

**MOVING TARGETS: ATTORNEY DISQUALIFICATION
AND MALPRACTICE LIABILITY RESULTING FROM
CONFLICTS OF INTEREST**

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February, 1997

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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 can be an extremely costly oversight. Not only do conflicts of interest serve as a basis for disqualification from ongoing representations, but they also can form a solid foundation for a malpractice claim against you and your firm. Traditionally lawyers have held the privilege of choosing their own targets during litigation. Now, the tables have turned and lawyers are finding that they are now 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 tool and the Texas Courts have often noted how it can be used as a procedural weapon with the opposing lawyer as the moving target. Courts have further noted the prejudice it can work on the party whose counsel is disqualified.¹ 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, 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. 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.

Complicating this issue is the quickly expanding and evolving case law on the issue of attorney disqualification in both the Texas state and federal courts. Although the Texas Disciplinary Rules of Professional Conduct, the Model Rules of Professional Conduct, and other ethical canons provide courts a foundation on which to develop legal privileges, by no means have these codifications lead to the development of consistent and coherent legal precedent. To the contrary,

Texas law on this issue has become a "moving target" in itself, leaving the practitioner vulnerable to ever-changing standards.

This article 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.² 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.³ 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.”⁴

Disqualification is, however, a “severe remedy.”⁵ Such motions are subject to ‘an exacting standard’ both to protect a party’s right to counsel of choice as well as to discourage the use of such motions as a “dilatatory trial tactic.”⁶ 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.⁷ 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.”⁸ 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.”⁹ 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.”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.¹¹ 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.¹² 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.¹³

However, it is well-settled that motions to disqualify in federal court 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*.”¹⁴ 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.¹⁵

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.”)¹⁶ 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.’”¹⁷ 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.”¹⁸ 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.”¹⁹ 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.”²⁰

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 client moves for disqualification; and (2) where a non-client 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.²¹ 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.²² 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. Although the Texas Supreme Court had an opportunity to do so, it

addressed neither the standing of the shareholder as non-party nor the standing of the party as a non-client in its opinion. Instead, the Court ignored these issues and cut directly to the issue of whether a substantial relationship existed between the representations.

The Texas Supreme Court contended in its recent opinion in *National Medical Enterprises v. Godbey* where *Metropolitan Life* left off.²³ In *Godbey*, the Court addressed directly whether a non-party former client of the offending law firm had standing to prosecute the motion to disqualify.²⁴ The Court looked to the requirement of “adversity” in Texas Disciplinary Rule of Professional Conduct 1.09.²⁵ The Court concluded that if the pending representation was “adverse” to the non-party former client, then he had standing to prosecute the action.²⁶ The critical element to adversity is risk, the Court found, and therefore determined that if the representation in question placed the non-party former client in any degree of risk, then the representation would be deemed adverse “as a matter of law.”²⁷ The court then concluded that because the non-party former client was subject to risk by the pending representation, the representation was adverse and he therefore had standing to file his motion to disqualify with the Court.²⁸

There is also the issue of whether an opposing party that has no relationship to the attorney who is the subject of the disqualification motion has standing. Certainly the “adversity” analysis in *Godbey* is inapplicable in this situation because there is no former or concurrent representation.²⁹ The Texas Disciplinary Rules of Professional Responsibility are 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.³⁰

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.³¹

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.³² 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.³³ Rule 3.08 governs situations where a lawyer may also serve as a witness in cases where the lawyer also serves as counsel.³⁴ 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 sealed 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.³⁵

However, the case of *In re Yarn Processing Patent Validity Litigation*, presents a more strict interpretation of the standing rule.³⁶ 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.”³⁷ 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.³⁸

Whether *In re Yarn* is consistent with the rulings in *In re American Airlines* is questionable.³⁹ 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. Disqualification Procedure.

To prosecute a motion for disqualification, the movant must first file his motion with the trial court and obtain a ruling. The losing party may then either appeal the ruling upon entry of judgment, or petition the appellate courts for a writ of mandamus.⁴⁰ It is widely accepted by Texas courts that disqualification of counsel renders the remedy of appeal adequate. Therefore, mandamus relief is available because disqualification is a severe remedy “which results in immediate and palpable harm, disrupts the trial court proceedings, and deprives a party of the right to have counsel of choice.”⁴¹ However, one court has rejected the argument that failure of a losing party to appeal a disqualification order through mandamus waives its right to raise the issue on direct appeal.⁴²

4. Waiver.

A party who fails to seek disqualification timely waives the complaint.⁴³ 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.⁴⁴ The court should also consider any other evidence indicating that the motion was filed merely as a dilatory trial tactic.⁴⁵

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.⁴⁶ In *Henderson v. Floyd*, 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.⁴⁷ Although the Court granted the stay, it later dissolved it upon denial of the relator's motion for leave to file.⁴⁸ The relator immediately moved for a hearing on his motion for leave, but neglected to renew his motion to stay the trial court proceedings.⁴⁹ 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.⁵⁰ 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."⁵¹

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.⁵²

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."⁵³ 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.⁵⁴ 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.⁵⁵

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.⁵⁶ 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 [the plaintiffs] and freely gave advice, *the fact that [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.⁵⁷

Similarly, in *Thompson v. Vinson & Elkins*, 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.⁵⁸ 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.⁵⁹

An attorney-client relationship also may be based on an express or implied contract.⁶⁰ The relationship may be implied from the conduct of the parties.⁶¹ “All that is required is that the parties explicitly or by their conduct manifest an intention to create the attorney-client relationship.”⁶² The contract may result if the client makes an offer or request of the attorney and the attorney accepts or assents.⁶³ 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.⁶⁴

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.⁶⁵ An attorney evaluates the client’s affairs and reports on them to the client or to others.⁶⁶ In addition, as an advisor, the attorney informs the client of his or her legal rights and obligations and explains their practical implications.⁶⁷ Thus 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.⁶⁸

Prior to the adoption of the Texas Disciplinary Rules of Professional Conduct, the issue of disqualification for representation adverse to a former client was governed primarily by the "substantial relationship" test. As the 14th 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."⁶⁹ 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. First, 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.⁷⁰ Second, Rule 1.09(a)(2) prohibits representation which will result in a disclosure of client confidences as defined by Rule 1.05.⁷¹ 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.⁷²

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.

Unfortunately, few Texas cases actually construe the meaning of "adverse,"⁷³ and Rule 1.09 contains no definition of the term.⁷⁴ 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 prohibits 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."⁷⁵ Comment 6 to Rule 1.06 defines "directly adverse" as follows:

Within the meaning of Rule 1.06(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 is also indirectly adverse if 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.⁷⁶

Although helpful, this definition is not a dispositive definition of “adverse.” The Texas Supreme Court has suggested that greater care and a higher standard is required when dealing with conflicts arising out of concurrent representations than with conflicts arising out of the representation of a former client.⁷⁷

c. Where the New Client Questions the Former Position.

Rule 1.09(a)(1) provides the first basis for disqualification. As indicated above, the representation is prohibited where the lawyer would represent a client who questions the validity of the lawyer’s services or work product for the former client. Comment 3 to Rule 1.09 states that an example of such prohibited conduct is where a lawyer who drew a will bearing a substantial portion of the testator’s property to a designated beneficiary is also representing the testator’s heirs at law in an action seeking to overturn the will.⁷⁸ No reported Texas cases have addressed Rule 1.09(a)(1) in the context of disqualification motions.

d. Disclosure of Confidential Information.

