

What You Need to Know About Attorney Disqualification in Texas

By Kelli Hinson: khinson@ccsb.com
Carrington, Coleman, Sloman & Blumenthal, L.L.P.

The disqualification of an attorney can be a very serious event, both for the client and the attorney, especially if disqualification comes after the attorney has already invested a significant amount of time in a matter. Even if the motion to disqualify is denied, the proceeding itself can serve as a distraction to both the party and the attorney, and can consume significant time and resources. Accordingly, attorneys would be well served to identify potential disqualifying events as early as possible and either act to avoid those circumstances or to at least minimize the risk of disqualification. As discussed in more detail below, the primary bases for disqualification are attorney conflicts related to prior work on a substantially related matter, representations that call into question the lawyer's or law firm's prior work, and violations of the "lawyer as witness" rule.

I. Standards Used for Disqualification

The first step in analyzing the risk of disqualification is to understand the ethical rules that govern your conduct in a particular situation and jurisdiction. It can sometimes be unclear whether your conduct will be judged by state rules, federal rules, or some combination. In addition, even if you are clear on what rules apply, case law and commentary vary with regard to whether the various disciplinary rules should be considered merely "guidelines" for evaluating disqualification motions or whether they are more in the nature of binding standards.

If you are a Texas lawyer practicing in a Texas state court, it is pretty clear that the Texas Disciplinary Rules of Professional Conduct (the "Texas Rules") will apply. *See, e.g., In re George E. Guidry*, 316 S.W.3d 729, 737 (Tex. App.—Houston [14th Dist.] 2010, no pet.). In the federal system, it can be more complicated. The court should look first to the local rules promulgated by the local court itself to determine what rules to apply. *In re Proeducation Int'l, Inc.*, 587 F.3d 296, 299 (5th Cir. 2009) (quoting *FDIC v. U.S. Fire Ins. Co.*, 50 F.3d 1304, 1312 (5th Cir. 1995)). The Southern District of Texas local rules, for example, state that "the minimum standard of practice shall be the Texas Disciplinary Rules of Professional Conduct," and that violations of the Texas Rules "shall be grounds for disciplinary action, but the court is not limited by that code." *Id.* (citing S.D. TEX. LOCAL R. APP. A, R. 1(A) & 1(B)). The Northern District of Texas likewise defines "unethical behavior" as conduct that violates the Texas Rules. (N.D. TEX. LOCAL R. 83.8(e)). But the federal courts also review disqualification motions in light of the national ethical standards, as articulated in the Model Rules of Professional Conduct (the "Model Rules"). *In re Proeducation Int'l, Inc.*, 587 F.3d at 299. Where there is a material conflict between the state and national standards, courts will often apply the stricter standard. In *Galderma Labs., L.P. v. Actavis Mid Atl. LLC*, No. 3:12-cv-2038, 2013 U.S. Dist. LEXIS 24171 (Feb. 21, 2013), for example, the Northern District of Texas held that applying Texas's more lenient current conflict rules would "vitiating the cornerstone of the national standard, the

requirement of informed consent,” and so it held that the Model Rules controlled. Further complicating matters, if you are licensed in one state but appearing in another state pro hac vice, you are likely governed by both states’ rules (plus the Model Rules if you are in federal court). *See, e.g.*, Model Rule 8.5; Texas Rule 8.05.

Although the rules technically are not supposed to be used as standards for disqualification, the courts lean very heavily on the rules to judge attorneys’ conduct. The preamble to the Texas disciplinary rules states that the rules are not controlling as standards to meet in a motion to disqualify, but should be used as guidelines in considering the motion. *See* Texas Rules, Preamble, Scope; *see also* Model Rules, Preamble, Scope. Nevertheless, courts sometimes rely solely on a rule violation to support disqualification, and some have even reasoned there is a “duty” to grant a disqualification motion when the movant can show that the representation is prohibited by the ethical rules. *In re Frost*, No. 12-08-00154-CV, 2008 Tex. App. LEXIS 3700, at *5 (Tex. App.—Tyler May 21, 2008, orig. proceeding); *In re Am. Airlines, Inc.*, 972 F.2d 605, 610 (5th Cir. 1992) (holding that a “district court is obliged to take measures against unethical conduct occurring in connection with any proceeding before it”). But disqualification is considered a “severe remedy” that can “cause immediate harm by depriving a party of its chosen counsel and disrupting court proceedings.” *In re Guidry*, 316 S.W.3d at 738. Thus, allegations of unethical conduct alone may not be enough. *Id.* Some courts require, not only that the attorney has violated the ethical rules, but that the movant will suffer actual prejudice or that the violation “taints” the judicial process. *See, e.g.*, *In re Nitla*, 92 S.W.3d 419, 422-23 (Tex. 2002); *In re Am. Airlines, Inc.*, 972 F.2d at 610 (citing *W.T. Grant Co. v. Haines*, 531 F.2d 671, 677 (2d Cir. 1976)); *Bd. of Educ. v. Nyquist*, 590 F.2d 1241, 1246 (2d Cir. 1979); *Armstrong v. McAlpin*, 625 F.2d 433, 445-46 (2d Cir. 1980)). Moreover, where continued representation will lead to prejudice, disqualification may be appropriate in certain limited circumstances even though the attorney has not violated any specific disciplinary rule. *In re Meador*, 968 S.W.2d 346, 351 (Tex. 1998).

