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Exploring Disqualification of Counsel in Texas: A Balancing of Competing Interests The Fifth Annual Symposium on Legal Malpractice and Professional Responsibility.

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EXPLORING DISQUALIFICATION OF COUNSEL IN TEXAS: A BALANCING OF COMPETING INTERESTS

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I. Introduction

Attorneys strive to avoid conflict situations. Conflicts can result in extra expense and irate clients. The absence of a uniform standard for disqualification, however, complicates the conflict analysis for lawyers. Take, for example, the following two scenarios. In the first example, Allison, a lawyer, currently represents Becky in a litigation matter that is substantially related and adverse to her previous representation of Brian. In the second example, Tom, also a lawyer, currently represents Sally in an appellate matter that is substantially related and adverse to his previous representation of Steven. If clients Brian and Steven move to disqualify their respective former counsel, under current case law, it is possible that only one will succeed.[1]

This Article explores a number of questions arising from these two examples. For instance, what grounds for disqualification could clients Brian and Steven present? Can they each argue different grounds? What policy concerns do they share? Why is it possible that only one of them will succeed on the motion to disqualify?

1. *Compare* Troutman v. Ramsay, 960 S.W.2d 176, 178 (Tex. App.—Austin 1997, orig. proceeding) (holding that whenever counsel has confidential information of a former client and represents, in the context of trial, a new client adverse to the previous one, the trial court should disqualify the attorney), *with* COC Servs., Ltd. v. CompUSA, Inc., No. 05-01-00865-CV, 2002 WL 1792479, at *4 (Tex. App.—Dallas Aug. 6, 2002, no pet.) (not designated for publication) (concluding that an attorney who previously worked for the law firm that a client retained for appellate purposes only, need not be disqualified).

The uncertainty over conduct that results in disqualification can be costly.[2] The law relating to disqualification may be well known, but its application is difficult. Rigid application of irrebuttable presumptions and imputation of knowledge may result in the disqualification of the client's chosen counsel.[3] Further, even if an attorney succeeds in opposing a motion to disqualify, the resulting costs and delay may damage the attorney-client relationship more than if the attorney had simply declined the representation.

To help clarify how courts view the law on disqualification, this Article reviews existing and potential grounds for attorney disqualification in Texas state courts. Part I considers the general principles and development of the substantive law regarding attorney disqualification. Part II outlines the predominant grounds for attorney disqualification and points out the intricacies and nuances in applying the current standards for disqualification. Part II also examines the existence of a common analytical core among the current grounds of disqualification. Finally, Part III discusses other possible grounds for attorney disqualification and the supporting policy considerations. Through an examination of the case law, the Texas Disciplinary Rules of Professional Conduct, and a variety of other persuasive authorities, this Article presents a comprehensive and practical guide to attorney disqualification.[4]

A. *History of Motions to Disqualify*

Early in the twentieth century, motions to disqualify an attorney were rare. Beginning around 1950, a process of change began in the legal profession. In the last thirty-five years, law firms have grown exponentially and attorney mobility has increased. These

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2. *See* John F. Sutton, Jr., *Introduction to Conflicts of Interest Symposium: Ethics, Law, and Remedies*, 16 REV. LITIG. 491, 502 (1997) (proposing that disqualification is a harsh remedy because "[o]ften extensive services have been rendered and the substitution of new counsel results in delay and additional expense"); Susan Borreson, *Defense Victorious in Nation's First Trial over Norplant*, TEX. LAW., Sept. 21, 1998, at 2, *available at* 9/21/1998 Tex. Law. 2 (Westlaw) (describing how a plaintiff's attorney, who had hired a legal assistant who previously worked for the defense, was disqualified after investing millions in the litigation).

3. *See generally* NCNB Tex. Nat'l Bank v. Coker, 765 S.W.2d 398, 400 (Tex. 1989) (orig. proceeding) (discussing the burden of proof in order for the moving party to disqualify former counsel in a conflict of interest).

4. This Article does not address motions to disqualify counsel in the context of criminal cases.

circumstances resulted in a proliferation of motions to disqualify. As the legal profession continues to change, the law relating to disqualification is likewise evolving.

Motions to disqualify counsel usually arise from conflicts of interest involving former clients.[5] The law on disqualification, in this instance, is well developed and largely based on the "substantial relationship" test originally established in *T.C. Theatre Corp. v. Warner Bros. Pictures*.[6] Yet, it was not until 1989 that the Texas Supreme Court, in *NCNB Texas National Bank v. Coker*,[7] addressed the burden of proof necessary to justify a disqualification as a result of former client conflicts.[8] Acknowledging the realities of the evolving practice of law, the supreme court noted the impracticality of an absolute disqualification in all conflicts of interest situations while also recognizing some restraints were necessary.[9] As such, the supreme court employed the substantial relationship test to determine whether the trial court abused its discretion in granting the motion to disqualify.[10]

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5. *See, e.g.*, *In re* EPIC Holdings, Inc., 985 S.W.2d 41, 54 (Tex. 1998) (orig. proceeding) (disqualifying an employee's counsel because of the attorneys' prior affiliation with the law firm that helped form the corporation, which the employee was now suing); *In re* Gayken, No. 09-05-169 CV, 2005 WL 1413189, at *2 (Tex. App.—Beaumont June 16, 2005, orig. proceeding [mand. denied]) (mem. op.) (per curiam) (involving a relator's request to disqualify opposing counsel because an attorney who worked for the opposing firm had previously represented the relator in the same suit).

6. *See* 113 F. Supp. 265, 268 (S.D.N.Y. 1953) (explaining that "where any substantial relationship can be shown between the subject matter of a former representation and that of a subsequent adverse representation, the latter will be prohibited"); *see also In re* Cap Rock Elec. Coop., Inc., 35 S.W.3d 222, 230 (Tex. App.—Texarkana 2000, orig. proceeding) (stating that "the Fifth Circuit cited *T.C. Theatre Corp. v. Warner Bros. Pictures* as the leading case articulating the applicable standard, predating the disciplinary rules" (citation omitted)).

7. 765 S.W.2d 398 (Tex. 1989) (orig. proceeding).

8. *See* NCNB Tex. Nat'l Bank v. Coker, 765 S.W.2d 398, 400 (Tex. 1989) (orig. proceeding) (requiring that the party requesting disqualification 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 his former counsel will be divulged to his present adversary"). In order to meet this burden, the movant must produce evidence of specific similarities between the previous and the pending litigation. *Id.*

9. *See id.* at 399 (acknowledging that "[i]n this day of merging law firms and consolidating businesses," a total prohibition against representation of a former client would be impractical). However, the court then asserts that the attorney-client relationship would be harmed absent some restraints on representation of new clients that have opposing interests to former clients. *Id.*

10. *Id.* at 400-01.

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Generally, under the substantial relationship test, the party seeking disqualification must prove that the factual matters in a prior attorney-client relationship are substantially related to the facts in the pending litigation.[11] Simply put, the matters are substantially related if there is a genuine threat that confidences disclosed to a former counsel will be revealed to the party's current adversary.[12] Proving the elements of the substantial relationship test entitles the movant to the following two conclusive presumptions: (1) the former counsel obtained confidences and (2) the former counsel shared the confidences with other members of her law firm.[13] It is this second presumption that vicariously disqualifies the other members of the conflicted attorney's firm.

In *Coker*, the Texas Supreme Court grappled with a number of competing interests with which courts still continue to struggle. On one hand, the supreme court worried that, absent any restraints on conflicts, the value of the attorney-client relationship and public confidence in the legal profession would diminish as lawyers represented new matters adverse to former clients' interests.[14] On the other hand, the right to choose counsel is a primary consideration that militates against disqualification.[15] As motions to disqualify proliferate, courts are increasingly concerned that an individual may use such motions as a dilatory tactic.[16] Providing an appropri-

11. *Id.* at 399-400; TEX. DISCIPLINARY R. PROF'L CONDUCT 1.09, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A (Vernon 2005) (TEX. STATE BAR R. art. X, § 9).

12. *Coker*, 765 S.W.2d at 400; TEX. DISCIPLINARY R. PROF'L CONDUCT 1.09.

13. *Coker*, 765 S.W.2d at 400; TEX. DISCIPLINARY R. PROF'L CONDUCT 1.09.

14. *Coker*, 765 S.W.2d at 399.

15. *See In re* Nitla S.A. de C.V., 92 S.W.3d 419, 423 (Tex. 2002) (orig. proceeding) (per curiam) (providing that because disqualification deprives a party of the right to choose their own counsel, a trial court must strictly apply an exacting standard); Wilborn v. Life Ambulance Servs., Inc., 163 S.W.3d 271, 274 (Tex. App.—El Paso 2005, pet. denied) ("The right to counsel is a valuable right; its unwarranted denial is reversible error."); City of Dallas v. Redbird Dev. Corp., 143 S.W.3d 375, 387 (Tex. App.—Dallas 2004, no pet.) (proclaiming that disqualification of an attorney can infringe upon the right of the party to have counsel of choice); Kindle v. Wood County Elec. Co-op, Inc., 151 S.W.3d 206, 210 (Tex. App.—Tyler 2004, pet. denied) (asserting that "the party choosing the attorney as a representative in court should not be denied that choice by the courts except for compelling reasons"); Spinks v. Brown, 103 S.W.3d 452, 459 (Tex. App.—San Antonio 2002, pet. denied) (proclaiming a judge's discretion not to grant a motion to substitute counsel should be weighed against the general principle that "[a] party has the right to be represented by the counsel of its choice").

16. *See In re Nitla*, 92 S.W.3d at 422 (explaining the trial court must apply a strict standard when reviewing motions to disqualify to discourage a party from using this pro-

ate balance between these competing interests remains a pivotal concern.

As a means of balancing these important competing interests, the Texas Supreme Court requires strict adherence to an "exacting standard" when evaluating motions to disqualify counsel.[17] Yet, the supreme court failed to provide a definition or description of such a standard. Perhaps the substantial relationship test best defines what the supreme court meant by an exacting standard because the elements of the substantial relationship test balance the right of the opposing party to retain the counsel of its choice against the strong interest in protecting client confidences. If, after careful review it appears that there was a substantial relationship, the balance swings in favor of preserving confidences and the conclusive presumption that the former counsel obtained such confidences precludes further representation.

While the substantial relationship test refined in *Coker* remains intact, it does not, by design, apply to all situations meriting disqualification.[18] However, exacting standards are required in each

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cess as a delay tactic); *see also Coker*, 765 S.W.2d at 399-400 (requiring the trial court to "determine whether the matters embraced within the pending suit are *substantially related* to the factual matters involved in the previous suit," in order to discourage a motion to disqualify from being used as a dilatory tactic).

17. Spears v. Fourth Court of Appeals, 797 S.W.2d 654, 656 (Tex. 1990) (orig. proceeding) (citing *Coker*, 765 S.W.2d at 399); *In re* Sw. Bell Yellow Pages, Inc., 141 S.W.3d 229, 231 (Tex. App.—San Antonio 2004, orig. proceeding); *In re* Chu, 134 S.W.3d 459, 464 (Tex. App.—Waco 2004, orig. proceeding) (quoting *In re Nitla*, 92 S.W.3d at 422); *see In re* Cap Rock Elec. Coop. Inc., 35 S.W.3d 222, 230 (Tex. App.—Texarkana 2000, orig. proceeding) ("Because the remedy of disqualification is severe in the sense that it deprives one of the parties to litigation of the selection of the counsel of its choice, the movant for disqualification [must] establish a preponderance of the facts indicating a substantial relationship . . . ."); Keller Indus., Inc. v. Blanton, 804 S.W.2d 182, 185 (Tex. App.—Houston [14th Dist.] 1991, orig. proceeding) (stating that a trial court's decision to disqualify litigant's counsel must be based on a compelling reason because "Texas courts have long held that the right to be represented by counsel of choice is a valuable one"); *see also In re* Am. Airlines, Inc., 972 F.2d 605, 611 (5th Cir. 1992) ("Our prior cases disclose that a careful and exacting application of the rules in each case will separate proper and improper disqualification motions.").

18. *See* Int'l Trust Corp. v. Pirtle, No. 07-96-0277-CV, 1997 WL 20870, at *6 (Tex. App.—Amarillo Jan. 17, 1997, orig. proceeding) (not designated for publication) ("The 'substantial relationship' test is not the only test which now governs a trial court's determination as to whether an attorney should be disqualified . . . ." (citing Clarke v. Ruffino, 819 S.W.2d 947, 949 (Tex. App.—Houston [14th Dist.] 1991, writ dism'd w.o.j.))). "The Texas Disciplinary Rules of Professional Conduct . . . now list several different situations in which an attorney may be disqualified." *Id.*

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determination of attorney disqualification, regardless of whether the disqualification is based on common law or the Texas Disciplinary Rules of Professional Conduct (the Rules).[19] At first glance, requiring exacting standards, while not defining a set of guidelines or discussing the standards, seems like an unreasonable requirement. In contrast, other areas of the law requiring exacting standards provide a set of guidelines or specific rules of law to guide counsel.[20]

The promulgation of the Rules has given rise to other standards for disqualification.[21] Courts, however, emphasize that they are not bound by the Rules,[22] and therefore to what extent the Rules comport with the Texas Supreme Court's exacting standards requirement remains unclear. In comparison, the core of the substantial relationship test is its inherent balancing of the tension between the moving party's right to protect client confidences and

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19. *See, e.g.*, *In re Nitla*, 92 S.W.3d at 422 (noting that courts must use exacting standards, and often rely upon the Rules, for determining motions to disqualify).

