

**LAWYERS IN THE CROSS-HAIRS:  
DISQUALIFICATION AND MALPRACTICE LIABILITY  
RESULTING FROM CONFLICTS OF INTEREST**

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## **I. INTRODUCTION**

The decision to represent a new client comes with many traps. Perhaps the most often ignored or overlooked issue by attorneys in making this decision is whether there exists a conflict of interest because of a former or concurrent representation of the adverse party. However, this oversight can be extremely costly. Not only do conflicts of interest serve as a basis for disqualification, but they also can form a solid foundation for a malpractice claim against you and your firm. Traditionally lawyers held the privilege of choosing their own targets during litigation. Now, the tables have turned and lawyers are finding that they are the target. Their decision to represent parties adverse to former and current clients are increasingly under scrutiny.

The stakes continue to grow for malpractice claims arising out of an attorney's conflicts of interest with former and current clients. Disqualification is a powerful procedural tool and the Texas Courts have often noted how it can be used as a procedural trial weapon. Courts have further noted the prejudice it can work on the party whose counsel is disqualified.<sup>1</sup> The expense of having new counsel brought up to speed because of a successful disqualification motion filed by opposing counsel can, in some cases, result in costs so prohibitive as to end the litigation. If this were not bad enough, all the work product created by the disqualified counsel would most likely be "tainted" and unusable by the new attorneys. Thus, the effect on the client can be devastating. Further, the disqualified attorney faces not only the loss of the business from the former client, but also the business of the current client from whom he is barred from representing.

But the effects of the conflict, in some cases, do not end at disqualification. Rather, malpractice based on a breach of the attorney's fiduciary duty to his former or current client is also a very real possibility. Two recent multi-million dollar judgments against major Texas law firms have hammered home the point to Texas lawyers -- violation of ethical duties to your client with respect to conflicts of interest is costly. As discussed below, one law firm was recently tagged with a \$35.7 million judgment in a lawsuit alleging serious breaches of ethical duties owed to the plaintiffs by the firm. Moreover, another firm is also appealing an \$8.1 million judgment entered against it over alleged conflict of interests. Although the potential for conflicts of interest is greater at larger firms, smaller firms are not immune from the problem.

This paper offers a basic outline of the issues relevant to conflicts of interest and the legal and procedural implications of such problems. First, it addresses the issue of disqualification and how an attorney can be disqualified from participating in a lawsuit based on ethical conflicts. Next, it explores the current Texas and Fifth Circuit authority with respect to conflicts of interest, and the subtle differences in their approaches.<sup>2</sup> Finally, it reviews the malpractice implications and consequences of conflicts of interest.

## **II. DISQUALIFICATION AND CONFLICTS OF INTEREST**

### **A. Motions to Disqualify**

#### 1. Standards and Burden of Proof for Disqualification.

Although disqualification of counsel can be based on any number of grounds, disqualification is usually based on violation of one or more of the attorney disciplinary rules, *Spears v. Fourth*

*Court of Appeals*, 797 S.W.2d 654 (Tex. 1990) (orig. proceeding); *NCNB Tex. Nat'l Bank v. Coker*, 765 S.W.2d 398, 400 (Tex. 1989) (orig. proceeding). Although the disciplinary rules in federal court are not binding or controlling as standards on motions to disqualify, the Texas Disciplinary Rules of Professional Conduct as construed in Texas state courts “have been viewed by the courts as guidelines that articulate considerations relevant to the merits of such motions,” *Spears*, 797 S.W.2d at 656; *see also Ayres v. Canales*, 790 S.W.2d 554, 556 n.2 (Tex. 1990) (orig. proceeding).<sup>3</sup>

Disqualification is, however, a “severe remedy”. *Coker*, 765 S.W.2d at 399. Such motions are subject to “an exacting standard” both to protect a party’s right to counsel of choice as well as discourage the use of such motions as a “dilatatory trial tactic.” *Id.*; *Spears*, 797 S.W.2d at 656. The burden is on the party moving to disqualify counsel to establish with specificity a violation of one or more of the disciplinary rules, and mere allegations of unethical conduct or evidence showing a remote possibility of a violation of disciplinary rules will not suffice. *Id. see also, Hydril Co. v. Multiflex*, 553 F.Supp. 552, 556 (S.D. Tex. 1982) (“A potential conflict based on potential issues is simply not the standard”). In effect, the law of Texas does not permit disqualification of a law firm based on a conflict that might occur or upon adversity that might arise.

Moreover, some Texas courts have held that the party seeking disqualification must demonstrate “actual prejudice resulting from the opposing lawyer’s service in dual roles.”<sup>4</sup> *Usury v. Grey*, 804 S.W.2d 232 (Tex. App. -- Fort Worth 1991, no writ). In addition, these courts have held the movant “must show that there is a specifically identifiable appearance of the occurrence of improper conduct and the likelihood of public suspicion or obloquy outweighs the social interest in obtaining counsel of one’s choice.” *Id.* at 237 (quoting *Hoggard v. Snodgrass*, 770 S.W.2d 577 (Tex. App. -- Dallas 1989, no writ)). Similarly, the Texas Supreme Court has held that “to prevent such misuse of Texas Disciplinary Rule 3.08 [the attorney-witness rule], “the trial court should require the party seeking disqualification to demonstrate actual prejudice to itself resulting from the opposing lawyer’s service in the dual rules.” *Ayres v. Canales*, 790 S.W.2d 554, 558 (Tex. 1990), (citing TEXAS DISCIPLINARY RULE cmt. 3.08, 10).

The approach taken by federal courts, and the Fifth Circuit in particular, is broader with respect to treatment of disqualification motions. Whereas the Texas courts focus on the Texas Disciplinary Rules of Professional Conduct, the Fifth Circuit has held that these rules are not the “sole authority” governing a motion to disqualify. *See In re American Airlines*, 972 F.2d 605 (5th Cir. 1992) *cert denied*, 113 S. Ct. 1262 (1993); *In re Dresser Industries*, 972 F.2d 540 (5th Cir. 1992). Instead, the court considers the ethical rules announced by the national profession in light of the public interest and the litigant’s rights such as the Model Rules of Professional Conduct promulgated by the American Bar Association. *Dresser*, 972 F.2d at 543. Despite this, the Fifth Circuit has noted that because the Texas Disciplinary Rules of Professional Conduct were patterned after the ABA Model Rules of Professional Conduct, where there is no material difference between the specific provisions of the two codifications, there is no problem looking to the Texas Disciplinary Rules of Professional Conduct for guidance. *American Airlines*, 972 F.2d at 610.

However, it is well-settled that motions to disqualify are not governed by state law, but

are “substantive motions affecting the rights of the parties and are determined by applying standards developed under *federal law*.” *Id.* Although federal courts may adopt state or ABA rules as their ethical standards, how these rules are applied to particular situations are questions of federal law, not of the state that created the standards. *Id.*; see *F.D.I.C. v. US. Fire Ins. Co.*, 50 F.3d 1304(5th Cir. 1995) (holding local rules establishing codes of conduct may be used for guidance in establishing standards of professional conduct, but may not be the sole basis on which to deprive parties of the right to counsel of their choice); *Dresser*, 972 F.2d at 543 (holding that district court clearly erred in following its local rules providing that the Texas Conduct rules were the sole authority governing a motion to disqualify).

It is clear that the Fifth Circuit, and federal courts in general, will carve their own paths with respect to the issue of standards of conduct for attorneys practicing before them. (“The rule of disqualification is not mechanically applied in this Circuit.”) *U.S. Fire Ins.*, 50 F.3d at 1314. As noted in *U.S. Fire Ins.*, “[t]he norms embodied in the Model Rules and the Model Code are relevant to our inquiry, ‘as the national standards utilized by this circuit in ruling on disqualification motions.’” 50 F.3d at 1312 (citing *American Airlines*, 972 F.2d at 610). The Fifth Circuit did concede in that same opinion that “consideration of the Texas Rules is also necessary, because they govern attorneys practicing in Texas generally, and because the United States Northern District Court Rules contain language virtually identical to the state canon.” *Id.* The Court concluded that all four sets of standards should be consulted, and that such application requires “painstaking analysis of the facts and precise application of precedent.” *Id.* at 1312-13. More importantly, the Fifth Circuit has stated that a federal court “is obligated to take measures against unethical conduct occurring in connection with any proceeding before it...it is our – business -- our responsibility.” *American Airlines*, 972 F.2d at 611.

## 2. Standing.

Whether a party has standing to present the alleged conflicts of interest to the court is a critical issue. Absent standing, the substantive issues of the disqualification notice need not be addressed by the Court. Texas and Fifth Circuit rulings on this issue are sparse and have not provided any clear rules in this area, although several courts have addressed, albeit indirectly, the issue in their opinions.

Standing becomes critical in two situations: (1) where a non-party former or concurrent client moves for disqualification; and (2) where a non-former or non-concurrent client that is a party to pending litigation moves for disqualification. In *Metropolitan Life Ins. V. Syntek Finance*, the Texas Supreme Court addressed an appeal from a disqualification motion filed by a non-party former client who had intervened in the litigation for purposes of the disqualification issue. 881 S.W.2d 319, 329 (Tex. 1994) There, a major shareholder in Syntek, moved the trial court to disqualify the law firm representing MetLife in the pending litigation because that law firm had previously represented him in his divorce. In support of his motion, the shareholder argued that MetLife’s contention that he had caused the financial problems that resulted in Syntek’s note default which formed the basis for the underlying litigation was “adverse” to him as a former client. *Id.* at 320. Syntek had never been a client of the opposing law firm, but joined in the motion to disqualify. Thus, the *Syntek* case deals with both circumstances set forth above, because the motion to disqualify was presented by both a non-client party and a non-party client.

In its brief filed with the Texas Supreme Court, the appellant MetLife argued that Syntek had no standing to present its disqualification motion because no previous attorney-client relationship had existed. Therein, MetLife argued that no standing exists in the absence of a prior attorney-client relationship. Unfortunately, although it had an opportunity to do so, the Texas Supreme Court addressed neither the standing of the shareholder as non-party nor the standing of the party as a non-client in its opinion. Interestingly, the Court skipped these issues and cut to the issue of substantial relationship between the representatives. Whether this indicates a rejection of MetLife's argument as to standing is unclear.

Other Texas courts have addressed this issue as well. In *Kelly A., et al v. Nat 'I Medical Enterprises, Inc., et al*, the court concluded that a non-client defendant had standing to bring its motion under the facts presented in that case. No. 94-10808-H (160th Dist. Ct. Dallas County, Texas March 20, 1995). Notably, *Kelly* as in *Syntek*, involved the motions of both the non-client party *and* the former-client non-party. The court in *Kelly* limited its analysis to the motion filed by the client, and rejected the party's motion on the basis that a relationship which would permit it to seek the disqualification of the law firm. *Id*

The Texas Disciplinary Rules of Professional Responsibility are also instructive on this issue. The Preamble to these Rules states:

[T]he purpose of these rules can be abused when they are invoked by opposing parties as procedural weapons. The fact that a rule is a just basis for a lawyer's self-assessment or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has *standing* to such enforcement of the rule.

TEX. DISCIPLINARY R. PROF. CONDUCT, Preamble: Scope ¶ 15 *reprinted in* TEX. GOVT CODE ANN., tit. 2, subtit. G. App. (Vernon Supp. 1996) (STATE BAR RULES art. X, § 9) (hereafter the "Texas Rules"). (emphasis added); *see also* MODEL RULES OF PROFESSIONAL CONDUCT, scope, ¶ 6. Further, Comment 17 to Rule 1.06 advises that:

Raising questions of conflict of interest is primarily the responsibility of the lawyer undertaking the representation. In litigation, a court may raise the question when there is reason to infer that the lawyer has neglected the responsibility. In a criminal case, inquiry by the court is generally required when a lawyer represents multiple defendants. Where the conflict is such as clearly to call in question the fair and efficient administration of justice, opposing counsel may properly raise the question. Such an objection should be viewed with great caution, however, for it can be misused as a technique of harassment.

TEX. DISCIPLINARY R. PROF. CONDUCT 1.06 cmt. 17 (1990).

The Fifth Circuit in *F.D.I.C. v. U.S. Fire ins. Co.* also addressed this issue in the context of a conflict arising out of a lawyer serving as a witness in the litigation. 50 F.3d. at 1308. There, a party filed a motion to disqualify opposing counsel and his entire law firm based on the possibility that the opposing attorney may be called to testify in violation of Texas Disciplinary Rule. 3.08. *Id.* Rule 3.08 governs situations where a lawyer may also serve as a witness in cases

where the lawyer also serves as counsel. TEX. DISCIPLINARY R. PROF. CONDUCT 3.08. Although *U.S. Fire Ins. Co.* did not address the standing issue directly, it did offer some guidance for disqualification motions filed in federal court. There, the Fifth Circuit held as follows:

Ideally, conflict of interest problems should be settled between the attorney and his client. Where an attorney's testimony may prejudice only his own client, the opposing party should have no say in whether or not the attorney participates in the litigation as both advocate and witness. It is generally for an opposing party to bring conflict of interest matters to the attention of the court.