In any event, regardless of the weight to be given to the violation of an ethical rule, the courts clearly look to and rely on the rules in determining disqualification motions. So the best defense against such a motion is to be familiar with and to avoid violating the conflicts rules if at all possible.

II. Conflicts of Interest

A. Rules

The majority of attorney disqualifications arise out of allegations that the attorney’s current representation would create a conflict of interest with another current client or a former client or representation. With regard to **current clients**, Texas Rule 1.06(b) provides that a lawyer may 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.

Such a representation is permitted, however, if the lawyer reasonably believes the representation of each client will not be materially affected and he obtains informed consent from each client. *See* Texas Rule 106(c). Note that the prohibition against current client adversity in the Texas Rules is limited to matters that are substantially related or where one representation will be adversely affected by the lawyer's responsibilities to another client. The Model Rules are not as lenient and prohibit *any* concurrent adverse representation (absent informed consent). *See* Model Rule 1.7.

Texas Rule 1.09 (similar in effect to Model Rule 1.9) governs representations adverse to **former clients**. It provides in relevant part:

- (a) 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;
 - (2) if the representation in reasonable probability will involve a violation of Rule 1.05; or
 - (3) if it is the same or a substantially related matter.

The other attorneys in a disqualified lawyer's *current* firm are also disqualified in all three of these instances, while those in a *prior* firm are disqualified only in the first two. *In re Basco*, 221 S.W.3d 637, 638-39 (Tex. 2007).

Texas Rule 1.05 and Model Rule 1.6 also more generally preclude a lawyer from using confidential information of a former client to the disadvantage of the client or for the advantage of a third person, so these rules are also implicated in many conflict situations.

B. Conflicts Based on Substantially Related Matters

Whether a conflict of interest exists will often depend on whether the two matters or representations are "substantially related." In determining substantial relationship, courts have

identified three relevant factors: “(1) the factual similarities between the current and former representations, (2) the similarities between the legal questions posed, and (3) the nature and extent of the attorney’s involvement with the former representation.” *Secure Access, LLC v. Dell, Inc.*, Cause No. 6:11-CV-338, 2012 U.S. Dist. LEXIS 61152, at *8 (E.D. Tex. Feb. 23, 2012) (quoting *Power Mosfet Techs., L.L.C. v. Siemens AG*, No. 2:99-CV-168, 2002 U.S. Dist. LEXIS 27557, at *2 (E.D. Tex. Sept. 20, 2002)).

If the movant establishes that the prior matter is substantially related to the present matter, an irrebuttable presumption arises that relevant confidential information was disclosed during the former representation. *Id.* (citing *In re Am. Airlines, Inc.*, 972 F.2d 605, 614 (5th Cir. 1992)). In applying these tests, courts look for more than a “superficial relationship” between the two matters, and evidence that the two matters involve the same general subject matter and area of the law is generally insufficient. *Id.* at **9-11. In *Secure Access v. Dell*, for example, the court held that the attorneys’ current representation in a patent litigation matter against Dell was not substantially related to their representation of Dell in two prior patent cases simply because all three matters involved “computer inventions” and technologies involving computers “communicating over a network.” *Id.* The court focused on the fact that the accused products in all three actions were different and that the test advocated by Dell would likely preclude the lawyers at issue “from ever representing any client in a patent infringement case against Dell,” which was unacceptably broad. *Id.* at *12.

1. Knowledge of the “Playbook”

Often, when a lawyer who has been representing a particular client for a significant amount of time “switches sides” and begins to bring cases *against* that client, the client will want to seek disqualification even if the matters cannot be said to be “substantially related” because they involve different parties, different transactions, or different products. The clients nevertheless urge that disqualification is necessary because the lawyer has, through her prior representations, learned about the company’s general business practices, risk tolerance, litigation strategy, settlement practices, etc.