20. *See* Kerr-McGee Corp. v. Helton, 133 S.W.3d 245, 259 (Tex. 2004) (noting that "[t]he exacting standards for expert testimony set forth by the United States Supreme Court . . . and in this [c]ourt . . . are well-known to Texas litigators"); Sun Exploration & Prod. Co. v. Jackson, 783 S.W.2d 202, 206 (Tex. 1989) (Spears, J., joined by Cook, J., concurring) (emphasizing that "[t]he judiciary . . . must hold itself to exacting standards lest it lose its legitimacy and suffer a loss of public confidence"); Nacol v. McNutt, 797 S.W.2d 153, 155 (Tex. App.—Houston [14th Dist.] 1990, writ denied) ("Texas trust law is replete with provisions which hold trustees to exacting standards."); 48 ROBERT P. SCHUWERK & LILLIAN B. HARDWICK, TEXAS PRACTICE: HANDBOOK OF TEXAS LAWYER AND JUDICIAL ETHICS: ATTORNEY TORT STANDARDS, ATTORNEY ETHICS STANDARDS, JUDICIAL ETHICS STANDARDS, RECUSAL AND DISQUALIFICATION OF JUDGES § 40.01, at 1456-58 (2005) (stating that grounds for disqualification for judges can be traced to the state constitution and statutes).

21. *See In re* Meador, 968 S.W.2d 346, 350-51 (Tex. 1998) (orig. proceeding) (asserting that "[w]e have often looked to our disciplinary rules to decide disqualification issues," but reiterating that the Rules are merely guidelines for these issues); 48 ROBERT P. SCHUWERK & LILLIAN B. HARDWICK, TEXAS PRACTICE: HANDBOOK OF TEXAS LAWYER AND JUDICIAL ETHICS: ATTORNEY TORT STANDARDS; ATTORNEY ETHICS STANDARDS; JUDICIAL ETHICS STANDARDS; RECUSAL AND DISQUALIFICATION OF JUDGES § 6.09, at 522-30 (2005) (discussing the standards to disqualify counsel based on a Rule 1.09 motion).

22. *See In re* EPIC Holdings, Inc., 985 S.W.2d 41, 48 (Tex. 1998) (orig. proceeding) (citing Nat'l Med. Enters., Inc. v. Godbey, 924 S.W.2d 123, 132 (Tex. 1996) (orig. proceeding)) (observing that the Rules are not dispositive of whether disqualification should occur, but rather give guidance and suggestions); Henderson v. Floyd, 891 S.W.2d 252, 253 (Tex. 1995) (orig. proceeding) (per curiam) (describing the Rules as "guidance" in disqualification determinations).

the opposing party's right to retain its chosen counsel.[23] Further development of the law on disqualification and its adherence to the exacting standards requirement may well depend on a balancing of these competing interests. While some facts may justify giving greater weight to one interest over the other, each analysis on disqualification should evidence an appropriate balancing of these competing interests.

B. *Sources for Disqualification*

As a shift in the profession occurred, additional authorities and sources contributed to the basis for disqualification. Much like the substantial relationship test, each of these sources addresses, to a certain extent, the tension among the competing interests in motions to disqualify.

1. Texas Disciplinary Rules of Professional Conduct

Texas courts are normally not a primary forum for disciplinary proceedings.[24] The Texas Supreme Court, nonetheless, has held that trial courts have a duty to regulate the legal profession and disqualify counsel when appropriate.[25] Consequently, the issue of

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23. *See* Robert P. Schuwerk & John F. Sutton, Jr., *A Guide to the Texas Disciplinary Rules of Professional Conduct*, 27A HOUS. L. REV. 1, 148-49 (1990) (noting that balancing must occur between the interests of the former client in confidentiality and those of the current client in the ability to choose counsel).

24. *See* TEX. R. DISCIPLINARY P. preamble, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A-1 (Vernon 2005) (delegating, by the Supreme Court of Texas, the responsibility for administering and supervising lawyer discipline to the Board of Directors of the State Bar of Texas).

25. *See* NCNB Tex. Nat'l Bank v. Coker, 765 S.W.2d 398, 399-400 (Tex. 1989) (orig. proceeding) (explaining that a motion to disqualify counsel is the appropriate channel to challenge an attorney's representation of a client who has interests in conflict with that of a former client and stating that the trial court has a "role in the internal regulation of the legal profession"); *see also In re Meador*, 968 S.W.2d at 351-52 (establishing a six-part test to help the trial court determine whether an attorney should be disqualified when the attorney has received improperly obtained privileged information, "even though the lawyer was not involved in obtaining the information"); Contico Int'l, Inc. v. Alvarez, 910 S.W.2d 29, 36 (Tex. App.—El Paso 1995, orig. proceeding) ("The Texas Supreme Court has adopted a standard requiring disqualification whenever counsel undertakes representation of an interest that is adverse to that of a former client . . . ." (citing Phoenix Founders, Inc. v. Marshall, 887 S.W.2d 831, 833 (Tex. 1994) (orig. proceeding), and *Coker*, 765 S.W.2d at 399-400)), *mand. granted sub nom.*, Mendoza v. Eighth Court of Appeals, 917 S.W.2d 787, 789-90 (Tex. 1996) (orig. proceeding) (per curiam) (characterizing the mandamus of the El Paso Court of Appeals as being improper because the court of appeals disturbed the trial court's factual determinations on the mandamus review).

disqualification arises more often in trial courts than in disciplinary forums.[26] The general goal of the Rules is to define the minimum standard of conduct for the purpose of professional discipline.[27] Comparatively, the general goal of attorney disqualification is to assure a fair trial.[28] The right to chosen counsel and deterring the use of disqualification as a dilatory tactic may carry great weight during litigation,[29] while such considerations are of little concern in a disciplinary proceeding. Thus, the Rules are not dispositive but merely advisory in a disqualification proceeding. Furthermore, the Rules do not purport to assist in determining disqualification, and the disqualification of an attorney does not necessarily result in a violation of the Rules.[30]

Nevertheless, the Rules are the preeminent source for attorney disqualification. They generally seek to protect the same interests that motions to disqualify further—protecting the value of the attorney-client relationship and the public's trust in the legal profes-

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26. *See, e.g.*, *In re EPIC Holdings*, 985 S.W.2d at 54 (granting mandamus directing the district court to grant the motion to disqualify); Metro. Life Ins. Co. v. Syntek Fin. Corp., 881 S.W.2d 319, 321 (Tex. 1994) (per curiam) (holding that the trial court did not abuse its discretion when it denied the motion to disqualify); *Coker*, 765 S.W.2d at 399 (justifying a restraint on representing new clients adverse to former clients in order to prevent a negative effect on public confidence in the legal profession and a stifling of attorney-client communications); *In re* Gayken, No. 09-05-169 CV, 2005 WL 1413189, at *4-5 (Tex. App.—Beaumont June 16, 2005, orig. proceeding [mand. denied]) (mem. op.) (per curiam) (granting mandamus for failure to disqualify attorney who previously represented relator); *In re* Bivins, 162 S.W.3d 415, 421 (Tex. App.—Waco 2005, orig. proceeding) (per curiam) (finding that the trial court abused its discretion in granting the motion to disqualify).

27. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT preamble ¶ 7 (stating that the Rules present the minimum standards of conduct that a lawyer must maintain to avoid disciplinary action).

28. *See* John F. Sutton, Jr., *Introduction to Conflicts of Interest Symposium: Ethics, Law, and Remedies*, 16 REV. LITIG. 491, 493 (1997) (naming fairness of the trial as the primary goal of attorney disqualification).

29. *See, e.g.*, *Coker*, 765 S.W.2d at 399 (acknowledging the importance in preventing disqualification motions from being used merely to delay trial); Robert P. Schuwerk & John F. Sutton, Jr., *A Guide to the Texas Disciplinary Rules of Professional Conduct*, 27A HOUS. L. REV. 1, 148-49 (1990) (pointing out the right of clients to retain the lawyer of their choice).

30. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT preamble ¶ 15 (qualifying that violations of the Rules does not necessarily mean that an attorney breached a duty to a client); *see also In re* Users Sys. Servs., Inc., 22 S.W.3d 331, 334 (Tex. 1999) (orig. proceeding) (observing that compliance with ethical rules does not necessarily preclude disqualification and a violation of ethical rules may not lead to disqualification).

sion.[31] Yet, because the strong interest in preserving chosen trial counsel may not be a major consideration in a disciplinary action,[32] the Rules are not entirely determinative of a motion to disqualify. Consequently, an analysis of the developing case law is needed to ascertain the influence of the Rules in determining attorney disqualification.

2. Other Rules and Principles

The Texas Supreme Court has clearly stated that the Rules are not determinative of motions to disqualify.[33] Even higher standards than those of the Rules may be used in deciding disqualification.[34] Ostensibly, independent of the Rules, under "appropriate circumstances"[35] or if "compelling reasons"[36] are presented, counsel may be disqualified. Identifying appropriate circumstances or

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31. *Compare* TEX. DISCIPLINARY R. PROF. CONDUCT preamble ¶¶ 9, 15 (stating that lawyers should not use the law's procedures to harass or intimidate and that maintaining society's confidence in the legal profession is the greatest incentive for lawyers to achieve the highest ethical standards), *with Coker*, 765 S.W.2d at 399-400 (emphasizing the value of trust in the attorney-client privilege and holding that the trial court abused its discretion when it failed to use the substantial relationship test to disqualify counsel).

32. *See* TEX. DISCIPLINARY R. PROF. CONDUCT preamble ¶ 10 (declaring the general goal of the Rules is to "define proper conduct for purposes of professional discipline"). *But see* Robert P. Schuwerk & John F. Sutton, Jr., *A Guide to the Texas Disciplinary Rules of Professional Conduct*, 27A HOUS. L. REV. 1, 148-49 (1990) (enumerating three primary interests of the former client in having protection against a former attorney, but noting the importance of allowing others to obtain a lawyer of their choice).

33. *See, e.g., In re* EPIC Holdings, Inc., 985 S.W.2d 41, 48 (Tex. 1998) (orig. proceeding) ("We have repeatedly observed that '[t]he Texas Disciplinary Rules of Professional Conduct do not determine whether counsel is disqualified in litigation, but they do provide guidelines and suggest the relevant considerations.'" (alteration in original) (quoting Nat'l Med. Enters., Inc. v. Godbey, 924 S.W.2d 123, 132 (Tex. 1996) (orig. proceeding))); *see also In re* Nitla S.A. de C.V., 92 S.W.3d 419, 422 (Tex. 2002) (orig. proceeding) (per curiam) (stating that "under appropriate circumstances, a trial court has the power to disqualify a lawyer even if he has not violated a specific disciplinary rule"); John F. Sutton, Jr., *Introduction to Conflicts of Interest Symposium: Ethics, Law, and Remedies*, 16 REV. LITIG. 491, 493-94 (1997) (discussing the interplay between states' disciplinary rules and motions for disqualification).

34. *See* Spears v. Fourth Court of Appeals, 797 S.W.2d 654, 656 (Tex. 1990) (orig. proceeding) (proposing that if the parties believe that a higher standard should be applied, they should offer "countervailing considerations as to why the disciplinary rules should not be . . . employed"); *see also In re* Acevedo, 956 S.W.2d 770, 773 (Tex. App.—San Antonio 1997, orig. proceeding) (determining the appropriateness of using a higher disqualification standard).

35. *See In re Nitla*, 92 S.W.3d at 422 (noting that a lawyer can be disqualified without violating the Rules if appropriate circumstances exist).

compelling reasons in all likelihood requires resorting to the Rules for some frame of reference. Thus, at the very least, the Rules will have some influence on the decision-making process.[37]

Consistent with its position on the Rules, the Texas Supreme Court has employed the American Bar Association's (ABA) model rules and ethics opinions in defining the applicable standard for disqualification. For instance, in *In re American Home Products Corp.*,[38] the court relied on a recommendation of the ABA's Committee on Ethics and Professional Responsibility in determining that a paralegal was not properly screened.[39] On a prior occasion, the court considered the ABA's ethical standards in addressing joint defense agreements and their impact on disqualification when a participating attorney breaches the confidentiality agreement.[40]

Other principles of law have also influenced the law on attorney disqualification.[41] The law of agency, for example, imposes fiduciary duties, including the duty of loyalty and communication to the client.[42] In this regard, the principle of confidentiality is protected not only by the Rules but also by the law of agency and evidence.[43] Essentially, Texas courts have significant discretion to go beyond

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36. *See In re* Moore, 153 S.W.3d 527, 532 (Tex. App.—Tyler 2004, orig. proceeding [mand. denied]) (expressing that only a compelling reason should cause a court to grant a counsel disqualification motion).

37. *See* Anderson Producing Inc. v. Koch Oil Co., 929 S.W.2d 416, 421 (Tex. 1996) (stating "it would be injudicious for this court to employ a rule of disqualification that could not be reconciled with the Texas Rules of Professional Conduct" (quoting Ayres v. Canales, 790 S.W.2d 554, 556 n.2 (Tex. 1990) (orig. proceeding))).

38. 985 S.W.2d 68 (Tex. 1998) (orig. proceeding).