*U.S. Fire Ins. Co.*, 50 F.3d at 1315. See also *American Airlines, Inc.*, 972 F.2d at 611, (“[a] motion to disqualify counsel is the proper method for a party-litigant to bring issues of conflict of interest or breach of ethical duties to the attention of the court.”) *Id.* at 611 (emphasis added). However, the case of *In re Yarn Processing Patent Validity Litigation*, presents a more strict interpretation of the standing rule. 530 F.2d 83 (5th Cir, 1976). There the Fifth Circuit held that “[a]s a general rule, courts do not disqualify an attorney on the grounds of conflict of interest unless the former client moves for disqualification.” *Id.* at 87. Noting that disqualification motions can be a powerful litigation tactic, the court concluded that non-clients should not be allowed to employ disqualification motions as tactical weapons:

To allow an unauthorized surrogate to champion the rights of the former client would allow that surrogate to use the conflict rules for his own purposes where a genuine conflict might not really exist. It would place in the hands of the unauthorized surrogate powerful presumptions which are inappropriate in his hands... We are reluctant to extend this where the party receiving such an advantage has no right of his own which is invaded. Such objection should be viewed with caution, however, for it can be misused as a technique of harassment.

*Id.* at 90.

Whether *In re Yarn* is consistent with the rulings in *In re American Airlines* is questionable.<sup>5</sup> This law is still being framed with respect to the issue of standing. As with most other issues related to disqualification motions, whether a party has standing will most likely depend on the facts of the specific case.

### 3. Waiver.

A party who fails to seek disqualification timely waives the complaint. *Vaughn v. Walther*, 875 S.W.2d 690 (Tex. 1994) (orig. proceeding); *Grant v. Thirteenth Court of Appeals*, 888 S.W.2d 466, 468 (Tex. 1994) (original proceeding), (per curiam, on rehearing); *Wasserman v. Black*, 910 S.W.2d 564, 568 (Tex. App. -- Waco 1995, n.w.h.). The court will generally consider the length of time between the moment the conflict became apparent to the aggrieved party to the time the motion for disqualification is filed in determining whether the complaint was waived. See *Vaughn*, 875 S.W.2d 690 (holding waiver occurred where motion filed six and a half months after discovery of the conflict); *Wasserman*, 910 S.W.2d at 568 (holding no waiver

where motion filed approximately two months after notice of conflict); *Syntek Finance Corp. v. Metropolitan Life Ins. Co.*, 880 S.W.2d 26, 34 (Tex. App. -- Dallas), *rev 'd on other grounds*, 881 S.W.2d 319 (Tex. 1994) (holding six weeks between time conflict became apparent and time motion to disqualify was filed did not waive complaint). The court should also consider any other evidence indicating that the motion was filed merely as a dilatory trial tactic. *Wasserman*, 910 S.W.2d at 568; *see also Spears v. Fourth Court of Appeals*, 797 S.W.2d at 656.

The Texas Supreme Court recently hinted that the failure of a party moving to disqualify opposing counsel to seek a stay of proceedings in the trial court during the pendency of a mandamus application to the appellate courts could provide grounds for later denying the motion to disqualify. *See Henderson v. Floyd*, 891 S.W.2d 252, 254 (Tex.1995). In *Henderson*, when the relator moved for leave to file his petition for writ of mandamus to the Texas Supreme Court, he also moved to stay proceedings in the trial court. *Id.* Although the Court granted the stay, it later dissolved it upon denial of the relator's motion for leave to file. *Id.* The relator immediately moved for a rehearing on his motion for leave, but neglected to renew his motion to stay the trial court proceedings. *Id.* The respondent argued that the failure of the relator to renew his motion to stay effectively waived the merits of the disqualification motion, because during the pendency of the motion for rehearing, the counsel relator sought to disqualify actively participated in the case. *Id.* The Texas Supreme Court held that it is possible that respondent's argument had merit, determining that this was a factual issue to be decided by the trial court, and that its opinion "does not preclude the district court from considering changed circumstances which would cast relator's motion for disqualification in a different light." *Id.* at 255.

## **B. The Role of the Attorney-Client Relationship in Disqualification Motions.**

A significant question in deciding any disqualification motion based on the existence of alleged conflicts of interest is "Who is the client?" Absent an attorney-client relationship, no duties run between the parties. Although, as discussed above, it is possible for a non-client to present a disqualification motion in some circumstances, for the purposes of determining the existence of a conflict of interest arising out of a prior or concurrent representation, an analysis of whether an attorney client relationship exists is mandatory.

An attorney-client relationship is established when the attorney and prospective client *agree* to create the relationship:

The legal relationship of attorney and client is purely contractual and results from the mutual agreement and understanding of the parties concerned, based upon the clear and express agreement of the parties as to the nature of the work to be undertaken and the compensation to be paid therefor.

*Parker v. Carnahan*, 772 S.W.2d 151, 156 (Tex. App. -- Texarkana 1989, writ denied). A contract between an attorney and client may be implied when the parties "by their conduct manifest an intention to create the attorney-client relationship." *Id.* at 156 (emphasis added); *see also Ins. Co. of North America v. Westergren*, 794 S.W.2d 812 (Tex. App. -- Corpus Christi 1990, orig. proceeding [leave denied]). It is not enough that the purported client attends meetings in the attorney's office or that the attorney makes statements to the alleged client concerning the

probable legal consequences of certain actions. *Parker*, 772 S.W.2d at 156. Further, an attorney-client relationship cannot be imposed unilaterally by a person claiming to be a former client, and his subjective intent is insufficient to establish the relationship. *State v. Lemon*, 603 S.W.2d 313, 317 (Tex. App. -- Amarillo 1980, no writ).

In *Castillo v. First City Bancorporation of Texas, Inc.* the Fifth Circuit held that, as a matter of law, no attorney-client relationship giving rise to a fiduciary duty existed when an attorney representing First City “discussed freely and gave advice” and opinions to the plaintiffs regarding First City’s loan transaction and the sale of the plaintiffs’ properties. 43 F.3d 953 (5th Cir. 1994). The Fifth Circuit relied upon the fact that the plaintiffs were represented by their own legal counsel during the loan negotiations to conclude that no attorney-client relationship existed between the lawyer who represented First City and the plaintiffs, stating as follows:

But even if [the lawyer] was especially helpful to them [the plaintiffs] and freely gave advice, *the fact that they [the plaintiffs] may have subjectively trusted [the lawyer] and relied on him, without more, is insufficient to create a fiduciary relationship.* We agree with the district court that as a matter of law, [the lawyer’s] *legal discussions with [the plaintiffs] did not create an attorney-client relationship* giving rise to a fiduciary duty,

*Id.* at 958 (citations omitted; emphasis added); *see also Berry v. Dodson, Nunley & Taylor*, 717 S.W.2d 716, 719 (Tex. App. -- San Antonio 1986), *writ dismissed by agr.*, 729 S.W.2d 690 (Tex. 1987) (an attorney does not owe a duty to a third party, even if that third party is an intended beneficiary of the attorney’s advice); *Vaccaro v. MSG Illinois, Inc.*, 789 F. Supp. 924, 927 (N.D. Ill. 1992) (an attorney representing a financial advisor was held to not have an attorney-client relationship with the advisor’s customer, even though the customer was given some legal advice by the attorney).<sup>6</sup> Similarly, in *Thompson v. Vinson & Elkins*, 859 S.W.2d 617 (Tex. App. -- Houston [1st Dist.] 1993, writ denied), the court held that attorneys retained to represent a trustee are not in privity with the beneficiaries of the trust and owed no fiduciary duty to them, even though the trustee himself may owe a fiduciary duty to those beneficiaries. *Id.* at 624.

The Fifth Circuit also has held that if an attorney represented only an agent, no privity of contract would exist with the agent’s principal and no claim could be made by the principal for legal malpractice. *Randolph v. Resolution Trust Corp.*, 995 F.2d 611, 616 (5th Cir. 1993), *cert denied*, 114 S. Ct. 1294 (1994) (an agent may employ counsel for his principal); *see also Pollard & Cook v. Lehmann*, 832 S.W.2d 729, 738 (Tex. App. -- Houston [1st Dist.] 1992, writ denied) (finding that agent had authority to hire counsel for principal). In *Randolph*, the plaintiffs had *instructed* an agent, not a business advisor, to arrange for legal representation for himself *and for the plaintiffs*. The plaintiffs did not have or retain their own attorney. *Id.* at 616.

An attorney-client relationship also may be based on an express or implied contract. *Simpson v. James*, 903 F.2d 372, 376 (5th Cir. 1990). The relationship may be implied from the conduct of the parties. *Kotzur v. Kelly*, 791 S.W.2d 254, 257-58 (Tex. App. -- Corpus Christi 1990, no writ). “All that is required is that the parties explicitly or by their conduct manifest an intention to create the attorney-client relationship.” *Parker v. Carnahan*, 772 S.W.2d at 156 (citing *Nolan v. Foreman*, 665 F.2d 738 (5th Cir. 1982)); *see Simpson*, 903 F.2d at 376 (“[T]he evidence was sufficient for a reasonable jury to conclude that an attorney-client

relationship existed, as manifested through the parties' conduct.”). The contract may result if the client makes an offer or request of the attorney and the attorney accepts or assents. *Simpson*, 903 F.2d at 376 (citing *State v. Lemon*, 603 S.W.2d at 318). In addition, an attorney may be held negligent when he fails to advise a party that he is not representing that party, when circumstances lead the party to believe that the attorney is representing him. *Randolph* 995 F.2d at 615 (citing *Kotzur* 791 S.W.2d at 257-58); *Parker*, 772 S.W.2d at 157.

Although the Texas Disciplinary Rules of Professional Conduct do not provide a standard for when an attorney-client relationship is formed, they do provide guidance on the activities an attorney performs for a client. TEX. DISCIPLINARY R. PROF. CONDUCT preamble ¶ 2(1989); *Clarke v. Ruffino*, 819 S.W.2d 947, 949 (Tex. App. -- Houston [14th Dist.] 1991, writ dism'd w.o.j.). An attorney evaluates the client's affairs and reports on them to the client or to others. TEX. DISCIPLINARY R. PROF. CONDUCT preamble ¶ 2 (1989). In addition, as an advisor, the attorney informs the client of his or her legal rights and obligations and explains their practical implications. *Id.* Thus we can infer the existence of an attorney-client relationship can be inferred when an attorney performs acts contemplated under the Rules.

### C. Successive Conflicts of Interest

One type of conflict that has been addressed by Texas Courts and the Fifth Circuit is that which arises from the representation of a client in a proceeding that is adverse to a former client. Different jurisdictions have unique approaches to this problem.

#### 1. The Texas Approach

##### a. *Disciplinary Rule 1.09.*

Texas Disciplinary Rule of Professional Conduct 1.09 provides for more than one basis for disqualification, and states in relevant part:

- (a) Without prior consent, the lawyer who personally has formerly represented a client in a matter shall not thereafter represent another person in a manner adverse to the former client:
  - (1) in which such other person questions the validity of the lawyer's services or work product for the former client;
  - (2) if the representation in reasonable probability will involve a violation of Rule 1.05; *or*
  - (3) if it is the same or a substantially related matter.

TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT 1.09(1991) (emphasis added). As the 14<sup>th</sup> Court of Appeals noted in *Clarke v. Ruffino*, “because of the ‘or’ strategically placed in this rule, there are now more than one bases for disqualification of an attorney.” 819 S.W.2d at 951.<sup>7</sup> Thus, Rule 1.09(a) prohibits a lawyer who personally represented

a client from representing another client in a matter adverse to the first client in three situations. Rule 1.09(a)(1) prohibits a lawyer from taking the representation under circumstances where the new client questions the position taken by the lawyer in the prior representation. *Id.* Rule 1.09(a)(2) prohibits representation which will result in a disclosure of client confidences as defined by Rule 1.05. TEX. DISCIPLINARY R. PROF. CONDUCT 1.05(a)(1991) (defining “confidential information” as both “privileged information” and “unprivileged information.”)<sup>8</sup> Neither Rule 1.09(a)(1) or (2) require that the new representation be related to the prior representation. Finally, a lawyer may be disqualified where the prior representation is “substantially related” to the new matter. TEX. DISCIPLINARY R. PROF. CONDUCT 1.09(a)(3) (1991).

b. *The Issue of Adversity*

Before any substantive analysis is performed as to whether any of the three grounds for disqualification are met, two essential facts must be established: (1) the existence of an attorney-client relationship between the former client and the attorney (not necessarily the law firm) in the current matter; and (2) that the current matter is adverse to the former client. The first has been discussed above, however, the second merits further discussion.