This is generally referred to as the “playbook” scenario. The comments to the Model Rules provide that, “[i]n the case of an organizational client, general knowledge of the client’s policies and practices ordinarily will not preclude a subsequent representation; on the other hand, knowledge of specific facts gained in a prior representation that are relevant to the matter in question ordinarily will preclude such a representation.” Model Rule 1.9 cmt. 3. The Model Rule comments further provide that “a lawyer who recurrently handled a type of problem for a former client is not precluded from later representing another client in a factually distinct problem of that type even though the subsequent representation involves a position adverse to the prior client.” Model Rule 1.9 cmt. 2. The comments to the Texas Rules do not specifically address this issue, but do provide that Rule 1.09 precludes the subsequent representation where “a lawyer could have acquired confidential information concerning a prior client that could be used either to that prior client’s disadvantage or for the advantage of the lawyer’s current client or some other person.” Texas Rule 1.09 cmt. 4A. The Restatement of the Law Governing

Lawyers provides that disqualification based on knowledge of a client’s “playbook” should be limited to situations in which the information “will be directly in issue or of unusual value in the subsequent matter.” Restatement (Third) of the Law Governing Lawyers § 132 cmt. d(iii) (2000).

As one might imagine from the tests articulated above, whether or not a firm would be disqualified in this scenario would require a fairly fact-specific inquiry, and courts have come out both ways. The court for the District of Nevada, for example, disqualified an attorney from representing the defendant in a patent infringement action when the attorney had at one time been in-house counsel for the plaintiff, where he oversaw the management of the plaintiff’s intellectual property portfolio. *SHFL Entm’t, Inc. v. DigiDeal Corp.*, 2:12-cv-01782, 2013 U.S. Dist. LEXIS 6635 (D. Nev. January 16, 2013). The court found, among other things, that the lawyer had obtained “insight as to how SHFL interprets its claims, manages and protects its patents, and construes the claims of its patents” and “can anticipate how SHFL will litigate this action and engage in the claim construction process.” *Id.* at **33-34; *see also, Murphy v. Simmons*, No. 06-1535, 2008 U.S. Dist. LEXIS 594, **39-47 (D.N.J. Jan. 3, 2008) (finding “playbook theory” applicable where attorney had represented litigation opponent for over 12 years). But in *Hartford Cas. Ins. Co. v. Am. Dairy and Food Consulting Labs., Inc.*, 1:09-cv-0914, 2010 U.S. Dist. LEXIS 70238 (E.D. Cal. June 17, 2010), the district court denied an insurance company’s motion to disqualify its former outside counsel from representing an insured in a coverage and bad faith claim. The court rejected the insurance company’s argument that “someone who has represented an insurance company in coverage and bad-faith litigation should [not] ever be allowed to sue that insurance company on behalf of another client.” *Id.* at **28-29. Although not labeled as a “playbook” case, the Texas Supreme Court granted mandamus in a case where the trial court had denied a motion for disqualification in a similar situation. *Texaco, Inc. v. Garcia*, 891 S.W.2d 255 (Tex. 1995). The supreme court held that attorney Ronald Sechrest and the firm of Beck, Redden, and Sechrest should be disqualified from representing plaintiffs suing Texaco in an environmental contamination case because, while at his former firm—Fulbright & Jaworski, Mr. Sechrest had represented Texaco in cases involving similar allegations. The court held that the “Plaintiffs’ allegations in this case involve similar liability issues, similar scientific issues, and similar defenses and strategies as were present in [the prior case].” *Id.* at 257.

So, in-depth knowledge of a former corporate client can certainly be a selling point for other parties looking to sue that former client. But that same in-depth knowledge can, in certain circumstances, preclude you from accepting the representation.

2. Imputed Conflicts Do Not Go with a Departing Lawyer

Another issue that often arises in conflict cases is to what extent a conflict “taints” the entire firm and whether the “taint” follows the infected lawyer from firm to firm. While an attorney is associated with a firm, he is “tainted” with the conflicts of every other lawyer in the

firm. Texas Rule 1.09(b); Model Rule 1.9(b).¹ When the “tainted” lawyer leaves the firm, however, he is relieved of his prior firm’s imputed conflicts unless he personally represented the client while at the firm or obtained confidential client information. *In re Proeducation Int’l, Inc.*, 587 F.3d at 302-04 (citing, among other things, Texas Rule 1.09 cmt. 7, Model Rule 1.9(b), and the Restatement (Third) of the Law Governing Lawyers § 124 cmt. c(ii)).