39. *In re* Am. Home Prods. Corp., 985 S.W.2d 68, 75 (Tex. 1998) (orig. proceeding).

40. *See* Nat'l Med. Enters., Inc. v. Godbey, 924 S.W.2d 123, 130-31 (Tex. 1996) (orig. proceeding) (outlining the Fifth Circuit's disqualification analysis where the court based attorney disqualification "on a duty to preserve confidences implied in the circumstances of a joint defense" (citing Wilson P. Abraham Constr. Corp. v. Armco Steel Corp., 559 F.2d 250, 253 (5th Cir. 1977) (per curiam); ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 95-395 (1995))).

41. *See* John S. Dzienkowski & Robert J. Peroni, *The Decline in Lawyer Independence: Lawyer Equity Investments in Clients*, 81 TEX. L. REV. 405, 445 (2002) ("Courts examining lawyer-client business transactions have relied on a body of case law to craft a variety of general principles based in large part on the common law of agency as well as trustee and fiduciary law principles.").

42. *See In re* Bass, 113 S.W.3d 735, 743 (Tex. 2003) (orig. proceeding) (asserting that a fiduciary duty stems from agency law (citing Johnson v. Brewer & Pritchard, P.C., 73 S.W.3d 193, 200 (Tex. 2002))).

43. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.05 cmt. 3.

the Rules and resort to other ethical axioms. However, absent applicable case precedent, requiring courts to adhere to exacting standards while failing to provide specific guidance in choosing the applicable standard may inevitably cause inconsistent results.[44]

II. PREDOMINANT GROUNDS FOR DISQUALIFICATION

There are a number of existing grounds for disqualification. A review of the predominant grounds, however, reveals an instructive common analytical core. Absent case law, this common analytical core may assist in understanding and determining the exposure to disqualification. Further, a review of these grounds shows some of the intricacies and nuances in applying the current standards for disqualification.

A. *Conflicts of Interests*

1. Former Client Conflicts: Rule 1.09 and the Substantial Relationship Test

When faced with a conflict of interest in the representation of a former client, courts usually resort to the substantial relationship test to determine disqualification. The Texas Supreme Court has articulated the substantial relationship test as follows:

> When contemplating whether disqualification of counsel is proper, the [trial] court must determine whether the matters embraced within the pending suit are *substantially related* to the factual matters involved in the previous suit.
>
> . . . The moving party 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 his former counsel will be divulged to his present adversary. . . . If this burden can be met, the

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44. *See, e.g.*, Dan S. Boyd, *Current Trends in Conflict of Interest Law*, 53 BAYLOR L. REV. 1, 7 (2001) (noting questionable former client conflict case analysis); Susan Borreson, *Supreme Court Broadens Attorney-Disqualification Standard*, TEX. LAW., Jan. 11, 1999, at 2, *available at* 1/11/1999 Tex. Law. 2 (Westlaw) (noting the comment of Professor Robert Schuwerk, who testified for EPIC Holdings on its motion to disqualify, that the ruling "adopts a broader standard for what constitutes a conflict than even Rule 1.09 contemplates").

moving party is entitled to a conclusive presumption that confidences and secrets were imparted to the former attorney.[45]

Of course, this test requires further analysis of "attorney-client relationship," "adverse matters," and "substantial relationship."[46] Significantly, in most former client conflict cases, Texas courts apply the substantial relationship test within a Rule 1.09 analysis.[47]

a. Attorney-Client Relationship

Initially, Rule 1.09(a)(3) and the substantial relationship test require an attorney-client relationship in the former representation.[48] Importantly, under the *Coker* standard, only if an attorney-client relationship existed can a moving party avail itself of the conclusive presumptions.[49] Determining whether the moving party is a former client can be complicated, particularly with corporate clients.

Based on the underlying policy of protecting client confidences, an attorney with minimal participation and without privileged factual information appears less likely to have "personally represented" a former client under Rule 1.09. Yet, to require the moving party to disclose the confidences he seeks to protect in order to justify disqualification would defeat the purpose of protecting client confidences. While the former Rules of Professional Responsibility defined confidences as "information protected by the attorney-client privilege,"[50] the current Rules broadly define

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45. NCNB Tex. Nat'l Bank v. Coker, 765 S.W.2d 398, 399-400 (Tex. 1989) (orig. proceeding). Attorneys should ponder a number of questions in determining the existence of a former client conflict: (1) whether the attorney actually represented the supposed former client; (2) if so, whether representation of the new matter is substantially related to the former matter where a genuine threat exists that confidences revealed by the former client will be disclosed to the new client; (3) if substantially related, whether the new matter is adverse to the former client; and (4) whether the former client consented or waived objection to the representation of the new matter. *Id.* at 400.

46. For purposes of defining these terms, no distinction is made between the substantial relationship test and Rule 1.09 unless otherwise indicated.

47. *See* Nat'l Med. Enters., Inc. v. Godbey, 924 S.W.2d 123, 146 (Tex. 1996) (orig. proceeding) (looking to Rule 1.09(a) in interpreting arguments made concerning the substantial relationship test).

48. *See* Clarke v. Ruffino, 819 S.W.2d 947, 949 (Tex. App.—Houston [14th Dist.] 1991, writ dism'd w.o.j.) (analyzing whether an attorney-client relationship existed in reviewing a motion for disqualification).

49. *See Coker*, 765 S.W.2d at 400 (describing the burden of proof for a motion to disqualify).

50. TEX. STATE BAR R., art. X, § 9, DR 4-101 (Tex. Code of Prof'l Resp.), 34 TEX. B.J. 758 (1971, superseded 1990).

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confidential information to include both privileged and unprivileged information.[51] Unprivileged information is defined as "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."[52]

Nonetheless, some commentators have urged a more lenient approach—one that would consider the attorney's degree of involvement and exposure to privileged factual information.[53] However, the Texas Supreme Court has held "[i]t is not necessary to show that [counsel] personally and substantially participated in the matter."[54] As such, the degree of involvement may not factor into the determination if the attorney was exposed to either privileged or unprivileged client information.[55] Consequently, even a pro forma relationship can result in an attorney-client relationship for purposes of disqualification.[56]

Although the Rules do not describe when an attorney-client relationship begins, the preamble to the Rules describes the different functions of an attorney in representing a client.[57] Thus, if an attor-

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51. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.05(a); *accord In re* Gerry, 173 S.W.3d 901, 903 (Tex. App.—Tyler 2005, orig. proceeding) (citing to Rule 1.05(a)).

52. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.05(a); *accord In re Gerry,* 173 S.W.3d at 903 (citing to Rule 1.05(a) in defining "unprivileged client information").

53. *See* Dan S. Boyd, *Current Trends in Conflict of Interest Law*, 53 BAYLOR L. REV. 1, 17 (2001) (stating that "the factors the court should consider are whether the lawyer involved was a young associate primarily handling a legal briefing issue who had little or no access to privileged factual information and whether the lawyer simply heard generalized discussion of the case . . . without having any substantial responsibility"); *see also* Amon Burton, *Migratory Lawyers and Imputed Conflicts of Interest*, 16 REV. LITIG. 665, 681 (1997) ("Just because a lawyer performs some work in a law firm on a client's matter does not necessarily mean that under the [Rules] he should be deemed to have 'personally represented' that client.").

54. Henderson v. Floyd, 891 S.W.2d 252, 254 (Tex. 1995) (orig. proceeding) (per curiam).

55. *See id.* (finding an attorney-client relationship for purposes of disqualification because an attorney might "have done some actual work on the case, albeit minor, and was at least exposed to confidential information").

56. *See, e.g.*, Clarke v. Ruffino, 819 S.W.2d 947, 949-50 (Tex. App.—Houston [14th Dist.] 1991, writ dism'd w.o.j.) (concluding that an attorney-client relationship did exist for purposes of a disqualification proceeding because "the [Rules] do not permit a mere pro forma representation of a client"); Ins. Co. of N. Am. v. Westergren, 794 S.W.2d 812, 815 (Tex. App.—Corpus Christi 1990, orig. proceeding [leave denied]) (providing that the Rules do not allow pro forma representation).

57. TEX. DISCIPLINARY R. PROF'L CONDUCT preamble ¶ 2. The preamble gives the following description for the various functions of an attorney in representing a client:

ney subject to a motion for disqualification performed any of these functions, an attorney-client relationship likely existed.[58] Unfortunately, there is no standard rule for when an attorney-client relationship begins for purposes of disqualification under Rule 1.09. The Rules and commentary suggest that whether an attorney-client relationship exists depends on the circumstances and may ultimately be a question of fact.[59]

b. Adverse Matters

The Austin Court of Appeals has previously stated that an attorney representing a client, in a matter adverse to a former client, is subject to disqualification *only if* "the . . . representation is actually adverse and hostile to the former client."[60] In *National Medical Enterprises, Inc. v. Godbey*,[61] the Texas Supreme Court defined "adversity" under Rule 1.09 as "a product of the likelihood of the risk [that a lawsuit poses to a person's interests] and the seriousness of its consequences."[62]

In defining adversity, the court granted mandamus relief disqualifying Baker & Botts L.L.P. (Baker & Botts) as the attorneys for numerous plaintiffs in a suit against National Medical Enterprises, Inc. (NME).[63] NME was subject to lawsuits stemming from its op-

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> As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealing with others. As intermediary between clients, a lawyer seeks to reconcile their divergent interests as an advisor and, to a limited extent, as a spokesperson for each client. A lawyer acts as evaluator by examining a client's affairs and reporting about them to the client or to others.

Id.

58. *See, e.g.*, *Ruffino*, 819 S.W.2d at 950-51 (interpreting the function of evaluating a client's affairs in the refinancing of a property as indicative of an attorney-client relationship).

59. Tex. Disciplinary R. Prof'l Conduct preamble ¶ 12.

60. Arteaga v. Tex. Dep't of Protective & Regulatory Servs., 924 S.W.2d 756, 763 (Tex. App.—Austin 1996, writ denied).

61. 924 S.W.2d 123 (Tex. 1996) (orig. proceeding).

62. *In re* EPIC Holdings, Inc., 985 S.W.2d 41, 50 (Tex. 1998) (orig. proceeding) (alteration in original) (quoting Nat'l Med. Enters., Inc. v. Godbey, 924 S.W.2d 123, 132 (Tex. 1996) (orig. proceeding)).

63. Nat'l Med. Enters., Inc. v. Godbey, 924 S.W.2d 123, 132-33 (Tex. 1996) (orig. proceeding).

erations of psychiatric hospitals across the United States, including Texas.[64] As a result, NME retained numerous independent counsel to represent some of its employees.[65] NME retained Ed Tomko, an attorney with Doke & Riley, as independent counsel for Ronald Cronen, a regional administrator at NME.[66] Tomko subsequently left Doke & Riley and joined Baker & Botts.[67] Tomko and Baker & Botts withdrew from representing Cronen for unrelated reasons.[68] More than a year later, other Baker & Botts attorneys representing a significant number of former patients at NME's psychiatric hospitals filed suit against NME.[69] Cronen was not named as a defendant; however, his immediate predecessor was named.[70] NME and Cronen independently filed a motion to disqualify Baker & Botts claiming that its representation violated Rule 1.09.[71]

The trial court denied Cronen's motion to disqualify because it found the representation was not adverse to Cronen.[72] The court based its conclusion on the fact that Cronen denied any wrongdoing, the criminal investigations and vast publicity did not implicate Cronen in any wrongdoing, and Cronen was dismissed or nonsuited in the civil cases originally filed against NME in Tarrant County.[73] The court concluded that "the risk to Mr. Cronen from Baker & Botts' prosecution of this action is small given that he is not a defendant and is not even alleged by any party to have committed any misconduct."[74]

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64. *Id.* at 124.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Godbey*, 924 S.W.2d at 125.

69. *Id.*

70. *Id.* at 126.

71. *Id.*

72. *Id.* at 126-27.

73. *See Godbey*, 924 S.W.2d app. at 142-44 (Baker, J., joined by Enoch, J., dissenting) (listing Baker & Botts' contentions of why its representation is not adverse to the movant). The dissenting opinion attached a copy of the "Amended Order on Motion to Disqualify" from the trial court to its opinion. *Id.* at 134 n.1.

74. Nat'l Med. Enters., Inc. v. Godbey, 924 S.W.2d 123, 132 (Tex. 1996) (orig. proceeding) (quoting the trial court's findings); *accord id.* app. at 143 (Baker, J., joined by Enoch, J., dissenting) (setting forth the trial court's findings, as originally stated, in the trial court's amended order).

The Texas Supreme Court disagreed with the trial court's conclusion but agreed that the only issue was "whether the small but serious risk to Cronen posed by the pending action makes it adverse to him."[75] In holding Baker & Botts' representation was adverse to Cronen as a matter of law, the supreme court considered the fact that Cronen's immediate predecessor pleaded guilty to criminal charges and was a named defendant in the pending case.[76] Justice Hecht, writing for the majority in *Godbey*, metaphorically concluded:

> 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.[77]

Considering the trial court's findings and the supreme court's definition of adversity, the supreme court appears to have given considerable weight to the seriousness of the consequences—a potential criminal prosecution against Cronen—despite the remoteness of the risk.[78]

Given *Godbey*, it appears that *potentially* adverse, as opposed to *actually* adverse, may be all that is necessary in the disqualification context.[79] At the very least, a cautious attorney should be aware that the seriousness of the consequences might carry significant weight in determining adversity notwithstanding the minimal likelihood of a risk.

c. Substantially Related

Under the substantial relationship test, a lawyer is prohibited from acting adversely to a former client in a matter that is *substan-*

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75. *Id.* at 132.