Few Texas cases actually construe the meaning of “adverse.”<sup>9</sup> Further Rule 1.09 contains no definition of “adversary.” Rule 1.06 of the Texas Rules provides some guidance as to this issue in its definition of “directly adverse.” As discussed more fully below, Rule 1.06 prohibiting any representation that “involves a substantially related matter in which that person’s interests are materially and *directly adverse* to the interests of another client of the lawyer or the lawyer’s firm.” TEX. DISCIPLINARY R. PROFESSIONAL CONDUCT 1.06 (b)(1). Comment 6 to Rule 1.06 defines “directly adverse” as follows:

Within the meaning of Rule 106(b), the representation of one client is “directly adverse” to the representation of another client if the lawyer’s independent judgment on behalf of a client or the lawyer’s ability or willingness to consider, recommend or carry out a course of action will be or is reasonably likely to be adversely affected by the lawyer’s representation of, or responsibilities to the other client. The dual representation also indirectly adverse of the lawyer reasonably appears to be called upon to espouse adverse positions in the same or a related matter. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only generally adverse, such as competing economic enterprises, does not constitute the representation of directly adverse interests.

*Id.* Rule 1.06 comment 6. However, although helpful, this definition is not a dispositive definition of “adverse.” The Texas Supreme Court has suggested that a greater care and a higher standard is required when dealing with conflicts arising out of concurrent representations than with conflicts arising out of a former client. *See Phoenix Founders, Inc. v. Marshall*, 887 S.W.2d 831, 836 (Tex. 1994).

c. *Substantial Relationship Test.*

The seminal case in Texas regarding former client conflicts is *NCNB Texas Nat 'l Bank v. Coker*, 765 S.W.2d at 398. There, the Texas Supreme Court, in construing the former Texas Code of Professional Responsibility,<sup>10</sup> ruled that disqualification of counsel is only proper when representation of the client involves matters which are “substantially related” to the matters embraced within the prior representation of the former client. The court noted that the party seeking disqualification “must prove the existence of a prior attorney-client relationship in which the factual matters involved were so related to the facts in the pending litigation *that it creates a genuine threat that confidences revealed to former counsel will be divulged to its present adversary.*” *Id.* (emphasis added) (restated and affirmed in *Metropolitan Life Ins. v. Syntek Finance*, 881 S.W.2d at 320). The burden on the movant seeking to establish a “substantial relationship” is to show *facts* in the current representation that “a genuine threat exists” that confidential information will be divulged. Sustaining this burden requires evidence of specific similarities capable of being cited in the disqualification order. *Coker*, 765 S.W.2d at 401. Mere conclusory statements and opinions are insufficient. *J.K. and Susie L. Wadley Research Inst. and Blood Bank v. Morris*, 776 S.W.2d 271 (Tex. App. -- Dallas 1989, orig. proceeding). (“a party moving to disqualify cannot rely upon conclusory statements; he must provide the trial court with sufficient information so that it can engage in a painstaking analysis of the facts.”) The Supreme Court has recently only required a showing of a “genuine threat” of disclosure and has required no showing of actual harm to the former client, i.e., materialized disclosure or wrongdoing by counsel. *See Henderson v. Floyd*, 891 S.W.2d 252, 254 (Tex. 1995); *Texaco, Inc. v. Garcia*, 891 S.W.2d 255, 257 (Tex. 1994); *Grant*, 888 S.W.2d at 467.

Further, to satisfy this test, the movant need not show identical legal and factual elements between the two representations. *See Home Ins. Co. v. Marsh*, 790 S.W.2d 749, 753 (Tex. App. - El Paso 1990, orig. proceeding). Nor, under some circumstances, is a movant required to show that actual confidences were violated or an appearance of impropriety. *Hoggard*, 770 S.W.2d at 588. There must be more than just a “superficial resemblance” between issues relevant to the two representations. *Arkla Energy Resources v. Jones*, 762 S.W.2d 694, 695 (Tex. App. -- Texarkana 1988, orig. proceeding). Evidence showing only a remote possibility of a violation of the disciplinary rules is insufficient under the *Coker* standard. *Coker*, 765 S.W.2d at 400. In *Coker*, the Texas Supreme Court determined that the trial court’s finding “that the two representatives were similar enough to give an ‘appearance’ that confidences which could be disclosed ‘might be relevant’ to the representatives falls short of the requisites of the established substantial relation standard.” *Id.* However, a mere comparison of subject matter and issues is not the proper legal test and a superficial resemblance between issues is not enough to constitute a substantial relationship. *Wadley*, 776 S.W.2d at 278; *Coker*, 765 S.W.2d at 400.<sup>11</sup>

In determining whether a “substantial relationship exists for purposes of a motion to disqualify, Texas courts have deemed it legally relevant if the information in question has become public or is available through the proceedings. In *Syntek*, the Texas Supreme Court noted that the information at issue was both available in public domain, and provided to the plaintiff through discovery, and available in the records filed in a bankruptcy proceeding. 881 S.W.2d at 321; *see also Wadley*, 776 S.W.2d at 278 (“[F]acts that are community knowledge or that are not material to a determination of the issues litigated do not constitute matters involved within the

meaning of the law.)

For example, The Texas Supreme court held the movant for disqualification satisfied this test in *Texaco, Inc. v. Garcia*, 891 S.W.2d at 257. There, *Texaco* moved for disqualification based on the opposing attorney's prior representation. The alleged conflict arose out of the opposing counsel's association an attorney from Fulbright & Jaworski, a long-time counsel for Texaco. While at Fulbright & Jaworski, the opposing counsel had actively participated in litigation involving environmental contamination, the same subject matter of the pending suit. The Texas Supreme Court held that disqualification was required because of the substantial relationship between the two matters. *Id.* In so holding, it noted that the Plaintiff's allegations in the present case "involve[d] in the similar liability issues, similar scientific issues, and similar defenses and strategies" as were present in the prior litigation. *Id.* The Court concluded that the opposing lawyer, and his entire firm, were disqualified. *Id.*

Also, in *Metropolitan Life Insurance v. Syntek Finance*, the Texas Supreme Court reversed the appellate court's decision that ruled the trial court's denial of a motion to disqualify was an abuse of discretion. 881 S.W.2d at 321. The dispute arises out of Hughes & Luce, L.L.P.'s prior representation of Gene Phillips. In 1986, Hughes & Luce represented Phillips in both an uncontested divorce and the drafting of a premarital agreement. At this time, Phillips owned a controlling interest in Syntek Finance Corporation ("Syntek"). During these representations, Phillips disclosed to Hughes & Luce extensive information regarding his financial position, including Syntek's related party transactions; the identity of business entities within Phillip's control; how they were structured; their financial status; how they related financially to one another; the past, present and future value of their assets; every source of Phillip's income; and all of Phillip's assets.

About that same time, a dispute arose between Syntek and Metropolitan Life Insurance Company ("MetLife"), and Hughes & Luce was retained to represent MetLife. Although Hughes & Luce investigated and recognized its prior representation of Phillips, it decided that there was no conflict of interest. No consent or waiver was sought from Phillips. Around 1990, Hughes & Luce discovered information implicating Phillips as responsible for the note default that created the Syntek/MetLife dispute. Despite the prior representation of Phillips, Hughes & Luce amended its pleadings to include allegations that the debt was not paid as a direct result of Phillip's misconduct. However, Phillips was not made a party. During the subsequent deposition of a Syntek corporate representative, a Hughes & Luce attorney introduced a document regarding Syntek that came directly from Phillips' divorce file maintained by Hughes & Luce. Counsel for Syntek quickly demanded that Hughes & Luce withdraw from the representation. When Hughes & Luce declined, Syntek filed its motion for disqualification. The trial court, after five days of testimony, denied the motion without stating the basis of his decision.

The Dallas Court of Appeals reversed the decision of the trial court with respect to the disqualification issue. *Id.* In reaching its decision, the court noted the *Coker* standard and the conclusive presumptions. *Id.* at 31-32. The court also found that under Texas law, the moving party must also establish that an appearance of impropriety exists as a matter of law. *Id.* at 32. Hughes & Luce argued that disqualification was not warranted because a divorce action is very different than a commercial dispute, and the issues litigated are unrelated. *Id.* The court

disagreed, holding “[a] mere comparison of subject matter and issues . . . is not the proper legal test.” *Id.* Instead, the court held that it should look to the “information common to both representations” for substantial similarity. *Id.* at 33. Noting the fact that the crux of the information transferred in the divorce representation was financially related to Syntek and Phillips personally, the court had no trouble finding disqualification necessary. *Id.*

On appeal to the Texas Supreme Court, a much different result was reached. *Metropolitan*, 881 S.W.2d at 320-21. There, the Court reversed the Dallas Court of Appeals and concluded that the trial court did not abuse its discretion in denying the disqualification motion. The Court cited Texas Disciplinary Rule of Professional Conduct 1.09 and the substantial relationship test generally. *Id.* Instead, the Court noted that the disqualification hearing lasted for five days and consisted of live testimony of fourteen fact witnesses and five expert witnesses who opined on the *Coker* standard. The evidence indicated to the Supreme Court that the documents used in the current matter that were from the prior file were a matter of public record or were not confidential. In deference to the trial court, the Court determined that based on the evidence in the record, and on the *Coker* standard of substantial relationship, the trial court’s conclusion that no substantial relationship existed between the parties was not an abuse of discretion. *Id.* at 321.

*d. The Irrebuttable Presumptions of Disclosure.*

The *Coker* court concluded that once the matters are shown to be substantially related, the former client “is entitled to a *conclusive presumption* that confidences and secrets were imparted to the former attorney. *Id.* at 400 (emphasis added). The court noted that such a presumption is necessary to protect the former client from the necessity of being “forced to reveal the very confidences he wishes to protect.” The court also found a second conclusive presumption that the attorney would share this confidential information with other members of the firm. *Id.* The imputation of knowledge to and disqualification of the entire firm may be justified “because of the assumption there is interplay or a sharing of confidences between lawyers who practice together. The application of the presumption recognizes not only the realities of law practice but also the ethical considerations found in the Disciplinary Rules and is a way to avoid inquiry into actual details of client confidences. Thus, once a substantial relationship is proven, the trial court *must* then perform its role in the internal regulation of the legal profession and disqualify counsel in the pending litigation. *Id.*

*e. Application of Irrebuttable Presumptions Since Coker*

A strict construction of Rule 1.09 raises questions as to the present applicability of the *Coker* conclusive presumptions.<sup>12</sup> Texas cases decided since *Coker* have struggled with the applicability of the conclusive presumption. Although every subsequent case has recognized their existence, several courts have declined to apply them under the specific facts of the case. Moreover, *Coker* only found the conclusive presumptions available under Rule 1.09(a)(3), with respect to the substantial relationship test. In those circumstances not involving a substantially related matter and governed by Rule 1.09(a)(1) or (2), the conclusive presumptions are rendered inapplicable. *See* TEX. DISCIPLINARY R. PROF. CONDUCT 1.09 cmt. 4 (1991) (providing that a “reasonable probability” of disclosure of confidences is a “question of facts”).

Even a cursory review of recent cases indicates that the courts are still struggling with the *Coker* test and the conclusive presumptions. In fact, some courts have questioned the applicability of *Coker* now that the Texas Disciplinary Rules have been adopted. *See Clarke v. Ruffino*, 819 S.W.2d at 949 (denying writ of mandamus based on application of the Texas Disciplinary Rules to the facts of the case, but returning to the *Coker* test in its analysis). This has led some commentators to note that some courts have adopted Rule 1.09 as the standard for disqualification in contravention of the *Coker* test. Adding to the confusion is some court's incorrect use of the "appearance of impropriety" standard. *See Hoggard* 770 S.W.2d at 588 (holding that substantial similarity between actions created an appearance of impropriety); *see also* Lori Gallagher & Andrew S. Hanen, *Attorney-Client Conflicts of Interest and Disqualification of Counsel in Texas Litigation*, 24 TEX. TECH. L. REV. 1039, 1082(1993). The confusion most likely results from the fact that the test for disqualification is one of the case law and not of the Texas Disciplinary Rules. *See* TEX. DISCIPLINARY R. PROF. CONDUCT, Preamble ¶ 15 ("these rules are not designed to be standards for procedural decisions"). At least one Texas court has recognized the need for "bright lines. . . to be drawn for the guidance of the bench and bar" in this area. *Wadley* 776 S.W.2d at 271.

*f. Vicarious disqualification and Chinese walls.*

*1. Vicarious disqualification.*

Conflicts of interest affect not only the attorney and the former or concurrent client. The Texas Disciplinary Rules of Professional Responsibility also provide for disqualification of the lawyer's law firm, including partners, associates and staff, under certain circumstances. Rule 1.09 and the interpretive comments offer further guidance on this issue. Rule 1.09(b) provides:

- (b) Except to the extent authorized by Rule 1.10 (dealing with successive government and private employment), when lawyers are or have become members of or associated with a firm, none of them shall knowingly represent a client if any one of them practicing alone would be prohibited from doing so by paragraph (a).