Unfortunately, there are several cases, including a Texas Supreme Court case, that use loose language and state that “[f]or attorneys, there is an irrebuttable presumption they gain confidential information on every case at the firm where they work (whether they work on them or not), and an irrebuttable presumption they share that information with the members of a new firm.” *See, e.g., In re Mitcham*, 133 S.W.3d 274, 276 (Tex. 2004) (internal citation omitted). Each of the statements, by itself, is accurate. But when stated together, these courts suggest that a departing lawyer takes an imputed conflict with him to his new firm and, thereby, “taints” the new firm, even if the lawyer had no involvement with a client at his prior firm. The cases making this connection generally are not lateral lawyer cases, and so the discussions are purely dicta, and they generally cite to other cases that do not involve lateral lawyers. *See, e.g., In re Mitcham*, 133 S.W.3d 274, 276 (Tex. 2004) (lateral paralegal case, citing *Nat’l Med. Enters., Inc. v. Godbey*, 924 S.W.2d 123, 131 (Tex. 1996), which applied presumption to lawyers currently in the same firm); *In re Am. Airlines*, 972 F.2d at 614 n.1 (discussion of presumption was dicta because case involved lawyers who actually worked on the prior matter).

The cases on point do not support this rule. In *In re Proeducation Int’l, Inc.*, for example, the Fifth Circuit analyzed the Texas Rules, Model Rules, the Restatement, and relevant case law and ethics opinions and held that both the Texas Rules and the Model Rules “produce the same result in application—they both require that a departing lawyer must have actually acquired confidential information about the former firm’s client or personally represented the former client to remain under imputed disqualification” after the lawyer leaves his former firm. 587 F.3d at 301.

3. Non-Lawyer Conflicts

In addition to the conflicts of a firm lawyer, a firm may be disqualified based on the conflicts of its non-lawyer personnel, such as paralegals and legal assistants. In a pair of recent disqualification cases, the Texas Supreme Court attempted to provide the lower courts with more guidance regarding disqualification standards when the conflict of interest involves non-lawyer employees.

Unlike lawyers, who are confronted with the double-whammy of irrebuttable presumptions that (1) confidences were gained with regard to any matters actually worked on at the first firm and (2) confidences were shared at the second firm, a non-lawyer is permitted to

¹ Note that some jurisdictions permit the screening of an infected lawyer in certain circumstances, but the Texas Rules do not.

rebut the assumption that confidences were shared with the second firm. *In re Columbia Valley Healthcare Sys., L.P.*, 320 S.W.3d 819, 824 (Tex. 2010); *In re Guar. Ins. Servs., Inc.*, 343 S.W.3d 130, 134 (Tex. 2011). The presumption can be overcome, but only by a showing that: “(1) the assistant was instructed not to perform work on any matter on which she worked during her prior employment, or regarding which the assistant has information related to her former employer’s representation, and (2) the firm took other reasonable steps to ensure that the assistant does not work in connection with matters on which the assistant worked during the prior employment, absent client consent.” *In re Columbia Valley Healthcare*, 320 S.W.3d at 824 (internal cites and quotations omitted).

In the *Columbia Valley* case, the Court sought to “clarify the measures a law firm or lawyer must take to effectively screen a non-lawyer employee from a matter.” *Id.* at 825. In that regard, the Court made clear that a “simple informal admonition” that the legal assistant should not work on matters she worked on at the previous firm will not suffice. *Id.* at 826. Rather, the firm must, at a minimum, institute “formal, institutionalized screening measures that render the possibility of the nonlawyer having contact with the file less likely.” *Id.* Although the nature of the “formal, institutionalized screening measures” may vary depending on a firm’s size and make-up, the courts will likely look for things such as formalized conflict review systems, physical separation between the affected employee and the “forbidden” files, written documentation of the screening instructions, and written policies regarding protecting confidential information. The Court also held that, despite the screening measures used, the presumption of shared confidences becomes conclusive if (1) information relating to the representation of an adverse client has in fact been disclosed, (2) screening would be ineffective or the non-lawyer necessarily would be required to work on the matter, or (3) the non-lawyer has actually performed work, including clerical work, on the matter at the lawyer’s directive if the lawyer reasonably should know about the conflict of interest. *Id.* at 827.