76. *Id.* at 133.

77. *Id.*

78. *Id.* at 132-33 (accepting the trial court's findings as supported by the record but ordering the trial court to disqualify Baker & Botts because the firm's representation was adverse as a matter of law).

79. *Contra* Arteaga v. Tex. Dep't of Protective & Regulatory Servs., 924 S.W.2d 756, 763 (Tex. App.—Austin 1996, writ denied) (holding "[a] lawyer only violates Rule 1.09 if the subsequent representation is *actually adverse* and hostile to the former client" (emphasis added)).

tially related to a prior representation.[80] The underlying policy for this general rule is the preservation of client confidences.[81] Thus, the current representation must be substantially related to the prior representation to merit disqualification. More specifically, a party seeking to disqualify counsel "must prove [1] the existence of a prior attorney-client relationship in which [2] the factual matters involved were so related to the facts in the pending litigation that it creates a genuine threat that confidences revealed to his former counsel will be divulged to his present adversary."[82] In this context, the Texas Supreme Court has stated that proving an actual disclosure of confidences is not required.[83] Importantly, the scope or length of the representation is not the focus of the inquiry; rather, it is the similarity of the two matters.[84]

Some commentators note that the efficacy of the substantial relationship test correlates to its strict and precise application.[85] Under such reasoning, deviating from the substantial relationship test's narrowly defined application would undermine the inherent

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80. NCNB Tex. Nat'l Bank v. Coker, 765 S.W.2d 398, 399-400 (Tex. 1989) (orig. proceeding).

81. *See id.* at 400 (justifying the substantial relationship test as the means of not forcing the movant to disclose the confidences he seeks to protect). The reason for this Rule is that an attorney should not put himself in a position where the attorney might take 'an advantage derived or traceable to, confidences reposed under . . . a prior, privileged, relationship.' Cochran v. Cochran, 333 S.W.2d 635, 643 (Tex. Civ. App.—Houston 1960, writ ref'd n.r.e.) (quoting Watson v. Watson, 11 N.Y.S.2d 537, 540 (N.Y. Sup. Ct. 1939)).

82. *Coker*, 765 S.W.2d at 400.

83. *In re* EPIC Holdings, Inc., 985 S.W.2d 41, 51 (Tex. 1998) (orig. proceeding).

84. *See* Centerline Indus., Inc. v. Knize, 894 S.W.2d 874, 875-76 (Tex. App.—Waco 1995, orig. proceeding) (concluding that "it should make no difference [under the substantial relationship test] whether the lawyer gained no confidences or whether all the confidences gained have been publicly disclosed"); *see also In re* Box Bros. Holding Co., No. 05-99-00391-CV, 1999 WL 374179, at *5 (Tex. App.—Dallas June 10, 1999, orig. proceeding) (not designated for publication) (stressing "[t]he length of . . . [the] representation and the actual scope or breadth of that representation is not the issue . . . . [W]e are concerned only with the similarity of the two matters.").

85. *See* John F. Sutton, Jr., *Introduction to Conflicts of Interest Symposium: Ethics, Law, and Remedies*, 16 REV. LITIG. 491, 506 n.59 (1997) (indicating that "[s]ome commentators suggest that 'substantially related matter' should be defined precisely with regard to the facts of the discrete situations and not encompass broad generalities such as general business practices or attitudes toward litigation, which would virtually prohibit litigation against a former client"); *see also* Duncan v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 646 F.2d 1020, 1029 (5th Cir. Unit B June 1981) (urging that "[m]erely pointing to a superficial resemblance between the present and prior representations will not substitute for the careful comparison demanded by our cases"), *abrogated in part on other grounds by* Gibbs v. Paluk, 742 F.2d 181 (5th Cir. 1984).

balancing of competing policy interests.[86] For example, in defining a substantial relationship, the court held in *Home Insurance Co. v. Marsh*[87] that a "comparison should be made of the issues asserted in the . . . cases against the former clients and issues likely to be asserted against them in the present suit through the efforts of their former counsel."[88] A comparison of issues may involve comparing legal claims, theories, or defenses, but not factual matters.[89] However, considering that information about legal claims is public information, in the absence of substantially related facts, related legal claims, theories, or defenses alone may not justify a disqualification.[90]

Commentators note a further problem with comparing legal issues instead of factual matters is that there is no inherent time limit.[91] Former representations are more likely to differ factually,

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86. *Coker*, 765 S.W.2d at 400 (holding the trial court's conclusions 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").

87. 790 S.W.2d 749 (Tex. App.—El Paso 1990, orig. proceeding [leave denied]).

88. Home Ins. Co. v. Marsh, 790 S.W.2d 749, 754 (Tex. App.—El Paso 1990, orig. proceeding [leave denied]). *But see In re Box Bros.*, 1999 WL 374179, at *5 ("[U]nder *Coker* we are concerned only with the factual matters involved in the two representations . . . .").

89. *See, e.g.*, Texaco, Inc. v. Garcia, 891 S.W.2d 255, 257 (Tex. 1995) (orig. proceeding) (per curiam) (stating the "[p]laintiffs' allegations in this case involve similar liability issues, similar scientific issues, and similar defenses and strategies").

90. *See* Dan S. Boyd, *Current Trends in Conflict of Interest Law*, 53 BAYLOR L. REV. 1, 6-7 (2001) (criticizing *Garcia* and arguing that a rule not requiring the movant to show a substantial relationship between the factual circumstances of the two representations "could substantially impair the ability of clients to secure adequate representation in litigation"); *see also* Metro. Life Ins. Co. v. Syntek Fin. Corp., 881 S.W.2d 319, 320-21 (Tex. 1994) (per curiam) (discussing the *Coker* substantial relationship test in terms of showing a substantial relationship between facts in the pending representation to facts from the previous representation). *But see* Islander E. Rental Program v. Ferguson, 917 F. Supp. 504, 508 (S.D. Tex. 1996) (stating 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 former representation), *aff'd in part sub nom.* Islander E. Rental v. Barfield, 145 F.3d 359 (5th Cir. 1998) (unpublished table decision); *Garcia*, 891 S.W.2d at 257 (holding that the near identical issues, defenses, and strategies in the two representations created sufficient factual similarities to create a genuine threat that confidences revealed to the former attorney would be divulged to Texaco's adversary).

91. *See* Dan S. Boyd, *Current Trends in Conflict of Interest Law*, 53 BAYLOR L. REV. 1, 7 (2001) (noting that a rule which does not require showing a substantial relationship between the facts, such as the one sanctioned by *Garcia*, appears to have no time limit).

as opposed to legally, with the passage of time.[92] Solely comparing legal issues could indefinitely bar attorneys from representing new clients with an adverse *legal* interest to a former client, a result that neither the substantial relationship test nor Rule 1.09 contemplates.[93]

To prove that the factual matters involved are substantially related, the party moving for disqualification must produce evidence delineating "specific similarities capable of being recited in the disqualification order."[94] In this regard, the Texas Supreme Court has noted that simply finding the two representations give an appearance that confidences disclosed are possibly relevant to the representations does not satisfy the substantial relationship standard.[95] Consequently, a cautious practitioner's motion to disqualify should evidence an analysis of the facts indicating precisely how the two representations are substantially related.

In comparison, Rule 1.09 paragraph (a) presents three different situations where representation of a client against a former client is improper: (1) a lawyer questions the validity of his prior work product; (2) the representation within reasonable probability would cause improper disclosure of the confidences of a former client; or (3) the matter is substantially related to the present representation.[96]

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92. *See id.* ("Showings of actual factual overlap . . . are usually limited to cases of subsequent representation happening soon after the factually-related representation because it is relatively unlikely that a representation will be factually related to another that took place in the distant past.").

93. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT 1.09 cmt. 3 (commenting "paragraph (a) does not absolutely prohibit a lawyer from representing a client against a former client"); John F. Sutton, Jr., *Introduction to Conflicts of Interest Symposium: Ethics, Law, and Remedies*, 16 REV. LITIG. 491, 506 n.59 (1997) (citing to commentators who suggest that if the substantially related matter test deals with merely broad generalities, the test would "virtually prohibit litigation against a former client").

94. NCNB Tex. Nat'l Bank v. Coker, 765 S.W.2d 398, 400 (Tex. 1989) (orig. proceeding); *accord In re* Cap Rock Elec. Coop., Inc., 35 S.W.3d 222, 230 (Tex. App.—Texarkana 2000, orig. proceeding) (citing to *Coker* for the same proposition).

95. *Coker*, 765 S.W.2d at 400.

96. TEX. DISCIPLINARY R. PROF. CONDUCT 1.09(a). Specifically, Rule 1.09(a) provides the following:

> Without prior consent, a lawyer who personally has formerly represented a client in a matter shall not thereafter represent another person in a matter 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; or

Despite the three specific circumstances outlined in Rule 1.09(a), much of the law regarding disqualification revolves around the substantial relationship test.[97] The substantial relationship test serves as the preeminent standard for disqualification for at least three reasons. First, the substantial relationship test predates Rule 1.09(a) and has more extensive roots in Texas jurisprudence.[98] Second, the substantial relationship test appears to subsume the last two situations described in Rule 1.09(a).[99] Finally, this strict test appears to balance the competing policy interests in motions to disqualify and therefore serves as the epitome of "exacting standards."[100]

Significantly, at least one case, albeit unpublished, has determined that even if there is a violation of Rule 1.09(a)(3)—essentially meeting the substantial relationship test—disqualification is not necessarily required.[101] In *COC Services, Ltd. v. CompUSA,*

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(2) if the representation in reasonable probability will involve a violation of Rule 1.05.

(3) if it is the same or a substantially related matter.

Id.

97. *See, e.g., In re* TXU U.S. Holdings Co., 110 S.W.3d 62, 65 (Tex. App.—Waco 2002, orig. proceeding) (referring to the substantial relationship test as the applicable law when dealing with former client conflicts), *mand. denied sub nom., In re* Mitcham, 133 S.W.3d 274 (Tex. 2004) (orig. proceeding) (per curiam); Troutman v. Ramsay, 960 S.W.2d 176, 178 (Tex. App.—Austin 1997, orig. proceeding) (reviewing the underlying motion to disqualify pursuant to the substantial relationship test).

98. *In re* Works, 118 S.W.3d 906, 908 (Tex. App.—Texarkana 2003, orig. proceeding) (stating "[the] 'substantial relationship' test is a product of common law and predates the Texas Rules of Disciplinary Conduct" (citing *In re Cap Rock*, 35 S.W.3d at 230)).

99. *See* Tex. Disciplinary R. Prof'l Conduct 1.09 cmt. 4B (concluding that Rule 1.09(a)(3)—matters substantially related to representation in question—"largely overlaps" Rule 1.09(a)(2)).

100. *Coker*, 765 S.W.2d at 399-400.

101. *See* COC Servs., Ltd. v. CompUSA, Inc., No. 05-01-00865-CV, 2002 WL 1792479, at *3 (Tex. App.—Dallas Aug. 6, 2002, no pet.) (not designated for publication) (asserting that "a court is not required to order disqualification" after finding a Rule 1.09 violation (citing Henderson v. Floyd, 891 S.W.2d 252, 254 (Tex. 1995) (orig. proceeding) (per curiam))). *But see* Anderson Producing Inc. v. Koch Oil Co., 929 S.W.2d 416, 433 (Tex. 1996) (Owen, J., joined by Hecht, J., dissenting) (stating "[w]e clearly meant that where there was a violation, the lawyer should be disqualified, and that in other situations, the rule serves as a guide"); Int'l Trust Corp. v. Pirtle, No. 07-96-0277-CV, 1997 WL 20870, at *13 (Tex. App.—Amarillo Jan. 17, 1997, orig. proceeding) (not designated for publication) (indicating *Coker* holds "that if the question is raised, and the record is sufficient to show a 'substantial relationship,' a trial court's failure to disqualify is an abuse of discretion" (citing *Coker*, 765 S.W.2d at 400)).

Inc.,[102] the Dallas Court of Appeals rejected the proposition that a violation of Rule 1.09 requires automatic disqualification and determined that "a court should make a separate inquiry into the relevant policy considerations as well as the specific facts of the case."[103] The court held that disqualification was inappropriate because the conflicted firm was retained for appellate purposes only.[104] Therefore, the court concluded, considering any issues on appeal must come from a cold record—which is public information—any information acquired "is either no longer confidential or could not affect the disposition of the appeal."[105] Notably, the court did not address whether the conflicted firm could represent CompUSA in the event of a remand.[106] Thus, whether a court needs to make a separate inquiry into the relevant policy considerations in addition to finding a violation of Rule 1.09(a)(3) or that both matters were substantially related under *Coker* in order to fulfill the "exacting standard" requirement remains unclear.

d. Presumptions and Vicarious Disqualification

Once the party moving for disqualification establishes a prior attorney-client relationship, adversity, and that the two matters are substantially related, the moving party is entitled to the following two irrebutable presumptions: (1) that the former client imparted confidences to the conflicted attorney and (2) that the attorney shared these confidences with other members of his law firm.[107]

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102. No. 05-01-00865-CV, 2002 WL 1792479 (Tex. App.—Dallas Aug. 6, 2002, no pet.) (not designated for publication).