TEX. DISCIPLINARY R. PROF. CONDUCT 1.09(b)(1991). Comment 6 to Rule 1.09 suggests that where a client severs the relationship with an attorney in a firm, whether that attorney, or any attorney in his law firm can undertake the representation, is governed by the requirements in Rule 1.09(b). TEXAS DISCIPLINARY R. PROF. CONDUCT 1.09 cmt. 6 (1991). Further, if a lawyer severs his relationship with a firm, and a client previously personally represented by the lawyer remain with the firm, the lawyer and his new law firm are limited in the representation of a different client in a matter adverse to the previous client as set forth in rule 1.09(a). *Id.* Thus, the effect of rule 1.09(b) is to "extend any inability of a particular lawyer under paragraph (a) to undertake a representation against a former client to all other lawyers who are or become members of or associated with any firm in which the lawyer is practicing." TEX. DISCIPLINARY R. PROF. CONDUCT cmt. 6 (1991).

Further, Rule 1.09 (c) provides:

- (c) When the association of a lawyer with a firm has terminated, the lawyers who were then associated with that lawyer shall not knowingly represent a client if the lawyer whose association with that firm has terminated would be prohibited from doing so by paragraph (a)(1) or if the representation in reasonable probability will insure a violation of Rule 1.05.

*Id.* 109(c). Applying this rule, when a former partner or associate of a lawyer who once represented a client terminates this relationship with the lawyer, the former partners or associates are only prohibited from questioning the validity of the lawyer's work product or from engaging in a representation which in reasonable probability would result in disclosure of client confidences.<sup>13</sup> TEXAS DISCIPLINARY R. PROF. CONDUCT 1.09 cmt. 6(1991) *Id.* The substantial relationship test of course does not apply here. Interestingly, a law firm is not disqualified from representing a client in a matter adverse to a former client of a lawyer who has left the firm provided there is no violation of Rule 1.09(a)(1) or (2). *Id.* cmt. 7. Further, where a lawyer is prohibited from representation under 1.09(a), other lawyers in the firm are not prohibited from undertaking the adverse representation. So long as they do not personally come within the restriction set forth in 1.09(a) or are prevented from doing so under another rule. *Id.*

## 2. Viability of Chinese walls.

A "Chinese Wall" is a device intended to "quarantine" a new employee of a law firm with confidential information received while in the employ of an adverse firm to pending litigation. *Petroleum Wholesale, Inc. v. Marshall*, 751 S.W.2d 295 (Tex. App. -- Dallas 1988, orig. proceeding). It is a popular misperception that "Chinese Walls" are a cure against disqualification in every instance. To the contrary, such screening devices are useful in some, but not all, circumstances. The function of these devices is to rebut the second *Coker* presumption, e.g. that the confidences of a former client will be shared with the members of the new law firm.

The problem arises out of the issue of vicarious disqualification. Today, movement by lawyers to new firms is a common occurrence. Unfortunately, it is in the context of these lateral movements that conflicts arise that result in disqualification motions. Texas state courts have yet to provide a clear answer as to the issue of screening. In *Petroleum Wholesale, Inc. v. Marshall*, *i.e.* the Dallas Court of Appeals concluded that a Chinese wall, under the facts presented, did not serve to overcome the appearance of impropriety created by the conflict. There a lawyer who worked for the plaintiff's law firm left and became associated with defense counsel's firm. The lawyer had previously worked on the plaintiff's case, but had not been privy to a strategy session or analysis on the merits of the plaintiff's case. Once at the new firm, the attorney was isolated from the files and attorneys working on the matter for the defendant by: (1) locking the files in a room separate from the central file room; (2) instructing the attorney not to discuss the matter with any of the lawyers at the new firm; and (3) instructing the new firm employees, including lawyers, not to discuss the matter with the new lawyer. *Id.* at 296. The court applied Canon 9 of the then effective TEXAS CODE OF PROFESSIONAL RESPONSIBILITY which prohibited a lawyer from engaging in conduct that created the appearance of impropriety, and noted the two presumptions arising out of that maxim, (*i.e.*, that confidences were disclosed to the attorney and that the confidences would be shared by the attorney). The court concluded that an analysis of

the effectiveness of the Chinese wall was unnecessary because Canon 9 requires disqualification under these facts. Specifically, the Court held;

[W]hen an attorney in private practice has actual knowledge of the confidences of a former client in a particular case, and he or she undertakes employment with a law firm representing a party whose interests in that identical case are adverse to that former client, the construction of a Chinese wall does not refute the appearance of impropriety -- the possible disclosure of the former client's confidences -- which is prohibited by Canon 9 of the TEXAS CODE OF PROFESSIONAL RESPONSIBILITY. In such a case, the entire new firm must be disqualified from representing the adversary of the challenged attorney's former client.

*Id.* at 301. In so holding, the court upheld the trial court's decision to disqualify the subsequent law firm. *Id.*

However, a new code of professional responsibility and a recent Texas Supreme Court case indicate that the futility of Chinese walls as is enunciated in *Petroleum Wholesale* may no longer be the case. In October 1994, the Texas Supreme Court held that a screening device similar to that used in *Petroleum Wholesale* was sufficient to rebut the second conclusive presumption if the law firm is able to establish that it has effectively screened the employee from any contact with the underlying suit. *Phoenix Founders, Inc. v. Marshall*, 887 S.W.2d at 831. Although *Phoenix Founders* involved an alleged conflict arising out of the employment of a non-lawyer legal assistant, the Texas Supreme Court could have stated that the screening of lawyers is prohibited. Instead, the Court stated that it was not addressing the issue of whether screening of lawyers is permissible under the new TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT. *Id.* at 835 ("In view of our holding that the presumption of shared confidences is rebuttable in the present context, the trial court erred in extending *Petroleum Wholesale* to the facts of this case. We need not decide whether *Petroleum Wholesale* itself was correctly decided, or whether it remains viable under the new Disciplinary Rules.") However, the Texas Supreme Court has subsequently applied the conclusive presumptions without a resolution of the issue. *See, Texaco*, 891 S.W.2d at 257; *Henderson*, 891 S.W.2d at 252.

## 2. The Fifth Circuit Approach

### a. *The Fifth Circuit balancing test.*

In determining whether disqualification is necessary, the Fifth Circuit has decided that "a court must take into account not only the various ethical precepts adopted by the profession but also the social interests at stake." Factors considered by the Fifth Circuit in the past include "whether a conflict has (1) the appearance of impropriety in general, or (2) a possibility that a specific impropriety will occur, and (3) the likelihood of public suspicion from the impropriety outweighs any social interests which will be served by the lawyer's continued participation in the case." *Dresser*, 972 F.2d at 544; *compare U.S. Fire Ins.*, 50 F.3d at 1315-16 (holding appearance of impropriety without more is insufficient as a grounds for disqualification). An inflexible application of the professional rules would be inappropriate because it would often "abrogate important societal rights, such as the right of a party to his counsel of choice and an attorney's

right to freely practice her profession.” *U.S. Fire Ins.* 50 F.3d at 1314.

More specifically, the application of the disqualification rule requires a balancing of the likelihood of public suspicion against a party’s right to counsel of choice. *Id.*; *see also Cossette v. Country Style Donuts, Inc.*, 647 F.2d 526, 530 (5th Cir. 1981). “[R]ather than indiscriminately gutting the right to counsel of one’s choice, disqualification is unjustified without at least a reasonable possibility that some identifiable impropriety actually occurred.” *U.S. Fire Ins.*, 50 F.3d at 1316. The reason for such a rule is to guard against those unscrupulous attorneys that would use disqualification for tactical purposes rather for protection of a client’s rights.<sup>14</sup>

However, the Fifth Circuit was clear to point out in *American Airlines* that the standard should not look to whether a counsel’s presence would “taint” a proceeding. 972 F.2d at 611. There, the court expressly rejected the proposition that “[a] business of the court is to dispose of litigation and not to act as a general overseer of the ethics of those who practice here unless the questioned behavior taints one trial of the cause before it. *Id.* at 610. Instead, the Fifth Circuit’s approach attempts to strike a balance that remains “sensitive to preventing conflicts of interest.” *Id.* at 611. The Fifth Circuit concluded that rather than follow the “hands off” approach of other circuits, the district court “is obliged to take measures against unethical conduct occurring in connection with any proceeding before it.” *Id.* For this reason, this circuit has stated that disqualification motions are the proper method of bringing issues of conflict of interest or breach of ethical duties to the attention of the court.

*b. The Fifth Circuit’s interpretation of “substantial relationship.”*

The substantial relationship test is also applied by the Fifth Circuit in determining disqualification motions. The interpretation of the substantial relationship test by the Fifth Circuit closely mirrors that used by the Texas courts as discussed above.<sup>15</sup> In *American Airlines*, the Fifth Circuit summarized its approach to this issue:

The test is categorical in requiring disqualification upon the establishment of a substantial relationship between past and current representations. But we have never applied the test in a mechanical way that might “prevent[] an attorney from ever representing an interest adverse to that of a former client.” Rather, a substantial relationship may be found only after “the moving party delineates with specificity the subject matters, issues and causes of action” common to prior and current representations and the court engages in a “painstaking analysis of the facts and precise application of precedent.”

*Id.* at 614 (citations omitted). The Fifth Circuit also acknowledges the existence of the same irrebuttable presumption applied by the Texas state courts, that once it is established that the prior matters are substantially related to the present case, “the court will irrebuttably presume that relevant confidential information was disclosed during the former period of representation.” *Id.*

The Fifth Circuit has made clear that this test must be construed in conjunction with the duties of loyalty and confidentiality to the client. *See id.* at 618-19; *In re Corrugated Container*

*Antitrust Litigation*, 659 F.2d 1341(5th Cir. 1981). In *Brennan’s Inc. v. Brennan’s Restaurants, Inc.*, 590 F.2d 168 (5th Cir. 1979), the Fifth Circuit disqualified a former counsel even though there was no chance that confidential information might be used against the former client. There, the Fifth Circuit held that despite the absence of prejudice to the client, disqualification was merited because “[a] client would feel wronged if an opponent prevailed against him with the aid of an attorney who formerly represented the clients in the same matter.” *Id.* at 172. Under such a construction, the issue of confidential information only has meaning in the context of a breach of loyalties to the client. As the Fifth Circuit concluded in *American Airlines*:

We agree that the confidentiality rule was historically concerned with disclosures, but we are also persuaded that the substantial relationship test cannot be reduced to a confidentiality rule. That is, because the substantial relationship test is concerned with both a lawyer’s duty of confidentiality *and* his duty of loyalty, a lawyer who has given advice in a substantially related matter must be disqualified, whether or not he has gained confidences.

972 F.2d at 619 (citations omitted, emphasis in original).

The case of *American Airlines* provides the most recent example of how the Fifth Circuit applies those principles to a factual situation. In *American Airlines*, American was seeking representation with respect to an antitrust action filed against it by Continental Airlines. 972 F.2d at 607. A partner in a large Houston firm agreed to accept the representation, apparently unaware that another partner had previously discussed the representation of Northwest Airlines against American. After discovery of the miscommunication, the firm accepted the representation of Northwest and declined to represent American. After Northwest filed its federal court complaint, the Northwest and Continental actions were consolidated and American moved to disqualify the firm based on its prior representation of American in antitrust matters and the alleged agreement to represent American in the Continental action. The trial court denied American’s motion, concluding that the prior representation was only “tangentially related” to the present dispute. *Id.* at 608. The trial court further concluded that the alleged agreement to represent American in the present litigation was a “mix-up” and that American was not prejudiced by it. *Id.*

The Fifth Circuit granted American’s petition for mandamus and ordered the district court to disqualify the firm. *Id.* at 628. As previously noted, the court declined to accept Northwest’s argument that a disqualification motion must be supported by evidence that a substantial relationship exists between the past and present representations sufficient to “taint” the trial of the matter. 972 F.2d at 615. In so doing, the court also rejected the argument that the substantial relationship test operated to only protect client confidences. *Id.* at 619. Rather, as indicated above, the court noted that the test serves the greater interest of protecting the duty of loyalty owed by an attorney to his client. *Id.* Thus, the court concluded that the rendition of legal services “on a substantially related matter *by itself* requires disqualification.” *Id.* (emphasis added).<sup>16</sup>

#### **D. Concurrent Conflict of Interest**

Another source of conflicts of interests that may result in disqualification is concurrent

representation of adverse clients.

1. The Texas Approach.

The standards relating to conflicts with existing clients are quite simple. “A lawyer shall not represent opposing parties to the same litigation.” TEXAS DISCIPLINARY R. PROF. CONDUCT 1.06(a) (1990). However, the Texas authority with respect to how such a standard is interpreted merits further review.