In *In re Guar. Ins. Servs.*, however, the Texas Supreme Court held that disqualification was not appropriate even though it was undisputed that the legal assistant actually worked on both sides of the litigation. The Court focused on the fact that the second firm’s screening procedures were very thorough and that, even though those procedures failed and the paralegal was able to do some work on the litigation at the second firm, there was no indication that any confidential information was actually disclosed. 343 S.W.3d at 133. It noted that it had “never said that ineffective screening measures merited automatic disqualification for nonlawyers. On the contrary, we have explained that in most cases, disqualification is not required provided ‘the practical effect of formal screening has been achieved.’” *Id.* at 134 (quoting *Phoenix Founders, Inc. v. Marshall*, 887 S.W.2d 831, 835 (Tex. 1994)). In clarifying the third situation listed above in which the presumption of shared confidences becomes conclusive, the Court went on to hold that, even where the non-lawyer actually worked on the case at the second firm, the presumption can be rebutted if the supervising attorney had no reason to know about the conflict of interest. *Id.* at 135. Although whether the supervising attorney had reason to know about the conflict bears little logical relation to whether the paralegal had the opportunity to or did reveal confidential information, this appears to be an attempt by the high court to avoid the dire result

of disqualification where all of the evidence suggests that the second firm was acting diligently and ethically and had done everything it could to avoid a conflict of interest.

So the message is that good intentions do matter here. The Texas Supreme Court has indicated a reluctance to require disqualification based on non-lawyer conflicts where the lawyers at issue diligently attempted to avoid the conflict.

C. Prior Work Conflicts

In addition to disqualifications based on a firm's representation of other clients, a firm may also be disqualified because the representation at issue will question the validity of the lawyer's own work, the work of another lawyer in the firm, or even the work of another lawyer at the lawyer's prior firm. *See, e.g., In re Basco*, 221 S.W.3d 637, 638-39 (Tex. 2007) (finding disqualification was mandatory because adequate representation of the client physician would necessarily call into question advice given to the client by the lawyer's prior law firm). Thus, for example, "a lawyer who drew a will leaving a substantial portion of the testator's property to a designated beneficiary would violate [Rule 1.09(a)] by representing the testator's heirs at law in an action seeking to overturn the will." Texas Rule 1.09 cmt. 3. Even if a departing attorney had no connection with a former client of a former firm, he cannot take on a case against that client if it involves questioning the validity or quality of the earlier representation. *In re Basco*, 221 S.W.3d at 639.

In other situations, it may be more difficult to tell if a representation involves a prior work conflict. Does handling an appeal implicate the firm's work at the trial level? Does a contract dispute implicate the firm's drafting of the contract at issue? Does an SEC investigation call into question the firm's advice regarding the company's disclosures? It is important that a firm's attorneys, particularly the client intake and conflicts attorneys, be able to spot potential prior work conflicts and deal with them appropriately.

D. Joint Defense and Other Contractual Bases

Joint defense agreements and other contractual obligations can give rise to disqualification even where disqualification would otherwise be unwarranted. While a lawyer generally does not owe duties to non-clients, a joint defense agreement may give rise to a duty to preserve the confidentiality of information shared pursuant to the agreement. In *Nat'l Med. Enters., Inc. v. Godbey*, for example, the Texas Supreme Court disqualified a law firm based on the fact that one of its attorneys had obtained confidential information from the opposing party under a prior joint defense agreement in a substantially related matter. 924 S.W.2d 123, 129-31 (Tex. 1996). While representing a former employee of National Medical Enterprises ("NME"), one of the firm's attorneys had entered into a joint defense agreement with NME agreeing, among other things, that information received from or about NME would be treated as confidential and protected from disclosure by the joint defense privilege, the attorney-client privilege, and the work product doctrine. *Id.* at 125. The Court concluded that this lawyer could not sue NME and still abide by his obligations under the joint defense agreement. *Id.* at 129.

Because one of the firm's lawyers was charged with knowledge of NME's confidential information and prohibited from bringing suit adverse to NME, all members of the firm were subject to disqualification. *Id.* at 131 (holding that one attorney's knowledge is "imputed by law to every other attorney in the firm" and that there is "an irrebuttable presumption that an attorney in a law firm has access to the confidences of the clients and former clients of other attorneys in the firm").