103. COC Servs., Ltd. v. CompUSA, Inc., No. 05-01-00865-CV, 2002 WL 1792479, at *3 (Tex. App.—Dallas Aug. 6, 2002, no pet.) (not designated for publication). *But see* Home Ins. Co. v. Marsh, 790 S.W.2d 749, 754 (Tex. App.—El Paso 1990, orig. proceeding [leave denied]) ("Once the [*Coker*] standard is met by the movant, there exists an irrebuttable, conclusive presumption that disqualification is mandated."); *see also* Clarke v. Ruffino, 819 S.W.2d 947, 951 (Tex. App.—Houston [14th Dist.] 1991, writ dism'd w.o.j.) (acknowledging once the party moving to disqualify an attorney proves a substantial relationship between the two representations, "[the moving party] is entitled to a conclusive irrebuttable presumption that confidences . . . were imparted to the former attorney" (citing Ins. Co. of N. Am. v. Westergren, 794 S.W.2d 812, 815 (Tex. App.—Corpus Christi 1990, orig. proceeding [leave denied]))).

104. *COC Servs.*, 2002 WL 1792479, at *4.

105. *Id.*

106. *Id.*

107. *Compare* Nat'l Med. Enters., Inc. v. Godbey, 924 S.W.2d 123, 131 (Tex. 1996) (orig. proceeding) (setting forth the second presumption—imputing the attorney's knowledge to his firm—in a case where the former attorney did not formally represent the mo-

The first conclusive presumption is designed to avoid the disclosure of confidences shared with former counsel in the disqualification hearing,[108] whereas the "reason for [the second] presumption is that it would always be virtually impossible for a former client to prove that attorneys in the same firm had not shared confidences."[109]

However, as comment 7 to Rule 1.09 indicates, whether an attorney from the disqualified law firm is also disqualified after joining another firm depends on whether the attorney "personally represented" the former client.[110] If an attorney with the disqualified firm, who was disqualified merely because of imputed knowledge, departs and joins a new firm, neither the attorney nor his new firm is vicariously disqualified under Rule 1.09.[111] Nonetheless, although Rule 1.09 may not serve as the predicate for disqualification in this scenario, other Rules, such as Rule 1.05, may present a basis for disqualification.[112]

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vant, but rather represented one of the movant's former employees and received the movant's confidential information under a written joint defense agreement), *with Coker*, 765 S.W.2d at 400 (asserting the first presumption—that the client disclosed confidential information—where the attorney did represent the movant in a previous matter (citing P & M Elec. Co v. Godard, 478 S.W.2d 79, 80-81 (Tex. 1972) (orig. proceeding))).

108. *See Coker*, 765 S.W.2d at 400 (giving the purpose of the first presumption—that a client divulged confidential information to the attorney).

109. *Godbey*, 924 S.W.2d at 131. According to the *Godbey* court, helping clients feel more secure and guarding the integrity of the legal profession are other reasons for the second presumption. *Id.*

110. Tex. Disciplinary R. Prof'l Conduct 1.09 cmt. 7; *see, e.g.*, Henderson v. Floyd, 891 S.W.2d 252, 254 (Tex. 1995) (orig. proceeding) (per curiam) ("Under this rule, if Thomas 'personally represented' relator while associated with Clint Lewis, Ken Lewis cannot represent Reed."). In *Henderson v. Floyd*, attorney Thomas previously worked for an attorney named Clint Lewis, who the movant retained for counsel. *Id.* at 253. Subsequent to Clint Lewis's retention, Thomas left the firm and began working for Ken Lewis (no relation to Clint Lewis), who was retained by the plaintiff, Linda Reed, in the suit against the movant. *Id.* The issue was whether Ken Lewis could represent Ms. Reed where attorney Thomas did not formally work on the particular case before he left Clint Lewis's firm. *Id.* The court concluded that although his contact with the case was limited, attorney Thomas had nonetheless personally represented the movant and subsequently disqualified Ken Lewis from representing the plaintiff. *Id.* at 254.

111. Tex. Disciplinary R. Prof'l Conduct 1.09 cmt. 7; Amon Burton, *Migratory Lawyers and Imputed Conflicts of Interest*, 16 Rev. Litig. 665, 676-77 (1997).

112. *See* Tex. Disciplinary R. Prof'l Conduct 1.09 cmt. 7 (asserting that "should those other lawyers cease to be members of the same firm as the lawyer affected by paragraph (a) without personally coming within its restrictions, they thereafter may undertake the representation against the lawyer's former client unless prevented . . . by some other of these Rules").

On the other hand, if the departing attorney personally represented the former client, the ability to take on representation adverse to the former client by that attorney and other lawyers in the new law firm is still subject to Rule 1.09.[113] To determine whether an attorney personally represented a client, comment 2 to Rule 1.09 provides the following:

> Among the relevant factors . . . would be how the former representation actually was conducted within the firm; the nature and scope of the former client's contacts with the firm (including any restrictions the client may have placed on the dissemination of confidential information within the firm); and the size of the firm.[114]

The above presumptions apply differently, however, when dealing with nonlawyers.[115] With regard to legal assistants, there is a conclusive presumption that they obtain confidential information only in cases on which they personally work.[116] The presumption that they shared information obtained in their previous employment with members of the new law firm is rebuttable,[117] so as not to unnecessarily impede their mobility for employment.[118] In this regard, proof that measures were taken to guard against any disclosure of confidences and to assure that the nonlawyer did not work

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113. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.09 cmt. 5; *see* Texaco, Inc. v. Garcia, 891 S.W.2d 255, 257 (Tex. 1995) (orig. proceeding) (per curiam) (holding the entire law firm was vicariously disqualified).

114. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.09 cmt. 2.

115. *See* Phoenix Founders, Inc. v. Marshall, 887 S.W.2d 831, 834 (Tex. 1994) (orig. proceeding) ("We disagree, however, with the argument that paralegals should be conclusively presumed to share confidential information with members of their firms.").

116. *See id.* (asserting that the paralegals are subject to the irrebuttable presumption that a client imparted confidences "during the course of the paralegal's work on the case" (citing NCNB Tex. Nat'l Bank v. Coker, 765 S.W.2d 398, 400 (Tex. 1989) (orig. proceeding))).

117. *In re* Mitcham, 133 S.W.3d 274, 276 (Tex. 2004) (orig. proceeding) (per curiam) (citing *Phoenix Founders*, 887 S.W.2d at 834); *see also In re* Bell Helicopter Textron, Inc., 87 S.W.3d 139, 145 (Tex. App.—Fort Worth 2002, orig. proceeding [mand. denied]) (explaining the presumptions as they relate to both attorneys and paralegals, and including the difference between the presumptions for each). As noted in *In re Bell Helicopter*, the presumption that a paralegal shared information with members of the new firm is rebuttable, whereas this presumption is irrebuttable with regard to attorneys. *Id.* (citing *Phoenix Founders*, 887 S.W.2d at 834-35).

118. *See In re Bell Helicopter*, 87 S.W.3d at 145 (citing *Phoenix Founders*, 887 S.W.2d at 834) (giving the purpose behind the presumption being rebuttable).

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on matters related to her prior employment can rebut the presumption.[119]

e. Rule 1.09(a)(2)

Rule 1.09(a)(2) may provide an independent basis for disqualification in situations where direct adversity between current and former clients is not readily apparent.[120] In conjunction with Rule 1.05, a "reasonable probability" of a violation of confidentiality in the attorney-client relationship can be the basis for disqualification of an attorney.[121] Reasonable probability of a violation of confidentiality may include: "(1) 'an unauthorized disclosure of confidential information' obtained from a client or former client or (2) the inappropriate use of confidential information to the detriment of a former client."[122]

The underlying policy justifying disqualification under such circumstances is that an attorney should not be in a position in which he may be forced to choose between zealously representing a current client and maintaining confidentiality toward a former client.[123] Furthermore, Rule 1.05 protects the fiduciary relationship between the lawyer and client, as well as the integrity of the legal system.[124]

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119. *In re Mitcham*, 133 S.W.3d at 276 (citing *Phoenix Founders*, 887 S.W.2d at 835-36); *see also Phoenix Founders*, 887 S.W.2d at 835 (giving specific precautions that a law firm can take to prevent disclosure of confidences by a paralegal and stating that proof of these precautions will rebut the presumption).

120. *See In re* Roseland Oil & Gas, Inc., 68 S.W.3d 784, 787-88 (Tex. App.—Eastland 2001, orig. proceeding) (disqualifying an attorney under Rules 1.09(a)(2) and 1.09(a)(3) and explaining that the definition of adversity is not limited merely to sides of a suit); Wasserman v. Black, 910 S.W.2d 564, 568 (Tex. App.—Waco 1995, orig. proceeding) (holding "[w]e conclude that Rule 1.09(a)(2) prevents Fulcher's continued representation of the defendants in the principal suit and, therefore, he should be disqualified").

121. *In re Roseland Oil & Gas*, 68 S.W.3d at 787 (citing TEX. DISCIPLINARY R. PROF'L CONDUCT 1.09(a)(2)).

122. *Id.* (citing TEX. DISCIPLINARY R. PROF'L CONDUCT 1.09(a)(2) & cmt. 4; TEX. DISCIPLINARY R. PROF'L CONDUCT 1.05(b)(1), (3)).

123. *See id.* at 787-88 (explaining that the attorney being placed in such a "precarious" position "undermines the confidentiality of the attorney-client relationship"); *Wasserman*, 910 S.W.2d at 568 (describing the precarious position and the choice the attorney would have to make with regard to the facts of the case (citing Tex. Comm. on Prof'l Ethics, Op. 482, 57 TEX. B.J. 200 (1994); NCNB Tex. Nat'l Bank v. Coker, 765 S.W.2d 398, 400 (Tex. 1989) (orig. proceeding))).

124. Pollard v. Merkel, 114 S.W.3d 695, 702 (Tex. App.—Dallas 2003, pet. denied) (citing TEX. DISCIPLINARY R. PROF'L CONDUCT 1.05 cmt. 1).

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Regarding vicarious disqualification, the relationship between Rule 1.09(a)(2) and Rule 1.05 seemingly ends once an attorney leaves the disqualified firm. If a lawyer is disqualified merely because of imputed knowledge, upon departing from the disqualified firm the lawyer may then undertake the representation from which he was previously vicariously disqualified.[125] However, the departing lawyer still cannot use the confidential information in violation of Rule 1.05.[126]

f. Actual Prejudice

Perhaps an unsettled question regarding disqualification pursuant to Rule 1.09 or under the *Coker* standard is whether the movant must additionally prove actual prejudice resulting from the presumed imparted confidences.[127] For example, in *COC Services*

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125. *Id.* at 701 (citing TEX. DISCIPLINARY R. PROF'L CONDUCT 1.09 cmt. 7).

126. *See id.* (cautioning that one should not interpret comment 7 to allow confidential information being used to the former client's disadvantage, thus violating Rule 1.05(b)(3)). "Where the departing attorney seeks out the former client's confidential information from her former law partner and uses it to the former client's detriment when representing the opposing party in the very same case, disqualification is required." *Id.* at 702.

127. *Compare In re* Nitla S.A. de C.V., 92 S.W.3d 419, 422 (Tex. 2002) (orig. proceeding) (per curiam) (stating, "Even if a lawyer violates a disciplinary rule, the party requesting disqualification must demonstrate that the opposing lawyer's conduct caused actual prejudice that requires disqualification" (citing *In re* Users Sys. Servs., Inc., 22 S.W.3d 331, 336 (Tex. 1999) (orig. proceeding); *In re* Meador, 968 S.W.2d 346, 350 (Tex. 1998) (orig. proceeding); Ayres v. Canales, 790 S.W.2d 554, 558 (Tex. 1990) (orig. proceeding))); *In re Meador*, 968 S.W.2d at 350 (agreeing that "a court should not disqualify a lawyer for a disciplinary violation that has not resulted in actual prejudice to the party seeking disqualification" (citing TEX. DISCIPLINARY R. PROF'L CONDUCT 3.08 cmt. 10)), *and In re* Davila, 1999 WL 735164, at *4 (Tex. App.—San Antonio 1999, orig. proceeding) (not designated for publication) (Green, J., concurring) (requiring "convincing proof" that the lawyer's continued representation would be "unduly harmful" to the movant), *with Coker*, 765 S.W.2d at 400 ("By proving the substantial relationship between the two representations, the moving party establishes as a matter of law that an appearance of impropriety exists. . . . [T]he trial court should perform its role in the internal regulation of the legal profession and disqualify counsel from further representation."), *In re* Gayken, No. 09-05-169-CV, 2005 WL 1413189, at *4 (Tex. App.—Beaumont June 16, 2005, orig. proceeding [mand. denied]) (mem. op.) (per curiam) (disqualifying the attorney under Rule 1.09 without discussing actual prejudice), Troutman v. Ramsay, 960 S.W.2d 176, 178 (Tex. App.—Austin 1997, orig. proceeding) (holding "[o]nce the presumption is in effect, the trial judge should disqualify the attorney . . . as an exercise on the part of the trial court of its role in the 'internal regulation of the legal profession'" (quoting *Coker*, 765 S.W.2d at 400)), Centerline Indus., Inc. v. Knize, 894 S.W.2d 874, 876 (Tex. App.—Waco 1995, orig. proceeding) (asserting that once a movant proves a substantial relationship the trial court must disqualify counsel as part of its role in internal regulation (citing *Coker*, 765 S.W.2d at 400)), Home Ins. Co. v. Marsh, 790 S.W.2d 749, 754 (Tex. App.—El Paso 1990, orig. proceeding

v. CompUSA, despite finding the two representations substantially related and in violation of Rule 1.09, the court noted, "COC would suffer no harm from Jenkens & Gilchrist's representation of CompUSA," and consequently refused to disqualify the firm.[128] In contrast, in *Home Insurance Co.* v. *Marsh*, also involving a Rule 1.09 violation, the court concluded that "[o]nce the [*Coker*] standard is met by the movant, there exists an irrebuttable, conclusive presumption that disqualification is mandated."[129]

In *Henderson v. Floyd*,[130] the Texas Supreme Court addressed whether the party moving for disqualification on the basis of Rule 1.09 needed to show actual harm. The court stated, "It would be virtually impossible for relator to show that Thomas revealed his confidences to his harm, and he should not be required to do so."[131] Although on several occasions the Supreme Court has subsequently emphasized that the party moving for disqualification must prove actual prejudice,[132] none of these occasions concerned disqualification on the basis of Rule 1.09(a)(3) or the *Coker* standard.[133]

[leave denied]) (finding that after the movant has established the *Coker* standard "there exists an irrebutable, conclusive presumption that disqualification is mandated"), *and In re* Box Bros. Holding Co., Inc. No. 05-99-00391-CV, 1999 WL 374179, at *5 (Tex. App.—Dallas June 10, 1999, orig. proceeding) (not designated for publication) (holding "[b]ecause under *Coker* we are concerned only with the factual matters involved in the two representations and because those matters are substantially similar . . . we conclude a genuine threat of disclosure exists and that disqualification is therefore required" (citing *Centerline Indus.*, 894 S.W.2d at 875-76)).

