DISQUALIFICATION:
A TRAP FOR THE UNWARY PRACTITIONER

Both federal and state courts have the power to disqualify an attorney from continuing to represent a client. Disqualification effectively requires that the attorney withdraw his representation. Thus, disqualification is a severe remedy. *See Spears v. Fourth Court of Appeals*, 797 S.W.2d 654, 656 (Tex. 1990); *In re A.M.*, 974 S.W.2d 857, 864 (Tex. App.—San Antonio 1998, orig. proceeding). Courts rarely impose the remedy of disqualification, recognizing that it may "abrogate important societal rights, such as the right of a party to his counsel of choice and an attorney's right to freely practice her profession." *FDIC v. United States Fire Ins. Co.*, 50 F.3d 1304, 1314 (5th Cir. 1995).

But while courts may rarely impose the remedy of disqualification, they will not hesitate to disqualify an attorney where the circumstances justify such a severe remedy. "Disqualification, where appropriate, ensures that the case is well presented in court, that confidential information of present or former clients is not misused, and that a client's substantial interest in a client's loyalty is protected." RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 6 cmt. i (2000). *See In re Dresser Indus.*, 972 F.2d 540, 543 (5th Cir. 1992) (noting that courts should consider whether the "likelihood of public suspicion from the impropriety outweighs any social interests which will be served by the lawyer's continued participation in the case").

Texas attorneys must be diligent in guarding against circumstances that may require their disqualification as counsel. "Conflicts of interest lurk around every corner, whether it is the potential new client who walks through the door with a million-dollar case or a new associate in the office who brings his or her past associations along for the ride." Carol Langford & Britt Hall, *"You're Out of Here!" A Proposed Disqualification Standard for Texas Courts*, 41 S. TEX. L. REV. 125, 125 (1999). The circumstances that may justify disqualification are not always obvious. A court may disqualify an attorney who has done nothing more egregious than simply hiring a new paralegal, signing a joint defense agreement, or taking over the file in an ongoing lawsuit.

Texas state courts primarily rely on the Texas Rules of Disciplinary Conduct in deciding whether to disqualify an attorney. Although the Texas Rules of Disciplinary Conduct are merely disciplinary rules and not procedural standards, they nonetheless "provide guidelines and suggest the relevant considerations." *National Med. Enters. v. Godbey*, 924 S.W.2d 123, 132 (Tex. 1996). *See Ayres v. Canales*, 790 S.W.2d 554, 556 n.2 (Tex. 1990). However, they are not necessarily *controlling* guidelines. For instance, the fact that an attorney violates a disciplinary rule does not automatically disqualify the attorney from representing a client. *In re Meador*, 968 S.W.2d 346, 350 (Tex. 1998). Similarly, "a court has the power, under appropriate circumstances, to disqualify an attorney even though he or she has not violated a specific disciplinary rule." *Id.*

Federal courts in Texas, even when sitting in diversity, must apply federal law in deciding whether to disqualify an attorney. *Dresser Indus.*, 972 F.2d at 543. Consequently, federal courts may consider not only the Texas Rules of Disciplinary Conduct, but also the ABA Model Rules of Professional Conduct, the ABA Model Code of Professional Conduct, and the Restatement (Third) of the Law Governing Lawyers. *See In re American Airlines, Inc.*, 972 F.2d 605, 610 (5th Cir. 1992), *cert. denied*, 507 U.S. 912 (1993); *City of El Paso v. Salas-Porras*, 6 F. Supp. 2d 616, 620 (W.D. Tex. 1998). As in Texas state court, these rules provide a useful guide for adjudicating disqualification motions, but they are not necessarily controlling. *See Chatham Holdings, Inc. v. Resolution Trust Corp.*, No. Civ. A. No. 3:95-CV-0854-P, 1996 WL 751052, *3 (N.D. Tex. 1996); *see also Woolley v. Sweeney*, No. Civ. A. 3:01CV1331-BF, 2003 WL 21488411, *3 (N.D. Tex. 2003) ("[A] finding that an ethics rule has been violated, without more, is not sufficient to support disqualification.").

The disqualification standards in Texas state court are largely identical to the disqualification standards in federal court. This paper will, of course, specify those areas in which the standards differ from state to federal court.

A. PROCEDURE

A party who seeks to disqualify opposing counsel must file a motion to disqualify. *See NCNB Tex. Nat'l Bank v. Coker*, 765 S.W.2d 398, 399 (Tex. 1989) ("A motion to disqualify is the proper procedural vehicle to challenge an attorney's representation. . . ."); *see also Musicus v. Westinghouse Elec. Corp.*, 621 F.2d 742, 744 (5th Cir. 1976).

1. Burden of Proof

As movant, a party who files a motion to disqualify opposing counsel bears the burden of proving that disqualification is proper. *See Duncan v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 646 F.2d 1020, 1028 (5th Cir. Unit B), *cert. denied*, 454 U.S. 895 (1981); *Cramer v. Sabine Transp. Co.*, 141 F. Supp. 2d 727, 730 (S.D. Tex. 2001); *Ayus v. Total Renal Care, Inc.*, 48 F. Supp. 2d 714, 716 (S.D. Tex. 1999); *Spears*, 797 S.W.2d at 656; *In re Butler*, 987 S.W.2d 221, 224 (Tex. App.—Houston [14th Dist.] 1999, orig. proceeding). The burden of proof is by a preponderance of the evidence. *Coker*, 765 S.W.2d at 400. However, while the burden requires only a preponderance of the evidence, the moving party must prove "the necessity for disqualification with specificity." *In re Taylor*, 67 S.W.2d 530, 533 (Tex. App.—Waco 2002, orig. proceeding).

2. Evidence

Although a full evidentiary hearing is not absolutely necessary, courts will commonly allow an evidentiary hearing on a motion to disqualify. In addition to any

affidavits that the movant may have previously attached to his motion, the movant may offer live testimony and documentary evidence in support of his motion.

Mere allegations of unethical conduct or evidence showing a remote possibility of a violation of the disciplinary rules will not satisfy the burden of proof necessary to disqualify opposing counsel. *See Spears*, 797 S.W.2d at 656*; In re Southwestern Bell Yellow Pages, Inc.*, 141 S.W.3d 229, 231 (Tex. App.—San Antonio 2004, orig. proceeding); *In re Chonody*, 49 S.W.3d 376, 379 (Tex. App.—Fort Worth 2000, orig. proceeding); *see also In re Moore*, 153 S.W.3d 527, 534 (Tex. App.—Tyler 2004, orig. proceeding) ("Mere allegations of unethical conduct are not evidence.").

As in any other type of proceeding, speculative and conclusory testimony is inadmissible. *See In re Bell Helicopter Textron, Inc.*, 87 S.W.3d 139, 147 (Tex. App.—Fort Worth 2002, orig. proceeding) (an affidavit stating that the affiant had never divulged proprietary information or trade secrets was conclusory and "therefore not probative evidence on the disqualification issue"); *see also Milliken v. Grigson*, 986 F. Supp. 426, 429 n.4 (S.D. Tex. 1997) (unsubstantiated and wholly conclusory allegations are insufficient to support a motion to disqualify); *Ghidoni v. Stone Oak, Inc.*, 966 S.W.2d 573, 579 (Tex. App.—San Antonio 1998, pet. denied) (same).

B. GROUNDS FOR DISQUALIFICATION

Because disqualification is a severe remedy, "courts must adhere to an exacting standard when considering motions to disqualify so as to discourage their use as a dilatory trial tactic." *Spears*, 797 S.W.2d at 656. *See American Airlines, Inc.*, 972 F.2d at 611; *see also FDIC*, 50 F.3d at 1315 (observing that a motion for disqualification "should be viewed with caution ... for it can be misused as a technique of harassment").

In Texas state court, a party who files a motion to disqualify opposing counsel typically must prove *actual prejudice* before a court will grant the motion. *See Meador*, 968 S.W.2d at 350; *Ayres*, 790 S.W.2d at 558; *In re Bahn*, 13 S.W.3d 865, 873 (Tex. App.—Fort Worth 2000, orig. proceeding). That is apparently not true in federal court. While federal courts—like Texas state courts—must adhere to an exacting standard in analyzing a motion to dismiss, federal courts in Texas do not require a moving party to show either that he has suffered any prejudice or that opposing counsel's presence will "taint" the proceedings. *American Airlines, Inc.*, 972 F.2d at 611.

Specific circumstances that a party may cite in support of a motion to disqualify:

1. **Prior Representation of the Party**

Under Rule 1.09(a)(3) of the Texas Disciplinary Rules of Professional Conduct, a lawyer may not take a representation that is adverse to a former client if the new case "is the same or a substantially related matter." TEX. DISCIPLINARY R. PROF. CONDUCT 1.09(a)(3) (1991), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. (Vernon Supp. 2001) (STATE BAR RULES art. X, § 9) (hereinafter "TEX. DISC. R."). Rule 1.09(a)(3) assures clients "that they may freely and openly discuss all the facts of their case with their attorney and without concern that the information discussed will later be disclosed to a potential adversary." *Wasserman v. Black*, 910 S.W.2d 564, 568 (Tex. App.—Waco 1995, orig. proceeding).

The ABA Model Rules and the Restatement contain similar prohibitions. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 132 (2000) ("[A] lawyer who has represented a client in a matter may not thereafter represent another client in the same or a substantially related matter in which the interests of the former client are materially adverse."); *see also* ABA MODEL RULES OF PROF. CONDUCT § 1.9(a) (1996).

Courts define the term "adverse" broadly. "Adversity is a product of the likelihood of the risk and the seriousness of its consequences." *Godbey*, 924 S.W.2d at 132. Even where there is a relatively small risk that an attorney's new client may oppose the interests of the attorney's former client, the risk may still be serious enough for a court to find that the two clients are sufficiently "adverse" to disqualify the attorney from representing his new client. *See In re Roseland Oil & Gas, Inc.*, 68 S.W.3d 784, 787 (Tex. App.—Eastland 2001, orig. proceeding) (disqualifying an attorney from representing a party who was a co-defendant with the attorney's former client).

a. ***Elements***

To disqualify opposing counsel on the basis of prior representation, a party must prove three elements: (i) that opposing counsel previously had an attorney-client relationship with the party; (ii) that the pending litigation is the same as or is substantially similar to the prior representation; and (iii) that the facts in the pending litigation create a genuine threat that the opposing counsel will reveal confidences. *See Johnson v. Harris County Flood Control Dist.*, 869 F.2d 1565, 1569 (5th Cir. 1989); *Coker*, 765 S.W.2d at 400. "The test is not to be applied in a 'mechanical' way such that an attorney can never represent an interest adverse to a former client." *Salas-Porras*, 6 F. Supp. 2d at 621. *See Islander E. Rental Program v. Ferguson*, 917 F. Supp. 504, 508 (S.D. Tex. 1996) (noting that "an absolute prohibition against an attorney accepting representation against a former client is neither practical nor laudable").

(1) Previous Attorney-Client Relationship

Proving a prior attorney-client relationship is commonly not that difficult. *Salas-Porras*, 6 F. Supp. 2d at 622. An attorney-client relationship may encompass many types of legal work, including "the representation of a client in court proceedings, advice to a client, and any action on a client's behalf that is connected with the law." *Hamrick v. Union Township*, 79 F. Supp. 2d 871, 875 (S.D. Ohio 1999).

(a) *Intent*. The moving party and the challenged attorney must have manifested an intent to create an attorney-client relationship in the prior representation. *Ins. Co. of N. Am. v. Westergren*, 794 S.W.2d 812, 814 (Tex. App.—Corpus Christi 1990, orig. proceeding). This intent must be mutual. The mere fact that the moving party subjectively believed that he formed an attorney-client relationship is insufficient in itself to prove such a relationship. *Cole v. Ruidoso Municipal Schools*, 43 F.3d 1373, 1384 (10th Cir. 1994).