*a. Rule 1.06: The general standard.*

TEXAS RULE OF PROFESSIONAL CONDUCT 1.06 sets forth the general rules for concurrent conflicts of interest. Specifically, Rule 1.06 states, in relevant part:

- (a) A lawyer shall not represent opposing parties to the same litigation.
- (b) In other situations and except to the extent permitted by paragraph (c), a lawyer shall not represent a person if the representation of that person:
  - (1) involves a substantially related matter in which that person’s interests are materially and directly adverse to the interests of another client of the lawyer or the lawyer’s firm; or
  - (2) reasonably appears to be or become adversely limited by the lawyer’s or law firm’s responsibilities to another client or to a third person or by the lawyer’s or law firm’s own interests.

TEX. DISCIPLINARY R. PROF. CONDUCT 1.06(a)-(b) (1990). Certainly, Rules 1.06(a) and (b) contemplate three separate, but related, grounds for disqualification: (1) simultaneous representation of opposing parties to a litigation; (2) concurrent representation of directly adverse parties to a substantially related matter; and (3) the reasonable appearance of limitation of responsibilities to each client.<sup>17</sup> This rule is intended to protect certain societal interests, such as “the preservation of the intangible representation elements of loyalty and client confidence essential to any attorney-client relationship, the preservation of client confidences, the assurance of unfettered advocacy on behalf of each client, and avoidance of additional costs of representation and litigation occasioned by inopportune changes in counsel.” *Conoco Inc. v. Baskin*, 803 S.W.2d 416 (Tex. App. -- El Paso 1991, no writ) (citing generally the comments to Texas Rule 1.06).

The comments to Texas Rule 1.06 provide some direction as to what type of conduct is prohibited by these standards. Certainly, advocating against a current client is “not advisable.” TEX. DISCIPLINARY R. PROF. CONDUCT 1.06 cmt. 11(1990). Further, the general reference to “opposing parties” is clarified in comment 2 which states the term “contemplates a situation where a judgment favorable to one of the parties will directly impact unfavorably upon the other party.” *Id.* cmt. 2. This same comment references the effect of the duty of loyalty with respect to concurrent representations of adverse parties, stating that “as a general proposition loyalty to a client prohibits undertaking representation directly adverse to the representation of that client in

a substantially related matter . . .” *Id.* The term “directly adverse” is defined as a situation where “the representation of another client if the lawyer’s independent judgment on behalf of a client or the lawyer’s ability or willingness to consider, recommend or carry out a course of action will be or is reasonably likely to be adversely affected by the lawyer’s representation of, or responsibilities to, another client.” *Id.* cmt. 6. The substantial relationship test also surfaces with respect to concurrent representation. To be prohibited under Rule 1.06, in addition to the client’s interests being “materially and directly adverse” to the interests of another client, the concurrent representations must be “substantially related.”<sup>18</sup> *Id.* Rule 1.06 (1990).

Relatively few cases in Texas have construed conflicts arising from concurrent representations and the duties owed under Rule 1.06.<sup>19</sup> One such case is *Conoco, Inc. v. Baskin*, 803 S.W.2d 416 (Tex. App. -- El Paso 1991). There, a company attempted to disqualify a firm from representing an opposing party in a suit against the company where the firm also represented Conoco in several other suits. The conflict arose when two lawyers moved to the firm and brought with them a case filed against Conoco. Their lateral move was at a time when the firm was handling six other lawsuits on behalf of Conoco. The firm, pursuant to Rule 1.06(c), withdrew from the representation of Conoco, but not the adverse party. The court held that disqualification was not warranted under the circumstances. *Id.* at 422. In reaching its conclusion, the Court noted that Rules 1.06(b)(1) and (2) applied. However, the complaint based on substantial relationship had been dropped by Conoco, leaving only the “adversely limited” test. With respect to that issue, the Court construed the following interests protected by the rule. *Id.* at 421. The court concluded that the alleged conflict did not rise to the level required under Rule 1.06(b)(2), stating that: (1) there was no evidence of a reasonable detriment to Conoco in the pending litigation; (2) no damager of disclosure of confidences; and (3) the firm would have withdrawn anyway if it had withdrawn from both representations, rather than just one representation, so there was no real hardship imposed upon Conoco. *Id.* at 421-422.

*b. Exceptions to the General Standard.*

Rule 1.06 does provide for certain exceptions to the general prohibition against concurrent representations. Specifically, Rule 1.06(c) states:

- (c) A lawyer may represent a client in the circumstances described in (b) if:
- (1) the lawyer reasonably believes the representation of each client will not be materially affected; and
  - (2) each affected or potentially affected client consents to such representation after full disclosure of the existence, nature, implications, and possible adverse consequences of the common representation and the advantages involved, if any.

TEX. DISCIPLINARY R. PROF. CONDUCT 1.06(c) (1990). Both the lawyer’s assessment of the conflict *and* the client’s offer of consent after full disclosure are critical to this rule. Certainly, the rule as written does not contemplate concurrent representation where the representation would be materially affected *even if* the clients consent. The lawyer must reasonably believe that his representation will be reasonably protective of that clients interests.

*Id.* cmt. 2. However, if a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer should not ask for the consent or represent the client. *Id.*

The consent necessary to carry on the dual representation may not be possible. Comment 7 expresses the situation where one client refuses to permit disclosure of the information necessary for the attorney to make full disclosure to the second client. *Id.* cmt. 7. Second, the level of disclosure necessary may be different for sophisticated clients than for unsophisticated clients. *Id.* cmt. 8. Finally, a lawyer may assert opposite sides of the same argument to different trial courts for different clients, but would be prohibited from asserting the same arguments to appellate courts. *Id.* cmt. 10.

In *Conoco*, the court held consent inadequate where the attorney had two phone calls with general counsel of the client regarding representation and the calls were brief, there was no evidence that the general counsel was familiar with the lawsuits involved, the provisions of Rule 1.06(c)(2) were not discussed, the client's other lawyer involved in one of the lawsuits was not included in the discussions, and the attorney admitted that full disclosure had not been made. 803 S.W.2d at 420. The court also rejected the argument that the client consented by "voicing no objection," although it declined to disqualify the firm on other grounds. *Id.*

## 2. The Fifth Circuit Approach.

The Fifth Circuit's approach to the issue of conflicts arising out of concurrent representation has not been significantly different from that of Texas courts, although the Fifth Circuit has affirmed its obedience to the "federal common law" and not the Texas Rules when deciding motions to disqualify. *See Dresser*, 972 F.2d 543-44. In addition to these "national standards", the Fifth Circuit has also considered whether the conflict has: (1) the appearance of impropriety in general, or (2) a possibility that a specific impropriety will occur, and (3) the likelihood of public suspicion from the impropriety outweighs any social interests which will be served by the lawyer's continued participation in the case. *Id.* at 544; *Woods v. Covington County Bank*, 537 F.2d 804, 812-13 (5th Cir. 1976).

*Dresser* presents a thorough discussion of the Fifth Circuit's approach to conflicts created by concurrent representation. 972 F.2d at 543-46. There, the law firm of Susman Godfrey represented Dresser Industries, Inc. in two separate concurrent lawsuits. At that same time, Stephen D. Susman, a partner in Susman Godfrey, was lead counsel for the plaintiff's committee in an antitrust action against various manufacturers of oil well drill bits. Once it became known to Susman Godfrey that Dresser Industries, Inc. would be joined as a defendant to the antitrust action, the law firm notified Dresser in writing that if Dresser replaced Susman Godfrey with respect to the two suits currently being handled by it, Susman Godfrey would assist in the transition to a new firm. However, instead of dismissing Susman Godfrey, Dresser moved for disqualification after being joined into the antitrust litigation.

The district court denied Dresser's motion because it found no substantial relationship, under Rule 1.06, between the antitrust litigation and the two suits currently being handled by

Susman Godfrey on Dresser's behalf. *Id.* at 542. The district court also concluded that the concurrent representation did not "reasonably appear to be or become adversely limited by Susman Godfrey's responsibilities to Dresser. . ." *Id.* The Fifth Circuit granted Dresser's petition for mandamus and issued a writ directing the district court to enter an order disqualifying the law firm. *Id.* In reaching its decision, the Fifth Circuit looked not only to the Texas Rules, but also the "national standards" as discussed above, *Id.* Critical to its decision was the fact that neither the ABA Model Rules or Model Code, nor the Restatement of Law Governing Lawyers, allowed an attorney to bring suit against a client without its consent. *Id.* at 544-45.

Interestingly, the Fifth Circuit did note that had Susman been able to establish "some social interest to be served by his representation that would outweigh the public perception of his impropriety", the court may have denied the mandamus petition. *Id.* at 545. The Court concluded its opinion with the suggestion of the following "rule of thumb" for determining future motions to disqualify based on concurrent representations: "However a lawyer's motives may be clothed, if the sole reason for suing his own client is the lawyer's self-interest, disqualification should be granted."<sup>20</sup> *Id.*

### 3. Vicarious Disqualification.

Rule 1.06 also provides grounds for vicarious disqualification. Specifically, Rule 1.06(f) provides that:

- (f) If a lawyer would be prohibited by this Rule from engaging in particular conduct, no other lawyer while a member or associated with that lawyer's firm may engage in that conduct.

TEX. DISCIPLINARY R. PROF. CONDUCT 1.06 (1991). Thus, where an attorney is precluded from representation of a particular client, his entire law firm is also disqualified from the representation. under certain circumstances Because Rule 1.06 refers generally to all conflicts, it is not limited to conflicts arising out of just concurrent representation.

### **E. Conflicts Arising From Lawyer As Witness.**

Another source of conflicts of interest that can result in disqualification is attorneys serving as witnesses in pending litigation where they are attorneys of record. Both Texas courts and the Fifth Circuit have addressed this issue.

#### 1. Texas Courts.

Texas courts apply Texas Disciplinary Rule of Professional Conduct 3.08 to disqualification motions asserting conflicts of interest arising out of a lawyer as a witness.<sup>21</sup> In relevant part, Rule 3.08(a) prohibits an attorney from accepting representation of a client where the attorney's testimony is necessary to establish an essential fact of the client's case.<sup>22</sup> Rule. 3.08 does not apply where: (1) the lawyers anticipated testimony applies to an uncontested issue; (2) the testimony is merely a formality and will go unchallenged; (3) the testimony is as to necessary and reasonable attorneys' fees; (4) the lawyer is a party to the action and is appearing

*pro se*; or (5) after prompt notification to the opposing lawyer of the anticipated testimony, the lawyer can establish that disqualification would result in substantial hardship on the client.<sup>23</sup> Regardless of the exceptions, an attorney may not continue the representation where it becomes clear that the attorney will be compelled to testify adversely to the interests of his client.<sup>24</sup> Further, absent consent on the part of the client, all other members of the attorneys firm are vicariously disqualified from representation where the testifying attorney is disqualified under any of the above circumstances.<sup>25</sup>

Some courts have required a showing of actual prejudice to the party moving for disqualification. *See Ayres v. Canales*, 790 S.W.2d at n. 2 (holding that to prevent abuse of 3.08, a trial court should require the party seeking disqualification to demonstrate actual prejudice to itself resulting from the lawyer's service in dual roles); *Schwager v. Texas Commerce Bank, N.A.*, 813 S.W.2d 225, 227 (Tex. App. -- Houston [1st Dist. 1991, no writ] (holding rule 3.08 should only be applied where the party seeking disqualification can demonstrate actual prejudice to itself); *see also*, TEX. DISCIPLINARY R. PROF. CONDUCT 3.08 cmt. 10 (noting standard of prejudice).

In *Mauze v. Curry*, the Texas Supreme Court applied Rule 3.08(a) and concluded that the trial court abused its discretion when it declined to disqualify a testifying attorney. 861 S.W.2d at 869. There, two plaintiffs sued their prior attorney for malpractice arising out of his handling of their personal injury settlement. The defendant attorney filed a motion for summary judgment, and the plaintiffs' lawyer responded with an affidavit signed by him testifying in his opinion the plaintiffs' previous attorney had been negligent and that the negligence was the proximate cause of plaintiffs' damages. No other expert affidavits were filed. The defendant subsequently filed his motion to disqualify, contending that the attorney who executed the affidavit became a witness necessary to establish the essential facts of malpractice negligence and proximate cause. The trial court denied the motion. The defendant petitioned the Texas Supreme Court for a writ of mandamus. Citing Rule 3.08, the Court conditionally granted the writ stating that because the testifying attorney failed to fall within any of the five exceptions, it was an abuse of discretion for the trial judge to deny the disqualification motion. *Id.* at 870.

Texas courts have offered several policy justifications for the lawyer as witness codified in Rule 3.08. First, it is difficult for a jury to separate the attorney as advocate from the attorney as witness. *Warrilow*, 791 S.W.2d at 522. Further, the attorney-witness must vouch for his own credibility during cross-examination and summation and is therefore unfair to opposing counsel and is "unseemly." *Id.* This undermines "one of the principal ethical considerations" underlying Rule 3.08, "that the attorney-witness is part is the unseemly position of arguing his own credibility to the jury." *Id.* Third, the opposing attorney and his client are disadvantaged when the jury grants undue weight to the attorney's testimony. *Id.* However, these policy considerations and the requirements of Rule 3.08 should be balanced against abuses by the aggressive attorney who unnecessarily calls the opposing lawyer as a witness and thus improperly asserts the rule to gain a tactical advantage. *See May v. Crofts*, 868 S.W.2d at 397 (holding that Rule 3.08 should not be used as a "tactical weapon" to deprive the opposing party of counsel of his/her choice).