128. COC Servs., Ltd. v. CompUSA, Inc., No. 05-01-00865-CV, 2002 WL 1792479, at *4 (Tex. App.—Dallas Aug. 6, 2002, no pet.) (not designated for publication).

129. *Home Ins. Co.*, 790 S.W.2d at 754.

130. 891 S.W.2d 252, 254 (Tex. 1995) (orig. proceeding) (per curiam).

131. Henderson v. Floyd, 891 S.W.2d 252, 254 (Tex. 1995) (orig. proceeding) (per curiam); *see also supra* note 111 (discussing the factual circumstances and setting forth the parties in the litigation).

132. *See supra* note 127 (giving supreme court authorities that require proof of actual prejudice).

133. *See In re* Nitla S.A. de C.V., 92 S.W.3d 419, 422 (Tex. 2002) (orig. proceeding) (per curiam) (addressing disqualification when a party receives privileged documents from the trial court); *In re* Users Sys. Servs., Inc., 22 S.W.3d 331, 336 (Tex. 1999) (orig. proceeding) (stating "[e]ven if Akin Gump violated the 'spirit' of [Rule 4.02], as the court of appeals suggested, Gulde's actions did not cause any prejudice that would require disqualification" (footnote omitted)); *In re* Meador, 968 S.W.2d 346, 350 (Tex. 1998) (orig. proceeding) (concerning an attorney that received privileged documents that the client improperly obtained from her adversary).

2. Concurrent Representations

In some instances, an attorney is not necessarily prohibited from simultaneously representing a client in a matter adverse to the interests of another client.[134] Rule 1.06 provides the limitations on concurrent representations.

a. Rule 1.06

An attorney violates Rule 1.06(b)(2) when the representation of one client "reasonably appears to be or become[s] adversely limited by the lawyer's or law firm's responsibilities to another client."[135] At least one court has determined that the interests Rule 1.06 seeks to protect should factor into determining whether there is a reasonable appearance that the concurrent representation will

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134. *In re* Sw. Bell Yellow Pages, Inc., 141 S.W.3d 229, 232-33 (Tex. App.—San Antonio 2004, orig. proceeding) (mem. op.); *see also* Conoco Inc. v. Baskin, 803 S.W.2d 416, 419 (Tex. App.—El Paso 1991, orig. proceeding) (discussing Rule 1.06(c), which allows for concurrent representation if the attorney meets the requirements of the Rule).

135. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.06(b)(2). Rule 1.06 provides:

> (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.

Id.

be adversely limited. In *Conoco Inc. v. Baskin*,[136] the court stated these interests include: "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."[137] Notably, these interests are also pertinent in former client conflicts situations.[138]

b. Actual Prejudice

In *In re Southwestern Bell Yellow Pages, Inc.*,[139] Star Shuttle retained a law firm to defend a personal injury case.[140] Later, Southwestern Bell hired the same law firm for representation in an unrelated breach of contract lawsuit that an affiliate of Star Shuttle filed.[141] Defining the requirements for disqualification, the court stated that the moving party must not only demonstrate that the attorney's representation would reasonably appear to be adversely limited by the representation of the other client, but also that the movant suffered actual prejudice.[142]

In comparison, in *Conoco Inc.*, the court simply stated that Rule 1.06(b)(2), dealing with concurrent representations, "requires disqualification upon a *reasonable* appearance of unduly diminished representational services."[143] Here, the court held that the trial court could have based the denial of the motion to disqualify on the "absence of any *reasonable* appearance of harm from the alleged conflict."[144]

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136. 803 S.W.2d 416, 421 (Tex. App.—El Paso 1991, orig. proceeding).

137. Conoco Inc. v. Baskin, 803 S.W.2d 416, 421 (Tex. App.—El Paso 1991, orig. proceeding) (citing generally to TEX. DISCIPLINARY R. PROF'L CONDUCT 1.06 cmt).

138. *See id.* (asserting that although the substantial relationship test is not at issue the same public policy concerns are relevant).

139. 141 S.W.3d 229 (Tex. App.—San Antonio 2004, orig. proceeding) (mem. op.).

140. *In re* Sw. Bell Yellow Pages, Inc., 141 S.W.3d 229, 230 (Tex. App.—San Antonio 2004, orig. proceeding) (mem. op.).

141. *Id.* at 230-31.

142. *Id.* at 231 (citing *In re* Nitla S.A. de C.V., 92 S.W.3d 419, 422 (Tex. 2002) (orig. proceeding) (per curiam); *In re* Davila, 1999 WL 735164, at *4 (Tex. App.—San Antonio 1999, orig. proceeding) (not designated for publication)).

143. *See Conoco*, 803 S.W.2d at 421 (failing to mention actual prejudice in its analysis of Rule 1.06(b)(2)).

144. *Id.* at 422.

If Rule 1.06(b)(2) serves as a proper basis for disqualification, then requiring actual prejudice even after proving that the representation reasonably appears adversely limited may propose a higher standard for disqualification than Rule 1.06 contemplates.[145] The inconsistency of such a higher standard becomes more apparent considering Rule 1.06(b)(2) calls for a higher standard of professional conduct than that of Rule 1.09(a)(3), and the same policy considerations underlying former client conflicts are pertinent to concurrent client conflicts.[146]

3. Joint Defense Privilege

As a general rule, an attorney participating in a joint defense agreement cannot thereafter represent a party with an adverse interest to any of the participating parties.[147] In such a situation, the movant seeking disqualification predicated on a joint defense privilege must show (1) that confidential information has been shared and (2) the prior representation, where the information was shared, is substantially related to the present representation.[148] Regarding the conclusive presumptions that the disqualified attorney has shared confidences with other members of her firm, the Texas Supreme Court explained:

> The attorney's duty to preserve confidences shared under a joint defense agreement is no less because the person to whom they belong was never a client. The attorney's promise places him in the role of a fiduciary, the same as toward a client. The difficulty in proving a

145. *Compare In re Sw. Bell*, 141 S.W.3d at 232-33 (holding that the moving party failed to establish actual prejudice, and thus, the trial court abused its discretion in disqualifying the opposing party under Rule 1.06(b)(2)), *with Conoco*, 803 S.W.2d at 421 (asserting a movant has to show "a *reasonable* appearance of unduly diminished representational services" to warrant disqualification under Rule 1.06(b)(2)).

146. *See Conoco*, 803 S.W.2d at 421 (stating "[w]hile the substantial relationship test is no longer an issue in this action as a dispositive formulation, the same underlying factual considerations are pertinent").

147. *See* Nat'l Med. Enters., Inc. v. Godbey, 924 S.W.2d 123, 131 (Tex. 1996) (orig. proceeding) (prohibiting an attorney who participated in a joint defense agreement between his former client and the former client's employer, from subsequently representing a party with interests adverse to the former client's employer); *In re* Skiles, 102 S.W.3d 323, 327 (Tex. App.—Beaumont 2003, orig. proceeding) (per curiam) (explaining the joint defense privilege).

148. Rio Hondo Implement Co. v. Euresti, 903 S.W.2d 128, 132 (Tex. App.—Corpus Christi 1995, orig. proceeding [leave denied]); *see also In re Skiles*, 102 S.W.3d at 327 (citing *Rio Hondo*, 903 S.W.2d at 132).

> misuse of confidences, and the anxiety that a misuse may occur, is no less for the non-client. The doubt cast upon the integrity of the legal profession is the same in either situation. Because the reasons for the presumption apply equally in both situations, and there are no other bases for differentiating between them, we hold that an attorney's knowledge of a non-client's confidential information that he has promised to preserve is imputed to other attorneys i[n] the same law firm.[149]

Thus, under a joint defense privilege, the party moving for disqualification must still prove that confidential information was imparted to the attorney and the matter in which the information was acquired is substantially related.[150] Hence, the movant must provide some proof of the imparted confidential information and can avoid waiving any privilege by submitting the information to the court *in camera* or in a sealed affidavit.[151]

4. Waiver of Conflict

Strong policies discourage conflict of interest situations; however, a party can waive the conflict formally or through inaction. Waiver in both former and concurrent client conflicts occur in at least two ways. First, the former client can consent to the new representation. Comment 10 to Rule 1.09 provides that "[a] waiver is effective only if there is consent after disclosure of the relevant circumstances, including the lawyer's past or intended role on behalf of each client, as appropriate."[152] In *In re Cerberus Capital Management, L.P.*,[153] the Texas Supreme Court examined a waiver letter against the requirements of comment 10 to Rule 1.09 and noted that the letter disclosed (1) the proposed representation; (2)

149. *Godbey*, 924 S.W.2d at 132 (citations omitted).

150. *In re Skiles*, 102 S.W.3d at 327 (citing with approval the holding in *Godbey*, which established the basis for disqualification under a joint defense agreement).

151. *See Rio Hondo*, 903 S.W.2d at 132 (implying that a sealed affidavit, specifying that confidences revealed to codefendants, would suffice as proof of the confidential information); Ryals v. Canales, 767 S.W.2d 226, 230 (Tex. App.—Dallas 1989, orig. proceeding [leave denied]) (holding that a trial judge abused his discretion when he failed "to include the documents allegedly protected by the joint defense privilege" in his order forcing an *in camera* inspection documents).

152. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.09 cmt. 10; *see also In re* Cerberus Capital Mgmt., L.P., 164 S.W.3d 379, 382 (Tex. 2005) (orig. proceeding) (per curiam) (quoting comment 10).

153. 164 S.W.3d 379 (Tex. 2005) (orig. proceeding) (per curiam).

the subject matter of the firm's prior representation; (3) the time period involved; (4) the attorney involved; (5) the nature of the discussions; and (6) how the prior representation concluded.[154] As such, the supreme court concluded that the relators had effectively waived any conflict based on this prior representation.[155]

In terms of concurrent client conflicts, Rule 1.06 allows for continued representation with consent if the attorney or law firm "reasonably believes the representation of each client will not be materially affected[ ] and [ ] each affected or potentially affected client consents to such representation after full disclosure of the existence, nature, implications, and possible adverse consequences."[156]

Second, in addition to the express waiver noted above, waiver can occur through inaction. Generally, a court will consider the length of time between the moment the conflict became apparent and when the movant filed the motion for disqualification.[157] Courts have found motions filed within a few months of discovery to be timely.[158] Interestingly, courts apparently do not have to rely

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154. *In re* Cerberus Capital Mgmt., L.P., 164 S.W.3d 379, 382-83 (Tex. 2005) (orig. proceeding) (per curiam).

155. *Id.* at 383.

156. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.06(c)(1), (2); *see also In re* Posadas USA, Inc., 100 S.W.3d 254, 257-58 (Tex. App.—San Antonio 2001, orig. proceeding) (explaining that a client can consent to continued representation although the attorney's responsibility to the client has been limited by a conflict of interest).