In re Mitcham, 133 S.W.3d 274 (Tex. 2004), involved a paralegal who worked on asbestos cases brought against various clients of Firm 1, including TXU. After getting a law degree, she went to work as an attorney at Firm 2, which represented plaintiffs in asbestos cases against TXU, among others. The two firms entered into an "Agreement Regarding Conflicts of Interest" in which the second firm agreed that it would not participate in any suits against TXU or share any information about them. Eventually, the paralegal-turned-lawyer moved to another firm, and Firm 2 wanted to resume its prosecution of cases against TXU. The Court recognized that the case presented sticky questions, such as whether the lateral employee should be judged under the standards applicable to paralegals or lawyers and whether Firm 2 could remain tainted by her imputed conflicts even after she left the firm. But it held it did not need to resolve these issues because Firm 2 undertook a contractual obligation to forego asbestos cases against TXU and to guard TXU's confidences. Because that agreement had no time limit and did not purport to expire when the employee left Firm 2, Firm 2 was disqualified from bringing asbestos cases adverse to TXU. *Id.* at 276-77.

As you can see from the above examples, joint defense agreements and conflict waivers/agreements should be drafted carefully to minimize the risk of unintended contractual disqualification.

E. Who Can Raise the Conflict?

In order to limit the ability of non-clients to use disqualification motions for tactical purposes, the courts have limited the universe of persons who can successfully seek disqualification. Typically, only the client or former client who is affected by the alleged conflict of interest has standing to raise the issue with the court and to seek disqualification. *See, e.g., In re Yarn Processing Patent Validity Litig.*, 530 F.2d 83, 88-89 (5th Cir. 1976). So a non-client adversary typically cannot get you disqualified by arguing that your representation creates a conflict as to other persons. This general rule, however, is subject to at least two important exceptions.

First, where the client company has been sold or has merged into a new entity, the ownership of the attorney-client privilege, and thus the standing to assert a conflict of interest, may pass to the new entity. Generally, where the entire entity is sold or transferred, and control of the entity is passed to new management, the new entity will have the power to assert the conflict. *See, e.g., John Crane Prod. Solutions, Inc. v. R2R and D, LLC*, No. 3:11-CV-3237-D, 2012 U.S. Dist. LEXIS 114293, **11-13 (N.D. Tex. Aug. 14, 2012) (citing *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343 (1985)). As some courts have recognized, however,

“a bright-line rule cannot capture the myriad ways control of a corporation or a portion of a corporation can change hands. So when determining whether the attorney-client privilege has transferred, courts should examine whether the practical consequences of the transaction result in the transfer of control of the business and the continuation of the business under new management, and if they do, the attorney-client privilege will follow as well.” *Id.* at 12-13. (internal quotations omitted).

Second, under certain very limited circumstances, the opposing party in litigation can seek disqualification based on an alleged conflict of interest even if the conflict does not affect him. The burden to assert standing in such a situation is fairly high. In Texas federal courts, a non-client can seek disqualification based on an alleged conflict when the alleged conflict is “manifest and glaring” such that it confronts “the court with a plain duty to act.” *Clemens v. McNamee*, No. 4:08-CV-00471, 2008 U.S. Dist. LEXIS 36916, at **5-6 (S.D. Tex. May 6, 2008) (quoting *In re Yarn Processing*, 530 F.2d at 88-89). Examples of such “manifest and glaring” conflicts include where a lawyer blatantly changes sides in the litigation or where the attorney was representing the plaintiff in a contract dispute in which he had previously represented the other party to the contract, and had prepared, and signed on behalf of his former client, some of the crucial documents in the case. *Id.* at **8-10 (citing *Porter v. Huber*, 68 F.Supp. 132 (W.D. Wash. 1946) and *Empire Linotype School, Inc. v. United States*, 143 F.Supp. 627, 631 (S.D.N.Y. 1956)). In Texas state court, the test is whether “the conflict is such as to clearly call in question the fair or efficient administration of justice.” *In re Robinson*, 90 S.W.3d 921, 925 (Tex. App.—San Antonio 2002, no pet.) (quoting Texas Rule 1.06 cmt. 17). The Waco Court of Appeals held that this test was met in *In re Seven-O Corp.*, 289 S.W.3d 384 (Tex. App.—Waco 2009, no pet.), in which a lawyer represented the plaintiffs and third-party defendants in a multi-party lawsuit arising out of a fatal car accident. Even though the clients had consented to the representation and stated that they had “the same litigation strategy and the same theory of liability,” the court found that they were “actually directly adverse,” thus creating an unconsentable conflict. *Id.* at 389-90. Such a conflict “clearly calls into question the fair administration of justice,” and the other party to the litigation therefore had standing to raise the issue. *Id.* at 388-89.