## 2. Fifth Circuit.

The Fifth Circuit applies the same “national standards” approach to the lawyer-witness rule as it does in other conflict of interest analyses. Although Rule 3.08 of the Texas Disciplinary Rules of Professional Conduct is considered when determining disqualification issues, the Fifth Circuit will also look to the relevant provisions of the American Bar Association Model Rules of Professional Conduct and the American Bar Association Model Code of Professional Responsibility. *See FDIC v. U.S. Fire Ins. Co.*, 50 F.3d at 1309.<sup>26</sup> The Model Code of Professional Responsibility sets forth four reasons for the lawyer-witness rule that are similar to those offered in support of the Texas Rules: (1) the lawyer may be a less effective witness because he is more easily impeachable for interest; (2) opposing counsel may be inhibited in challenging the credibility of a lawyer who also appears as an advocate; (3) a lawyer-witness must argue his own credibility; and (4) while the role of a witness is to objectively relate facts, the role of an advocate is to advance his client’s cause.

The Local Rules for the Northern District of Texas have also set forth the District’s own interpretation of the lawyer-witness rule.<sup>27</sup>

### **F. Other Problem Areas: Associates, and Support Staff.**

The actions of partners are not the only source of conflicts of interest. Texas courts have found all members of the law office subject to scrutiny for conflicts of interest.

#### 1. Associates.

The Texas Supreme Court recently decided a case dealing with the conflicts created by the lateral hire of an associate. In *Henderson v. Floyd*, plaintiff’s counsel associated another law firm as co-counsel nearly one month before trial. 891 S.W.2d at 253. An associate in the co-counsel’s firm had previously been associated with the Defendants’ counsel’s firm. It was undisputed that the associate, while at defense counsel’s firm never served as attorney of record and never worked on a specific briefing assignment in the case. However, the associate admitted that he had seen and handled the files, watched the settlement video and may have proofread briefs. Also, the associate had attended “file review” meetings during which the case had been discussed, although the associate did not remember the specifics of the discussions with respect to that file. The associate avoided all contact with the case and his firm attempted to shield him from any accidental or intentional exchange of information regarding the case. The trial court denied the defendants’ motion to disqualify. The defendants then petitioned for writ of mandamus.

The *Henderson* Court looked first to Texas Disciplinary Rule 1.09, and concluded that if the associate “personally represented” the defendants while associated with his prior law firm, then the new co-counsel could not represent the plaintiff. *Id.* at 254. The Court quickly concluded that the “record in this case leaves little doubt” that the associate had personally represented the defendant before associating with the plaintiff’s co-counsel. *Id.* The court held that “[i]t is not necessary to show that [the associate] personally and substantially participated in the matter.” *Id.* The court further held that a determination of whether the associate had disclosed

confidential information was unnecessary, and that the dispositive issue was the “simple fact [that the defendants’] former lawyer is now associated with his opponent’s lawyer.” *Id.* In so holding, the Texas Supreme Court found the trial court abused its discretion and conditionally granted the writ of mandamus. *Id.*

## 2. Support Staff/Non-lawyers.

Two recent Texas Supreme Court cases, both handed down the same day, address the issues related to the disqualification of law firms by virtue of conflicts resulting from the employment of non-lawyers. In *Phoenix Founders, Inc. v. Marshall*, 887 S.W.2d at 831 Court decided the issue of “whether a law firm must be disqualified from ongoing litigation because it rehired a legal assistant who had worked for opposing counsel for three weeks.” In July 1993, a legal assistant at Thompson & Knight (“T&K”) left her position to work for another Dallas firm, David & Goodman (“D&G”). T&K and D&G at that time were on opposite sides of a collection suit. During her short three-week employment with her new firm, she billed six-tenths of an hour to the suit in question, after which she returned to work for T&K. In a letter to T&K, D&G noted the conflict of interest and demanded that T&K withdraw from the representation. T&K did not withdraw, but did obtain a forced resignation from the legal assistant. D&G then filed its motion to disqualify. The district court, on motion for rehearing, granted D&G’s motion and disqualified T&K from the suit on the basis of the legal assistant’s exposure to confidential information. *Id.* at 833. T&K petitioned for a writ of mandamus. *Id.*

The Court opened its analysis with a brief review of the law applicable to lawyers with respect to disqualification and the “substantial relationship” test. *Id.* at 833-34. The Court agreed that a paralegal that actually works on a case is subject to the first *Coker* irrebuttable presumption that confidences and secrets were imparted during the course of the paralegal’s work on the case. *Id.* at 834. However, the Court declined to apply the second conclusive presumption that paralegals would be conclusively presumed to share confidential information with members of their firm. *Id.* Instead, this presumption *could be rebutted upon a showing that sufficient precautions had been taken to guard against any disclosure of confidences.* *Id.* at 835. The Court cited the Texas Committee on Professional Ethics consideration of the issue of the “right hand” legal secretary or legal assistant leaving one small firm and joining another that represents an adverse party, and concluded that “the Rules do not require disqualification of the new law firm, provided that the supervising lawyer at that firm complies with the Rules so as to ensure that the nonlawyer’s conduct is compatible with the professional obligations of the lawyer.” *Id.* at 834 (citing Tex. Comm. on Professional Ethics, Op. 472, 55 Tex. B. J. 520, 521 (1992)).

The Court offered guidance to lawyers faced with the prospect of a conflict created by the employment of legal assistants or secretaries from adverse firms. Citing the ABA Commission on Ethics and Professional Responsibility, the Court stated that the hiring law firm may take specific actions to prevent disqualification: (1) the newly hired paralegal should be cautioned to not disclose any information relating to their representation of a client of the former employer; (2) the paralegal should be told to not work on any matter on which the paralegal worked during the prior employment or regarding which the paralegal has information relating to the former employer’s representation. *Id.* at 835 (citing ABA Comm. on Ethics and Professional

Responsibility, Informal Op. 1526 (1988). Further, after stating that it would remand the case to the trial court with instructions, the Court offered the trial court the following guidance with respect to its reconsideration of the disqualification motion:

In reconsidering the disqualification motion, the trial court should examine the circumstances of [the legal assistant's] employment at Thompson & Knight to determine whether the practical effect of formal screening has been achieved. The factors bearing on such a determination will generally include the substantiality of the relationship between the former and current matters; the time elapsing between the matters; the size of the firm; the number of individuals presumed to have confidential information; the nature of their involvement in the former matter; and the timing and features of any measures taken to reduce the danger of disclosure.

*Id.* at 836 (citing Comment, *The Chinese Wall Defense to Law-Firm Disqualification*, 128 U.P.A.L.REV. 677, 711-715 (1980)). The Court concluded that the “ultimate question” is whether T&K had taken sufficient measures “to reduce the potential for misuse of confidences to an acceptable level.” *Phoenix*, 887 S.W.2d at 836.

Another significant opinion discussing the effect of non-lawyer created conflicts of interest is *Grant v. Thirteenth Court of Appeals*. 888 S.W.2d at 466. There, a legal secretary left the firm representing the plaintiffs in a pending toxic tort litigation for work at the firm representing the defendants to the same action. It was undisputed that she gained confidential information during the course of her employment at the plaintiff's law firm. After her employment at the defendant's firm, the secretary informed the managing partner of her work on the pending case at the plaintiff's firm. She was immediately told not to reveal her knowledge to anyone at the firm, and she later signed an affidavit attesting that she disclosed no information. The plaintiff's moved to disqualify the defendant's law firm, and the trial court granted the motion after concluding that the sharing of client confidences is conclusively presumed when a non-lawyer transfers to a firm adverse to the prior firm. The trial court also concluded that no client confidences were shared with the defendant's firm by the secretary.

The Court of Appeals conditionally granted the defendant's writ of mandamus, rejecting the trial court's application of the irrebuttable presumption of disclosure of confidences *Occidental Chemical Corp. v. Brown*, 877 S.W.2d 27 (Tex. App. -- Corpus Christi, 1994, orig. proceeding), *rev 'd, Grant*, 888 S.W.2d at 466. Instead, the court of appeals stated that such situations should be dealt with on a “case-by-case basis,” and that situations arising out of conflicts created by a transfer of a non-lawyer required the application of a rebuttable presumption. *Id.* at 32. Thus, the court concluded that although the plaintiffs were entitled to the presumption that the secretary disclosed confidential information while at the defendants firm, this presumption was rebutted by the secretary's sworn affidavit. *Id.*

The Texas Supreme Court affirmed the holding in *Phoenix* that created the rebuttable presumption with respect to shared confidences. *Id.* However, the *Grant* Court arguably added to this standard, holding that to grant disqualification the movant must establish the mere “threat of disclosure, not an actual materialized disclosure.” *Id.* at 467. Certainly, the *Grant* decision focuses the trial court's inquiry on the measures taken by the law firm to prevent disclosure of

confidential information rather than on the substance of any information that might be disclosed. The Court stated that “timely screening arrangements are essential to the avoidance of firm disqualification.” *Id.* at 468.

### **III. MALPRACTICE**

Issues related to disqualification and conflict of interest are directly relevant to attorney malpractice. In fact, it is with respect to this subject that the cross-hairs become most focused on the attorney. Disqualification is serious because it results in a loss of revenue and most likely the client as well. However, the malpractice implications rise to an entirely different level. It is fundamental that the attorney-client relationship is a fiduciary one. Accordingly, the attorney owes the client the duty of utmost confidence and good faith. The presence of a conflict of interest can cut at the heart of that fiduciary relationship. It is out of this breach that claims of malpractice can arise.

#### **A. The Malpractice Implications of Conflicts of Interest.**

A malpractice action in Texas is based on negligence and requires proof of four well-known elements: (1) the existence of a duty; (2) a breach of that duty; (3) that the breach of the duty proximately caused certain damages; and (4) that the plaintiff was damaged. *Cosgrove v. Grimes*, 774 S.W.2d 662, 664 (Tex.1989). Because an attorney owes his client a fiduciary duty, *see Willis v. Maverick*, 760 S.W.2d 642, 645 (Tex.1988); where a conflict in interests arises that causes a breach of that duty, the attorney will be responsible for all damages proximately resulting therefrom.

Although attorney malpractice actions have traditionally centered on the assertion that the attorney caused the client to lose his case, malpractice actions arising out of conflicts of interest are uniquely different. *See Mackie v. McKenzie*, 900 S.W.2d 445, 449 (Tex. App. --Texarkana 1995, writ denied) (“To succeed in a legal malpractice action, the plaintiff must prove ‘a suit within a suit’ by showing that he would have prevailed in the underlying action but for his attorney’s negligence.” *MND Drilling Corp. v. Lloyd*, 866 S.W.2d 29,31 (Tex. App. --Houston [14th Dist.] 1987, no writ) (holding that client has the burden of proving his case would have been successful but for the negligence of the attorney). In a malpractice action arising out of a conflict of interest, it is questionable whether a plaintiff would have to prove the “suit within a suit” because the real issue is breach of fiduciary duty owed to the client. Similarly, it is conceivable that a former client could recover for malpractice of the attorney even in a situation where the client is successful in the litigation where it is sued by its former attorney.

#### **B. Paying the Price.**

Several recent cases have brought the issue of malpractice and conflicts of interest to the forefront. As is self-evident from the verdicts rendered in these cases, the stakes are high when dealing with malpractice based on conflicts of interest. Although, these cases deal specifically with “large” Texas firms, smaller law firms are equally endangered with respect to malpractice liability. However, the specter of conflicts of interest haunts larger firms perhaps more significantly just by virtue of their size. The more lawyers, clients, and diverse representation

undertaken by large law firms renders them particularly susceptible to conflict issues.

1. Anne E. Moran. et. al. v. Vinson & Elkins

As a result of this suit, V&E is currently appealing a \$35.7 million judgment entered against it in 1994. *Vinson & Elkins v. Ann E. Moran, et. al.* (No. 14-95-00348-CV). The suit is based on alleged conflicts of interest asserted by two heirs of William T. Moran, a Houston multi-millionaire. The heirs claim that V&E failed to disclose conflicts of interest it had when representing the estate and beneficiaries from 1984 to 1989. The two heirs also maintain that V&E tried to prolong administration of the estate in an effort to charge additional unnecessary attorneys' fees, was negligent in rendering certain tax advice, and conspired with others in an effort to decrease the value of certain estate assets. No decision has been reached by the Fourteenth Court of Appeals.

a. *The basis of the conflict of interest.*

W.T. Moran died in November 1983. He left his estate in trusts for his family and employees, and left the family businesses, Moran Utilities and Morgas Pipeline Corporation, in the hands of his grandson, Patrick J. Moran. Apparently, it was the intent of the beneficiaries to retain control of the companies under the leadership of Pat Moran. The will designated three co-executors:

Pat Moran, John McDonough and First City National Bank of Houston ("First City").