A lawyer’s representation of a current client against a former client is also limited under Rule 1.09(a)(2), which prescribes such a representation where there is a “reasonable probability” that the engagement would cause the lawyer to disclose confidential information relating to his former representation.⁷⁹ Interestingly, Rule 1.05(a) defines “confidential information as both privileged *and* non-privileged information.”⁸⁰ Pursuant to this rule, a lawyer generally may not disclose confidential information of a former client unless: (1) the lawyer has been expressly authorized to do so; (2) the former client consents; (3) the disclosure is made to the former client or his representatives, agents or employees; (4) the lawyer is ordered to disclose the information by a court; (5) it is done in defense of a malpractice claim; (6) it is disclosed to establish a defense to a criminal charge or disciplinary complaint against the lawyer; (7) the lawyer has reason to believe disclosure is necessary to prevent the client from committing a criminal or fraudulent act; or (8) it reasonably appears necessary to rectify the consequences of a client’s criminal or fraudulent action the commission of which the lawyer’s services had been used.⁸¹

As is discussed below, most cases discussing disqualification issues focus on the “substantial relationship” test of Rule 1.09(a)(3). Nonetheless, when analyzing a potential conflict situation, the practitioner should review Rule 1.05 and its potential as a means for disqualifying opposing counsel. The recent Texas Supreme Court decision in *National Medical Enterprises v. Godbey*⁸² provides a comprehensive analysis of this issue. *Godbey* arose out of an ongoing investigation by the federal government into National Medical Enterprises, Inc.’s (“NME”) and other entities operation of some seventy psychiatric hospitals in Texas. The investigation had produced countless federal criminal indictments as well as multiple civil lawsuits. Because of conflicts of interest between individual employees (i.e., turning state’s

evidence) and NME, NME was forced to retain independent counsel for its individual employees that were targets of the investigation. NME retained “Attorney A,” a member of Firm 1, to represent two of these targeted employees, Wicoff and Cronen. Attorney A represented Wicoff and Cronen for about one year. During Attorney A’s representation of Wicoff and Cronen, and while at Firm 1, Wicoff and Cronen entered into a Joint Defense Agreement (the “JDA”) with NME and several other of its employees and former employees. The terms of the JDA prohibited Attorney A from disclosing to any third party to the agreement any confidential information that was given to him. Pursuant to the JDA, Attorney A received confidential information from counsel for NME.

Subsequently, Attorney A left Firm 1 and joins Firm 2. Attorney A continued to represent Wicoff and Cronen. After five (5) months at Firm 2, Attorney A and Firm 2 withdrew from the representation of Wicoff and Cronen. Thereafter, Attorneys Y and Z of Firm 2, who had no relationship to NME and did no work on the files of Wicoff and Cronen, filed suit against NME on behalf of ninety (90) plaintiffs alleging misconduct similar to that investigated by the federal government. Attorney A had no involvement in this suit, and neither Wicoff nor Cronen were named as Defendants. However, Cronen’s predecessor was a named defendant. NME quickly moved for disqualification of Firm 2 because of the information Attorney A had received by virtue of the JDA. Cronen, a non-party to the litigation, also filed a motion to disqualify based on the possibility of the litigation becoming adverse to him. Prior to associating with Firm 2, Attorney A billed NME approximately \$18,000 in legal fees. After moving to Firm 2, Attorney A billed NME \$700.

In a lengthy opinion, the trial court analyzed both NME and Cronen’s motions.⁸³ It denied NME’s motion and found that Firm 2 could not be presumed to share Attorney A’s confidences so to disqualify the firm unless Firm 2: (1) had actually represented NME; (2) owed NME a duty of loyalty because of its representation of Wicoff and Cronen, or the JDA; or (3) was actually misusing NME’s confidences.⁸⁴ The trial court found no evidence supporting these exceptions.⁸⁵ Further, the trial court denied Cronen’s motion because it concluded that the proceeding was not “adverse” to him, therefore there could be no conflict of interest.⁸⁶ Both Cronen and NME petitioned the court of appeals for mandamus which denied leave to file.⁸⁷

The Texas Supreme Court granted the motion for mandamus review, and decided two issues: (1) Can a non-client party (NME) disqualify Firm 2 when Attorney A in Firm 2 received confidences from the non-client party by virtue of the JDA; and (2) Can a non-party former client (Cronen) disqualify Firm 2?⁸⁸ The Court responded affirmatively to both issues.⁸⁹ As to NME’s motion, the court held that it must first determine whether Attorney A would be disqualified from the representation.⁹⁰ The Court initially looked to Rule 1.09 and the substantial similarity test as enunciated in *N.C.N.B. Texas Nat’l Bank v. Coker*, however found it inapplicable because Attorney A never represented NME.⁹¹ However, the Court noted that because Attorney A admitted he had received confidential information regarding NME by virtue of the JDA, he could not represent the plaintiffs in the current action without violating his obligations of strict confidence under the JDA.⁹² After reaching this conclusion the Court then addressed whether Firm 2 is vicariously disqualified because of Attorney A.⁹³ The Court ceded that (1) NME offered no evidence that Attorney A disclosed its confidences to Attorneys Y and Z; (2) Attorneys Y and Z had no access to the confidential information; and (3) Attorney A

testified to the great lengths he took to erect a “Chinese Wall.”⁹⁴ Despite this clear evidence of no shared confidences of NME, the Court still found disqualification mandatory based on the irrebuttable presumptions cited in *Coker*.⁹⁵ The Court concluded that Attorney A’s knowledge of the confidential information was imputed *by law* to every other attorney in Firm 2.⁹⁶ The Court further held that the fact that NME was not a former or current client did not affect this analysis, because the attorney’s duties imposed by the JDA were tantamount to that of a fiduciary, and he was prohibited from disclosing any confidential information because of that duty.⁹⁷

The Court next turned to Cronen’s motion and addressed whether the pending matter was “adverse” to Cronen.⁹⁸ In granting it, the court again looked to Rule 1.09.⁹⁹ Finding no definition of “adverse”, it looked to the term’s common meaning.¹⁰⁰ From this, the Court concluded that Firm 2’s diligent prosecution of the case could surface new facts that could implicate Cronen which would subject him to both civil and criminal penalties.¹⁰¹ The Court conceded that the risk was small, but it was still a significant risk.¹⁰² Accordingly, the Court concluded that because the issue was adversity, a non-party such as Cronen could prosecute the motion to disqualify and Cronen’s motion should have been granted.¹⁰³

e. The Substantial Relationship Test.

1. The Definition of “Substantially Related.”

The seminal case in Texas regarding former client conflicts is *NCNB Texas Nat? Bank v. Coker*.¹⁰⁴ There, the Texas Supreme Court, in construing the former Texas Code of Professional Responsibility,¹⁰⁵ 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.*”¹⁰⁶ The burden on the movant seeking to establish a “substantial relationship” is to show *facts* in the current representation indicating 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.¹⁰⁷ Mere conclusory statements and opinions are insufficient.¹⁰⁸ 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.¹⁰⁹

Further, to satisfy this test, the movant need not show identical legal and factual elements between the two representations.¹¹⁰ Nor, under some circumstances, is a movant required to show that actual confidences were violated or an appearance of impropriety.¹¹¹ There must, however, be more than just a “superficial resemblance” between issues relevant to the two representations.¹¹² Evidence showing only a remote possibility of a violation of the disciplinary rules is insufficient under the *Coker* standard.¹¹³ In *Coker*, the Texas Supreme Court determined that the trial court’s finding “that the two representations were similar enough to give an ‘appearance’ that confidences which could be disclosed ‘might be relevant’ to the representations

falls short of the requisites of the established substantial relation standard.¹¹⁴ 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.¹¹⁵

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.¹¹⁶ 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.¹¹⁷

For example, the Texas Supreme court held the movant for disqualification satisfied this test in *Texaco, Inc. v. Garcia*.¹¹⁸ There, *Texaco* moved for disqualification based on the opposing attorney’s prior representation. The alleged conflict arose out of the opposing counsel’s association with 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.¹¹⁹ In so holding, it noted that the Plaintiff’s allegations in the present case “involve[d] the similar liability issues, similar scientific issues, and similar defenses and strategies” as were present in the prior litigation. The Court concluded that the opposing lawyer, and his entire firm, were disqualified.¹²⁰

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.¹²¹ 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.¹²² In reaching its decision, the court noted the *Coker* standard and the conclusive presumptions.¹²³ 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.¹²⁴ 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.¹²⁵ The court disagreed, holding “[a] mere comparison of subject matter and issues. . . is not the proper legal test.”¹²⁶ Instead, the court held that it should look to the “information common to both representations” for substantial similarity.¹²⁷ 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.¹²⁸

On appeal to the Texas Supreme Court, a much different result was reached.¹²⁹ 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.¹³⁰ 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.¹³¹

2. 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.”¹³² 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.¹³³ 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.”¹³⁴

A strict construction of Rule 1.09 raises questions as to the present applicability of the *Coker* conclusive presumptions.¹³⁵ 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.¹³⁶

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.¹³⁷ 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" standard¹³⁸ 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.¹³⁹ 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.¹⁴⁰

f. Vicarious disqualification and Chinese Walls.