(b) *Evidence of the Attorney-Client Relationship.* The moving party need not produce a formal contract or invoice to establish the existence of an attorney-client relationship. *See Cole*, 43 F.3d at 1384; *Howe Investment, Ltd. v. Perez Y Cia. de P.R., Inc.*, 96 F. Supp. 2d 106, 109-10 (D.P.R. 2000); *see also Woolley*, 2003 WL 21488411, at *10 (noting that the existence of an attorney-client relationship does not depend upon the payment of a fee). An attorney-client relationship may be implied from the actions of the attorney. *Salas-Porras*, 6 F. Supp. 2d at 622. *See Clarke v. Ruffino*, 819 S.W.2d 947, 949 (Tex. App.—Houston [14th Dist.] 1991, orig. proceeding) ("evaluating a client's affairs and reporting about them to the client or to others" may be sufficient to establish an attorney-client relationship); *see also In re McCormick*, No. 12-02-00231-CV, 2002 WL 31076557, *2 (Tex. App.—Tyler Sept. 18, 2002, orig. proceeding) (not designated for publication). *But cf. Milliken*, 986 F. Supp. at 430 (holding that the mere fact that an attorney "attends a meeting or looks at a document" is insufficient to establish an attorney-client relationship).

(c) *Affiliated Companies*. In some instances, courts have found an attorney-client relationship even where the moving party never itself had any direct relationship with the challenged attorney. *See In re Butler*, 987 S.W.2d 221, 225 (Tex. App.—Houston [14th Dist.] 1999, orig. proceeding) ("Disqualification does not necessarily require counsel to have previously represented the same entity."). To disqualify an attorney, it may be sufficient simply that the challenged attorney had an attorney-client relationship with a company or entity that is closely affiliated with the moving party. Examples:

- Parents and Subsidiaries. Some courts have disqualified attorneys for representing a party against a corporate relation—a parent, subsidiary or affiliated company—of a former client. *See Gen-Cor, L.L.C. v. Buckeye Corrugated, Inc.*, 111 F. Supp. 2d 1049, 1053-54 (S.D. Ind. 2000); *Image Tech. Serv., Inc. v. Eastman*

Kodak Co., 820 F. Supp. 1212, 1214 (N.D. Cal. 1993); *Gould, Inc. v. Mitsui Mining & Smelting Co.*, 738 F. Supp. 1121, 1126 (N.D. Ohio 1990); *see also Butler*, 987 S.W.2d at 225 (disqualifying an attorney who had previously represented an affiliated company that shared "the same facilities, personnel and policy guidelines").

• Predecessors and Successors. Whether an attorney-client relationship survives a corporate acquisition may depend on the nature of the acquisition. If the acquisition is a corporate merger in which the former client is absorbed into a newly merged company, the attorney-client relationship continues with the newly merged company, and an attorney for the former client may not accept a substantially related representation adverse to the newly merged company. *See In re Cap Rock Elec. Co-op, Inc.*, 35 S.W.3d 222, 227-28 (Tex. App.—Texarkana 2000, orig. proceeding). Conversely, if the acquisition is merely a purchase of assets—or if the acquisition effectively results in the liquidation of the former client—the attorney-client relationship will not survive the acquisition. In that instance, nothing prevents an attorney from accepting a representation that is adverse to the acquiring company. *Id.* at 28-29. *See also FDIC v. Amundson*, 682 F. Supp. 981, 987 (D. Minn. 1988) (liquidated company).

• Unincorporated Associations and their Members or Principals. An attorney may represent trade associations and unions without forming an attorney-client relationship with its individual members. *See City of Kalamazoo v. Michigan Disposal Serv. Corp.*, 125 F. Supp. 2d 219, 236 (W.D. Mich. 2000). The same may not be true with respect to a partnership. Arguably, an attorney for a partnership has an attorney-client relationship with each member of the partnership and, as a result, may not accept a substantially related representation that is adverse to any individual partner. *Id.* (citing cases). No Texas court, however, has specifically addressed this situation. *But cf. Burnap v. Linnartz*, 38 S.W.3d 612, 619-20 (Tex. App.—San Antonio 2000, no pet.) (finding summary judgment improper where factual issues pervaded the question of whether a partner not actively involved in a transaction was nonetheless a consumer of legal services provided to the partnership in connection with that transaction).

(d) *Standing to Challenge Attorney-Client Relationship.* A third party has no standing to challenge the existence of an attorney-client relationship when both the attorney and his former client have acknowledged the relationship. *In re EPIC Holdings, Inc.*, 985 S.W.2d 41, 49 (Tex. 1998) (orig. proceeding).

(2) Same Matter or Substantial Relationship

An attorney may not represent a new client adversely against a former client in the same or a substantially related matter. TEX. DISC. R. 1.09(a)(3). The term "same matter" is straightforward and means what it says—literally the same dispute or litigation. "The 'same' matter generally prohibits an attorney from switching sides in a lawsuit and representing another whose interests are in conflict with those of the

former client." *Roseland Oil & Gas*, 68 S.W.3d at 788. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 132 cmt. d(i) (2000).

The term "substantial relationship" is more troubling. Neither the federal courts nor Texas state courts have articulated a clear definition for the term. Federal courts have declared that a "substantial relationship exists 'if the factual contexts of the two representations are similar or related.'" *Cole*, 43 F.3d at 1384 (quoting *Smith v. Whatcott*, 757 F.2d 1098, 1100 (10th Cir. 1985). Some federal district courts have identified a list of factors that may be relevant in this analysis, including (i) the factual similarities between the current and former representations, (ii) the similarities between the legal issues, and (iii) the nature and extent of the attorney's involvement in the former representation. *Power Mosfet Techs., L.L.C. v. Siemens AG*, No. 2:99-CV-168, 2002 WL 32785219, *2 (E.D. Tex. 2002); *Dieter v. Regents of the Univ. of Cal.*, 963 F. Supp. 908, 911-12 (E.D. Cal. 1997).

The Texas Supreme Court has declared, somewhat tautologically, that "two matters are 'substantially related' ... when a genuine threat exists that a lawyer may divulge in one matter confidential information obtained in the other because the facts and issues involved in both are so similar." *EPIC Holdings, Inc.*, 985 S.W.2d at 51.

(a) *Proof of a Substantial Relationship*

To establish a substantial relationship, the legal advice that the lawyer gave in the prior representation need not be "relevant," at least in the evidentiary sense, to the pending litigation. *In re Corrugated Container Antitrust Litig.*, 659 F. 2d 1341, 1346 (5th Cir. Unit A 1981). "It need only be akin to the present action in a way reasonable persons would understand as important to the issues involved." *Hydril Co. v. Multiflex, Inc.*, 553 F. Supp. 552, 554 (S.D. Tex. 1982). "The test speaks in terms of a substantial *relationship*, not substantial *identity*, of legal and factual elements between the prior representation and the pending litigation." *Home Ins. Co. v. Marsh*, 790 S.W.2d 749, 753 (Tex. App.—El Paso 1990, orig. proceeding) (emphasis in original).

The moving party must offer evidence of *specific similarities* between the prior representation and the pending litigation. *Coker*, 765 S.W.2d at 400. "Merely pointing to a superficial resemblance between the present and prior representations will not substitute for the careful comparison demanded by our cases." *Duncan*, 646 F.2d at 1029.

A substantial relationship most commonly occurs where the second action arises from the subject matter of the prior representation. *See Troutman v. Ramsay*, 960 S.W.2d 176, 178 (Tex. App.—Austin 1997, orig. proceeding) (finding that an action to probate the will of a party's deceased spouse was substantially related to an action to enforce a quitclaim deed because the property named in the quitclaim was part of the estate settlement). However, the two representations need not involve

identical circumstances to be substantially related. *See Texaco, Inc. v. Garcia*, 891 S.W.2d 255, 257 (Tex. 1995) (finding that an environmental action was substantially related to another environmental action for the same company—even though the two actions involved different plaintiffs and different circumstances—because the actions involved "similar liability issues, similar scientific issues, and similar defenses and strategies"); *see also Ledwig v. Cuprum, S.A.*, No. SA-03-CA-542-RF, 2004 WL 573650, *3 (W.D. Tex. 2004); *Butler*, 987 S.W.2d at 226-27.

The prior representation need not involve litigation to be substantially related to a pending action. *See, e.g., Salas-Porras*, 6 F. Supp. 2d at 623-24 (finding that tax consultation for a tract of property was substantially related to a post-judgment collection proceeding arising out of a condemnation of the same tract); *Blanchard & Co. v. Heritage Capital Corp.*, No. CIV. A.3:97-CV-0690-H, 1997 WL 757906, *2 (N.D. Tex. 1997) (finding that legal work in which a lawyer reviewed contracts between his former client and one of its suppliers was substantially related to litigation arising from those same contracts). In particular, a lawyer who previously represented multiple parties in drafting a document, such a loan papers or real estate documents, may not subsequently represent one of those parties in litigation arising out of an alleged breach of the document. *Taylor*, 67 S.W.3d at 533. *See* TEX. R. DISC. P. 1.06 cmt. 9.

A remote or hypothetical connection between the two representations is insufficient to establish a substantial relationship. *Hydril Co.*, 553 F. Supp. at 556. *See Church of Scientology v. McLean*, 615 F.2d 691, 693 (5th Cir. 1980) (a zoning action is not substantially similar to a slander action involving the same client); *Metropolitan Life Ins. Co. v. Syntek Finance Corp.*, 881 S.W.2d 319, 321 (Tex. 1994) (a divorce action for a corporate officer is not substantially similar to a commercial dispute involving the corporation); *Cruz v. Hinojosa*, 12 S.W.3d 545, 551 (Tex. App.—San Antonio 1999, pet. denied) (an eviction action is not substantially related to a personal injury action involving the same client).

(b) *Irrebutable Presumption of Shared Confidences*

By proving the substantial relationship test, "the moving party is entitled to a conclusive irrebutable presumption that confidences and secrets were imparted to the former attorney." *Westergren*, 794 S.W.2d at 815. *See Salas-Porras*, 6 F. Supp. 2d at 623 ("Once the movant proves that the matters are substantially related, the court will irrebuttably presume that relevant confidential information was disclosed during the former representation."); *see also American Airlines, Inc.*, 972 F.2d at 614; *Coker*, 765 S.W.2d at 400; *Pollard v. Merkel*, 114 S.W.3d 695, 699 (Tex. App.—Dallas 2003, pet. denied). This presumption protects the moving party from having to reveal its secrets in any hearing on its motion to disqualify. *Troutman*, 960 S.W.2d at 178-79.

As a result of this irrebuttable presumption, any evidence that the attorney took steps to try to protect the confidences of his former client is irrelevant and will not insulate him from disqualification. *See Grant v. Thirteenth Ct. of App.*, 888 S.W.2d 466, 467 (Tex. 1994) ("[A]ny rule focusing on actual disclosure would place a virtually insurmountable burden on the party seeking disqualification, since the only persons who know whether confidences were actually shared will generally be the very lawyers seeking to avoid disqualification.").

(3) Genuine Threat of Revealed Confidences

To satisfy this element of the test, the moving party need not detail any specific confidences. *Hydril Co.*, 553 F. Supp. at 554. "[T]he test is met by demonstrating a genuine *threat* of disclosure, not an actual materialized disclosure." *Home Ins. Co.*, 790 S.W.2d at 753 (emphasis in original). *See EPIC Holdings, Inc.*, 985 S.W.2d at 51; *see also Pollard*, 114 S.W.3d at 699 (noting that the moving party need only show a "reasonable probability" of disclosure); *Roseland Oil & Gas*, 68 S.W.3d at 787 (same).