In early 1984, V&E filed suit on behalf of First City for construction of the will. Specifically, there was a dispute regarding whether the will provided for a sufficient "marital deduction" for W.T. Moran's widow, Louise Moran. In the course of this suit, V&E raised a malpractice issue with respect to the law firm that was at that time representing the estate thus forcing the law firm to withdraw. According to the plaintiffs, this allowed V&E to move in as principal counsel for the Moran Estate. During V&E's representation, its managing partner frequently met with Pat Moran to discuss estate matters as well as confidential business issues relating to Morgas Pipeline and Moran Utilities.

During the course of V&E's involvement, it is unclear that V&E ever specifically acknowledge to anyone whom it was representing. According to the plaintiffs, V&E often referred to itself as representing "the Moran family", "the Morans", "the Moran Estate", or "the Estate" or sometimes "the Moran interests" or "the Moran entities." Further, no specific engagement letter was ever executed by V&E with respect to this matter, nor was there ever any letter stating the scope of the engagement. This ambiguity was the start of a multitude of problems for V&E. One example occurred in V&E's internal discussions of whether to sue the other law firm for alleged malpractice regarding certain marital deduction. V&E ultimately advised Louise Moran not to sue. However, the plaintiffs allege that a subsequently uncovered V&E internal memorandum noted that the other law firm had actually relied on a prior will drafted by V&E lawyers, and that if the other law firm was liable to the beneficiaries, V&E could also face up to \$9 million in malpractice liability.

Plaintiffs also allege that First City's involvement led to a conflict of interest with V&E.

First City held over \$60 million of the estate's liquid assets. The plaintiffs allege that First City began to have financial problems during the second-half of the 1980's. Pat Moran and other beneficiaries wanted to remove the estate assets and transfer them to Texas Commerce Bank. V&E then issued an opinion letter on behalf of First City stating that the estate assets would be safe. Although V&E represented both the bank and the estate at that time, this was never disclosed in any correspondence to the beneficiaries. Pat Moran nevertheless withdrew many of the accounts from First City and transferred them to Texas Commerce Bank. In retaliation, First City cut off Pat Moran's line of credit. The managing partner of V&E sat on the Credit Review Committee that oversaw all lines of credit. Further, adding to the alleged conflict, when First City became insolvent in 1987, V&E acquired \$5 million of stock in First City.

In 1984, W.J. Wooten was hired as President of the Moran Corporation, based on the recommendation of First City. According to the plaintiffs, Wooten was a long-time friend of the managing partner of V&E. During Wooten's employment, the plaintiffs allege that more serious conflicts of interest arose with respect to V&E. First, Wooten recommended that the estate invest \$3.2 million in a venture called HOFECO. The plaintiffs later discovered that First City had made a \$1.5 million non-recourse loan to HOFECO which was later increased to \$5 million, essentially "propping up" HOFECO. Additionally, V&E had represented both HOFECO and First City in the loan deal and still represented HOFECO in other matters. In fact, V&E owned \$300,000 of HOFECO stock. None of these apparent conflicts of interest were disclosed to the beneficiaries. Additionally, in a negotiated deal for the sale of Moran Utilities, V&E represented the estate in negotiations with the suitor, Entex. However, the V&E Lawyers Retirement Plan and the First City pension trust were partners in a partnership that's purpose was to purchase Entex oil and gas properties and lease them back to Entex. According to the plaintiffs, V&E's relationship with Entex was never disclosed. Third, V&E's plan for settling the estate required the sale of Morgas Pipeline and Moran Utilities. A \$30 million offer for these assets was offered by Seagull and Entex, as an undisclosed partner. V&E represented the estate at this time, but failed to disclose its relationship with its former client Seagull or the other conflicts relative to Entex. Although Pat Moran and the other beneficiaries opposed the sale of the assets, V&E sided with First City and tried to push the deal through. Despite this, V&E continued to do work for the beneficiaries.

It was at this time that the beneficiaries learned of the conflicts between themselves, and V&E, First City and Seagull. Specifically, they learned that the managing partner for V&E was on the board and executive committee of Seagull, the board and various committees of First City, and that other executives and board members of Seagull were on the board of First City and that V&E had recently purchased \$5 million of First City stock. They also learned that other high ranking lawyers at V&E were on the First City board, and that many V&E attorneys owned stock in First City. The beneficiaries also learned in 1990 that the managing partner of V&E owned 20,000 shares of Seagull stock worth over \$600,000, and that he had voted in his capacity as board member for Seagull to bid for the Moran companies.

The beneficiaries eventually lost control of both companies. In 1990, Entex finally acquired Moran Utilities for \$15.2 million, and Morgas was sold for \$21.5 million.

*b. The trial court's verdict and judgment.*

The jury returned a verdict based on the above evidence and found that the plaintiffs' interests in the Moran estate had been damaged as a result of V&E's negligence, gross negligence, breach of fiduciary duty, conspiracy (with First City, Seagull, Entex and Wooten), deceptive trade practices, and unconscionable course of conduct. The jury assessed a total \$17.7 million in actual damages, plus attorneys' fees of one third of the Plaintiffs' recovery. The jury also returned a second-phase verdict for \$1 million in exemplary damages and \$3 million in DTPA additional damages. The trial court entered the judgment on the verdict, except for exemplary damages based on the plaintiffs' election. Thus, the total judgment entered was for \$35.7 million.

2. Vaughn v. Akin Gump Hauer & Feld. et al,

Akin, Gump, Hauer & Feld was recently hit with an \$8 million judgment over undisclosed conflicts of interest. The judgment followed a bench trial in a third-party adversary action filed by the plaintiff, Grady H. Vaughn III against the firm and two of its lawyers. The conflict arises out of a dispute over the fundamental question of "Who is the client?" Akin Gump claims that it represented Malcolm Kelso, a self-acclaimed "crisis manager" for Vaughn's company, Chama Land & Cattle Co., Inc. ("Chama") and Kelso's workout company, Legal Econometrics Inc. Vaughn contends that Akin Gump was his company's attorney and represented it in regards to its restructuring.

In Judge Abramson's Findings of Fact and Conclusions of Law entered by the Bankruptcy Court for the Northern District of Texas, he found the Akin Gump lawyers had an attorney-client relationship with Vaughn, and that they had been negligent and grossly negligent in representing Vaughn and his interests, and that they breached the fiduciary duty they owed him. The Judge then awarded Vaughn \$4 million in actual and \$4 million in punitive damages against Akin Gump and the lawyers individually.

a. *The bases of the suit.*

The suit arises out of some problems Vaughn's company was having with an investigation conducted by the State of New Mexico and allegations that Chama had been involved in the transportation of stolen game. Vaughn hired Kelso and Legal Econometrics Inc. as a "crisis manager" to aid in resolving the investigation and to act as Vaughn's agent and representative with respect to all matters involving Chama. Subsequently, Kelso introduced Vaughn to two Akin Gump lawyers. No disclosure was made of Kelso's prior relationship with the two Akin Gump lawyers.

Akin Gump, through the two lawyers introduced by Kelso, began to consider various means to dilute Chama's assets. They concluded that the best way would be to have Chama execute long-term fifty year leases as to the land, Game Parks and other assets owned by Chama to tie up the land and Game Parks in the event NCNB foreclosed on Vaughn's two-third's stock ownership in Chama. This was also to be accomplished through the creation of four long-term voting trusts of which Kelso was the trustee for the entire 50-year period. In addition to the voting trust documents, Akin Gump was to also draft a resignation letter for Kelso. This letter was never drafted based on the explanation offered by the Akin Gump attorneys that such a letter

would constitute a fraud on the State of New Mexico. However, no other means of unseating Kelso was ever provided for in any of the documents prepared by Akin Gump.

All of the relevant documents were to have been executed by July 31, 1990. In November 1990, one of the Akin Gump attorneys was substituted as successor trustee to Kelso for a longer term than the life expectancy of either the attorney or Kelso. No consent was ever obtained from Vaughn.

The Court noted in its Findings of Fact and Conclusions of Law that during the entire string of transactions and restructuring, the Akin Gump lawyers communicated not only with Vaughn's lawyers but also with Vaughn himself. Although Vaughn was represented by his own counsel, their participation was merely "passive" in nature.

*b. The Court findings.*

The Court concluded that the actions of Akin Gump only served to divest the assets of Chama from the control of Vaughn in such a way that violated their fiduciary duty to Vaughn. The Court found the existence of an attorney-client relationship between Akin Gump and Vaughn. Kelso was hired to find counsel to represent Vaughn and Chama to implement the reorganization scheme. The Court noted that an agent may employ counsel for his principal. Because Vaughn reasonably believed that Akin Gump was hired on his behalf by Kelso, there were facts sufficient to support a finding of an attorney-client relationship.

The Court further found that Akin Gump and the two attorneys were negligent and grossly negligent in the performance of their professional responsibilities to the client. The Court also found for Vaughn with respect to his claims for breach of fiduciary duty. In so finding, the Court primarily relied on Akin Gump's failure to disclose its prior relationship with Kelso and that they were not acting in Vaughn's best interest. In other words, the Court relied on the presence of the conflict of interest in finding malpractice and breach of fiduciary duty. The Court also noted that Akin Gump's failure to provide Vaughn with a resignation letter or other mechanism to remove Kelso as trustee of the voting trusts constituted professional negligence. The Court finally concluded that these acts met the test for gross negligence.

#### IV. CONCLUSION

Disqualification motions are an increasing occurrence in modern litigation. Disqualification has become an effective weapon in the arsenal of procedural weaponry available to opposing counsel. As a result, large firms and small firms alike have been forced to re-evaluate their approaches to conflicts of interest. The results of a successfully prosecuted disqualification motion can be devastating, in some circumstances, to not only the client but also the lawyer. Texas and Fifth Circuit authority is still growing with respect to many issues in this area, and Texas practitioners will have to be vigilant in keeping abreast of the emerging trends.

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<sup>1</sup> See *F.D.I.C. v. U.S. Fire Ins. Co.*, 50 F.3d 1304 (5<sup>th</sup> Cir. (95) ("Depriving a party of the right to be represented by the attorney of his or her choice is a penalty that must not be imposed without careful consideration.")

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<sup>2</sup> For other discussions of this issue, see Samara L. Kline, *Conflicts of Interest: Motions to Disqualify – Identifying the Rules of the Game*, 57 Tex. B.J. 240-245 (1994) and Gregory P. Crinion, *Lawyer Disqualification – Undertaking a Representation Adverse to a Current or Former Client*, THE ADVOCATE (March 1993) at 11-19. Also, for discussions of this topic from a national perspective, see *Conflict of Interest Issues*, The Business Lawyer 1381 (August 1995).

<sup>3</sup> Compare *Koch Oil Co. v. Anderson Producing, Inc.*, 883 S.W.2d 784, 787 (Tex. App. – Beaumont 1994, orig. proceeding) (giving Texas Disciplinary Rules of Professional Conduct the same force and effect as the Texas Rules of Civil Procedure); *Warrilow v. Norrell*, 791 S.W.2d 515, 519 (Tex. App. – Corpus Christi 1989, writ denied) (holding disciplinary rules are mandatory in nature because “they establish the minimum level of conduct below which no lawyer may fall.”)

<sup>4</sup> These cases essentially concern the “taint” standard as enunciated in comment 17 to TEX. DISCIPLINARY R. PROF. CONDUCT, 1.06 where opposing counsel may raise the question of conflict of interest. TEX. DISCIPLINARY R. PROF. CONDUCT, 1.06 (1991) (“Raising questions of conflict of interest is primarily the responsibility of the lawyer undertaking the representation.... Where the conflict is such as to clearly call in question the fair or efficient administration of justice, opposing counsel may properly raise the question.”)

<sup>5</sup> Interestingly, the Fifth Circuit in *In re American Airlines* fails to mention *In re Yarn Processing*. *American Airlines* did involve a motion filed by a client, but there is language indicating that a non-client may file a motion to disqualify taking the conflict to the attention of the Court. *American Airlines* 972-F.2d at 610-611.

<sup>6</sup> Even though *Vaccaro* was decided under Illinois law, Texas law similarly holds that asking questions of someone else’s attorney does not create an attorney-client relationship. *Parker v. Carnahan*, 772 S.W.2d 151, 156 (Tex. App. – Texarkana, 1989, writ denied).