I. 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).¹⁴¹

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).¹⁴² Further, if a lawyer severs his relationship with a firm, and a client previously represented personally by the lawyer remains 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).¹⁴³ 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."¹⁴⁴

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 1.05.¹⁴⁵

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.¹⁴⁶ 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).¹⁴⁷ 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.¹⁴⁸

Ethics Opinion 501 promulgated by the Texas Commission on Professional Ethics provides a good discussion of issues relevant to vicarious disqualification.¹⁴⁹ The opinion addresses the question of whether the Texas Disciplinary Rules of Professional Conduct prohibit a lawyer from representing a husband in a divorce where the wife had previously consulted with the lawyer's former law partner concerning a divorce but did not actually hire the former partner. This issue tests the extent to which Rules 1.09 and 1.05 will be used to vicariously disqualify an attorney and his firm.

The Opinion first concludes that the former law partner would be prohibited from representing the husband pursuant to Rule 1.09(a)(3) and 1.09(a)(2) because it would require disclosure of confidential information in violation of Rule 1.05 and it involved a substantially similar matter. Second, it determined that as long as the former law partner was with the firm, the entire firm would be prohibited from the representation of the husband under a vicarious disqualification theory. However, the opinion then looks to the effect of the law partner who intends to represent the husband leaving the firm and joining another firm. The opinion then concluded that unless the attorney intending to represent the husband in the current divorce proceeding *personally* comes within the provisions of Rule 1.09(a), then there is no vicarious disqualification. Thus, the attorney would only be prohibited from the representation of the husband if it would create a conflict of interest with a current client of the new law firm. The opinion concluded that because the attorney is no longer associated with his former law partner or his prior law firm, and the attorney possesses no confidential information from the former law partner's prior representation of the wife, then there is no violation of the Texas Disciplinary Rules of Professional Conduct, and the attorney may represent the husband in the divorce proceedings against the wife.

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.¹⁵⁰ 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.¹⁵¹ The court applied Canon 9 of the Texas Code of Professional Responsibility then in effect 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.¹⁵²

In so holding, the court upheld the trial court's decision to disqualify the subsequent law firm.¹⁵³

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.¹⁵⁴ 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.¹⁵⁵ However, the Texas Supreme Court has subsequently applied the conclusive presumptions without a resolution of the issue.¹⁵⁶

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.”¹⁵⁷ 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.”¹⁵⁸

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.¹⁵⁹ “[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.”¹⁶⁰ The reason for such a rule is to guard against those unscrupulous attorneys that would use disqualification for tactical purposes rather than for protection of a client’s rights.¹⁶¹

However, the Fifth Circuit was clear to point out in *American Airlines* that the standard should not look to whether counsel’s presence would “taint” a proceeding.¹⁶² 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.”¹⁶³ Instead, the Fifth Circuit’s approach attempts to strike a balance that remains “sensitive to preventing conflicts of interest.”¹⁶⁴ 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.”¹⁶⁵ 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.¹⁶⁶ 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.”¹⁶⁷

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.”¹⁶⁸

The Fifth Circuit has made clear that this test must be construed in conjunction with the duties of loyalty and confidentiality to the client.¹⁶⁹ 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 client in the same matter.”¹⁷⁰ 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.¹⁷¹

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.¹⁷² 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.¹⁷³ 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.¹⁷⁴

The Fifth Circuit granted American’s petition for mandamus and ordered the district court to disqualify the firm.¹⁷⁵ 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.¹⁷⁶ In so doing, the court also rejected the argument that the substantial relationship test operated to only protect client confidences.¹⁷⁷ 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.¹⁷⁸ Thus, the court concluded that the rendering of legal services “on a substantially related matter *by itself* requires disqualification.”¹⁷⁹

c. *Disclosure of Confidential Information*

The Fifth Circuit in *American Airlines* noted that the “substantial relationship” rule is not the only grounds for disqualification.¹⁸⁰ Citing Texas Rule 1.09 and Model Rule 1.9, the Fifth Circuit stated that:

[i]n providing two distinct grounds for disqualification, the rules expand the protections for former clients beyond those offered by the substantial relationship test. The Rules are not, however, broader than the protections provided by our precedents. While the focus of our cases has been the substantial relationship test, we have indicated that a former client *could* also disqualify counsel by showing that his former attorney possessed relevant confidential information in the manner contemplated by Rule 1.09(a)(s).¹⁸¹

In so holding, the Court recognized that disqualification may be granted if the former attorney possesses relevant confidential client communications, However no reported Fifth Circuit opinion has analyzed this issue in any depth, since the *American Airlines*, opinion dealt primarily with the substantial relationship test.

However, the United States District Court for the Southern District of Texas recently addressed the issues of disclosure of confidential information and disqualification in *Islander East Rental Program v. Ferguson*, and therein provided a contrast of the substantial relationship test and prohibited disclosure of confidential information.¹⁸² This litigation arises out of a dispute over condominium rentals and service marks rights between the owners of certain condominiums and the entity established to administer the condominiums’ operations. One plaintiff, J. Ray Riley (“Riley”), was formerly represented by Fulbright & Jaworski in his 1987 divorce. However, Fulbright & Jaworski also represented the defendants adverse to Riley in the current matter. Fulbright & Jaworski propounded upon Riley a request for production seeking discovery of “[r]ecords of all monies paid or transferred by [the condominium owners] from 1977 to the present to any past or present member of the executive committee, to J. Ray Riley or his law firm, or to his past wives or present wife.”¹⁸³ Riley filed his motion to disqualify based on this discovery request, contending that during his representation by Fulbright & Jaworski, he had disclosed confidential information to Fulbright & Jaworski and these confidences were jeopardized by Fulbright’s representation of the defendants. In support of his motion, Riley attached an affidavit stating that one of the issues litigated in his divorce was “alleged ‘secreting and improper wasting’ of assets and income, including the existence and disposition of income from [the condominium association].”¹⁸⁴ He further claimed that he and his Fulbright & Jaworski attorneys engaged in “substantive conversations regarding [Riley’s condominium] unit, its participation in the [condominium association], [Riley’s] relationship with the [association] and revenues derived through the [association].”¹⁸⁵

Fulbright & Jaworski, citing *American Airlines*, contended in response to the motion that the *sole* basis for disqualification is the substantial relationship test and that Riley’s motion must fail because two matters are not substantially related.¹⁸⁶ However, the court disagreed noting the test in *American Airlines* referenced above,¹⁸⁷ as well as Texas Rule 1.09(a)(2) relating to disclosure of confidential information in violation of Texas rule 1.05.¹⁸⁸ The Court noted the rule

in *American Airlines* that “a party establishes a genuine threat of disclosure of confidential information by establishing a substantial relationship between the subject matters of the former and current representation not the other way around.”¹⁸⁹ The Court further found the affidavit from Riley’s divorce attorney at Fulbright & Jaworski insufficient to overcome the evidence presented in Riley’s affidavit.¹⁹⁰ Adding to the evidence in support of the motion, the Court found it “unusual” that a discovery request in a commercial dispute extended to spouses of those involved in the dispute, and found it even more perplexing that this request was made of Riley *only* and no other plaintiff.¹⁹¹ Therefore, the Court granted Riley’s motion, holding that permitting Fulbright & Jaworski to continue its representation of the defendants “would violate the ethical standards governing the practice of law, and would raise public suspicion about the integrity of the legal profession.”¹⁹²