This element is usually not in dispute as long as the moving party can prove the substantial relationship test. *See Centerline Indus., Inc. v. Knize*, 894 S.W.2d 874, 876 (Tex. App.—Waco 1995, orig. proceeding) ("[I]f two matters are substantially related . . ., it should make no difference whether the lawyer gained no confidences or whether all the confidences gained have been publicly disclosed."). *But see COC Servs., Ltd. v. CompUSA, Inc.*, No. 05-01-00865-CV, 2002 WL 1792479, *4 (Tex. App.—Dallas Aug. 6, 2002, no pet. h.) (refusing to disqualify a law firm where the conflict of interest arose while the case was on appeal, and noting that the issues on appeal must come solely from the "cold record," which is a matter of public information) (not designated for publication).

For a discussion of the types of matters that constitute client "confidences," see *infra* Section B.4.

b. ***Disqualification of Law Firm***

If an attorney is disqualified on the basis of his prior representation of an adverse party, then his entire firm is disqualified. *See Salas-Porras*, 6 F. Supp. 2d at 625; *Texaco, Inc.*, 891 S.W.2d at 257; *Pollard*, 114 S.W.3d at 701; *Taylor*, 67 S.W.3d at 533-34; *see also* TEX. DISC. R. 1.09(b). "The attorney's knowledge is imputed by law to every other attorney in the firm. There is, in effect, 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." *Godbey*, 924 S.W.2d at 131. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 123 (2000).

c. ***Consent***

An attorney may take a representation that is adverse to a former client if the client authorizes—*i.e.*, gives its informed consent—to the representation. *See In re Gutierrez*, 309 B.R. 488, 498-99 (W.D. Tex. 2004); *City of Dallas v. Redbird Development Corp.*, 143 S.W.3d 375, 388 (Tex. App.—Dallas 2004, no pet.); *Centerline Indus., Inc.*, 894 S.W.2d at 875-76; *see also City of Kalamazoo*, 125 F. Supp. 2d at 243 ("A client may expressly or impliedly waive his objection and consent to the adverse representation.").

For the former client to give its informed consent, the attorney must fully disclose the risks of his adverse representation. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 122 (2000) ("Informed consent requires that the client or former client have reasonably adequate information about the material risks of such representation to that client or former client."). Full disclosure really means *full* disclosure. Courts "do not appear to allow different levels of disclosure depending on the sophistication of the client." *Woolley*, 2003 WL 21488411, at *10.

Consent need not be in writing to be enforceable, although written consent is certainly preferable to an oral authorization. *Woolley*, 2003 WL 21488411, at *6. *See* TEX. DISC. R. 1.06 cmt. 8 ("While it is not required that the disclosure and consent be in writing, it would be prudent for the lawyer to provide potential dual clients with a least a written summary of the considerations disclosed.").

Silence is not the same thing as consent. While silence may give rise to a waiver if the client does not timely object to the adverse representation, the mere "acquiescence of a client without informed consent is tantamount to no consent at all." *Selby v. Revlon Consumer Prod. Corp.*, 6 F. Supp. 2d 577, 582 (N.D. Tex. 1997). *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 122 cmt. c(i) (2000) ("Ambiguities in a client's purported expression of consent should be construed against the lawyer seeking the protection of the consent. . . . In general, a lawyer may not assume consent from a client's silent acquiescence.").

The fact that a former client gives its consent to an adverse representation does not permit its former attorney to use any confidential information that he may have received from the client unless the attorney secures specific consent to do so. *Corrugated Container Antitrust Litig.*, 659 F.2d at 1348 ("[S]imple consent to adverse representation is not a consent to the use of confidential information.").

d. ***Lawyer's Own Representation***

Nothing prevents a lawyer from representing himself in pursuing his own action against a former client, even if his own action is substantially related to his prior representation. *Doe v. A Corp.*, 709 F.2d 1043, 1049 (5th Cir. 1983).

2. **Concurrent Representation of the Party**

Both the Restatement and the ABA Model Rules forbid a lawyer from taking a case against an existing client. For instance, the Restatement provides that a lawyer may not, without consent, "represent one client to assert or defend a claim against or brought by another client currently represented by the lawyer, even if the matters are not related." RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 128(2) (2000). *See also* ABA MODEL RULES OF PROF. CONDUCT § 1.7 cmt. 3 (1996) ("[A] lawyer ordinarily may not act as advocate against a person the lawyer represents in some other matter, even if it is wholly unrelated.").

The Texas Disciplinary Rules of Professional Conduct, by contrast, contain no similar prohibition. "With respect to current client conflicts, the Texas Rules differ significantly from the Model Rules because the Texas Rules incorporate the substantial relationship test even as to a current client, as long as the adverse representation is not in the same case (*i.e.*, as long as the attorney is not representing both the plaintiff and defendant in the same lawsuit)." Samara Lackman Kline, *Motions to Disqualify Based on Conflicts of Interest—Identifying the Rules of the Game*, 25 ST. MARY'S L.J. 739, 746 (1994).

a. ***Federal Court***

Absent exceptional circumstances, federal courts in Texas will automatically disqualify an attorney from representing a party in a lawsuit against an existing client without the consent of both parties. *Dresser Indus., Inc.*, 972 F.2d at 545. The federal courts have not yet specifically identified any exceptional circumstances that will allow an attorney to avoid disqualification for dual representation, but any such exceptional circumstances will arise only if the attorney can show "some social interest . . . that would outweigh the public perception of his impropriety." *Id.*

An attorney may not avoid disqualification simply by firing one of the two clients. *See Stratagem Development Corp. v. Heron Int'l N.V.*, 756 F. Supp. 789, 794 (S.D.N.Y. 1991) (noting that an attorney "may not undertake to represent two potentially adverse clients and then, when the potential conflict becomes actuality, pick and choose between them").

b. ***State Court***

Texas state courts will treat a situation involving an existing client the same way that they treat a situation involving a former client. That is, they will allow an attorney to represent a party in a lawsuit against an existing client as long as the lawsuit is not *substantially related* to any of the work that the attorney is doing for his existing client. *See Conoco*, 803 S.W.2d at 419; *see also Southwestern Bell Yellow Pages*, 141 S.W.3d at 231 ("While not encouraged, concurrent representation of adverse clients is permitted in Texas."); Kline, *supra*, at 747 ("[T]o be prohibited

under the Texas Rules, . . . the concurrent representations must be 'substantially related.'"). *But see Delta Air Lines, Inc. v. Cooke*, 908 S.W.2d 632, 635-36 (Tex. App.—Waco 1995, orig. proceeding) (Vance, J., dissenting from denial of motion for leave to file petition for writ of mandamus) (arguing that Texas state courts should forbid dual representation without consent, and distinguishing *Conoco* on the basis that the existing client gave consent to the dual representation).

For a discussion of the substantial relationship test, *see supra* Section B.1.a.(2).

3. **Joint Representation**

Unless the parties consent to the representation, an attorney may not jointly represent two or more parties whose interests may be adverse to each other. TEX. DISC. R. 1.06(b). *See In re B.L.D.*, 113 S.W.3d 340, 346 (Tex. 2003) ("Generally, ethical rules prohibit an attorney from jointly representing clients when the clients' interests are adverse to each other."); *see also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 128 cmt. d (2000) ("Multiple representation is precluded when the clients, although nominally on the same side of a lawsuit, in fact have such different interests that representation of one will have a material and adverse effect on the lawyer's representation of the other."). *But cf. In re Robinson*, 90 S.W.3d 921, 925 (Tex. App.—San Antonio 2002, orig. proceeding) (refusing to disqualify an attorney where the two joint clients consented to the representation and the opposing party offered no material evidence of an actual conflict of interest).

4. **Revelation of Confidential Information**

Under Rule 1.05(b)(3) of the Texas Disciplinary Rules of Professional Conduct, a lawyer may not "[u]se confidential information of a former client to the disadvantage of the former client after the representation is concluded unless the former client consents after consultation or the confidential information has become generally known." TEX. DISC. R. 1.05(b)(3). Rule 1.09(a)(2) further provides that a lawyer should not accept a representation if it "in reasonable probability will involve a violation of Rule 1.05." TEX. DISC. R. 1.09(a)(2). *See also* ABA MODEL RULES OF PROF. CONDUCT § 1.6(a) & 1.9(c) (1996).

a. ***Basis for Disqualification***

Even when an attorney is not disqualified on the basis that he represents a party in pending litigation that is substantially related to his work for a former client, he may nonetheless be disqualified if he received confidential information in his prior work that he could use against his former client in the pending litigation. *See Salas-Porras*, 6 F. Supp. 2d at 624; *Butler*, 987 S.W.2d at 226 n.3; *Clarke*, 819 S.W.2d at 950; *see also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 132 cmt. a (2000) ("[A] lawyer representing a client in a matter may not use confidential client

information if doing so will adversely affect a material interest of the former client, even though that matter is not substantially related to a former representation. . . .").

The substantial relationship test simply does not apply in such a situation: even when the two representations are unrelated, an attorney may not accept a subsequent representation that places him in the position of potentially using confidential information to the disadvantage of a former client. *See Islander E. Rental Program*, 917 F. Supp. at 510 ("[E]stablishing a substantial relationship between the attorney's former and current representations is not the only way a former client can disqualify his former attorney. . . . [D]isqualification may be warranted if the former attorney possesses relevant confidential information.").

b. ***Definition of Confidential Information***

Confidential information is not necessarily the same thing as privileged information. It may also include unprivileged information. TEX. DISC. R. 1.05(a). *See Clarke*, 819 S.W.2d at 950; *see also Phoenix Founders, Inc. v. Marshall*, 887 S.W.2d 831, 834 (Tex. 1994) ("[V]irtually any information relating to a case should be considered confidential. . . ."). The Restatement broadly defines "confidential client information" to include all "information relating to representation of a client, other than information that is generally known." RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 59 (2000). *See, e.g., Salas-Porras*, 6 F. Supp. 2d at 624 (disqualifying an attorney who gave tax advice to a former client because the financial information he received from the client could be used for impeachment); *see also Islander E. Rental Program*, 917 F. Supp. at 511-12.

Confidential information does not include information previously made available to the general public, such as (i) court filings, (ii) documents previously produced in discovery in prior litigation, or (iii) information readily available from corporate shareholder reports or websites. *See Abney v. Wal-Mart*, 984 F. Supp. 526, 530 (E.D. Tex. 1997); *Metropolitan Life Ins. Co. v. Syntek Finance Corp.*, 881 S.W.2d 319, 321 (Tex. 1994); *COC Servs., Ltd.*, 2002 WL 1792479, at *4.

c. ***Evidence***

In pursuing a motion to disqualify opposing counsel on the basis of having previously furnished confidential information to him, the moving party need not disclose the confidential information either to the court or to the opposing parties. *Abney*, 984 F. Supp. at 530. However, the moving party "must make some showing that some substantive conversations between the former client and the attorney occurred which contained information relevant to the present litigation." *Id.* Usually, the moving party may satisfy his burden by describing the general types of information that he conveyed to the attorney—*e.g.*, tax information, financial data, corporate organizational information, etc.—and by explaining the relevance of that information in the pending litigation. *Islander E. Rental Program*, 917 F.2d at 511.

d. ***Disqualification of Law Firm***

If an attorney is disqualified on the basis of having received relevant confidential information, then his entire firm is disqualified. *See Salas-Porras*, 6 F. Supp. 2d at 625; *In re Mitcham*, 133 S.W.3d 274, 277 (Tex. 2004) (orig. proceeding); *Godbey*, 924 S.W.2d at 131; *see also American Airlines, Inc.*, 972 F.2d at 614 n.1 (recognizing an irrebuttable presumption that "confidences obtained by an individual lawyer will be shared with the other members of his firm").

e. ***Consent***

A former client may presumably give consent for his former attorney to use confidential information against him. *See* TEX. DISC. R. 1.05(b)(3). Not surprisingly, few cases have found such consent.

f. ***Multiple Parties***

Litigation involving multiple parties raises unique concerns about the use of confidential information:

(1) Former Joint Representation

If an attorney previously represented two or more parties jointly, the attorney may not subsequently represent one of those parties in any litigation against the others where the litigation poses the risk that the attorney may use confidential information against his former clients. *Wasserman*, 910 S.W.2d at 567. *But cf. In re Works*, 118 S.W.3d 906, 909 (Tex. App.—Texarkana 2003, orig. proceeding) (refusing to disqualify an attorney who had jointly represented two parties in a previous matter where the previous matter was not substantially related to the ongoing lawsuit and the fear of disclosure was a "moot issue").

