Maricopa County the reassignment of a murder conviction PCR to another county, have spurred nationwide discussion on the topic of disqualification.

Motions to disqualify serve a critical role in upholding the integrity of the legal profession, while safeguarding the fairness of judicial proceedings for all participants. In Arizona, motions to disqualify have been filed with regularity and have reached our appellate courts on occasion in the past few years. This article outlines the legal standards involved when a motion to disqualify is filed in a variety of contexts.



## The Civil Case Context

### Individual Attorney

The Rules of Professional Conduct are designed to regulate attorney conduct, and failure to comply with these rules is a “basis for invoking the disciplinary process.”<sup>1</sup> However, an attorney violation of a disciplinary rule does not necessarily warrant their disqualification. The burden is on the moving party to show “sufficient reason” why that attorney should be disqualified for their conflict-of-interest. In *Powers Reinforcing Fabricators v. Contes*,<sup>2</sup> for example, petitioners’ claim of “abuse of discretion” did not rise to the level of “sufficient reason” to disqualify, where the attorneys were both counsel to one party and parties to the litigation themselves.

While the “appearance of impropriety” is no longer a part of the Arizona Rules of

Professional Conduct, it remains part of the conflict-of-interest disqualification analysis, and it can result in disqualification when misconduct is severe. <sup>3</sup>

However, disqualification is not required where a conflict is “so remote that there is insufficient appearance of wrongdoing,” and the court should only disqualify an attorney when it determines that disqualification is an appropriate means of enforcing the applicable disciplinary rule. <sup>4</sup>

## Entire Firm

At its root, a motion to disqualify an entire firm relies on the same basis of conflict-of-interest or impropriety used to disqualify an individual attorney. The proponent must demonstrate that a firm has a conflict of interest that would impair its ability to represent the client effectively, or that an individual attorney’s conflict of interest worthy of disqualification has been imputed to the entire firm (vicarious disqualification). <sup>5</sup> In *Golleher v. Horton*, <sup>6</sup> where the appellant did not meet the burden of proof required to show that confidential information had been shared with the firm, nor that a conflicting relationship had been imputed to a firm, the court held that it could not reverse to disqualify the entire firm.

The ethical rules provide for screening of lawyers moving from one firm to another and for government lawyers moving to a private firm. Proper screening will decrease the possibility of a motion to disqualify. That screening must cover both materials and communications. Effective screening may combat disqualification only if the firm has recorded evidence of the screen and its notification to other firm members.

## The Criminal Case Context

### Individual Attorney

Disqualification is distinguished from a defendant’s request for replacement counsel. While a criminal defendant is entitled to counsel, they do not have an absolute right to counsel of their own choosing. Typically, disqualification motions arise from multiple representations, conflicts with prior representations, or where counsel may become a witness based on allegations in the indictment.

The Sixth Amendment right of the defendant must be balanced with the court’s interest in preserving the integrity of the process, and the government’s interests

in ensuring a fair trial. In the context of **criminal** proceedings, the standard for disqualification of counsel begins with a “presumption in favor of the accused’s chosen counsel.” <sup>7</sup> This presumption may be overcome by a defendant’s showing of an “actual conflict or potentially serious conflict.” <sup>8</sup> There is no bright-line rule for determining whether a rule violation rises to the level of a due process violation, so each case must be analyzed on the facts specific to it in order to determine if a conflict of interest was created.

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If an actual or severe potential conflict is found “such that no rational defendant would knowingly and intelligently desire the conflicted lawyer’s representation,” the court must disqualify the attorney. <sup>9</sup> An actual conflict-of-interest exists when attorney’s and defendant’s interests diverge with respect to a material factual or **legal** issue or to a course of action, or when the attorney’s representation of the defendant is impaired by loyalty owed to a prior client. However, a conflict may be found that is potential, or lesser, and suitable to a waiver. In that case, a court is to allow the party opposing a motion to disqualify to make a “‘knowing and intelligent’ waiver of any potential conflict.” This was the case in *United States v. McDonald*, <sup>10</sup> where defendants’ motion to disqualify was denied based on their prior waivers of any potential conflict, and in the absence of an “unwaivable conflict.”

In *Corbin v. Broadman*, <sup>11</sup> the Arizona Court of Appeals analyzed a prosecutor’s

work history and prior authorizations and held that his level of involvement in previous proceedings against the defendants amounted to a conflict of interest that warranted disqualification. Though there is no bright-line rule, courts now must consider specific factors (the “Gomez factors”) when making a disqualification determination. These factors inquire as to:

- (1) whether the motion is being made for the purposes of harassing the defendant,
- (2) whether the party bringing the motion will be damaged in some way if the motion is not granted,
- (3) whether there are any alternative solutions, or is the proposed solution the least damaging possible under the circumstances,
- and (4) whether the possibility of public suspicion will outweigh any benefits that might accrue due to continued representation.