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.”¹⁹³ 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.¹⁹⁴ 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.¹⁹⁵

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.¹⁹⁶ 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.”¹⁹⁷

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.”¹⁹⁸ 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.”¹⁹⁹ 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...”²⁰⁰ 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.”²⁰¹ 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.”²⁰²

Relatively few cases in Texas have construed conflicts arising from concurrent representations and the duties owed under Rule 1.06.²⁰³ One such case is *Conoco, Inc. v. Baskin*.²⁰⁴ 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.²⁰⁵ 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.²⁰⁶ 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 damage 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.²⁰⁷

Another decision discussing Rule 1.06 is *Smirl v. Bridewell*.²⁰⁸ There, the Court construed the meanings of “member” and “associate” as used in Rule 1.06(f).²⁰⁹ In February 1996, Andrew Korn, counsel for Donald Smirl, contacted the Cleburne firm of MacLean & Boulware to solicit their services as local counsel for an action filed by Smirl against the City of Mesquite. The Court, for purposes of its analysis, assumed that a confidential relationship arose between Korn and MacLean & Boulware as a result of this solicitation, even though MacLean & Boulware declined the invitation to be local counsel.²¹⁰ However, several months later, to Korn’s surprise, counsel for the City, Haynes & Boone, retained MacLean & Boulware as local counsel

for the action. Korn immediately brought this to the attention of MacLean & Boulware and it withdrew from the representation of the City within a week. Not satisfied, Smirl filed a motion to disqualify Haynes & Boone as well as its new local counsel, arguing that their representation violated Rule 1.06, and that “[b]y switching sides to represent the defendants in this case, an irrebuttable, conclusive presumption exists that MacLean & Boulware shared confidences with Haynes & Boone, LLP, and that Haynes & Boone, LLP later shared those same confidences with [the new local counsel].”²¹¹ Haynes & Boone’s response conceded that a lawyer shall not represent opposing parties to the same litigation; however, Rule 1.06(1) provides a defense insofar as it only applies to “members” or “associates” of the firm that has the confidential information.²¹² In short, Haynes & Boone argued that Rule 1.06 did not apply to it, because Rule 1.06 did not “extend outside the firm for which the lawyer prohibited from engaging in particular conduct works.”²¹³ The Court agreed, noting that “member” means “a partner or [a] shareholder in a professional corporation,” and “associated with” refers to an “associate,” which means a lawyer “on the payroll of a law firm as an employee.”²¹⁴ Therefore, the court denied Smirl’s motion to disqualify holding that because neither MacLean nor Boulware were “members” of or “associated with” Haynes & Boone, Rule 1.06 did not prohibit Haynes & Boone nor the new local counsel’s continued representation in the litigation.²¹⁵

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.²¹⁶

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.²¹⁷ 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.²¹⁸

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.²¹⁹ Second, the level of disclosure necessary may be different for sophisticated clients than for unsophisticated clients.²²⁰ 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.²²¹

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.²²² 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 ease.²²³

Dresser presents a thorough discussion of the Fifth Circuit's approach to conflicts created by concurrent representation.²²⁴ 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.²²⁵ 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..."²²⁶ 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.²²⁷ In reaching its decision, the Fifth Circuit looked not only to the Texas Rules, but also the "national standards" as discussed above.²²⁸ 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.²²⁹

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.²³⁰ 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.”²³¹

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.²³²

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. 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*, plaintiffs counsel associated another law firm as co-counsel nearly one month before trial²³³ 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. The associate had also attended “file review” meetings during which the case had been discussed, although he 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.²³⁴ 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.²³⁵ The court held that “[i]t is not

necessary to show that [the associate] personally and substantially participated in the matter.”²³⁶ 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.”²³⁷ In so holding, the Texas Supreme Court found the trial court abused its discretion and conditionally granted the writ of mandamus.²³⁸

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*,²³⁹ the 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.²⁴⁰ T&K petitioned for a writ of mandamus.²⁴¹

The court opened its analysis with a brief review of the law applicable to lawyers with respect to disqualification and the “substantial relationship” test.²⁴² 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.²⁴³ 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.²⁴⁴ Instead, this presumption *could be rebutted upon a showing that sufficient precautions had been taken to guard against any disclosure of confidences*.²⁴⁵ 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.”²⁴⁶

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.²⁴⁷ 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.²⁴⁸

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."²⁴⁹

Another significant opinion discussing the effect of non-lawyer created conflicts of interest is *Grant v. Thirteenth Court of Appeals*.²⁵⁰ There, a legal secretary left the firm representing the plaintiffs in a pending toxic tort litigation and began working 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.²⁵¹ 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.²⁵² 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.²⁵³

The Texas Supreme Court affirmed the holding in *Phoenix* that created the rebuttable presumption with respect to shared confidences.²⁵⁴ 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."²⁵⁵ 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."²⁵⁶

This screening issue was again recently revisited in *Arzate v. Hayes*.²⁵⁷ There, Lorena

Tabares, a paralegal at a firm representing Arzate in a medical malpractice claim against Hayes, left that firm's employ to join the law firm representing Hayes. Tabares had worked extensively on the Arzate case. Counsel for Arzate moved to disqualify Hayes on this basis.²⁵⁸ The trial court denied Arzate's motion and the case went to trial where the jury found against Arzate.²⁵⁹ Arzate appealed the decision of the trial court to deny his motion to disqualify. The court of appeals affirmed the trial court's decision, noting that Tabares had promptly notified Hick's firm that she had confidential knowledge of the Arzate case, and Hick's firm directed her not to discuss with anyone these confidences. Tabares claimed that she never disclosed these confidences to anyone. Citing *Phoenix Founders*, the court concluded that the evidence taken as a whole as "sufficient to guard against disclosure of confidences."²⁶⁰ Therefore, the court found that the trial court had not abused its discretion in denying Arzate's motion.

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.²⁶¹ Because an attorney owes his client a fiduciary duty,²⁶² 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.²⁶³ 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 1994.²⁶⁴ 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 acknowledged 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 deductions. 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 HOFCO. The plaintiffs later discovered that First City had made a \$1.5 million non-recourse loan to HOFCO which was later increased to \$5 million, essentially "propping up" HOFCO. Additionally, V&E had represented both HOFCO and First City in the loan deal and still represented HOFCO in other matters. In fact, V&E owned \$300,000 of HOFCO 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's 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. It is clear from a review of the case law that lawyers have become the new targets of litigation. However, as with other areas of emerging legal theories, the legal concepts are still evolving, this making not only attorneys, but also the law, moving targets.

¹ See *F.D.I.C v. U.S. Fire Ins. Co.* 50 F.3d 1304(5th Cir, 1995) (“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.”)

² For other discussions of this issue, see Samara L. Kline. *Conflicts of Interest: Motions to Disqualify -- Identifying the Rules of the Game*, 57 Tex. 8.1. 240-245 (1994); Gregory P. Crinion, *Lawyer Disqualification -- Undertaking a Representation Adverse to a Current or Former Client*, THE ADVOCATE (March 1993) at 11-19; Schuwerk & Sutton, *A Guide to the Texas Disciplinary Rules of Professional Conduct*, 27A Hou. L.REV. 1 (Oct. 1990). Also, for discussions of this topic from a national perspective, see *Conflict of Interest Issues*. 50 The Business Lawyer 1381 (August 1995).

³ *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).