Although the attorney-client privilege does not strictly apply between the parties to a joint representation, "the ethical duty is broader than the evidentiary privilege." *Brennan's, Inc. v. Brennan's Restaurants, Inc.*, 590 F.2d 168, 172 (5th Cir. 1979). "The need to safeguard the attorney-client relationship is not diminished by the fact that the prior representation was joint with the attorney's present client." *Id.*

(2) Joint Defense

An attorney is barred not only from using confidential information against a former client, but also from using confidential information against a former co-defendant who previously shared the information to the attorney under the terms of a joint defense agreement or confidentiality agreement. *See Wilson P. Abraham Const. Corp. v. Armco Steel Corp.*, 559 F.2d 250, 253 (5th Cir. 1977); *Godbey*, 924

S.W.2d at 129; *Rio Hondo Implement Co. v. Euresti*, 903 S.W.2d 128, 132 (Tex. App.—Corpus Christi 1995, orig. proceeding). "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." *Godbey*, 924 S.W.2d at 132. *See also Wilson P. Abraham Const. Corp.*, 559 F.2d at 253. *But cf. City of Kalamazoo*, 125 F. Supp. 2d at 233 (distinguishing between "common counsel" and a "joint defense group" for purposes of deciding whether a lawyer is disqualified from representing a party in any lawsuit adverse to a former co-defendant).

Where an attorney has received confidential information under the terms of a joint defense agreement, a former co-defendant may properly move to disqualify both the attorney and his law firm in any subsequent litigation which poses the risk that the attorney will use the information against that former co-defendant. *See Wilson P. Abraham Const. Corp.*, 559 F.2d at 253; *Mitcham*, 133 S.W.3d at 277; *Godbey*, 924 S.W.2d at 132. *But see* Thomas F.A. Hetherington, Note, *Confusing Conflicts: National Medical Enterprises, Inc. v. Godbey and the Problem of Disqualification When No Previous Attorney-Client Relationship Exists*, 34 HOUS. L. REV. 909, 927-29 (1997) (criticizing *Godbey* and arguing that, at a minimum, courts should decline to disqualify a law firm that erects an adequate Chinese Wall against any of their attorneys who received confidential information under a joint defense agreement).

The joint defense agreement need not be in writing. Disqualification is appropriate as long as the former co-defendants knowingly participated in a joint defense with the tacit agreement that their disclosures would remain confidential. *In re Skiles*, 102 S.W.3d 323, 326 (Tex. App.—Beaumont 2003, orig. proceeding).

Only a former co-defendant has any standing to complain. A party may not move to disqualify opposing counsel on the basis that the attorney received confidential information under a joint defense agreement to which the party was neither a signatory nor a participant. *Cf. Turner v. Firestone Tire & Rubber Co.*, 896 F. Supp. 651, 653 (E.D. Tex. 1995) (refusing to disqualify an attorney where the moving party was not a participant in the joint defense agreement, even if the attorney's actions gave rise to the appearance of impropriety). However, as long as the former co-defendant was a party to the joint defense agreement, the former co-defendant need not actually have been named as a party in the prior litigation. For instance, an attorney who previously participated in joint defense communications with his client's insurance carrier may not subsequently use confidential information from those communications against the carrier—whether or not the carrier was a party to the prior litigation. *See Skiles*, 102 S.W.3d at 326-27.

5. **Prior Employment**

As noted, a lawyer may not "switch sides" and represent a party against a former client in the same or in a substantially related matter. In such a situation, a

court may properly disqualify both the lawyer and his law firm, whether or not the lawyer took steps to try to preserve the confidences of his former client. *See supra* Section B.1.

A slightly different result may arise where the lawyer himself does not "switch sides," but instead hires someone who previously worked for a law firm or other entity that represents the adverse party in the same or in a substantially related matter. Whether a court should disqualify the lawyer in that instance may depend on three factors: (i) the job description of the new employee; (ii) the extent of the knowledge that the new employee acquired of the adverse party's confidences; and (iii) the steps, if any, that the lawyer has taken to erect a "Chinese Wall" between himself and his new employee.

a. ***Types of New Employees***

The duty to protect a client's confidences extends not only to the client's attorney, but also the attorney's employees and former employees. *American Can Co. v. Citrus Feed Co.*, 436 F.2d 1125, 1128 (5th Cir. 1971). Thus, "liability to disqualification extends also to employees, and former employees, of the attorney who has been privy to a client's communications." *Id.*

(1) Attorney from Private Practice

When a law firm hires an attorney who previously worked with a firm that represents an adverse party in the same or a substantially related matter, the attorney is disqualified from assisting his new employers in their work against the adverse party. *Enstar Petroleum Co. v. Mancias*, 773 S.W.2d 662, 664 (Tex. App.—San Antonio 1989, orig. proceeding). Whether or not the attorney was personally involved in representing the party at his former firm, the attorney is irrebuttably presumed to have acquired confidential information about the adverse party during his employment with his former firm. *See Mitcham*, 133 S.W.3d at 275. This presumption arises from the fact that "it would always be virtually impossible for a former client to prove that attorneys in the same firm had not shared confidences." *Godbey*, 924 S.W.2d at 131.

The question often is not so much whether a new attorney is disqualified from assisting in a representation against his former firm's client, but rather whether his new employment disqualifies his new firm from continuing its representation against his former firm's client. Obviously, if the attorney himself was personally involved in representing the client at his former firm, both the attorney and his new firm would be disqualified from participating in the same or a substantially similar matter against that client. *Id. See supra* Section B.1.

But what if the attorney did not personally represent his former firm's client? The answer to this question may depend on the forum and the degree of knowledge that the attorney acquired of the client's confidences:

(a) *Imputed Knowledge*

If the new firm can show that the attorney's knowledge of an adverse party's confidences is only imputed and not actual, then at least in federal court, the new firm may continue to pursue a matter against that party. *See Freeman v. Chicago Musical Instr. Co.*, 689 F.2d 715, 723 (7th Cir. 1982); *American Can Co.*, 436 F.2d at 1129. The rule may be the same in Texas state court. *See Enstar Petroleum Co.*, 773 S.W.2d at 664 ("New partners of a vicariously disqualified partner, to whom knowledge has been imputed during a former partnership, are not necessarily disqualified: they need only show that the vicariously disqualified partner's knowledge was imputed, and not actual."). *But see Mitcham*, 133 S.W.3d at 276 (suggesting that the new firm is disqualified regardless whether the new attorney's knowledge is imputed or actual).

A new firm may show that an attorney's knowledge was only imputed, and not actual, by offering evidence that the attorney was not involved in the former firm's representation—*i.e.*, by offering evidence that other lawyers in the former firm were handling the firm's representation. *See Edwards v. 360° Communications*, 189 F.R.D. 433, 435-36 (D. Nev. 1999); *see also San Gabriel Basin Water Quality Auth. v. Aerojet-Gen. Corp.*, 105 F. Supp. 2d 1095, 1105-06 (C.D. Cal. 2000) (concluding that an attorney is not automatically disqualified from handling a matter adverse to his former firm's client if he was not involved in his former firm's representation). Although the new attorney's knowledge may only be imputed, the new firm should erect a Chinese Wall screening the attorney from any involvement in the matter.

(b) *Actual Knowledge*

If the attorney acquired actual knowledge of the former client's confidences, then at least in Texas state court, a Chinese Wall will not rebut the presumption of shared confidences. *Petroleum Wholesale, Inc. v. Marshall*, 751 S.W.2d 295, 300 (Tex. App.—Dallas 1988, orig. proceeding). "In such a case, the entire new firm must be disqualified from representing the adversary of the challenged attorney's former client." *Id.* at 301.

The rule may be different in federal court. *See Carbo Ceramics, Inc. v. Norton-Alcoa Proppants*, 155 F.R.D. 158, 163 (N.D. Tex. 1994) (suggesting that an effective Chinese Wall may allow a firm to continue its representation even where its new attorney acquired actual knowledge of the former client's confidences); *see also Cromley v. Board of Educ. of Lockport Township High School Dist. 205*, 17 F.3d 1059, 1065 (7th Cir. 1994) (same); *Van Jackson v. Check 'N Go of Ill., Inc.*, 114 F. Supp. 2d 731, 733 (N.D. Ill. 2000) (same).

(2) Government Attorney

Under Rule 1.10 of the Texas Disciplinary Rules of Professional Conduct, a former government lawyer is disqualified from subsequently representing a private client if (i) the subsequent representation involves a matter in which the lawyer participated personally and substantially as a public officer or employee or (ii) the subsequent representation is adverse to a legal entity about which the lawyer acquired confidential information in his previous government employment. TEX. DISC. R. 1.10(a). *See Spears*, 797 S.W.2d at 657; *see also* ABA MODEL RULES OF PROF. CONDUCT § 1.11(a) (1996).

In either of these situations, a law firm that hires a former government lawyer may itself avoid disqualification as long as it erects an appropriate Chinese Wall. *See Spears*, 797 S.W.2d at 657 ("This disqualification does not . . . extend to other members of the firm if the former government attorney is screened from any participation in the matter and is not apportioned any of the resulting fee."). Thus, a law firm that hires a former government attorney may have a little more flexibility in avoiding disqualification than a law firm that hires a former attorney in private practice.

(a) *Personal and Substantial Involvement.* A former government attorney may not take a subsequent representation that involves a matter in which he previously participated personally and substantially. The requirement of *personal* and *substantial* participation essentially means that the attorney must have had active "hands-on" involvement. *Spears*, 797 S.W.2d at 657. *See Evans v. North St. Boxing Club*, 83 F. Supp. 2d 741, 744 (W.D. La. 1999). "This 'hands-on' involvement cannot be imputed based on title of office or the existence of statutory authority." *Spears*, 797 S.W.2d at 657. *Cf. Monument Builders of Pa., Inc. v. The Catholic Cemeteries Ass'n, Inc.*, 190 F.R.D. 164, 167-68 (E.D. Pa. 1999) (disqualifying a former judicial law clerk from working on a case on remand from an appeal in which she was previously involved).

(b) *Confidential Information*. A former government attorney may not take a subsequent representation if it would allow him to use confidential information that he acquired in his former government employment. "[S]pecific information obtained by the exercise of government power should not be used to the prejudice of a party to private litigation." *Woods v. Covington County Bank*, 537 F.2d 804, 817 (5th Cir. 1976).

(3) Legal Secretary, Paralegal or Support Staff

Rule 5.03 of the Texas Disciplinary Rules of Professional Conduct provides that "a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer." TEX. DISC. R. 5.03(a). The ABA Model

Rules contain a similar provision. *See* ABA MODEL RULES OF PROF. CONDUCT § 5.3(a) (1996). Under these provisions, an attorney may be directly responsible for the conduct of a legal secretary, paralegal or staff employee. Consequently, he may suffer the consequences of any conflict of interest that may arise from hiring a nonlawyer employee. *See Daines v. Alcatel, S.A.*, 194 F.R.D. 678, 682 (E.D. Wash. 2000); *Williams v. Trans World Airlines, Inc.*, 588 F. Supp. 1037, 1044 (W.D. Mo. 1984); *cf. In re Bell Helicopter Textron, Inc.*, 87 S.W.3d 139, 145 (Tex. App.—Fort Worth 2002, orig. proceeding) (applying same principles to freelance consultant).