F. Advance Conflict Waivers

One way to reduce the risk that a firm will be disqualified from an important engagement is to obtain conflict waivers from the clients involved. Of course, once an actual conflict has developed and two clients are in an adversarial position, obtaining a conflict waiver can be challenging. Many firms have, therefore, adopted the practice of including advance conflict waivers in their engagement agreements, getting the client to agree at the outset that it will not seek disqualification if the law firm later becomes adverse to it in a matter not substantially related to the matter for which the client is hiring the firm. In order for conflict waivers to be enforced, they must be informed, and so firms have struggled to find a way to adequately inform clients of potential conflicts that have not yet arisen. While some firms are able to predict with some specificity the conflicts that may likely develop, others have incorporated general open-ended waivers. One example would be:

You understand and agree that, with [certain described] exceptions, we are free to represent other clients, including clients whose interests may conflict with yours in litigation, business transactions, or other legal matters. You agree that our representing you in this matter will not prevent or disqualify us from representing clients adverse to you in other matters and that you consent in advance to our undertaking such adverse representations.

Although there has been some dispute whether such a general advance waiver would be enforced, a district judge for the Northern District of Texas enforced the waiver quoted above and denied a client's motion to disqualify Vinson & Elkins ("V&E") from representing the client's adversary in an ongoing patent infringement action. *Galderma Labs., L.P.*, 2013 U.S. Dist. LEXIS 24171. The client, Galderma, retained V&E in 2003 to give legal advice concerning its benefit plans and other employment issues. *Id.* at **4-5. In 2012, while the employment engagement was still ongoing, Galderma filed a patent infringement case against Actavis Mid Atlantic. *Id.* at *5. It was represented by different lawyers (Munck Wilson Mandala and DLA Piper) in the patent litigation. *Id.* V&E had already been representing various Actavis entities in intellectual property matters, and Actavis hired V&E to defend it in the Galderma matter. *Id.* When Galderma learned of V&E's representation, it filed a motion to disqualify the firm. *Id.* at **5-6.

The court noted that such open-ended and general advance waivers would often be ineffective because the client would not normally be expected to understand the risks involved such that it could give informed consent.² Where the client is sophisticated with regard to legal matters, however, and is represented by independent counsel, the waiver is more likely to be enforced. *Id.* at *28. The court focused on the fact that Galderma is "highly sophisticated in both legal matters generally and in making decisions to retain large, national firms" and had signed advance conflict waivers with respect to other engagements. *Id.* at *31. This level of sophistication weighed in favor of finding informed consent. *Id.* The court also noted that when a client is represented by independent counsel, it requires less information and explanation in order to give informed consent. *Id.* at *33. It cited comment 6 to the Model Rules definition of informed consent: "generally a client . . . who is independently represented by other counsel in giving the consent should be assumed to have given informed consent." *Id.* at *34. Here, Galderma had the benefit of its in-house General Counsel, who signed the engagement agreement.

The court also looked at the practical benefits of advance conflict waivers. When Galderma chose to retain other counsel in the patent litigation, it should not also be able to prevent its adversary from retaining V&E, its long-time counsel, simply because V&E is representing Galderma in completely unrelated matters. The court noted that, without the ability to protect themselves from future disqualifications in such circumstances, many large firms

² As discussed in Section I above, informed consent is required in this situation under the Model Rules. Because the two matters are not substantially related, no consent would be required under the Texas Rules.

would not take on small, specialized matters from clients who might someday be adverse to their more regular clients. *Id.* at *9. This would, in the long run, deprive clients of their counsel of choice.

In short, the court found that V&E plainly disclosed to Galderma that it might represent clients in litigation directly adverse to Galderma, the very result of which Galderma now claims it was not aware, and it obtained Galderma's consent to such representations. Given Galderma's legal sophistication and the benefit of its in-house counsel, its consent should be considered informed. The disqualification motion was, therefore, denied. *Id.* at *42. A New York appellate court recently reached the same conclusion in *Macy's Inc. v. J.C. Penney Corp.*, upholding a trial court order declining to disqualify Jones Day from representing Macy's in litigation against J.C. Penney over the plan to sell Martha Stewart merchandise at J.C. Penney. 107 A.D.3d 616 (N.Y. App. Div. 1st Dep't. 2013).

These cases underscore the importance of obtaining an enforceable advance conflict waiver when appropriate, as the waiver was outcome determinative in the *Galderma* disqualification proceeding. Although the court in that case enforced a general open-ended waiver against a sophisticated client represented by independent counsel, it also made clear that a similar waiver would not be enforceable against all clients under all circumstances. This case demonstrates that a general advance waiver can provide some protection, but a law firm may obtain greater protection by tailoring the waiver, to the extent possible, to the specific client and the specific potential conflicts.