<sup>7</sup> The *Clarke* opinion cited DR 4-101(B), a prior version of Rule 1.09 codified in the TEXAS CODE OF PROFESSIONAL RESPONSIBILITY, however the substance of the above argument is unaffected. In 1989, the Texas Supreme Court replaced the TEXAS CODE OF PROFESSIONAL RESPONSIBILITY with the TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT. DR 4-101(B)’s counterpart, Rule 1.09 entitled “Conflict of Interest: Former Client”, provides as follows:

- (a) Without prior consent, the lawyer who personally has formerly represented a client in a matter shall not thereafter represent another person in a manner adverse to the former client:
  - (1) If it is the same or substantially related matter;
  - (2) In which such other person questions the ability of the lawyer’s services or work product for the former client; or
  - (3) If the representation and reasonable probability will involve a violation of Rule 1.05 [breach of client confidence]..
- (b) Except to the extent authorized by Rule 1.1, when lawyers are or have become members of or associated with a firm, none of them shall knowingly represent a client if any one of them practicing alone would be prohibited from doing so by paragraph (a).
- (c) When the association of a lawyer with a firm has terminated, the lawyers who were then associated with that lawyer shall not knowingly represent a client if the lawyer whose association with that firm has terminated would be prohibited from doing so by paragraph (a) (1) or if the representation in reasonable probability will involve a violation of Rule 1.5.

TEX. DISCIPLINARY R. PROF. CONDUCT 1.09 (1989). A comparison of this version with that of the current Rule 1.09 set forth above in the main text reveals that the only difference is a change in the order of (a)(1), (2) and (3). Regardless of these changes, there remain three separate tests for disqualification: (1) reasonable probability of disclosing client confidences; (2) questioning the lawyer’s services performed by the former client; and (3) substantial relationship. Compare MODEL RULES OF PROFESSIONAL CONDUCT 1.9:

- (a) 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 consents after consultation.
- (b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in

- 
- which a firm with which the lawyer formerly was associated had previously represented a client.
- (1) whose interests are materially adverse to that person; and
  - (2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter;
- unless the former client consents after consultation.
- (c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:
    - (1) use information relating to the representation to the disadvantage of the former client except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client, or when the information has become generally known; or
    - (2) reveal information relating to the representation except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.9 (1989)

<sup>8</sup> Compare Rule 1.6 of the MODEL RULES OF PROFESSIONAL CONDUCT promulgated by the American Bar Association which does not attempt to make the same distinction:

- (a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).
- (b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:
  - (1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or
  - (2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

<sup>9</sup> For an excellent discussion of the term adverse, see *Kelly, supra*

<sup>10</sup> The Court, in *Coker*, construed Texas Code of Professional Responsibility DR 4-101(B), which discusses representation by attorneys with alleged conflicts of interest arising from prior representation of adverse parties. This provision has been replaced by the current Texas Disciplinary Rules of Professional Conduct 1.09. TEX. DISCIPLINARY R. PROF. CONDUCT 1.09 (1991)

<sup>11</sup> See also *Clarke v. Ruffino*, 819 S.W.2d at 949 (finding lawyer disqualified where lawyer represented a client regarding a real estate refinancing and later represented and adverse party to the first client in an action where the refinancing was an issue); *Gleason v. Colman*, 693 S.W.2d 564, 565 (Tex. App. -- Houston [14th Dist.] 1985, writ ref'd n.r.e.) (finding lawyer disqualified where lawyer represented a man in a divorce matter that ended in reconciliation and later represented the wife in a second divorce proceeding between the two persons); *Westergren*, 794 S.W.2d at 812 (finding disqualification where a lawyer had represented an insured and, on an F"accommodation or pro forma" basis, the insurance company, and subsequently represented the insured against the insurer in a bad faith claim arising from settlement of the earlier claim). Compare *Arkla* 762 S.W.2d at 694 (finding no substantial relationship between representation of an employer in workers' compensation case and subsequent negligence lawsuits involving other plaintiffs); *Lott v. Ayres*, 611 S.W.2d 473 (Tex. Civ. App. -- Dallas 1980, writ ref'd n.r.e.) (finding no substantial relationship where lawyer represented movant's wife, and briefly husband, in personal injury claim, and later lawyer represented the wife in a divorce action against the husband)

<sup>12</sup> Whether the substantial relationship test will be replaced by the new broader test in Rule 1.09 for the purposes of disqualification is yet to be seen, however courts have already begun applying the new tests in cases such as *Clarke*. See TEX. DISCIPLINARY R. PROF. CONDUCT 1.09 cmt. 9 (1991) ("Whether the 'substantial relationship' test will continue to be employed as a standard for procedural disqualification is a matter beyond the scope of these Rules."). However, the comments to Rule 1.09 indicate that Rule 1.09(a)(3) is not the broad brush that some courts may believe it to be. Specifically, comment 8 notes that "[a] lawyer is not subject to discipline under Rule

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1.05(b)(1), (3) or (4), however, unless the protected information is actually used.” TEX. DISCIPLINARY R. PROF. CONDUCT 1.09 cmt. 8 (1991) Likewise, a lawyer is not subject to discipline under this Rule unless the new representation by the lawyer in reasonable probability would result in a violation of those provisions. *Id.* Further, Comment 3 to Rule 1.09 states that Rule 1.09 does not however, absolutely prohibit a lawyer from ever representing a client against a former client. TEX. DISCIPLINARY R. PROF. CODUCT 1.09 cmt. 3(1991)

<sup>13</sup> See, e.g. *Enstar Petroleum Co. v. Mancias* 773 S.W.2d 662 (Tex.App -- San Antonio 1989, orig proceeding); *Wadley* 776 S.W.2d at 278. Also, for a good discussion of the rules related to vicarious disqualification and Rule 1.09, see Texas Ethics Opinion 501, Texas Commission on Professional Ethics, (April 12, 1994).

<sup>14</sup> The Fifth Circuit, in *U.S. Fire ins.*, commented on this issue at length and made clear its disdain for such tactics: As noted in the comments to both the Model Rules and the Texas Rules, an opponent may be tempted to invoke the disqualification rule for purposes of harassment. Unhappily, as often as the rule is misused, the profession is disserved. When, for purely strategic purposes, opposing counsel raises the question of disqualification, and subsequently prevails, public confidence in the integrity of the legal system is proportionately diminished. Indeed, the more frequently a litigant is delayed or otherwise disadvantaged by the unnecessary disqualification of his lawyer under the appearance of impropriety doctrine, the greater the likelihood of public suspicion of both the bar and the judiciary.

50 F.3d at 1316(citations omitted).

<sup>15</sup> Interestingly, the Fifth Circuit stated in *American Airlines* that the substantial relationship test, though expressly included in all state and national professional standards, is actually a product of the federal common law. *Id.* (“This circuit adopted the substantial relationship test before the promulgation of the Rules of Professional Conduct.”). More specifically, the Fifth Circuit noted in *American Airlines* that the substantial relationship test has its roots in the seminal decision of *T.C. Theatre Corp. v Warner Bros. Pictures, Inc.*, 113 F.Supp. 265 (S.D.N.Y. 1953), which was decided prior to the issuance of the Model Code or Model Rules. 972 F.2d at 617. In fact, neither the original drafts of the ABA Model Code or Rules, nor the Texas Code or Rules included a rule barring representation in substantially related matters. Instead, the substantial relationship language was added only in an effort to reflect existing case law. *Id.*

<sup>16</sup> The court also analyzed the firm’s prior representation of American in the past. Nothing that the firm had been paid in excess of \$676,000 in several years prior to the dispute for representation in antitrust matters involving American, Continental and Northwest, the court had little trouble finding a substantial relationship between the past and present representations.

<sup>17</sup> Compare Rule 1.7 of the MODEL RULES OF PROFESSIONAL CONDUCT which also relates to concurrent conflicts of interest:

- (a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:
  - (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
  - (2) each client consents after consultation.
- (b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer’s responsibilities to another client or to a third person, or by the lawyer’s own interests, unless:
  - (1) the lawyer reasonably believes the representation will not be adversely affected; and
  - (2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 (1989).

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<sup>18</sup> The Texas Rules differ significantly from the Model Rules promulgated by the ABA. *See supra* a.7. Model Rule 1.7, which deals with the same issue of concurrent representation, generally prohibits representations “directly adverse to another client” unless each client consents and the attorney reasonably believes that representation of one client will not “adversely affect” the relationship with the other client. MODEL RULES OF PROFESSIONAL CONDUCT 1.7 (1989). However, the Texas Rules incorporate the “substantial relationship” test even as to a current client so long as the adverse representation is not in the same case. *See* TEX. DISCIPLINARY R. PROF. CONDUCT 1.06(b)(1) (1990).

<sup>19</sup> However, several significant ethics opinions have been issued with respect to Rule 1.06. *See e.g.*, Texas Commission on Professional Ethics, Op. 487, 67 Tex. B.J. 305 (1994).

<sup>20</sup> The court noted:

[T]hat the Texas rules of discipline do not control a motion to disqualify in federal court. We are mindful, however, that the Texas rules’ allowance of some concurrent representation is based, in part, on a concern that concurrent representation may be necessary either to prevent a large company, such as Dresser, from monopolizing the lawyers of an area or to assure that certain classes of unpopular clients receive representation. Although we do not now reach the matter, our consideration of social benefit to offset the appearance of impropriety *might* allow such a representation if the balance clearly and unequivocally favored allowing such representation to further the ends of justice.

*In re Dresser*, 972 F.2d at 545.

<sup>21</sup> *See Mauze v. Curry*, 861 S.W.2d 869 (Tex. 1993, orig. proceeding); *Koch Oil Co. v. Anderson Producing Inc.*, 883 S.W.2d at 784; *May v. Crofts*, 868 S.W.2d 397 (Tex. App. -- Texarkana 1993, orig. proceeding); *Warrilow v. Norrell*, 791 S.W.2d at 515 (applying Rule 3.08’s counterparts under the prior Disciplinary Rules).

<sup>22</sup> Rule 3.08 provides the following with respect to this issue:

(a) A lawyer shall not accept or continue employment as an advocate before a tribunal in a contemplated or pending adjudicatory proceeding if the lawyer know or believes that the lawyer is or may be a witness necessary to establish an essential fact on behalf of the lawyer’s client, unless:

(1) the testimony relates to an uncontested issue;

(2) the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony;

(3) the testimony relates to the nature and value of legal services rendered in the case;

(4) the lawyer is a party to the action and is appearing pro se; or

(5) the lawyer has promptly notified opposing counsel that the lawyer expects to testify in the matter and disqualification of the lawyer would work substantial hardship on the client.

(b) A lawyer shall not continue as an advocate in a pending adjudicatory proceeding if the lawyer believes that the lawyer will be compelled to furnish testimony that will be substantially adverse to the lawyer’s client, unless the client consents after full disclosure.

(c) Without the client’s informed consent, a lawyer may not act as advocate in an adjudicatory proceeding in which another lawyer in the lawyer’s firm is prohibited by paragraphs (a) or (b) from serving as advocate, if the lawyer to be called as a witness could not also serve as an advocate under this Rule, that lawyer shall not take an active role before the tribunal in the presentation of the matter.

TEX. DISC. R. PROF. CONDUCT 3.08 (1994).

<sup>23</sup> *Id.* 3.08(a)(1-5).

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<sup>24</sup> *Id.* 3.08(b)

<sup>25</sup> *Id.* 3.08(c)

<sup>26</sup> Compare Rule 3.08 of the Texas Disciplinary Rules of Professional Conduct with Rule. 3.7 of the American Bar Association Model Rules of Professional Conduct:

Rule 3.7 Lawyer as Witness:

- (a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where:
  - (1) the testimony relates to an uncontested issue;
  - (2) the testimony relates to the nature and value of legal services rendered in the case; and
  - (3) disqualification of the lawyer would work a substantial hardship on the client.
- (b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by rule 1.7 or rule 1.9.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.7 (1992).

<sup>27</sup> Local Rule 13.8 provides:

**Rule 13.8 Attorney as a Witness.**

**(a) Acceptance of Employment.**

An attorney shall not accept employment in contemplated or pending litigation if he knows, or if it is obvious, that he or an attorney in his firm ought to be called as a witness on behalf of the client, except that the attorney may undertake the employment and he or an attorney in his firm may testify:

- (1) if the testimony will relate solely to an uncontested matter.
- (2) if the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony.
- (3) if the testimony will relate solely to the nature and value of legal services rendered in the case by the attorney or his firm to the client.
- (4) as to any matter, if refusal would work a substantial hardship on the client, because of the distinctive value of the attorney or his firm as counsel in the particular case.

**(b) Withdrawal from Representation.**

If, after undertaking employment in contemplated or pending litigation, an attorney learns or it is obvious that he or an attorney in his firm ought to be called as a witness on behalf of the client, the attorney and his firm shall withdraw from the conduct of the trial and continued representation, unless one of the exceptions listed in (a) is applicable.

**(c) Testimony Prejudicial to Client.**

If, after undertaking employment in contemplated or pending litigation, an attorney learns or it is obvious that he or an attorney in his firm may be called as a witness *other than on behalf of his client*, the attorney and his firm may continue the representation until it is apparent that his testimony is or may be prejudicial to the client.

LOCAL RULES OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS 13.8 (1985).