Nonetheless, Texas courts are reluctant to interpret the disciplinary rules in a manner that might affect the career mobility of secretaries, paralegals and other nonlawyers. *See In re American Home Prod. Corp.*, 985 S.W.2d 68, 75 (Tex. 1998) (orig. proceeding); *Phoenix Founders, Inc.*, 887 S.W.2d at 835. As a result, Texas courts give law firms a little more leeway in hiring new secretaries and paralegals. When a law firm hires a secretary or paralegal who previously worked with a firm that represents an adverse party in the same or a substantially related matter, the law firm is not automatically disqualified from continuing its representation against the adverse party, so long as it erects a Chinese Wall against the new secretary or paralegal. *See American Home Prod. Corp.*, 985 S.W.2d at 75; *Phoenix Founders, Inc.*, 887 S.W.2d at 835; *see also Daines*, 194 F.R.D. at 682.

In the context of secretaries, paralegals and other nonlawyer employees, Texas courts have analyzed the various presumptions concerning confidential information as follows:

(a) *Presumption of Acquisition*

Where a secretary, paralegal or other staff employee previously worked for a law firm representing an adverse party, Texas courts will irrebutably presume that the employee received confidential information as long as the moving party can show that the employee actually worked on the same or a substantially similar matter at his former law firm. *See Mitcham,* 133 S.W.3d at 276; *American Home Prod. Corp.*, 985 S.W.2d at 75; *Phoenix Founders, Inc.*, 887 S.W.2d at 835; *see also Daines*, 194 F.R.D. at 682 ("It is no secret that paralegals and other non-attorney staff members are regularly exposed to confidential client information as part of their everyday work."). The moving party need only show that the employee actually worked on the same or a substantially similar matter, not that the employee *actually received* confidential information in his prior employment. *American Home Prod Corp.*, 985 S.W.2d at 74-75. This irrebutable presumption "serves to prevent the moving party from being forced to reveal the very confidences sought to be protected." *Phoenix Founders, Inc.*, 887 S.W.2d at 835.

(b) *Presumption of Revelation*

While Texas courts will irrebuttably presume that a staff employee has received confidential information from working on the same or a substantially similar matter at a prior firm, Texas courts will only rebuttably presume—and *not* irrebuttably presume—that the employee has shared or will share the confidential information with his new employer. *See American Home Prod. Corp.*, 985 S.W.2d at 75; *Phoenix Founders, Inc.*, 887 S.W.2d at 835. *But cf. In re TXU U.S. Holdings Co.*, 110 S.W.3d 62, 66 (Tex. App.—Waco 2002, orig. proceeding) (arguing that an irrebuttable presumption of disclosure applies where the employee was a paralegal at her prior firm but, after graduation from law school, became a lawyer at her new firm), *pet. for mand. denied per curiam on other grounds*, *In re Mitcham*, 133 S.W.3d 274 (Tex. 2004) (orig. proceeding).

The burden falls on the new employer to offer evidence rebutting this presumption. The only way that the new employer may rebut this presumption is to show (i) that it has instructed the secretary or paralegal not to work on any matter on which he may have worked during his prior employment and (ii) that it has taken other reasonable steps—*i.e.*, erecting a Chinese Wall—to ensure that the secretary or paralegal does not work on any such matter. *American Home Prod. Corp.*, 985 S.W.2d at 75. *See Mitcham*, 133 S.W.3d at 276 (noting that the presumption "is rebutted not by denials of disclosure, but by prophylactic measures assuring that legal assistants do not work on matters related to their prior employment"); *cf. Grant*, 888 S.W.2d at 468 (concluding that a law firm cannot rebut the presumption of shared confidences if it allowed the challenged secretary to continue working on the matter in question, even if only mundane work such as typing, filing and scheduling).

Although the presumption of shared confidences is rebuttable rather than irrebuttable, circumstances may preclude the new employer from rebutting the presumption. "Absent consent of the former employer's client, disqualification will always be required under some circumstances, such as (1) when information relating to the representation of an adverse client has in fact been disclosed, or (2) when screening would be ineffective or the nonlawyer necessarily would be required to work on the other side of a matter that is the same as or substantially related to a matter on which the nonlawyer has previously worked." *Phoenix Founders, Inc.*, 887 S.W.2d at 835. *See Bell Helicopter Textron*, 87 S.W.3d at 148 (holding that a Chinese Wall would be ineffective where the law firm hired a freelance consultant for the very purpose of providing useful advice against the consultant's former client).

(4) Expert Witnesses

A court usually will not disqualify a law firm for hiring an expert witness who previously worked for opposing counsel in the same or a substantially related matter. *American Home Prod. Corp.*, 985 S.W.2d at 73. The goal of protecting a party's

confidences simply does not apply in such a situation. *Id.* ("[I]f communications with an expert may be discovered during the course of litigation by opposing counsel, that information cannot be considered confidential, and the fact that it has been shared with opposing counsel cannot be the basis for disqualification."). *See also Bell Helicopter Textron*, 87 S.W.3d at 149. *But see Cordy v. Sherwin Williams Co.*, 156 F.R.D. 575, 582 (D.N.J. 1994) (disqualifying an attorney for hiring a turncoat expert, noting that a party "who retains an expert should not have to worry that the expert will change sides in the middle of the proceeding").

Instead of disqualifying a *law firm* for hiring an expert witness that has "switched sides," federal courts frequently will disqualify *the expert* from testifying in the matter. *See Wang Laboratories, Inc. v. Toshiba Corp.*, 762 F. Supp. 1246, 1248 (E.D. Va. 1991) ("[N]o one would seriously contend that a court should permit a consultant to serve as one party's expert where it is undisputed that the consultant was previously retained as an expert in the same litigation and had received confidential information from the adverse party pursuant to the earlier retention."); *see also Koch Refining Co. v. Jennifer L. Boudreaux M/V*, 85 F.3d 1178, 1181 (5th Cir. 1996); *Great Lakes Dredge & Dock Co. v. Harnischfeger*, 734 F. Supp. 334, 336 (N.D. Ill. 1990).

b. ***Chinese Wall***

A "Chinese Wall" is a "device erected by a law firm intended to 'quarantine' a new [employee] with confidential information received from an adversary of one of the firm's clients." *Petroleum Wholesale, Inc.*, 751 S.W.2d at 297. Types of screening mechanisms that may go into a successful Chinese Wall include the following: (i) instructions, given to all attorneys in the firm, of the new employee's recusal from the matter in question; (ii) a ban on any exchange of information with the new employee relating to the matter in question; (iii) a prohibition on access to the files and other information relating to the matter; (iv) secret codes for accessing pertinent information on electronic hardware; and (v) a prohibition on the sharing of any fees derived from the matter. *See Cromley*, 17 F.3d at 1065.

Any law firm that erects a Chinese Wall to avoid disqualification may have to affirm the existence of its screening mechanisms under oath. *Cromley*, 17 F.3d at 1065.

The mere fact that a law firm erects a Chinese Wall does not necessarily shield the law firm from disqualification:

(1) Timing of the Implementation. A Chinese Wall is useless if a law firm fails to erect it contemporaneously with the arrival of the new employee. *See Papanicolaou v. Chase Manhattan Bank, N.A.*, 720 F. Supp. 1080, 1087 (S.D.N.Y. 1989); *Haagen-Dazs Co. v. Perche No! Gelato, Inc.*, 639 F. Supp. 282, 287 (N.D. Cal. 1986). "Once Pandora's Box has been opened, the ethical malaise which may

have escaped cannot be treated by nailing a plank over the open vessel." *SLC Ltd. v. Bradford Group W., Inc.*, 147 B.R. 586, 592 (Bankr. D. Utah 1992), *aff'd in part, rev'd in part on other grounds*, 999 F.2d 464 (10th Cir. 1993).

(2) Adequacy of the Screening Mechanisms. The Chinese Wall must be adequate "to prevent any flow of confidential information." *Van Jackson*, 114 F. Supp. 2d at 733. The adequacy of a Chinese Wall may depend on several factors, including (i) the size of the new employee's new law firm, (ii) the types of structural divisions within the law firm; (iii) the new employee's duties in his new law firm; (iv) the nature and longevity of the relationship between the employee and his former firm's client; (v) the degree of the employee's involvement in any matters relating to his former firm's client. *See Cromley*, 17 F.3d at 1065; *Dworkin v. General Motors Corp.*, 906 F. Supp. 273, 279-80 (E.D. Pa. 1995); *Phoenix Founders, Inc.*, 887 S.W.2d at 836; *cf. Van Jackson*, 114 F. Supp. 2d at 733-34 (disqualifying a law firm, despite its erection of a Chinese Wall, because the "small size of the firm ... weighs heavily against an effective screen").

6. **Lawyer as Witness**

Rule 3.08(a) of the Texas Disciplinary Rules of Professional Conduct provides:

> A lawyer shall not accept or continue employment as an advocate before a tribunal in a contemplated or 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, unless:
>
> (1) the testimony relates to an uncontested issue;
>
> (2) the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony;
>
> (3) the testimony relates to the nature and value of legal services rendered in the case;
>
> (4) the lawyer is a party to the action and is appearing pro se; or
>
> (5) the lawyer has promptly notified opposing counsel that the lawyer expects to testify in the matter and disqualification of the lawyer would work substantial hardship on the client.

TEX. DISC. R. 3.08(a). Additionally, Rule 3.08(b) provides that "[a] lawyer shall not continue as an advocate in a pending adjudicatory proceeding if the lawyer believes that the lawyer will be compelled to furnish testimony that will be substantially adverse to the lawyer's client, unless the client consents after full disclosure." TEX. DISC. R. 3.08(b). Both the ABA Model Rules and the Restatement contain similar provisions. *See* ABA MODEL RULES OF PROF. CONDUCT § 3.7(a) & (b) (1996); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 108 (2000).

a. ***Basis for Disqualification***

The disciplinary rules forbidding an attorney from serving as an advocate and a witness in the same proceeding have a long history. *See FDIC*, 50 F.3d at 1311. They arose primarily from twin concerns: (i) that the jury may become confused when one person acts as both advocate and witness; and (ii) that the opposing party may be handicapped in challenging the credibility of a testifying attorney. *Id.*; *Anderson Producing Inc. v. Koch Oil Co.*, 929 S.W.2d 416, 422 (Tex. 1996); *Worrilow v. Norrell*, 791 S.W.2d 515, 522 (Tex. App.—Corpus Christi 1989, writ denied); *Ayres*, 790 S.W.2d at 557 n.4; *see* TEX. DISC. R. 3.08(b) cmt. 4; *see also Aghili v. Banks*, 63 S.W.3d 812, 818 (Tex. App.—Houston [14th Dist.] 2001, pet. denied) ("[T]he appearance of a testifying advocate tends to cast doubt on the ethics and propriety of our judicial system."). Because of these concerns, a court may potentially disqualify an attorney from acting as an advocate—*i.e.*, actively acting as a speaking lawyer—in a case in which he might have to testify as a witness.

The Texas Rules of Disciplinary Conduct recognize two situations in which a court may potentially disqualify an attorney because of his status as a potential witness: (i) the attorney's testimony is *necessary* to establish an essential fact; and (ii) the attorney's testimony is *substantially adverse* to his client's position.

(1) Necessary Testimony

Subject to various exceptions, a court may disqualify an attorney if the attorney's testimony is "necessary" to establish an essential fact. *Bahn*, 13 S.W.3d at 873. An attorney's testimony is "necessary" if it "goes to an 'essential fact' of the nonmovant's case." *A.M.*, 974 S.W.2d at 864. *See, e.g., Aghili*, 63 S.W.3d at 818 (disqualifying, in a case seeking to set aside a foreclosure sale, an attorney who provided a summary judgment affidavit attesting on the basis of his personal knowledge that the foreclosure sale was proper); *Spain v. Montalvo*, 921 S.W.2d 852, 856 (Tex. App.—San Antonio 1996, orig. proceeding) (disqualifying, in a case involving the alleged conversion of legal files, an attorney who wrote letters accusing the defendant lawyer of failing to return the files).