157. Wasserman v. Black, 910 S.W.2d 564, 568 (Tex. App.—Waco 1995, orig. proceeding).

158. *Compare In re* Am. Home Prods. Corp., 985 S.W.2d 68, 73 (Tex. 1998) (orig. proceeding) (finding two-month delay did not constitute waiver), Syntek Fin. Corp. v. Metro. Life Ins. Co., 880 S.W.2d 26, 34 (Tex. App.—Dallas 1994) (concluding one-month delay did not waive complaint), *rev'd on other grounds*, 881 S.W.2d 319 (Tex. 1994) (per curiam), *and* Ins. Co. of N. Am. v. Westergren, 794 S.W.2d 812, 815 (Tex. App.—Corpus Christi 1990, orig. proceeding [leave denied]) (claiming two-month delay after issue was raised did not waive complaint), *with* Vaughan v. Walther, 875 S.W.2d 690, 691 (Tex. 1994) (orig. proceeding) (per curiam) (claiming six and one-half month delay waived complaint), Turner v. Turner, 385 S.W.2d 230, 236 (Tex. 1964) (determining eighteen-month delay waived disqualification), HECI Exploration Co. v. Clajon Gas Co., 843 S.W.2d 622, 628-29 (Tex. App.—Austin 1992, writ denied) (asserting an eleven-month delay corroborated the conclusion that the motion was being improperly used as a negotiating tool), Conoco Inc. v. Baskin, 803 S.W.2d 416, 420 (Tex. App.—El Paso 1991, orig. proceeding) (stating an eleven-month delay supported waiver finding), *and* Enstar Petroleum Co. v. Mancias, 773 S.W.2d 662, 664 (Tex. App.—San Antonio 1989, orig. proceeding [leave denied]) (per curiam) (holding motion to disqualify new firm filed four months after conflict discovered and on the day of trial was untimely).

on the opposing party to assert a lack of diligence in order to deny mandamus relief to a dilatory party.[159]

B. *Confidential Material: Rule 1.05*

Although most disqualification arises in the context of conflicts, other circumstances arise where policy considerations suggest disqualification is necessary. One such circumstance is the disclosure of confidential material. Rule 1.05 does not allow a lawyer to "knowingly . . . [u]se confidential information of a former client to the disadvantage of the former client after the representation is concluded or [u]se privileged information of a client for the advantage of [another]."[160] Consequently, an attorney who obtains confidential material, rightfully or wrongfully, can be disqualified from continuing to represent the new client.[161]

1. Confidential Material Obtained Through the Discovery Process

The potential for disqualification by virtue of receiving materials in discovery has become more common after the 1999 enactment of the Texas Rules of Civil Procedure. The party moving to disqualify must prove that (1) opposing counsel's possession of the confidential information caused actual harm to the moving party and (2) no lesser means to remedy the harm are available.[162] The Texas Supreme Court noted that the standard enunciated does not require a violation of the Rules in order for disqualification to occur.[163]

2. Confidential Material Legally Obtained Outside the Discovery Process

When a party's lawyer receives confidential material outside the discovery process without being directly involved in wrongfully ob-

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159. *In re* Users Sys. Servs., Inc., 22 S.W.3d 331, 337 (Tex. 1999) (orig. proceeding).

160. *In re* Roseland Oil & Gas, Inc., 68 S.W.3d 784, 787 (Tex. App.—Eastland 2001, orig. proceeding) (internal quotation marks omitted) (alterations and omission in original) (quoting Tex. Disciplinary R. Prof'l Conduct 1.05(b)(3), (4)).

161. *In re* Nitla S.A. de C.V., 92 S.W.3d 419, 423 (Tex. 2002) (orig. proceeding) (per curiam); *In re* Meador, 968 S.W.2d 346, 351 (Tex. 1998) (orig. proceeding).

162. *In re Nitla*, 92 S.W.3d at 423.

163. *See id.* (pointing out that the trial court rightfully found that the attorney did not violate a disciplinary rule in obtaining the information).

taining the material, the trial court may disqualify the lawyer.[164] In contrast to confidential material obtained through discovery, the Texas Supreme Court has not established a specific standard for disqualification in this situation.[165] Rather, the court has stated that courts must consider the significance of discovery privileges, the surrounding facts and circumstances, and the interest of justice to decide whether disqualification is warranted.[166] The court provided the following six factors—known as the *Meador* factors—to assist in this determination:

> 1) whether the attorney knew or should have known that the material was privileged;
>
> 2) the promptness with which the attorney notifies the opposing side that he or she has received its privileged information;
>
> 3) the extent to which the attorney reviews and digests the privileged information;
>
> 4) the significance of the privileged information; i.e., the extent to which its disclosure may prejudice the movant's claim or defense, and the extent to which return of the documents will mitigate that prejudice;
>
> 5) the extent to which movant may be at fault for the unauthorized disclosure; [and]
>
> 6) the extent to which the nonmovant will suffer prejudice from the disqualification of his or her attorney.[167]

After articulating the six factors, the court noted that a different case is presented if an attorney is directly involved in wrongfully obtaining an opposing party's confidential material.[168]

164. *See In re Meador*, 968 S.W.2d at 351 ("Without doubt, there are situations where a lawyer who has been privy to privileged information improperly obtained from the other side must be disqualified, even though the lawyer was not involved in obtaining the information.").

165. *See id.* at 351 (refusing "to articulate a bright-line standard for disqualification" in this situation); *see also In re Nitla*, 92 S.W.3d at 423 (citing *In re Meador*, 968 S.W.2d at 352) (acknowledging that the court has not devised a precise standard).

166. *In re Meador*, 968 S.W.2d at 351.

167. *Id.* at 351-52.

168. *Id.* at 354.

3. Confidential Material Wrongfully Obtained Outside the Discovery Process

In *Contico International, Inc. v. Alvarez*,[169] the plaintiff's attorney in the underlying suit was accused of stealing Contico's investigation file.[170] During a discovery hearing, Contico's attorneys noticed the plaintiff's attorney, Scherr, had what appeared to be a notebook and videotape from Contico's file.[171] Contico's attorneys notified the trial court, but the court refused to take any action without a formal motion and hearing.[172] Scherr did not respond to the accusations and left the courtroom.[173] Contico then filed a motion to disqualify Scherr and his law firm, on the basis that he obtained privileged material in violation of the Rules.[174] In addition, Contico's investigator filed criminal charges against Scherr.[175] At the hearing, Scherr refused to answer questions, invoking his Fifth Amendment rights.[176] There was conflicting evidence introduced at the hearing as to whether the materials Scherr possessed were in fact part of Contico's file.[177] The trial court denied the motion.[178]

The court of appeals conditionally granted the defendant's writ of mandamus, requiring the trial court to vacate its original order and enter a new order disqualifying Scherr.[179] The court of appeals asserted that Scherr's conduct—not responding to the accusations and later invoking his Fifth Amendment rights—created a permissible conclusive presumption that Scherr possessed Contico's confidential material.[180] The presumption, however, "[was] not based on the truth or falsity of the allegations against Scherr and require[d] no final determination of the information he possessed or

169. 910 S.W.2d 29 (Tex. App.—El Paso 1995, orig. proceeding), *mand. granted sub nom.*, Mendoza v. Eighth Court of Appeals, 917 S.W.2d 787 (Tex. 1996) (orig. proceeding) (per curiam).

170. Contico Int'l, Inc. v. Alvarez, 910 S.W.2d 29, 32 (Tex. App.—El Paso 1995, orig. proceeding), *mand. granted sub nom.*, Mendoza v. Eighth Court of Appeals, 917 S.W.2d 787 (Tex. 1996) (orig. proceeding) (per curiam).

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. *Contico*, 910 S.W.2d at 32.

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.* at 45.

180. *Contico*, 910 S.W.2d at 37.

how he obtained it."[181] The court also stated, "it is likewise misconduct to continue a representation when a lawyer has gained confidences of the opposing party through theft, deceit, inadvertent disclosure or other means."[182]

The Texas Supreme Court subsequently granted mandamus relief, concluding that the trial court did not abuse its discretion.[183] The supreme court reasoned that the trial court could have interpreted the conflicting evidence to indicate that Scherr did not possess Contico's confidential material, and therefore, without an abuse of discretion, mandamus relief was inappropriate.[184] The supreme court also disapproved of the court of appeals's decision to the extent that it held, without considering the surrounding circumstances and facts, that an attorney must be disqualified when the attorney, through no wrongdoing, acquires an opponent's confidential material.[185] The court, however, did not address the portion of the court of appeals's holding that a lawyer must not continue a representation when a lawyer has wrongfully or illegally obtained confidences of the opposing party.[186] Therefore, it is unclear whether a conclusive presumption continues to apply when an attorney possesses confidential information and fails to refute an allegation of illegal appropriation of such information, asserts a Fifth Amendment right, or both.[187]

181. Contico Int'l, Inc. v. Alvarez, 910 S.W.2d 29, 37 (Tex. App.—El Paso 1995, orig. proceeding), *mand. granted sub nom.*, Mendoza v. Eighth Court of Appeals, 917 S.W.2d 787 (Tex. 1996) (orig. proceeding) (per curiam).

182. *Id.* at 35.

183. Mendoza v. Eighth Court of Appeals, 917 S.W.2d 787, 790 (Tex. 1996) (orig. proceeding) (per curiam).

184. *Id.*

185. *See id.* at 789-90 (pointing out the court of appeals's interference with the trial court's factual determinations); *see also In re* Meador, 968 S.W.2d 346, 351, 354 (Tex. 1998) (orig. proceeding) (stating the court's disapproval of the *Contico* opinion and calling on trial courts to "consider all the facts and circumstances" in making the disqualification decision).

186. *See Mendoza*, 917 S.W.2d at 790 (ruling on the basis of the trial court's factual determinations); *see also In re Meador*, 968 S.W.2d at 354 (noting that the supreme court did not address the court of appeals's holding in *Contico* relating to attorney misconduct).

187. *In re* Moore, 153 S.W.3d 527, 534 (Tex. App.—Tyler 2004, orig. proceeding [mand. denied]) (concluding that "[w]hen two equally consistent inferences can be made from an assertion of the Fifth Amendment . . . , neither inference can be made").

C. *Lawyer As a Witness*

Another situation where policy considerations dictate the disqualification of a lawyer arises when the lawyer may be called to testify. Rule 3.08 restricts a lawyer's representation if that lawyer believes he may be a witness "necessary to establish an essential fact on behalf of the lawyer's client," unless the lawyer meets one of the following five exceptions:

> (1) the testimony relates to an uncontested issue;
> (2) the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony;
> (3) the testimony relates to the nature and value of legal services rendered in the case;
> (4) the lawyer is a party to the action and is appearing pro se; or
> (5) the lawyer has promptly notified opposing counsel that the lawyer expects to testify in the matter and disqualification of the lawyer would work substantial hardship on the client.[188]

Alternatively, the attorney should not continue as an advocate if the attorney believes he or she will be "compelled to furnish testimony that will be substantially adverse to the lawyer's client, unless the client consents after full disclosure."[189]

The underlying concern over a dual-role attorney is the possibility of confusion for the trier of fact. According to comment 4 to Rule 3.08, if the attorney's testimony relates to a contested or controversial matter, confusion over the role of counsel can prejudice the opposing party.[190] Additionally, comment 9 to Rule 3.08 makes clear the concern over preventing a situation where an attorney finds himself testifying adversely to his client's case.[191]

In *Anderson Producing Inc. v. Koch Oil Co.*,[192] the Texas Supreme Court addressed the issue regarding disqualification of a tes-

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188. TEX. DISCIPLINARY R. PROF'L CONDUCT 3.08(a); *see also In re* Sanders, 153 S.W.3d 54, 57 (Tex. 2004) (orig. proceeding) (per curiam) (reiterating Rule 3.08 in regard to a lawyer serving as a witness (quoting TEX. DISCIPLINARY R. PROF'L CONDUCT 3.08(a))).

189. TEX. DISCIPLINARY R. PROF'L CONDUCT 3.08(a).

190. *Id.* 3.08 cmt. 4.

191. *See id.* cmt. 9 (setting forth the two purposes of Rule 3.08).

192. 929 S.W.2d 416 (Tex. 1996).

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tifying attorney using Rule 3.08 as the controlling standard.[193] While comment 9 to Rule 3.08 discourages use of the Rule as a disciplinary standard for disqualification, the supreme court has nonetheless recognized that "the rule articulates considerations relevant to a procedural disqualification determination."[194] Notably, Justice Owen's dissent stressed that Rule 3.08 did not address the issue of public confidence in the legal system and is therefore not the only standard that should be used in determining disqualification of a testifying attorney.[195] Indeed, the supreme court expressly left open the question of whether a different standard could govern under different factual circumstances.[196]

Consequently, notwithstanding Justice Owen's dissent and the supreme court's acknowledgement of a potential different standard, one should, at minimum, look to Rule 3.08 to determine allowable conduct for a testifying attorney. Although Rule 3.08 prohibits the testifying attorney from serving as an advocate, the testifying attorney may participate in the preparation of the case.[197] Moreover, another attorney in the same firm may serve as an advocate with the client's informed consent.[198] Finally, although some argue the supreme court took a restrictive view of Rule 3.08 in *An-*

193. *See* Anderson Producing Inc. v. Koch Oil Co., 929 S.W.2d 416, 421-22 (Tex. 1996) (deciding the issue "under the dictates of Rule 3.08" because the parties failed to give an alternate standard to govern the decision); *see also In re* Bahn, 13 S.W.3d 865, 872-73 (Tex. App.—Fort Worth 2000, orig. proceeding) (placing the burden on the parties to set forth "as to why the disciplinary rules should not be employed in this proceeding" and turning to Rule 3.08 for the court's guidance).

194. Ayres v. Canales, 790 S.W.2d 554, 556 n.2 (Tex. 1990) (orig. proceeding); *see also Anderson Producing*, 929 S.W.2d at 421 (stating "[a]lthough Rule 3.08 was promulgated as a disciplinary standard . . . we have recognized that 'the rule articulates considerations relevant to a procedural disqualification determination'" (quoting *Ayres*, 790 S.W.2d at 556 n.2)); Mauze v. Curry, 861 S.W.2d 869, 870 (Tex. 1993) (orig. proceeding) (per curiam) (applying Rule 3.08 to determine the motion to disqualify a testifying attorney).