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The importance of the *Gomez* factors was reinforced last year in the Arizona Supreme Court decision in *State ex rel. Mitchell v. Palmer*,<sup>13</sup> where the Court considered a motion to disqualify the Maricopa County Attorney’s Office in a case where the victim was a prosecutor in that office, holding that the superior court failed to consider the appropriate factors before disqualifying the entire office and ordering its transfer to another prosecutorial agency. The opinion provides a thoughtful analysis of the defendant’s due process rights when in conflict with the victim’s rights.

## Entire Office

A motion to disqualify an entire office first came before the Arizona Supreme Court in 2021. The motion was directed at the Tucson office of the Arizona Attorney General. It was based on the misconduct of an assistant AG who had an undisclosed conversation with a court-appointed confidential intermediary. The Court found the Gomez factors “useful in determining whether an appearance of impropriety is sufficiently weighty to justify disqualification.” <sup>14</sup>

In two more recent cases, one in 2023 and one in 2024, the Arizona Supreme Court has reaffirmed its commitment to a test using the four *Gomez* factors. <sup>15</sup> The *Palmer* case is worth note. Specifically, the court stated that one party “should only ‘be allowed to interfere with the attorney–client relationship of his opponent’ in “extreme circumstances,” quoting *Alexander v. Superior Court*. <sup>16</sup> This begs the question of how trial courts are to interpret what is or is not an “extreme circumstance.”

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## The Judicial Context

### Individual Judge

In both the civil and criminal context, a defendant may attempt to remove a judge in two ways. The first is by filing a notice (oral notice is acceptable in civil cases) for a “change of judge as a matter of right.” <sup>17</sup> Each side, in criminal and civil settings, is entitled to one “change of judge as a matter of right.” A party also may file for a “change of judge for cause.” <sup>18</sup> The procedure for this differs between civil and criminal cases. In civil cases, a party seeking to remove a judge for cause must establish grounds by affidavit, alleging how a judge may be biased, prejudiced or otherwise interested, such that defendant may be precluded from receiving a fair and impartial trial. <sup>19</sup> In a criminal case, a party must file a

motion stating the grounds for the change of judge, supported by affidavit.

<sup>20</sup> The grounds for this motion are typically allegations of interest or prejudice that may prevent a fair and impartial hearing or trial. <sup>21</sup>



In civil and **criminal** contexts, courts faced with an affidavit or motion to disqualify a judge generally presume the impartiality of the judge. Therefore, the burden is on the party seeking disqualification to prove bias or prejudice by a preponderance of the evidence. Though Arizona judges are subject to the Arizona Code of **Judicial** Conduct, the **legal** standard for disqualification of a judge relies on their impartiality, regardless of whether any specific **judicial** conduct rule provision applies. <sup>22</sup> For example, in *State v. Salazar*, <sup>23</sup> the court reasoned that the risk of injustice associated with failing to disqualify a partial trial judge was too great. In that case, the court held that failure to disqualify would undermine public confidence in the **judicial** process, though the judge did not directly violate a **judicial** code of conduct rule.

A court faced with an affidavit or motion for change of judge must perform an impartiality analysis. That involves a two-part inquiry consisting of subjective and objective components. Subjectively, if a judge believes that their impartiality has been impaired, disqualification or recusal is required. The objective inquiry asks whether an external observer, fully informed of the facts underlying the motion to disqualify, would “entertain a significant doubt that justice would be done in the case.” <sup>24</sup> A judge should not be disqualified absent a showing of prejudice or interest that prevents the moving party from receiving a fair and impartial trial.

<sup>25</sup>

In addition to analyzing whether bias or prejudice are present, the source of the alleged bias or prejudice and timeliness of the motion must be considered. For example, removal is unlikely if the claim of bias or prejudice does not arise from

example, a motion is timely if the claim or basis of prejudice does not arise from an extrajudicial source. <sup>26</sup> This was the foundation for the decision in *State v. Elem*, <sup>27</sup> where defendant's allegations rested solely on the judge's participation in the defendant's case. The court denied defendant's motion to disqualify due to failure to prove that the judge was biased or prejudiced such that the defendant would be prevented from receiving a fair hearing.

The motion also must be filed in a timely manner. <sup>28</sup> In *State of Arizona v. Murad Can Dervish*, a motion for change of judge was filed primarily based on the assigned judge's commitment of Superior Court resources to hire a State expert witness. <sup>29</sup> The court reasoned that the claim did not arise from an extrajudicial source, and that the defendant's motion was not timely, as it was not filed within 10 days of discovering that grounds existed for change of judge. <sup>30</sup> Therefore, the motion was denied. <sup>31</sup>

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## Entire Judicial Bench

In Arizona, the court's analysis differs when a motion to disqualify is filed against an entire bench. When a motion to disqualify is filed against an entire bench, the court must consider whether the facts alleged by the party seeking disqualification, if taken as true, would entitle them to relief. <sup>32</sup> If not, a hearing on the matter is not required. For example, in the case of *Fernando-Sholes v. Sholes*, the defendants requested the recusal of the entire Pima County bench based on their belief that they would not receive a fair hearing as the bench was

allegedly incapable of acting in an impartial manner. <sup>33</sup> The party seeking disqualification of an entire bench must provide a factual basis that could justify that broad of a disqualification. In a 2024 ruling, Maricopa County Presiding Judge Welty ruled that the entire Maricopa County bench must be disqualified from presiding over a post-conviction relief petition, due to pervasive misconduct relating to a former judge of the county. The case was assigned outside of Maricopa County to avoid potential bias likely to violate the defendant's due process rights. <sup>34</sup>