(a) *The Breadth of Necessity*

As a general rule, a court determines whether an attorney's testimony is "necessary" by examining the underlying facts. *See Spain*, 921 S.W.2d at 856. If the underlying facts show that an attorney's testimony is "necessary," a party may not avoid the disqualification of its attorney simply by disclaiming the intent to call its attorney as a witness. *See Ayus*, 48 F. Supp. 2d at 717 (disqualifying, in a wrongful termination case, an attorney who wrote letters which formed the basis for the plaintiff's claim that the defendant fired him for pretextual reasons to avoid its contractual obligations).

However, the mere fact that counsel for the moving party desires or intends to call the attorney as an adverse witness does not establish that the attorney is a "necessary" witness. *See Spears*, 797 S.W.2d at 658; *In re Slusser*, 136 S.W.3d 245, 248 (Tex. App.—San Antonio 2004, orig. proceeding); *A.M.*, 974 S.W.2d at 864; *Olguin v. Jungman*, 931 S.W.2d 607, 611 (Tex. App.—San Antonio 1996, no writ); *see also Schwartz v. Jefferson*, 930 S.W.2d 957, 960 (Tex. App.—Houston [14th Dist.] 1996, orig. proceeding) (noting that the moving party may not disqualify an attorney "by unnecessarily calling that attorney as a witness"). Any other rule would invite abuse. *See May v. Crofts*, 868 S.W.2d 397, 399 (Tex. App.—Texarkana 1993, orig. proceeding) (noting that the rule forbidding trial counsel from testifying as a witness "should not be used as a tactical weapon"); *see also In re Acevedo*, 956 S.W.2d 770, 775 (Tex. App.—San Antonio 1997, orig. proceeding).

A moving party does not satisfy its burden of proof by citing speculative or contingent circumstances under which opposing counsel's testimony may arguably become relevant. *In re Sanders*, 153 S.W.3d 54, 58 (Tex. 2004) (orig. proceeding); *In re Chu*, 134 S.W.3d 459, 464-65 (Tex. App.—Waco 2004, orig. proceeding). A "necessary" witness is one who really is *necessary*. *See A.M.*, 974 S.W.2d at 864 ("[T]here must be a genuine need for the attorney's testimony...."). For instance, an attorney is not a "necessary" witness if the moving party can acquire the same testimony or evidence from other sources. *Sanders*, 153 S.W.3d at 57. *See Horaist v. Doctor's Hosp.*, 255 F.3d 261, 267 (5th Cir. 2001) (holding that an attorney is not a necessary witness if "his testimony is cumulative").

(b) *Exceptions*

Even when an attorney's testimony is "necessary" to establish an essential fact, a court may decline to disqualify the attorney if the attorney's testimony falls within one of several exceptions:

- Uncontested Issue. An attorney may testify to an uncontested issue without fear of disqualification. TEX. DISC. R. 3.08(a)(1). "[I]f the testimony will be uncontested, the ambiguities in the dual role are purely theoretical." TEX. DISC. R. 3.08 cmt. 5.

• Matter of Formality. An attorney may testify to a mere matter of formality where he has no reason to believe that the opposing party will offer substantial evidence to the contrary. TEX. DISC. R. 3.08(a)(2).

• Value of Legal Services. An attorney may testify as a witness to the nature and value of his legal services. TEX. DISC. R. 3.08(a)(3). *See Hope v. Connell*, No. Civ. A. 3:98-CV-0929D, 1999 WL 608855, *6 n.10 (N.D. Tex. 1999); *see also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 108 cmt. g (2000). This exception is essentially an accommodation to the prevailing practice allowing an attorney to testify as an expert witness to the reasonableness and necessity of his attorney's fees in a case allowing an award of attorney's fees. Thus, this exception is necessarily limited in scope. It does not permit an attorney to testify broadly as an expert witness in any case in which the attorney is also trial counsel. *See Warrilow*, 791 S.W.2d at 523 (disqualifying an attorney who, in the same case in which he was trial counsel, sought to testify as an expert in insurance bad faith).

• Attorney is Pro Se. An attorney may testify as a witness where he is appearing pro se in a case in which he is himself a party. TEX. DISC. R. 3.08(a)(4). *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 108 cmt. d (2000).

• Substantial Hardship. An attorney may testify to any matter as a necessary witness, without fear of disqualification, if (i) he notifies opposing counsel that he expects to testify as a witness and (ii) his disqualification would work a substantial hardship to his client. TEX. DISC. R. 3.08(a)(5). *See Ayres*, 790 S.W.2d at 557; *A.M.*, 974 S.W.2d at 864. "This exception generally contemplates an attorney who has some expertise in a specialized area of law such as patents...." *Warrilow*, 791 S.W.2d at 520. The attorney's notification to opposing counsel must be "prompt." *Bahn*, 13 S.W.3d at 874 (concluding that an attorney may not rely on the "substantial hardship" exception when he sends his notification three days after receiving the opposing party's motion to disqualify). This exception may be available only in Texas state court, not in federal court.

• Testimony Only to the Judge. Because the primary purpose for the rule forbidding an attorney from serving both as an advocate and a witness is to avoid confusing a jury, an attorney—at least in federal court—may testify as a necessary witness where the fact finder is the judge, not a jury. *See Crowe v. Smith*, 151 F.3d 217, 234 (5th Cir. 1998). "Similarly, a lawyer who testifies before a judicial officer concerning only a preliminary motion is not thereby disqualified from serving as advocate at a subsequent trial before a jury." RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 108 cmt. c (2000). *See Liz Claiborne, Inc. v. Consumer Prod. Recovery, L.L.C.*, No. Civ. 3:04-CV-819-H, 2004 WL 1496537, *2 (N.D. Tex. 2004) (declining to disqualify an attorney who provided declarations in support of his client's request for TRO). This exception may be available only in federal court, not in Texas state court.

(2) Substantially Adverse Testimony

Conceptually, even when an attorney is not a "necessary" witness—*e.g.*, other persons may testify to the same subjects of which the attorney has knowledge—a court may disqualify the attorney if his testimony would be "substantially adverse" to his client. *See* TEX. DISC. R. 3.08(b); *see also Spears*, 797 S.W.2d at 657-58. In that event, the client presumably would not be able to waive the conflict. *Horaist*, 255 F.3d at 266 ("If a lawyer must testify adversely to a client's interest, the client cannot waive the conflict."). Courts are reluctant, however, to disqualify an attorney on this basis. *See FDIC*, 50 F.3d at 1315 ("Where an attorney's testimony may prejudice only his own client, the opposing party should have no say in whether or not the attorney participates in the litigation as both advocate and witness."); *see also Horaist*, 255 F.3d at 267; *cf.* TEX. DISC. R. 3.08 cmt. 9 (commenting that Rule 3.08 "is not well suited to use as a standard for procedural disqualification").

b. ***Participation by the Attorney Up to the Time of Trial***

While the disciplinary rules may forbid an attorney from testifying as a trial witness, they do not prohibit the attorney—and they do not disqualify the attorney—from participating in any pretrial matters. *See Anderson Producing Inc.*, 929 S.W.2d at 422; *Spain*, 921 S.W.2d at 857; *see also* Barbara Hanson Nellermoe & Fidel Rodriguez, Jr., *Professional Responsibility and the Litigator: A Comprehensive Guide to Texas Disciplinary Rules 3.01 Through 4.04*, 28 ST. MARY'S L.J. 443, 482 (1997). An attorney who is disqualified from serving as trial counsel by virtue of his status as a potential witness may still assist in drafting pleadings, engaging in settlement negotiations, taking depositions, arguing pretrial motions, and discussing trial strategy. *See Ayus*, 48 F. Supp. 2d at 718; *Bahn*, 13 S.W.3d at 873. *But cf. Anderson Producing Inc.*, 929 S.W.2d at 423 (declining to consider whether a testifying attorney may sit at counsel table).

c. ***Disqualification of Law Firm***

While the disciplinary rules may forbid an attorney from testifying as a trial witness, they do not necessarily prohibit another attorney in his law firm from representing their client at trial. *See Ayus*, 48 F. Supp. 2d at 718; *Ayres*, 790 S.W.2d at 558; *see also* Nellermoe & Rodriguez, *supra*, at 481. "[T]he testifying attorney's law firm can continue to represent the client even though the attorney will testify, as long as the client gives informed consent." *Bahn*, 13 S.W.3d at 873 (emphasis added). *See In re Atherton*, No. 05-02-01053-CV, 2002 WL 31160059, *3 (Tex. App.—Dallas Sept. 30, 2002, orig. proceeding) (not designated for publication); *Acevedo*, 956 S.W.2d at 774; *Schwartz*, 930 S.W.2d at 960.

Whether the client has adequately consented to the continued representation of the testifying attorney's law firm is purely a issue between the client and the law firm; it is not an issue that a court may properly address in a disqualification hearing.

Bahn, 13 S.W.3d at 873. The moving party has no standing to contest the adequacy of any consent that a client has given to the law firm's continued representation. *See Anderson Producing Inc.*, 929 S.W.2d at 424.

7. **Improper Conduct**

Most disqualification cases involve circumstances in which an attorney's continued representation involves either a conflict of interest or the threat of revealing a client's confidences. Only rarely does attorney misconduct provide the basis for disqualification. Other remedies less prejudicial than disqualification, such as sanctions or contempt, "are ordinarily available to deal with ethical improprieties by counsel." *Koller v. Richardson-Merrell, Inc.*, 737 F.2d 1038, 1057 (D.C. Cir. 1984), *vacated on other grounds*, 472 U.S. 424 (1985). *See also Shade v. Great Lakes Dredge & Dock Co.*, 72 F. Supp. 2d 518, 521 (E.D. Pa. 1999); *Bahn*, 13 S.W.3d at 876-77; *A.M.*, 974 S.W.2d at 864. For instance:

- A court need not disqualify an attorney for bribing a witness to provide favorable testimony because "[t]he appropriate court response to the improper compensation of a witness is usually to exclude the tainted testimony, or to give the opposing party access to the terms of the agreement between the paying party and the compensated witness." *Dyll v. Adams*, No. Civ. A. 3:94-CV-2734-D, 1997 WL 222918, *3 (N.D. Tex. 1997).

- A court need not disqualify an attorney for allegedly conspiring with family court judges to deprive the plaintiff of her parental rights because the conduct, while potentially subjecting the attorney to discipline and civil liability, does not form the basis for disqualification under any local, state or national codes of ethics. *Hope*, 1999 WL 608855, at *6.

- A court need not disqualify an attorney for providing living expenses to a witness and for knowingly allowing false testimony because the remedy of disqualification was not necessary to "protect the integrity of the legal process in this case." *Shade*, 72 F. Supp. 2d at 521.

- A court need not disqualify an attorney who has acquired a lien on his client's property to secure a contingency fee. *Slusser*, 136 S.W.3d at 249.

- A court need not disqualify an attorney who has had a prior sexual relationship with a client. *Horaist*, 255 F.3d at 268 ("Prior sexual relationships do not give rise to the type of ethical violation requiring disqualification under the rules.").

Some circumstances, however, deserve special mention:

a. ***Acquisition of Privileged Information***

While disqualification usually is not a proper remedy for attorney misconduct, it may be an appropriate remedy where an attorney—wrongfully *or even innocently*—acquires privileged information that belongs to the opposing party. *See Salas-Porras,* 6 F. Supp. 2d at 624 (noting that disqualification is frequently the most appropriate remedy for protecting a party's confidences).