⁴ *Spears*, 797 S.W.2d at 656; see also *Ayres v. Canales*, 790 S.W.2d 554, 556 n.2 (Tex. 1990) (orig. proceeding). 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.”)

⁵ *Coker*, 765 S.w.2d at 399.

⁶ *Id.*; *Spears*, 797 S.W.2d at 656.

⁷ *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”).

⁸ 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.”), *Usury v. Grey*, 804 S.W.2d 232 (Tex. App.-- Fort worth 1991, no writ).

⁹ *Id.* at 237 (quoting *Hoggard v. Snodgrass*, 770 S.W.2d 577 (Tex. App. --Dallas 1989, no writ)).

¹⁰ *Ayres v. Canales*, 790 S.W.2d 554, 558 (Tex. 1990), (citing TEXAS DISCIPLINARY RULE cmt. 3.08, 10).

¹¹ 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).

¹² *Dresser*, 972 F.2d at 543.

¹³ *American Airlines*, 972 F.2d at 610. Because many of the provisions are similar, the federal court practitioner should carefully compare the two codifications for contradictions or conflicts.

¹⁴ *Id.*

¹⁵ *Id.*; see *F.D.I.C. v. U.S. Fire Ins. Ca.*, 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).

¹⁶ *U.S. Fire Ins.*, 50 F.3d at 1314

¹⁷ 50 F.3d at 1312 (citing *American Airlines*, 972 F.2d at 610).

¹⁸ *Id.*

¹⁹ *Id.* at 1312-13.

²⁰ *American Airlines*, 972 F.2nd at 611.

²¹ 881 S.9, 329 (Tex. 1994)

²² *Id.* at 320.

²³ 924 S.W.2d 123, 132-133 (Tex. (916). For a full discussion of the facts of this case see *infra* p. _.

²⁴ *Id.*

²⁵ *Id.* At 132; TEX. DISCIPLINARY R. PROF. CONDUCT 1.09 *reprinted in* Tex. Gov't Code Ann. tit 2, subtit. G. App. (Vernon Supp. 1996) (State Bar Rules art. X, § 9) (hereafter the "Texas Rules).

²⁶ *Godbey*, 924 S.W.2d at 132. Because Rule 109 and its comments provide no definition for "adverse", the court relied on the dictionary definition as well as the definition of "directly adverse" found in Texas Rule 1.06, cmt. 6 *Id.*; TEX. DISCIPLINARY R. PROF. CONDUCT 1.06 cmt. 6 ().

²⁷ *Godbey*, 924 S.W.2d at 132. The following passage from the Court's opinion illustrates how little risk is necessary to establish adversity:

The chances of being struck by lightening are slight, but not slight enough, given the consequences, to risk standing under a tree in a thunderstorm. [The non-party former client] is not likely to be struck by lightening in the pending case, even though he is in the midst of a severe thunderstorm, but he is entitled to object to being forced by his former lawyer to stand under a tree while the storm wages on.

Id. at 133.

²⁸ *Id.*

²⁹ See discussion of necessity of attorney-client relationship *infra*, p. ____.

³⁰ TEX. DISCIPLINARY R. PROF. CONDUCT, Preamble: Scope ¶ 15. (emphasis added); 15. (emphasis added); *see also* MODEL RULES OF PROFESSIONAL CODUCT, scope, ¶ 6.

³¹ TEX. DISCIPLINARY R. PROF. CONDUCT 1.06 cmt. 17 (1990).

³² 50 F.3d. at 1308.

³³ *Id.*

³⁴ TEX. DISCIPLINARY R. PROF. CONDUCT 3.08.

³⁵ *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.”) (emphasis added).

³⁶ 530 F.2d 83 (5th Cir. 1976)

³⁷ *Id.* at 87.

³⁸ *Id.* at 90.

³⁹ 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.

⁴⁰ *Coker*, 765 S.W.2d at 400.

⁴¹ *Arzate v. Hayes*, 915 S.W.2d 616, 618 n. 1 (Tex. App. -- El Paso 1996,__). *See also*, *Occidental Chemical Corp. v. Brown*, 877 S.W.2d 27, 30 (Tex. App. -- Corpus Christi 1994), *vacated by Grant v. Thirteenth Court of Appeals*, 888 S.W.2d 466, 467 (Tex. 1994, orig. Proceeding); *Phoenix Founders, Inc. v Marshall*, 887 S.W.2d 832 (Tex. 1994); *Spears v. Fourth Court of Appeals*, 787 S.W.2d 654 (Tex. 1990); *Ayres v. Canales*, 790 S.W.2d 554 (Tex. 1990).

⁴² *Arzate*, 915 S.W.2d at 618, n.1. The Court in *Arzate* noted that the existence of legal precedent in Texas acknowledging that disqualification issues could be presented through either direct appeal or mandamus. *Id* Although the *Arzate* court recognized that mandamus is the “better” procedure, the court concluded that to require mandamus to preserve error would be “a dangerous precedent” to set. *Id*

⁴³ *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) (orig. proceeding), (per curiam, on rehearing); *Wasserman v. Black*, 910 S.W.2d 564, 568 (Tex. App. -- Waco 1995, n.w.h.)

⁴⁴ *See Schwarz v. Jefferson*, 930 S.W.2d 957 (Tex. App.-- Houston [14th Dist.] 1996, orig. proceeding) (holding fact issue existed preventing mandamus on issue of waiver as to whether the moving party for disqualification had notice of the disqualification for over two years); *Arteaga v. Texas Dept. of Prot. and Reg.*, 924 S.W.2d 756 (Tex. App. -- Austin 1996, __) holding party waived right to raise disqualification issue on appeal by failing to raise issue with trial court); *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), *Islander East Rental Program v. Ferguson*, 917 F. Supp. 504, 507 (S.D. Tex. 1996) (holding four month delay insufficient to support waiver of the disqualification issues). But, failure to seek mandamus relief is probably not a waiver of the right to raise the disqualification issue on direct appeal. *See infra*. n. ____.

⁴⁵ *Wasserman*, 910 S.W.2d at 568; *see also Spears v. Fourth Court of Appeals*, 797 S.W.2d at 656.

⁴⁶ *See Henderson v. Floyd*, 891 S.W.2d 252, 254 (Tex. 1995).

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

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- ⁵¹ *Id.* at 255.
- ⁵² *Parker v. Carnahan*, 772 S.W.2d 151, 156 (Tex. App. -- Texarkana 1989, writ denied).
- ⁵³ *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]).
- ⁵⁴ *Parker*, 772 S.W.2d at 156.
- ⁵⁵ *State v. Lemon*, 603 S.W.2d 313, 317 (Tex. App. -- Amarillo 1980, no writ).
- ⁵⁶ 43 F.3d 953 (5th Cir. 1994).
- ⁵⁷ *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). 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).
- ⁵⁸ 859 S.W.2d 617 (Tex. App.-- Houston [1st Dist.] 1993, writ denied); *Id.* at 624.
- ⁵⁹ *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 Polland & 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).
- ⁶⁰ *Simpson v. James*, 903 F.2d 372, 376 (5th Cir. 1990).
- ⁶¹ *Kotzur v. Kelly*, 791 S.W.2d 254, 257-58 (Tex. App. -- Corpus Christi 1990, no writ).
- ⁶² *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.").
- ⁶³ *Simpson*, 903 F.2d at 376 (citing *State v. Lemon*, 603 S.W.2d at 318).
- ⁶⁴ *Randolph* 995 F.2d at 615 (citing *Kotzur* 791 S.W.2d at 257-58); *Parker*, 772 S.W.2d at 157.
- ⁶⁵ TEX. DISCIPLINARY R. PROF. CONDUCT preamble ¶ 2 (1989); *Clarke v. Ruffino*, 819 S.W.2d 947, 949 (Tex. App.-- Houston [14th Dist.] 1991, writ dismissed w.o.j.).
- ⁶⁶ TEX. DISCIPLINARY R. PROF. CONDUCT preamble ¶ 2 (1989).
- ⁶⁷ *Id.*
- ⁶⁸ TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT 1.09 (1991) (emphasis added).
- ⁶⁹ 819 S.W.2d at 951. 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 provides as follows:

Rule 1.09 CONFLICT OF INTEREST: FORMER CLIENT

- (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 confidences].
- (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 Rule of Professional Conduct 1.9:

Rule 1.9 Conflict of Interest: Former Client

- (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 RULE OF PROFESSIONAL CONDUCT 1.9 (1989)

⁷⁰ *Id.*

⁷¹ TEX. DISCIPLINARY R. PROF. CONDUCT 1.05(a)(1991).