195. *Anderson Producing*, 929 S.W.2d at 430 (Owen, J., joined by Hecht, J., dissenting).

196. *Id.* at 422 (majority opinion) (refusing to discount "the possibility that we would apply a different standard under other appropriate circumstances").

197. *Id.* at 423-24.

198. *Id.* at 424 (citing TEX. DISCIPLINARY R. PROF'L CONDUCT 3.08 cmt. 8).

derson Producing,[199] the court has previously held that even testimony by affidavit can be grounds for disqualification.[200]

It appears a disqualification standard under Rule 3.08 would require the movant to establish actual prejudice. The party moving for disqualification on the grounds that the attorney is a potential witness must demonstrate actual prejudice resulting from the opposing lawyer's role as an advocate and witness.[201] In addition, at least one court has also explicitly required the moving party to show that "disqualification is necessary because the trial court lacks any lesser means to remedy [his] harm."[202]

III. Other Possible Grounds?

A. *Successive Government and Private Employment*

Rule 1.10 forbids representation of a private client by a previous government attorney in two instances.[203] The first is, "when the subsequent representation involves 'a matter in which the lawyer participated personally and substantially as a public officer or employee,'" unless the lawyer acquires consent from the government agency.[204] The second instance occurs "when the subsequent representation is adverse to a [person or] legal entity about whom the lawyer acquired 'confidential government information' while a public officer or employee."[205]

Regardless of which portion of the Rule the movant invokes, the movant will have to meet similar burdens for disqualification. Section (a) mandates the movant establish that the lawyer personally and substantially participated in the matter while working as a gov-

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199. *See id.* at 427 (Owen, J., joined by Hecht, J., dissenting) (characterizing the majority opinion as a "narrow, strict interpretation of Rule 3.08").

200. *See* Mauze v. Curry, 861 S.W.2d 869, 870 (Tex. 1993) (orig. proceeding) (per curiam) (holding that an expert affidavit was effectively testimony under Rule 3.08).

201. *In re* Bahn, 13 S.W.3d 865, 873 (Tex. App.—Fort Worth 2000, orig. proceeding) (citing Ayres v. Canales, 790 S.W.2d 554, 558 (Tex. 1990) (orig. proceeding)); *In re* A.M., 974 S.W.2d 857, 864 (Tex. App.—San Antonio 1998, no pet.) (citing *Ayres*, 790 S.W.2d at 558).

202. *In re* Bivins, 162 S.W.3d 415, 421 (Tex. App.—Waco 2005, orig. proceeding) (per curiam) (alteration in the original) (quoting *In re* Nitla S.A. de C.V., 92 S.W.3d 419, 423 (Tex. 2002) (orig. proceeding) (per curiam)).

203. Spears v. Fourth Court of Appeals, 797 S.W.2d 654, 657 (Tex. 1990) (orig. proceeding).

204. *Id.* (quoting Tex. Disciplinary R. Prof'l Conduct 1.10(a)).

205. *Id.* (quoting Tex. Disciplinary R. Prof'l Conduct 1.10(c)).

ernment employee.[206] To meet this burden, the moving party must prove "hands-on" involvement, and such participation cannot be imputed solely by the former government attorney's responsibilities, title, or office.[207] In comparison, section (c) also requires the moving party to show actual, not imputed, knowledge to establish that the former government attorney acquired confidential government information.[208]

Unlike disqualification under Rule 1.09, law firms can prevent vicarious disqualification under both sections, while maintaining the former government lawyer's association with the firm.[209] If the former government lawyer is screened from participation without receiving any of the resulting fee, and written notice is presented with reasonable promptness to the government agency, then a firm can prevent vicarious disqualification that would otherwise result from Rule 1.10(a).[210] Similarly, under a violation of Rule 1.10(c), other members of the firm are not vicariously disqualified if the lawyer is screened and receives no portion of the fee.[211] Moreover, written notice is apparently not required.

B. *Fairness in Adjudicatory Proceedings*

Rule 3.04 forbids an attorney from compensating or offering to compensate "a witness . . . contingent upon the content of the testimony of the witness or the outcome of the case."[212] As previously discussed, Rule 3.08 prohibits an attorney from serving as an advocate and witness in the same proceeding other than in the circumstances listed within this Rule.[213] In *Anderson Producing* Justice Owen writing in the dissent, joined by Justice Hecht, stated:

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206. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.10(a).

207. *Spears*, 797 S.W.2d at 657.

208. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.10 cmt. 7; *see also Spears*, 797 S.W.2d at 657 (citing TEX. DISCIPLINARY R. PROF'L CONDUCT 1.10 cmt. 7).

209. *See Spears*, 797 S.W.2d at 657 (pointing out that the as long "the former government attorney is screened from any participation in the matter and is not apportioned any of the resulting fee," other members of the firm may not be vicariously disqualified (citing TEX. DISCIPLINARY R. PROF'L CONDUCT 1.10(b), (d))).

210. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.10(b).

211. *Id.* 1.10(d). Rule 1.10 is not the sole governing authority; statutes and regulations may apply.

212. *Id.* 3.04.

213. *Id.* 3.08.

> It is doubtful whether a lawyer who has a financial interest contingent on the outcome of the case can ever testify as to matters other than those listed in Rule 3.08(a)(1) through (4) and comply with Rule 3.04. The Court observes that the contingency fee issue was not raised by Koch, but a violation of this nature should not be sanctioned by any court, objection or no.[214]

The majority agreed that this situation could arise, but refrained from articulating a standard of disqualification because the issue had not been raised at trial or on appeal.[215] In *In re Bahn*,[216] the Second Court of Appeals, while not squarely addressing the issue, added that trial courts should consider less drastic measures—measures other than disqualification—to prevent a possible violation of Rule 3.04.[217] The court further suggested providing the testifying attorney and his firm an opportunity to alter their method of billing the client before considering disqualification.[218]

C. *Communications with Represented Parties*

Rule 4.02, also known as the anticontact rule, prohibits certain types of communication. Under the terms of the Rule, a lawyer cannot communicate or encourage communication regarding the subject matter of the representation with a person the lawyer knows has legal counsel on the matter, unless the lawyer acquires consent from the other lawyer.[219] In part, the anticontact rule was intended "to preserve the integrity of the client-lawyer relationship by protecting the represented party from the superior knowledge and skill of the opposing lawyer."[220]

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214. Anderson Producing Inc. v. Koch Oil Co., 929 S.W.2d 416, 430 (Tex. 1996) (Owen, J., joined by Hecht, J., dissenting) (footnote omitted).

215. *Id.* at 425 (majority opinion).

216. 13 S.W.3d 865 (Tex. App.—Fort Worth 2000, orig. proceeding).

217. *In re* Bahn, 13 S.W.3d 865, 876-77 (Tex. App.—Fort Worth 2000, orig. proceeding) (citing Spears v. Fourth Court of Appeals, 797 S.W.2d 654, 656 (Tex. 1990) (orig. proceeding)).

218. *Id.* at 877.

219. TEX. DISCIPLINARY R. PROF'L CONDUCT 4.02.

220. Robert P. Schuwerk & John F. Sutton, Jr., *A Guide to the Texas Disciplinary Rules of Professional Conduct*, 27A HOUS. L. REV. 1, 351 (1990) (citing Powell v. Alabama, 287 U.S. 45 (1932); Shelton v. Hess, 599 F. Supp. 905, 906 (S.D. Tex. 1984); *In re* Breen, 552 A.2d 105, 117 (1989)).

The case of *In re Users System Services, Inc.*[221] probably best exemplifies Rule 4.02 and its relation as a standard for disqualification. In this case, the plaintiffs' attorney received a letter from one of the defendants stating that he wished to meet with the attorney, that he was no longer represented by counsel in the matter, and that he did not want to be.[222] Based on this correspondence, the attorney and one of the plaintiffs met with this defendant without notifying opposing counsel.[223] About eight months later, opposing counsel learned about the meeting in a deposition, but took no immediate action.[224] Then, eight months after learning of the meeting, the defendants moved to disqualify the plaintiffs' attorney and her entire law firm for violating Rule 4.02(a).[225] The trial court denied the motion.[226]

The Fourth Court of Appeals disagreed with the trial court and granted mandamus relief for the defendants.[227] The court of appeals concluded that Rule 4.02 required the plaintiffs' attorney to give immediate notice to opposing counsel under the circumstances.[228] The court further stated, if after giving notice to opposing counsel the defendant carried through with his decision to end the representation, then the plaintiffs' attorney should have encouraged the defendant to both give his original attorney advance notice and seek substitution of counsel.[229]

The Texas Supreme Court disagreed with the court of appeals's conclusion and reasoning. The supreme court stated that "Rule 4.02 does not require an attorney to contact a person's former attorney to confirm the person's statement that representation has been terminated before communicating with the person."[230] The

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221. 22 S.W.3d 331 (Tex. 1999) (orig. proceeding).

222. *In re* Users Sys. Servs., Inc., 22 S.W.3d 331, 333 (Tex. 1999) (orig. proceeding).

223. *Id.*

224. *See id.* at 332-33 (reciting the facts of the case and indicating that the particular defendant initiated contact for the meeting in May 1995 and depositions did not occur until January 1996).

225. *See id.* at 333 (asserting the defendants filed the motion to disqualify in August 1996).

226. *Id.*

227. *In re* News Am. Publ'g, Inc., 974 S.W.2d 97, 105 (Tex. App.—San Antonio 1998, orig. proceeding), *mand. granted sub nom.*, *In re* Users Sys. Servs., 22 S.W.3d 331 (Tex. 1999) (orig. proceeding).

228. *Id.*

229. *Id.*

230. *In re Users Sys. Servs.*, 22 S.W.3d at 334.

court also dispelled the notion that communication is absolutely prohibited until the party's former lawyer withdraws his appearance.[231] As a result, the court determined the plaintiffs' attorney did not violate Rule 4.02, and thus could not be disqualified under Rule 4.02.[232] The court noted that the plaintiffs' attorney may have acquired privileged information, which could present other grounds for disqualification; however, the defendants did not meet *Meador*'s requirements for disqualification in such a situation.[233]

The supreme court did not disregard the possibility of Rule 4.02 serving as a standard for disqualification. The court merely concluded that Rule 4.02 prohibits an attorney from communicating with another person only if the attorney knows the person has legal representation in the matter.[234] Further, an attorney can rely on the written statement of a person that she is no longer represented without having to confirm or notify her former counsel.[235] The court, however, did note that even if a person violated Rule 4.02, the moving party must show prejudice.[236]

IV. Conclusion

Motions to disqualify counsel are common in litigation. Although disqualification is a harsh remedy, courts are more willing to consider this option when client confidences are at stake. As the cases above indicate, the Rules are not the sole authority in determining motions for disqualification. In fact, some rules may not provide any guidance in determining whether disqualification is warranted.[237]

Thus, as laid out in the introduction, because similar fact patterns often arise out of different types of relationships between an

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231. *See id.* at 336 (disagreeing with an ABA opinion cited by the Fourth Court of Appeals).

232. *Id.* at 336.

233. *Id.*

234. *Id.* at 334.

235. *See In re Users Sys. Servs.*, 22 S.W.3d at 334-35 (explaining the client's right to terminate counsel at any time).

236. *See In re* Users Sys. Servs., Inc., 22 S.W.3d 331, 336 (Tex. 1999) (orig. proceeding) (stating "even if [the attorney] violated the 'spirit' of the rule . . . [her] actions did not cause any prejudice that would require disqualification").

237. *E.g.*, *In re* Slusser, 136 S.W.3d 245, 249 (Tex. App.—San Antonio 2004, orig. proceeding) (holding "[w]e are not persuaded that Rule 1.08 provides any guidance relevant to a party seeking to disqualify an opposing party's attorney").

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attorney and the moving party, different results can occur. For instance, using the previous fact pattern, Allison was a lawyer who represented client Becky on a matter that was substantially related and adverse to her previous representation of Brian. Because Allison had previously represented Brian, and the matter was substantially related, Brian is entitled to the presumptions that confidences were imparted to Allison and that Allison shared these with other members of her law firm. As such, Allison is precluded from representing Becky on this matter, and the trial court has no other option but to grant the motion to disqualify.

In the second scenario, Sally retained attorney Tom, for solely appellate purposes. Yet, the matter on which Sally seeks representation is a matter that is substantially related and adverse to Tom's previous representation of Steven. Although this scenario looks strikingly similar to the one above, at least one court has determined that disqualification is not required under similar facts. In cases with factual nuances that avoid easy categorization, the established case law can assist the trial court in weighing the public policy concerns of protecting client confidences against the right to retain counsel of choice.

The same policy concerns that would trigger the conclusive presumptions requiring disqualification with regard to Allison may not disqualify Tom, because an appellate matter may not raise the same policy concerns with regard to protecting client confidences. Although the case law provides established standards with regard to certain categories of relationships, the trial court must ultimately undertake a factual analysis of the impact on the protection of client confidences and one's right to counsel of choice. Consequently, at the core of the analysis of a motion to disqualify is the juxtaposition of the relationship between the attorney and the moving party with the tension between the public policy considerations over protecting client confidences and the right to retain chosen counsel.

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