(1) Wrongful Acquisition

Although few cases directly address the issue, some federal courts have held that an attorney is per se disqualified from working on any case in which he has wrongfully acquired an opposing party's privileged information. *See Rentclub, Inc. v. Transamerica Rental Finance Corp.*, 811 F. Supp. 651, 655-56 (M.D. Fla. 1992); *MMR/Wallace Power & Indus., Inc. v. Thames Assocs.*, 764 F. Supp. 712, 714-15 (D. Conn. 1991).

The rule in Texas state court may arguably be the same. *See Contico Int'l, Inc. v. Alvarez*, 910 S.W.2d 29, 35 (Tex. App.—El Paso 1995, orig. proceeding) (applying a per se rule of disqualification against an attorney who illegally obtained a copy of the opposing party's litigation notebook), *vacated and mandamus granted sub. nom., Mendoza v. Eighth Court of Appeals*, 917 S.W.2d 787 (Tex. 1996). Although the Texas Supreme Court vacated the court of appeals decision in *Contico,* the decision in *Contico* may still accurately reflect Texas law where an attorney *wrongfully* acquires an opposing party's privileged information. *See Meador*, 968 S.W.2d at 354 (distinguishing between wrongful and innocent acquisition).

(2) Innocent Acquisition

The innocent acquisition of an opposing party's privileged information presents an entirely different situation from the wrongful acquisition of an opposing party's privileged information. *See Meador*, 968 S.W.2d at 354 (acquisition was innocent where the attorney obtained the documents from his client). While the wrongful acquisition of an opposing party's privileged information may result in the per se disqualification of an attorney, there is no such bright line standard when an attorney innocently receives an opposing party's privileged information. *Id.*

Where an attorney innocently acquires a party's privileged documents outside of the discovery process, a trial court may consider several factors in deciding whether to disqualify the attorney:

(i) whether the attorney knew or should have known that the material was privileged;

(ii) the promptness with which the attorney notified the opposing side that he or she received its privileged information;

(iii) the extent to which the attorney reviewed or digested the privileged information;

(iv) the significance of the privileged information, *i.e.*, the extent to which its disclosure may prejudice the moving party's claim or defense, and the extent to which return of the documents will mitigate that prejudice;

(v) the extent to which the moving party may be at fault for the unauthorized disclosure; and

(vi) the extent to which the nonmovant will suffer prejudice from the disqualification of his or her counsel.

Meador, 968 S.W.2d at 351-52. These factors apply only when a lawyer receives an opposing party's privileged information outside the normal course of discovery. "If a lawyer receives privileged materials because the opponent inadvertently produced them in discovery, the lawyer ordinarily has no duty to notify the opponent or voluntarily return the materials." *Id.* at 352. *See In re Nitla S.A. de C.V.*, 92 S.W.3d 419, 423 (Tex. 2002) (orig. proceeding).

In some instances, the balance of these factors may require disqualification even though the attorney has himself done nothing overtly wrong. *See Meador*, 968 S.W.2d at 351 ("[S]ituations may exist where the attorney does everything within his or her power to mitigate the harm from the disclosure, yet the privileged information is so sensitive that disqualification is necessary to ensure a fair trial."). But in other instances, disqualification may not be necessary. *Meador*, 968 S.W.2d at 351. *See also Milford Power L.P. v. New England Power Co.*, 896 F. Supp. 53, 58-59 (D. Mass. 1995); *Resolution Trust Corp. v. First of Am. Bank*, 868 F. Supp. 217, 220 (W.D. Mich. 1994).

Where an attorney innocently acquires a party's privileged documents through the discovery process (such as where a trial court orders the party to produce the documents and an appellate court later determines that the documents are privileged), the party must establish two conditions to disqualify the attorney: (i) that the attorney's review of the privileged documents caused the party to suffer actual harm; and (ii) that the trial court lacks any lesser means than disqualification to remedy the party's harm. *Nitla*, 92 S.W.3d at 423. Under this test, disqualification is improper where the trial court may cure the moving party's harm through less severe means. *Id.* (noting that where the attorney's review of the documents had allowed the attorney to identify four additional deponents, the trial court could properly remedy the harm by quashing the depositions of the additional deponents).

b. ***Communications With Represented Parties***

Rule 4.02(a) of the Texas Disciplinary Rules of Professional Conduct states that an attorney may not discuss the subject of a lawsuit with another party that "the lawyer knows to be represented by another lawyer regarding that subject, unless the lawyer has the consent of the other lawyer or is authorized by law to do so." TEX. DISC. R. 4.02(a). *See* MODEL RULES OF PROF. CONDUCT § 4.2 (1996); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 99 (2000) ("A lawyer representing a client in a matter may not communicate about the subject of the representation with a nonclient whom the lawyer knows to be represented in the matter by another lawyer. . . .").

The rule forbidding communications with represented parties does not require an adversity of interests. "[T]he anti-contact prohibition extends to any nonclient that the contacting lawyer knows to be represented by counsel in the matter in which the lawyer is representing a client. It is not limited to situations of opposing parties in litigation or in which persons otherwise have adverse interests." RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 99 cmt. c (2000).

Not only does this rule bar an attorney from contacting a represented party, but it also bars an attorney from communicating with another party's experts. *See Cramer v. Sabine Transp. Co.*, 141 F. Supp. 2d 727, 730 (S.D. Tex. 2001); *see also* TEX. DISC. R. 4.02 cmt. 3 ("[T]his Rule provides that unless authorized by law, experts employed or retained by a lawyer for a particular matter should not be contacted by opposing counsel regarding the matter without the consent of the lawyer who retained them."); Nellermoe & Rodriguez, *supra*, at 495 ("[T]he rule prohibits an attorney from contacting the opposing counsel's expert witness without that lawyer's consent.").

(1) Willful Violation

A court may disqualify an attorney who willfully violates the rule forbidding communications with a represented party. *See Weeks v. Independent School Dist. No. I-89*, 230 F.3d 1201, 1211 (10th Cir. 2000); *Trimper v. Terminix Int'l Co.*, 82 F. Supp. 2d 1, 6 (N.D.N.Y. 2000); *Papanicolaou*, 720 F. Supp. at 1085. This is true even if the represented party initiated the communications. *See Shelton v. Hess*, 599 F. Supp. 905, 911 (S.D. Tex. 1984) (disqualifying an attorney who failed to terminate communications initiated by a party whom the attorney knew to be represented by counsel).

Disqualification is appropriate in this situation because an attorney who engages in communications with a party whom he knows to be represented by counsel has not merely committed an ethical violation, but also has potentially acquired that party's confidential information through improper means. *See Papanicolaou*, 720 F. Supp. at 1086; *Shelton*, 599 F. Supp. at 910. A Chinese Wall

will not cure the violation. If an attorney is disqualified because he engaged in communications with a represented party, then his entire law firm is probably disqualified on the basis of the irrebuttable presumption of shared knowledge within the law firm. *Papanicolaou*, 720 F. Supp. at 1087.

(2) Inadvertent or Innocent Communications

To violate the rule forbidding communications with a represented party, an attorney must *know* that he is engaging in communications with a party who is *actually represented* by counsel:

(a) *Personal Knowledge.* If an attorney did not *know* that a party was represented by counsel at the time of his communications with that party, then the attorney has not willfully violated the rule forbidding communications with a represented party. *See In re Users Sys. Serv., Inc.*, 22 S.W.3d 331, 334 (Tex. 1999) ("Rule 4.02 forbids a lawyer from communicating with another person only if the lawyer *knows* the person has legal counsel in the matter.") (emphasis in original); *see also Tannahill v. United States*, 25 Cl. Ct. 149, 165-66 (1992). In that instance, the attorney may be disqualified only if (i) he acquired privileged information from the party and (ii) the balance of factors shows that he should be disqualified for his innocent acquisition of another party's privileged information. *Users Sys. Serv., Inc.*, 22 S.W.3d at 336. *See supra* Section B.7.a.(2) (discussing the *Meador* factors).

(b) *Actual Representation*. Irrespective of the attorney's knowledge or intent, an attorney does not violate the rule forbidding communications with a represented party if the party was not actually represented by counsel at the time of the communications. *Users Sys. Serv., Inc.*, 22 S.W.3d at 335-36. *But see* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 103 (2000) (describing the ethical duties that attorneys owe to unrepresented parties).

C. DISQUALIFICATION OF CO-COUNSEL

Courts are generally reluctant to disqualify co-counsel simply on the basis of the prior disqualification of their colleagues from another law firm. While courts may disqualify a law firm on the basis of an irrebuttable presumption of shared knowledge between the law firm and its tainted attorney or employee, they will not carry this presumption to the next step—*i.e.*, they will not apply an irrebuttable presumption of shared knowledge between a disqualified law firm and its co-counsel. "Carriage of this imputation-on-an-imputation to its logical terminus could lead to extreme results in no way required to maintain public confidence in the bar." *American Can Co.*, 436 F.2d at 1129. *See Brennan's, Inc.*, 590 F.2d at 174; *Smirl v. Bridewell*, 932 S.W.2d 743, 744-45 (Tex. App.—Waco 1996, orig. proceeding).

Nonetheless, even in the absence of an irrebuttable presumption of shared knowledge, courts have occasionally disqualified co-counsel from continuing to work on a matter:

1. **Relationship With Tainted Law Firm**

A court may have to disqualify co-counsel when the moving party can establish an especially close relationship or affiliation between the disqualified law firm and its co-counsel. *See Fund of Funds, Ltd. v. Arthur Andersen & Co.*, 567 F.2d 225, 236 (2d Cir. 1977).

2. **Relationship With Tainted Attorney or Employee**

Even if the relationship between the disqualified law firm and its co-counsel is not especially close, a court may have to disqualify co-counsel if it had substantial contact with the tainted attorney or employee. *See American Home Prod. Corp.*, 985 S.W.2d at 77 (noting that disqualification is required if the tainted attorney or employee and co-counsel "worked so closely together or the nature of their communications was such that there is a substantial likelihood that confidential information was shared"); *see also Ledwig v. Cuprum, S.A.*, No. SA-03-CA-542-RF, 2004 WL 573650, *3 (W.D. Tex. 2004).

If the basis for disqualification is a tainted former employee, secretary or paralegal, the moving party need only show that there was contact or communication between the tainted employee and co-counsel. The burden then "shifts to the party resisting disqualification of co-counsel to offer evidence that there was no reasonable prospect that the opposing party's confidential information was disclosed and that it was not in fact disclosed." *American Home Prod. Corp.*, 985 S.W.2d at 77-78. The party resisting disqualification may satisfy this burden by showing (i) that the only contact or communication between the tainted employee and co-counsel involved "casual greetings or similar, passing contact," (ii) that the contact or communication was in no way related to any matters from which the tainted employee should have been screened, or (iii) that the contact or communication ran only from co-counsel to the tainted employee, and not vice versa. *Id.* at 78.

If the basis for disqualification is a tainted attorney, the moving party need only show that "there were substantive conversations between disqualified counsel and co-counsel, joint preparation for trial by those counsel, or the apparent receipt by co-counsel of confidential information." *Ledwig*, 2004 WL 573650, at *3. At that point, a court will presume that the tainted attorney shared confidential information with his co-counsel. "[T]he party resisting disqualification of co-counsel may rebut this presumption by providing probative and material evidence that confidential information was not disclosed to them." *Id.*

D. SUCCESSOR COUNSEL

After a client selects successor counsel to replace a disqualified lawyer or law firm, the successor counsel will obviously want to have access to any materials relating to the representation. By the same token, however, the party who sought to disqualify prior counsel will want to ensure that these materials do not themselves reveal any of the confidences that formed the basis for their original motion to disqualify. "A file of the work done on a matter before disqualification by a disqualified lawyer may be provided to a successor lawyer in circumstances in which doing so does not threaten confidential information . . . of the successful moving client." RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 6 cmt. i (2000).