III. Lawyer as Witness

A. Rule

Another common basis for disqualification motions, in addition to the conflicts issues discussed above, is an allegation that the opposing lawyer will likely be a witness in the case. Texas Rule 3.08 (similar to Model Rule 3.7) provides that, with certain exceptions:

A lawyer shall not . . . continue employment as an advocate before a tribunal in a . . . pending adjudicatory proceeding if the lawyer knows or believes that the lawyer is or may be a witness necessary to establish an essential fact on behalf of the lawyer's client.

As with the other ethical rules discussed above, Rule 3.08 was "promulgated as a disciplinary standard rather than one of procedural disqualification, but [courts] have recognized that the rule provides guidelines relevant to a disqualification determination." *In re Tips*, 341 S.W.3d 30, 32 (Tex. App.—San Antonio 2010, orig. proceeding).

Unlike the other potential bases for disqualification discussed above, disqualification under the lawyer-as-witness rule does not necessarily disqualify all members of the firm. Texas Rule 3.08(c); Model Rule 3.7(b). Under the Texas Rules, however, a lawyer may not act as an advocate in an adjudicatory proceeding in which another lawyer in his firm is prohibited by the

lawyer-as-witness rule from serving as an advocate unless the client gives informed consent. Texas Rule 3.08(c).

B. Cases

Because disqualification is such a severe sanction, courts are reluctant to grant disqualification under the lawyer-as-witness rule unless the movant can demonstrate that the lawyer's testimony is "necessary to establish an essential fact on behalf of the lawyer's client" and that the lawyer's continued participation in the trial will cause the moving party actual prejudice. *In re Tips*, 341 S.W.3d at 32-33; *see also, In re Frost*, 2008 Tex. App. LEXIS 3700, at *7 (noting that "Rule 3.08 should rarely be the basis for disqualification"). The movant must do more than simply make conclusory allegations, but rather must demonstrate what fact the lawyer's testimony is necessary to establish and why that fact is essential to the case. *In re Frost*, 2008 Tex. App. LEXIS 3700, at *8. The court in *Randall v. BAC Home Loans Servicing, LP*, for example, denied disqualification because the attorney could only have testified regarding written communications sent or received by the attorney, which documents speak for themselves. No. 4:11-CV-182, 2012 U.S. Dist. LEXIS 72342, *8 (E.D. Tex. May 24, 2012). The court noted that the movants had not "described a single, disputed fact where [the attorney] is the sole witness to one side of a dispute." *Id.*

On the other hand, where the lawyer to be disqualified is just one of many lawyers on the trial team and is not the lead attorney, the concern for respecting a litigant's choice of counsel is given much less weight. *See, e.g., In re Guidry*, 316 S.W.3d at 742 (finding failure to disqualify lawyer was abuse of discretion where the party sought to add the potential witness to its existing six-member litigation team). This is especially true because the lawyer/witness can still represent the client "by performing out-of-court functions in the case, such as drafting motions and pleadings, trial strategy, and settlement negotiations." *Id.* at 738.

IV. Discovery Sanction

In rare cases, courts have disqualified an attorney or law firm as a sanction for attorney misconduct or discovery abuse. The trial court in *In re Vossdale Townhouse Ass'n., Inc.*, for example, disqualified trial counsel as a discovery sanction after the attorney propounded 31,448 requests for admission and 1,136 requests for production on the opposing party. 302 S.W.3d 890, 891-92 (Tex. App.—Houston [14th Dist.] 2009, orig. proceeding). Although the Houston Court of Appeals acknowledged that there was no justification for sending so many discovery requests and that "such abuse is sanctionable" (*id.* at 895), it reversed the trial court's disqualification. *Id.* at 896. The court reasoned that attorney disqualification is not among the sanctions enumerated in Texas Rule of Civil Procedure 215 and that the trial court was without authority to impose such a severe sanction, especially when it had failed to consider the availability of lesser sanctions to punish the offending conduct. *Id.* at 894 n.6, 895 n. 7. But the court declined to hold that discovery abuses could never justify the trial court's disqualification of counsel. In *Ibarra v. Baker*, a Texas federal district court also disqualified defense counsel as a sanction for allegedly improperly coaching defense witnesses and giving or abiding false testimony. No. 08-20220,

2009 U.S. App. LEXIS 16753, *2 (5th Cir. July 28, 2009). By the time the case was appealed, the disqualification issue was moot, and so the Fifth Circuit did not consider the appropriateness of disqualification as a sanction.

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