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## Conclusion

Motions to disqualify individual attorneys, firms, government offices or judicial officers represent a critical aspect of legal proceedings. Though the legal standards differ, in each context the decision to disqualify is subject to close scrutiny and is generally disfavored. Ultimately, the resolution of motions to disqualify requires a nuanced approach. The need for ethical conduct and the rights of the parties must be balanced with the realities of legal practices. While not exceedingly common, due to the substantial evidence needed and legal standards that must be met for a motion to disqualify to be ordered, these motions are significant when successful. As the legal landscape continues to evolve, the scrutiny of motions to disqualify will remain a critical aspect of maintaining ethical standards.

## endnotes

1. Pmbl. PP 19-20, Ariz. R. Prof'l Conduct.
2. 249 Ariz. 585, 473 P.3d 714 (Ct. App. 2020).
3. *State v. Marner*, 487 P.3d 631 (Ariz. 2021).
4. *Gomez v. Superior Court*, 149 Ariz. 223, 717 P.2d 902 (1986).

5. Arizona State Bar Committee on the Rules of Professional Conduct, *Advisory Opinion: Supervision of Nonlawyer Assistants* (2013), <https://tools.azbar.org/RulesofProfessionalConduct/ViewEthicsOpinion.aspx?id=485> (accessed June 3, 2024).
6. 148 Ariz. 537, 715 P.2d 1225 (Ariz. Ct. App. 1986).
7. *United States v. Locascio*, 6 F.3d 924, 931 (2d Cir. 1993) (upholding the district court disqualification of defendant's counsel for multiple conflicts).
8. *Id.*
9. *United States v. McDonald*, No. 01-CR-1168 (JS)(MLO), 2002 U.S. Dist. (E.D.N.Y. Aug. 6, 2002).
10. *Id.*
11. 6 Ariz. App. 436, 433 P.2d 289 (Ariz. Ct. App. 1968).
12. *Gomez v. Superior Court*, 149 Ariz. 223, 717 P.2d 902 (1986).
13. 546 P.3d 101 (Ariz. 2024).
14. *Marner*, 487 P.3d at 631.
15. *State v. Chambers*, 255 Ariz. 464 (Ariz 2023) and *State ex. rel. Mitchell v. Palmer*, 546 P.3d 101 (2024).
16. 141 Ariz. 157, 165 (1984).
17. Ariz.R.Civ.P. 42.1.; Ariz.R.Crim.P. 10.2.
18. Ariz.R.Civ.P. 42.2.; Ariz.R.Crim.P. 10.1.
19. A.R.S. § 12-409.
20. Ariz.R.Crim.P. 10.1.
21. *Id.*
22. Arizona Supreme Court, Code of **Judicial** Conduct, Rule 2.11 (2022).
23. 182 Ariz. 604, 898 P.2d 982 (Ct. App. 1995).
24. *Planned Parenthood Ariz. Inc. v. Mayes*, 545 P.3d 892 (Ariz. 2024).
25. *State v. Cropper*, 205 Ariz. 181, 68 P.3d 407 (2003).
26. Mot. for Change of Judge for Cause, *Mark McCormick v. Arizona Lottery et al.*, No. CV 2022-053274 (Super. Ct. of Ariz., Maricopa Cnty.).
27. Mot. for Change of Judge for Cause, *State of Arizona v. Melvin Elem*, No. CR20124581-001 (Super. Ct. of Ariz., Pima Cnty.).
28. Ariz.R.Crim.P. 10.1(b).
29. Mot. for Change of Judge for Cause, *State of Arizona v. Murad Can Dervish*, No. CR20224004-001 (Super. Ct. of Ariz., Pima Cnty.).
30. Resp. to Mot. for Change of Judge for Cause, *State of Arizona v. Murad Can Dervish*, No. CR20224004-001 (Super. Ct. of Ariz., Pima Cnty.).
31. *Id.*

32. Mot. for Change of Venue; To disqualify Pima Cnty. Bench; To Seal Records and Request for Visiting Judge, *Fernando-Sholes v. Sholes*, No. D-20062053, (Super. Ct. of Ariz., Pima Cnty.).

33. Superior Court of Arizona Maricopa County, *State of Arizona v. Victor Hernandez*, 019, Minute Entry (May 7, 2024),

<https://ewscripps.brightspotcdn.com/4c/15/bbf4fa2542fcbf7f3c2fb50c5a27/judge-welty-order.pdf>

34. *Litigation Overview: Motion to Disqualify Counsel*, Bloomberg Law,

[www.bloomberglaw.com/external/document/X4198PDS000000/litigation-overview-motion-to-disqualify-counsel](http://www.bloomberglaw.com/external/document/X4198PDS000000/litigation-overview-motion-to-disqualify-counsel) (last visited Dec. 15, 2024)

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