⁷² TEX. DISCIPLINARY R. PROF. CONDUCT 1.09(a)(3) (1991).

⁷³ *See Arteaga*, 924 S.W.2d at 762-763 (holding that attorney did not violate Rule 1.09 by her earlier representation of client's wife, where both clients had made same defenses to claims against them and there were no pending or alleged disputes between the client and his wife); *see also Kelly A. et al v. Nat 'I Medical Enterprises, Inc., et al.* No.

94-10808-H (160th Dist. Ct. Dallas County, Texas, March 20, 1945), *petition for mandamus granted, National Medical Enterprises, Inc. et al. v. Godbey*, 924 S.W.2d 123 (Tex. 1996).

⁷⁴ One court has suggested that there really is a “spectrum of degrees of adversity.” *Kelly*, pp. 6-12. Specifically, it offered the following potential degrees: (a) opposing a party in litigation or in a transaction and trying to obtain money, property, or other relief from that party; (b) representing a party against another party in litigation or a transaction that is not directly adverse to the other party, but that may contain elements of conflict, such as co-defendants united in opposing the plaintiff but adverse in allocations of liability; (c) seeking a resulting litigation that will directly and detrimentally affect a non-party’s property or interests through, for example, collateral estoppel; (d) advocating a legal or factual position in litigation that, if adopted and applied in other proceedings, could detrimentally affect a non-party’s property or interest; (e) advancing a position in litigation that might develop facts inadvertently that could affect a non-party’s property or interest; (f) advocating a position in litigation or advancing an interest in a transaction to which a non-party is strongly opposed. *Id.* Although this court’s ruling was overruled by the Texas Supreme Court, this analysis of adversity was not attacked. To the contrary, the Texas Supreme Court praised the trial court for a “thorough and thoughtful” analysis of the issues. *Godbey*, 924 S.W.2d at 133-134.

⁷⁵ TEX. DISCIPLINARY R. PROF. CONDUCT 1.06 (b)(1).

⁷⁶ *Id.* cmt. 6.

⁷⁷ *See Phoenix Founders, Inc. p. Marshall* 887 S.W.2d 831, 836 (Tex. 1994).

⁷⁸ TEX. DISCIPLINARY R. PROF. CONDUCT 1.09 cmt. 3 (1994).

⁷⁹ TEX. DISCIPLINARY R. PROF. CONDUCT 1.09(a)(2). Rule 1.05 of the Texas Rules provides as follows:

Rule 1.05 Confidentiality of information

- (a) Confidential information” includes both “privileged information” an “unprivileged client information.” “Privileged information” refers to the information of a client protected by the lawyer-client privilege of Rule 503 of the Texas Rules of Evidence or of Rule 503 of the Texas Rules of Criminal Evidence or by the principles of attorney-client privilege governed by Rule 501 of the Federal Rules of Evidence for United States Courts and magistrates. “Unprivileged client information” means all information relating to a client or furnished by the client, other than privileged information, acquired by the lawyer during the course of or by reason of the representation of the client.
- (b) Except as permitted by paragraphs (c) and (d), or as required by paragraphs (e) and (f), a lawyer shall not knowingly:
 - (1) Reveal confidential information of a client or a former client to:
 - (i) a person that the client has instructed is not to receive the information; or
 - (ii) anyone else, other than the client, the client’s representatives, or the members, associates, or employees of the lawyer’s law firm.
 - (2) Use confidential information of a client to the disadvantage of the client unless the client consents after consultation.
 - (3) Use confidential information of a former client to the disadvantage of the former client after the representation is concluded unless the former client consents after consultation or the confidential information has become generally known.
 - (4) Use privileged information of a client for the advantage of the lawyer or of a third person, unless the client consents after consultation.
- (c) A lawyer may reveal confidential information:
 - (1) When the lawyer has been expressly authorized to do so in order to carry out the representation.

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- (2) When the client consents after consultation.
 - (3) To the client, the client's representatives, or the members, associates, and employees of the lawyer's firm, except when otherwise instructed by the client.
 - (4) When the lawyer has reason to believe it is necessary to do so in order to comply with a court order, a Texas Disciplinary Rule of Professional Conduct, or other law.
 - (5) To the extent reasonably necessary to enforce a claim or establish a defense on behalf of the lawyer in a controversy between the lawyer and the client.
 - (6) To establish a defense to a criminal charge, civil claim or disciplinary complaint against the lawyer or the lawyer's associates based upon conduct involving the client or the representation of the client.
 - (7) When the lawyer has reason to believe it is necessary to do so in order to prevent the client from committing a criminal or fraudulent act.
 - (8) To the extent revelation reasonably appears necessary to rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services had been used.
- (d) A lawyer also may reveal unprivileged client information:
- (1) When implied authorized to do so in order to carry out the representation.
 - (2) When the lawyer has reason to believe it is necessary to do so in order to:
 - (i) carry out the representation effectively;
 - (ii) defend the lawyer or the lawyer's employees or associates against a claim of wrongful conduct;
 - (iii) respond to allegations in any proceeding concerning the lawyer's representation of the client; or
 - (iv) prove the services rendered to a client, or the reasonable value thereof, or both, in an action against another person or organization responsible for the payment of the fee for services rendered to the client.
- (e) When a lawyer has confidential information clearly establishing that a client is likely to commit a criminal or fraudulent act that is likely to result in death or substantial bodily harm to a person, the lawyer shall reveal confidential information to the extent revelation reasonably appears necessary to prevent the client from committing the criminal or fraudulent act.
- (f) A lawyer shall reveal confidential information when required to do so by Rule 3.03(a)(2), 3.03(b), or by rule 4.01(b).

TEX. DISCIPLINARY R. PROF. CONDUCT 1.05 (1991). *Compare* Model Rule of Professional Conduct 1.6:

Rule 1.6 Confidentiality of Information

- (a) A lawyer may 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.

MODEL RULE OF PROFESSIONAL CONDUCT 1.6 (1989).

⁸⁰ TEX. DISCIPLINARY R. PROF. CONDUCT 1.05(a) (1991).

⁸¹ *Id.* 1.05(c)(1)-(8).

⁸² 924 S.W.2d at 128-131.

⁸³ *Kelley A., et. al. v. Nat'l Medical Enterprises, Inc., et. al.*, No. 94-10808-H (160th Dist. Ct. Dallas County, Texas, March 20, 1995).

⁸⁴ *Id.*; *Godbey*, 924 S.W.2d at 126.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Godbey*, 924 S.W.2d at 128.

⁸⁸ *Id.* at 129 through 134.

⁸⁹ *Id.*

⁹⁰ *Id.* at 128-129.

⁹¹ *Id.* at 129, *Coker* as addressed at length *infra*, p. ___ . 765 S.W.2d at ___.

⁹² *Id.* at 131. The Court cited several cases which concurred in this result. See *Wilson P. Abraham Construction Corp. v. Armco Steel Corp.*, 559 F.2d 250 (5th Cir. 1997) (per curiam); *Westinghouse Electric Corp. v. Kerr-McGee Corp.*, 580 F.2d 131 (7th Cir.), *cert. denied*, 439 U.S. 955, 99 S. Ct. 353 (1978); *Analytica, Inc. v. NPD Research, Inc.*, 708 F.2d 1263 (7th Cir. 1983).

⁹³ *Godbey*, 924 S.W.2d at 131-132

⁹⁴ *Id.* at 131.

⁹⁵ *Id.* at 131-132.

⁹⁶ *Id.*

⁹⁷ *Id.* at 131.

⁹⁸ *Id.* at 132-133.

⁹⁹ *Id.* at 132.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 132-133.

¹⁰² *Id.* at 133. The Court provided the following illustration of the degree of risk necessary to meet the definition of “adverse:”

The chances of being struck by lightning are slight, but not slight enough, given the consequences, to risk standing under a tree in a thunderstorm. Cronen is not likely to be struck by lightning in the pending case, even though he is in the midst of a severe thunderstorm, but he is entitled to object to being forced by his

former lawyer to stand under a tree while the storm rages on.

¹⁰³ *Id.*

¹⁰⁴ 765 S.W.2d at 398

¹⁰⁵ The Court, in *Coker*, construed Texas Code of Professional Responsibility DR4-101(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 Rule of Professional Conduct 1.09. TEX. DISCIPLINARY R. PROF. CONDUCT 1.09 (1991)

¹⁰⁶ *Id.* (emphasis added) (restated and affirmed in *Metropolitan Life Ins. v. Syntek Finance*, 881 S.W.2d at 320).

¹⁰⁷ *Coker*, 765 S.W.2d at 401

¹⁰⁸ *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.”)

¹⁰⁹ 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.

¹¹⁰ See *Home Ins. Co. v. Marsh*, 790 S.W.2d 749, 753 (Tex. App. --El Paso 1990, orig. proceeding).

¹¹¹ *Hoggard*, 770 S.W.2d at 588.

¹¹² *Arkla Energy Resources v. Jones*, 762 S.W.2d 694, 695 (Tex. App.-- Texarkana 1988, orig. proceeding).

¹¹³ *Coker*, 765 S.W.2d at 400.

¹¹⁴ *Id.*

¹¹⁵ *Wadley*, 776 S.W.2d at 278; *Coker*, 765 S.W.2d at 400. Several Texas courts have disqualified counsel after finding the existence of a substantial relationship. See *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 114th 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 “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),

¹¹⁶ *Syntek*, 881 S.W.2d at 321; see also *Simon v. Floyd*, 1997 WL 30922 (Tex. App. -- Beaumont, Jan. 23, 1997) (unpublished opinion).

¹¹⁷ *Syntek*, 881 S.W.2d at 321; see a/so *Wadley*, 776 S.W.2d at 278 (“[Facts 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.)

¹¹⁸ 891 S.W.2d at 257.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ 881 S.W.2d at 321.

¹²² *Id.*

¹²³ *Id.* at 31-32.

¹²⁴ *Id.* at 32.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.* at 33.

¹²⁸ *Id.*

¹²⁹ *Metropolitan*, 881 S.W.2d at 320-23.

¹³⁰ *Id.*

¹³¹ *Id.* at 321.

¹³² *Id.* at 400 (emphasis added).

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ 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 (3991) (“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 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. CONDUCT 1.09 cmt. 3 (1991).

¹³⁶ 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”).

¹³⁷ 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).

¹³⁸ 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).

¹³⁹ See TEX. DISCIPLINARY R. PROF. CONDUCT, Preamble ¶ 15 (“these rules are not designed to be standards for procedural decisions”).

¹⁴⁰ *Wadley* 776 S.W.2d at 271.

¹⁴¹ TEX. DISCIPLINARY R. PROF. CONDUCT 1.09(b)(1991). The ABA Model Rules of Professional Conduct provides a separate section on vicarious disqualification:

Rule 1.10 Imputed Disqualification: General Rule

- (a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7, 1.8(c), 1.9 or 2.2.
- (b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer unless:
 - (1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and
 - (2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(b) that is material to the matter.
- (d) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7.

MODEL RULE OF PROFESSIONAL CONDUCT 1.10 (1989)

¹⁴² TEX. DISCIPLINARY R. PROF. CONDUCT 1.09 cmt. 6 (1991).

¹⁴³ *Id.*

¹⁴⁴ TEX. DISCIPLINARY R. PROF. CONDUCT cmt. 6 (1991).

¹⁴⁵ *Id.* 109(c).

¹⁴⁶ TEXAS DISCIPLINARY R. PROF. CONDUCT 1.09 cmt. 6 (1991). 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.

¹⁴⁷ *Id.* cmt. 7.

¹⁴⁸ *Id.*

¹⁴⁹ Texas Ethics Opinion 501, Texas Commission on Professional Ethics (April 12, 1994). See also ABA Commission on Ethics and Professional Responsibility, Formal Op. 96-400 (January 24, 1996) (discussing conflicts of interest arising out of employment negotiations with adverse firms or parties).

¹⁵⁰ *Petroleum Wholesale, inc. v. Marshall*, 751 S.W.2d 295 (Tex. App. -- Dallas 1988, orig. proceeding).

¹⁵¹ *Id.* at 296.

¹⁵² *Id.* at 301.

¹⁵³ *Id.*

¹⁵⁴ *Phoenix Founders, Inc. v. Marshall*, 887 S.W.2d at 831.

¹⁵⁵ *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.”).

¹⁵⁶ *See, Texaco*, 891 S.W.2d at 257; *Henderson*, 891 S.W.2d at 252.

¹⁵⁷ *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); *see also Islander East Program v. Ferguson*, 917 F. Supp. 504, 513 (S.D. Tex. 1996) (citing “public suspicion about the integrity of the legal profession” as grounds for disqualification).

¹⁵⁸ *US. Fire Ins.* 50 F.3d at 1314.

¹⁵⁹ *Id.*; *see also Cossette v. Country Style Donuts, Inc.*, 647 F.2d 526,530(5th Cir. 1981).

¹⁶⁰ *US. Fire Ins.*, 50 F.3d at 1316.

¹⁶¹ 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).

¹⁶² 972 F.2d at 611.

¹⁶³ *Id.* at 610.

¹⁶⁴ *Id.* at 611.

¹⁶⁵ *Id.*

¹⁶⁶ 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.*

¹⁶⁷ *Id.* at 614 (citations omitted).

¹⁶⁸ *Id.*

¹⁶⁹ *See id.* at 618-19; *in re Corrugated Container Antitrust Litigation*, 659 F.2d 1341(5th Cir. 1981).

¹⁷⁰ *Id.* at 172.

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

¹⁷² 972 F.2d at 607.

¹⁷³ *Id.* at 608.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 628.

¹⁷⁶ 972 F.2d at 615.

¹⁷⁷ *Id.* at 619.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* (emphasis added). 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.

¹⁸⁰ 972 F.2d at ____.

¹⁸¹ *Id.* at 615 (emphasis added).

¹⁸² 917 F. Supp. 504 (S.D. Tex. 1996).

¹⁸³ *Id.* at 507 (emphasis added)

¹⁸⁴ 917 F.Supp.at 511.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 509.

¹⁸⁷ *See supra n.* ____.

¹⁸⁸ *Islander East*, 917 F, Supp. At 509. The Court first reviewed the "substantial relationship" test as enunciated in *American Airlines*. It noted that [i]t is beyond dispute that an attorney is prohibited from accepting representation adverse to a former client if the subject matter of the current representation is substantially related to the subject matter of the former representation and that this was an "uncompromising" standard. *Id.* At 508. The Court noted

that although the irrebuttable presumption discussed above is not applicable because it is limited to the substantial relationship test, the principles behind it (i.e., preventing the moving party from having to disclose confidences in making its proof to the Court in Support of its motion) were equally applicable here. *Id.* at 511.

¹⁸⁹ *Id.* These “relevant ethical standards”, according to the Court, were the following: Model Rule 1.6(a) (requiring attorney to keep confidential “information relating to representation of a client”); Texas Rule 1.06(a) (confidential information includes privileged and unprivileged information; privileged information refers to information protected by the attorney-client privilege, while unprivileged information refers to all other information relating to a client or furnished by the client during the course of or by reason of the representation of the client); Model Code Canon 4 (requiring attorney to preserve a client’s confidences and secrets) and DR 4-101 (defining “confidence” as information protected by the attorney-client privilege, and “secret” as other information learned through the attorney-client relationship “that the client has requested to be held inviolate or the disclosure of which would be embarrassing or would likely be detrimental to the client.”); RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 112(1) (Tent. Draft No. 2 1989) (confidential information is information, other than information that is generally known, if the attorney learns the information during the course of representing the client).

¹⁹⁰ The attorney admitted in his affidavit that the condominium rentals were at issue in the divorce, but that “no other information whatsoever which Mr. Riley disclosed to me is responsive to the disputed discovery request or relevant to the present action,” and that the allegations of wasting and secreting assets were “boilerplate.” *Id.* at 512.

¹⁹¹ *Id.* The Court determined that this fact suggested that the “defendants had information leading them to believe the unusual request would be fruitful with regard to Riley.” *Id.* However, the Court stopped short of accusing Fulbright & Jaworski of impropriety and merely stated that because of the unusual circumstances the issue should be resolved in favor of Riley to avoid the appearance of impropriety. *Id.*

¹⁹² *Id.* at 513-514. Interestingly, although the Court was firm in its application of the ethical rules to the facts of this case, it noted at the end of its opinion how it believed the circumstance of this case presented a “very close question.” *Id.* at 514. However, despite the hardship the court acknowledged its findings would place on the defendants, it stated that the risk of “public suspicion” and the threat of public questioning of “the extent of an attorney’s loyalty to his client” warranted disqualification. *Id.*

¹⁹³ TEX. DISCIPLINARY R. PROF. CONDUCT 1.06(a) (1990).

¹⁹⁴ Texas Rule 1.06 provides as follows:

Rule 106 Conflict of Interest: General Rule

- (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.
- (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.
- (d) A lawyer who has represented multiple parties in a matter shall not thereafter represent any of such parties in a dispute among the parties arising out of the matter, unless prior consent is obtained from all such parties to the dispute.
- (e) If a lawyer has accepted representation in violation of this Rule, or if multiple representation properly accepted becomes improper under this Rule, the lawyer shall promptly withdraw from one or more

representations to the extent necessary for any remaining representation not to be in violation of these Rules.

- (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.

¹⁹⁵ *Id.* 1.06(a)-(b).

¹⁹⁶ Compare Rule 1.7 of the Model Rules of Professional Conduct which also relates to concurrent conflicts of interest:

Rule 1.7 Conflict of Interest: General Rule

- (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 1.7 (1989).

¹⁹⁷ *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).

¹⁹⁸ TEX. DISCIPLINARY R. PROF. CONDUCT 1.06 cmt. 11(1990)

¹⁹⁹ *Id.* cmt. 2.

²⁰⁰ *Id.*

²⁰¹ *Id.* cmt. 6.

²⁰² *Id.* Rule 1.06 (1990). 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 RULE 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).

²⁰³ However, several significant ethics opinions have been issued with respect to Rule 1.06. *See e.g.*, Texas Ethics Opinion 487, Texas Commission on Professional Ethics (1994).

²⁰⁴ 803 S.W.2d 416(Tex. App. -- El Paso 1991).

²⁰⁵ *Id.* at 422.

²⁰⁶ *Id.* at 421.

²⁰⁷ *Id.* at 421-422.

²⁰⁸ 932 S.W.2d 743 (Tex. App. -- Waco 1996, _).

²⁰⁹ *Id.* at 744-745.

²¹⁰ *Id.* at 745, n.2.

²¹¹ *Id.* at 744.

²¹² *Id.* Texas Rule 1.06(f) states as follows:

- (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.

²¹³ *Id.*

²¹⁴ *Id.* (citing *Samuels v. Montgomery*, 793 S.W.2d 337, 340 (Tex. App. -- Houston [14th Distl 1990, orig proceeding]).

²¹⁵ *Id.* at 744-745. The Court noted that if disqualification is required by Rule 1.06 "to extend beyond the entity actually employing a lawyer is an issue that the drafters of the rules must confront themselves." *Id.*

²¹⁶ TEX. DISCIPLINARY R. PROF. CONDUCT 1.06(c) (1990).

²¹⁷ *Id.* cmt.2.

²¹⁸ *Id.*

²¹⁹ *Id.* cmt. 7.

²²⁰ *Id.* cmt, 8.

²²¹ *Id.* cmt. 10.

²²² *See Dresser*, 972 F.2d 543-44.

²²³ *Id.* at 544; *Woods v. Covington County Bank*, 537 F.2d 804, 812-13 (5th Cir. 1976). *See also In re Asbestos Litigation*, 90 F.3d 963 (5th Cir. 1996) (applying Model Rule 1.7 because that is what the parties to the litigation agreed was the controlling standard).

²²⁴ 972 F.2d at 543-46.

²²⁵ *Id.* at 542.

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ *Id.* at 544-45

²³⁰ *Id.* at 545.

²³¹ *Ld.* 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 182 and unequivocally favored allowing such representation to further the ends of justice.

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

²³² TEX. DISCIPLINARY R. PROF. CONDUCT 1.06 (1991).

²³³ 891 S.W.2d at 253.

²³⁴ *Id.* at 254.

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ 887 S.W.2d at 831.

²⁴⁰ *Id.* at 833.

²⁴¹ *Id.*

²⁴² *Id.* at 833-34.

²⁴³ *Id.* at 834.

²⁴⁴ *Id.*

²⁴⁵ *Id.* at 835.

²⁴⁶ *Id.* at 834 (citing Texas Ethics Opinion 472, Texas Commission on Professional Ethics, (1992)).

²⁴⁷ *Id.* at 835 (citing ABA Comm. On Ethics and Professional Responsibility, Informal Op. 1526 (1988)).

²⁴⁸ *Id.* at 835 (citing Comment, *The Chinese Wall Defense to Law-Firm Disqualification*, 128 U.P.A.L.REV. 677, 711-715 (1980)).

²⁴⁹ *Phoenix*, 887 S.W.2d at 836.

²⁵⁰ 888 S.W.2d. at 466.

²⁵¹ *Occidental Chemical Corp. v. Brown*, 877 S.W.2d 27 (Tex. App – Corpus Christi, 1994, orig. proceeding), *revved Grant*, 888 S.W.2d at 466.

²⁵² *Id.* at 32.

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ *Id.* at 467.

²⁵⁶ *Id.* at 468.

²⁵⁷ 915 S.W.2d 616, 618-620 (Tex. App. – El Paso 1996, ___)

²⁵⁸ Arzate actually did not file his motion immediately upon discovery that Tabares had gone to work for Hayes. To the contrary, he waited almost an entire year until 48 days prior to the trial. Although the issue of waiver was raised by Hayes on appeal, the court did not address it in its holding. *Id.* at 618.

²⁵⁹ *Id.* at 617.

²⁶⁰ *Id.* At 620. The Court noted that, in its opinion, *Phoenix Founders* establishes a multi-factor test that courts should use to determine if disqualification should be granted over conflicts of interest involving support staff. *Id.* at 619. The court should consider “the substantiality of the relationship between the former and current matter, time lapsed between the matters, 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 to reduce the danger of disclosure.” *Id.* The court comprehensively analyzed the evidence in light of these factors, and concluded that it supported denial of the motion to disqualify.

²⁶¹ *Cosgrove v. Grimes*, 774 S.W.2d 662, 664 (Tex.1989).

²⁶² *See Willis v. Maverick*, 760 S.W.2d 642 645 (Tex. 1988).

²⁶³ *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).

²⁶⁴ *Vinson & Elkins v. Ann E. Moran, et. al.* (No. 14-95-00348-CV).