1. **Pleadings, Discovery and Correspondence**

Pleadings, discovery, correspondence and other materials in the public record are unlikely to contain any confidential information. Accordingly, when an attorney is disqualified, "successor counsel is presumptively entitled to obtain the pleadings, discovery, correspondence and all other materials in the public record or exchanged by the parties." *In re George*, 28 S.W.3d 511, 514 (Tex. 2000). If the party who successfully moved to disqualify prior counsel believes that any of these documents contain confidential information, he may move to seal these documents or move for a protective order. *Id. See* TEX. R. CIV. P. 76a & 192.6.

2. **Work Product**

While pleadings, discovery and correspondence do not ordinarily contain any confidential information, the work product of prior counsel "is a much more serious matter." *George*, 28 S.W.3d at 515. The standards governing the work product of prior counsel apparently differ from state to federal court.

a. ***Texas State Court***

Texas state courts apply a rebuttable presumption that the work product of prior counsel contains confidential information. *George*, 28 S.W.3d at 518. "'The ability to rebut the presumption of taint protects the current client's legitimate interest in its current counsel having access to whatever untainted work product has already been generated on its behalf, presumably at its expense." *Id.*

(1) Procedure

Successor counsel should file a motion for access to the work product of prior counsel. *See George*, 28 S.W.3d at 518. If the party who successfully moved to disqualify prior counsel opposes the motion—or if that party files its own motion to restrict access to the work product of prior counsel—the trial court should order the disqualified prior counsel to produce an inventory of its work product. *Id.* "For each

item of work product created, the inventory should describe the type of work, the subject matter of the item, the claims it relates to and any other factor the court considers relevant." *Id.* A trial court generally should try to reach its decision on the basis of this inventory, but if absolutely necessary, the court may review the disputed work product in camera. *Id.* at 519.

(2) Rebuttal of the Presumption

To rebut the presumption that prior counsel's work product contains confidential information, the party who retained successor counsel must show "that there is not a substantial likelihood that the desired items of work product contain or reflect confidential information." *George*, 28 S.W.3d at 518. In determining whether that party has met this burden, the trial court may consider several rules of thumb:

(a) *Relationship of the Work Product to the Disqualifying Event.* If the work product is unrelated to any matter that formed the basis for the disqualification of prior counsel, then it probably does not contain any confidential information. *See id.* (questioning whether the work product contains any confidential information when prior counsel prepared the work product long after the events that created the basis for its eventual disqualification).

(b) *Nature of the Work Product.* If the work product is simply a deposition summary or an index of pleadings or document production, it probably does not contain any confidential information. *Id.* at 519.

(c) *Subject Matter of the Work Product.* If the work product relates to purely legal rather than factual issues, it probably does not contain any confidential information. For instance, "[l]egal research on certain procedural or evidentiary issues is unlikely to be tainted." *Id.* By contrast, an attorney's notes relating to his investigation of background facts may very likely contain confidential information. *Id.*

b. ***Federal Court***

The federal courts have reached no consistent standard on the proper treatment of a prior counsel's work product. *See EZ Paintr Corp. v. Padco, Inc.*, 746 F.2d 1459, 1463 (Fed. Cir. 1984) (applying an irrebuttable presumption that the work product contains confidential information); *First Wis. Mortgage Trust v. First Wis. Corp.*, 584 F.2d 201, 203 (7th Cir. 1978) (placing the burden on the party who successfully disqualified prior counsel to show that the work product contains confidential information); *Behunin v. Dow Chem. Co.*, 642 F. Supp. 870, 872 (D. Colo. 1986) (applying a hybrid balancing test). The Fifth Circuit has not yet considered this issue.

E. WAIVER

A party may waive its right to seek disqualification if it fails to file a timely motion to disqualify. *See Alexander v. Primerica Holdings, Inc.*, 822 F. Supp. 1099, 1115 (D.N.J. 1993); *Grant*, 888 S.W.2d at 468; *Vaughn v. Walther*, 875 S.W.2d 690, 690 (Tex. 1994).

1. Length of Delay

In deciding whether a party has waived its right to seek disqualification, the trial court should consider the length of the delay from the time that the conflict became apparent to the moving party to the time that the party filed its motion to disqualify. *See Butler*, 987 S.W.2d at 224-25; *Wasserman*, 910 S.W.2d at 568. A delay of more than six months will commonly justify a finding of waiver. *See, e.g.*, *Alexander*, 822 F. Supp. at 1116 (three years); *Vaughn*, 875 S.W.2d at 691 (six and a half months). Absent evidence that the moving party filed the motion purely as a trial tactic, a delay of less than six months will not commonly support a finding of waiver. *See Montgomery Academy v. Kohn*, 82 F. Supp. 2d 312, 318 (D.N.J. 1999) (three months); *Salas-Porras*, 6 F. Supp. 2d at 621 (five months); *Islander E. Rental Program*, 917 F. Supp. at 508 (four months); *Rio Hondo Implement Co.*, 903 S.W.2d at 131 (four months); *Westergren*, 794 S.W.2d at 815 (three months).

2. Evidence that Motion is Trial Tactic

A trial court may also consider any other evidence indicating that the moving party filed its motion to disqualify as a dilatory trial tactic rather than a legitimate exercise of its rights. *Wasserman*, 910 S.W.2d at 568. *See also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 6 cmt. i (2000) ("Concern that motions to disqualify might be used to delay proceedings and harass opposing parties . . . requires that the motion to disqualify be timely.").

If, for instance, the moving party files its motion on the eve of trial, the motion is probably nothing more than a dilatory tactic that a trial court may properly reject on waiver grounds. *See Abney*, 984 F. Supp. at 530; *Enstar Petroleum Co.*, 773 S.W.2d at 664; *see also Commissioners Court of Dallas County v. Buster*, No. 08-02-00048-CV, 2003 WL 22810455, *1 (Tex. App.—El Paso Nov. 25, 2003, pet. denied) (not designated for publication) (motion filed less than 30 days prior to trial); *Davis v. Weatherston*, No. 04-00-00533-CV, 2002 WL 871407, *6 (Tex. App.—San Antonio May 8, 2002, no pet. h.) (not designated for publication) (motion filed after trial). "The untimely urging of a disqualification motion lends support to any suspicion that the motion is being used as a tactical weapon." *Grant*, 888 S.W.2d at 468.

F. APPELLATE REVIEW

After a trial court has granted or denied a motion to disqualify, the standard of appellate review is *abuse of discretion*. *See Dresser Indus., Inc.*, 972 F.2d at 542 n.4; *Cap Rock Elec. Co-op, Inc.*, 35 S.W.3d at 231; *Warrilow*, 791 S.W.2d at 520. A trial court abuses its discretion when it (i) acts in an unreasonable or arbitrary manner or (ii) acts without reference to any guiding rules or principles. *Troutman*, 960 S.W.2d at 178. An appellate court may not reverse for an abuse of discretion merely because it disagrees with the trial court. *Id. See also Clarke*, 819 S.W.2d at 949 ("The fact that a trial judge exercised its discretionary authority in a manner different than an appellate judge might in a similar circumstance does not demonstrate that an abuse of discretion has occurred.").

Although the abuse of discretion standard is deferential to the trial court's findings of fact, the appellate courts will carefully analyze the trial court's legal conclusions. If the trial court misapplies the rules of disqualification, an appellate court may easily conclude that the trial court abused its discretion. *See FDIC*, 50 F.3d at 1311; *see also American Airlines, Inc.*, 972 F.2d at 609 ("Whatever deference is due the [trial] court's factual findings, little or no deference is proper in reviewing its interpretation of ethical rules."). "[A] clear failure by the trial court to analyze or apply the law correctly will constitute an abuse of discretion. . . ." *Bahn*, 13 S.W.3d at 872.

1. **Mandamus**

In Texas state court, mandamus is the preferred method for reviewing a trial court order that grants or denies a motion to disqualify. *See Godbey*, 924 S.W.2d at 133 (mandamus review of a trial court's denial of a motion to disqualify); *Schwartz*, 930 S.W.2d at 959 (mandamus review of a trial court's granting of a motion to disqualify); *see also Bahn*, 13 S.W.3d at 872 ("The granting or denial of a motion to disqualify is reviewable by mandamus."). The same is not necessarily true in federal court. *See In re Lewis*, 212 F.3d 980, 982 (7th Cir. 2000) (arguing that mandamus review of a disqualification order is proper only under "exceptional circumstances"); *see also American Airlines*, 972 F.2d at 608.

To obtain mandamus relief, a party must show (i) that the trial court committed a clear abuse of discretion and (ii) that the party has no adequate remedy by appeal. *See In re Barnett*, 97 F.3d 181, 183-84 (7th Cir. 1996); *Godbey*, 924 S.W.2d at 128; *Bahn*, 13 S.W.3d at 872. A party seeking relief from an adverse ruling on a motion to disqualify must timely file its petition for writ of mandamus. *See In re Little*, 998 S.W.2d 287, 290 (Tex. App.—Houston [1st Dist.] 1999, orig. proceeding) (holding that a petition for writ of mandamus was barred by laches where the relators filed the petition five months after the trial court signed its order denying their motion to disqualify).

a. ***Clear Abuse of Discretion***

As abuse of discretion is the standard of review in any event, a party may usually satisfy this element for mandamus relief by offering the same arguments and evidence it would use to show that the trial court incorrectly disqualified its counsel or refused to disqualify opposing counsel. *See Cap Rock Elec. Co-op, Inc.*, 35 S.W.3d at 231. *But cf. Barnett*, 97 F.3d at 183-84 (emphasizing that, for mandamus purposes, the abuse of discretion must be "clear").

b. ***Adequacy of Remedy by Appeal***

Texas state appellate courts readily agree that an appeal from a final judgment is ordinarily an inadequate remedy for an incorrect ruling on a motion to disqualify. Mandamus review of an order that improperly grants a motion to disqualify is appropriate because "disqualification is a severe remedy resulting in immediate and palpable harm that disrupts the trial court proceedings and deprives a party of the right to have counsel of choice." *Schwartz*, 930 S.W.2d at 959. *See Nitla*, 92 S.W.3d at 422 ("A party generally lacks an adequate appellate remedy if its counsel is disqualified."). Similarly, mandamus review of an order that improperly denies a motion to disqualify is appropriate because "the injury to the legal profession from representation by lawyers who are disqualified cannot be cured by appeal." *Godbey*, 924 S.W.2d at 133. *See also Coker*, 765 S.W.2d at 400.

By contrast, federal appellate courts are more reluctant to concede that an appeal is an inadequate remedy. *See Lewis*, 212 F.3d at 983 (arguing that the mere fact that disqualification may cause a party to incur additional costs does not constitute an irreparable injury). The Fifth Circuit has stressed that mandamus may not serve as a substitute for appeal, but it has also recognized that "the standard governing the availability of mandamus is not 'never,' but 'hardly ever.'" *American Airlines, Inc.*, 972 F.2d at 608. Where the nature and size of the litigation may preclude effective appellate review, the Fifth Circuit will not hesitate to grant a writ of mandamus against an improper ruling on a motion to disqualify. *See id.* at 609; *Dresser Indus., Inc.*, 972 F.2d at 543.

2. **Interlocutory Appeal**

An order granting or denying a motion to disqualify is not an appealable collateral order. *See Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 440 (1985); *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 377 (1981). Thus, federal appellate courts ordinarily have no jurisdiction to hear an interlocutory appeal from an order granting or denying a motion to disqualify. *See Resolution Trust Corp. v. Bright*, 6 F.3d 336, 340 n.5 (5th Cir. 1993). Texas state appellate courts likewise have no jurisdiction to hear an interlocutory appeal from an order granting or denying a motion to disqualify. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014 (Vernon 2004).

Arguably, under the federal interlocutory appeal statute, a federal court may, in its discretion, give a party leave to pursue an interlocutory appeal from an order granting or denying a motion to disqualify. 28 U.S.C. § 1292(b). Federal courts in Texas, however, have been largely unwilling to exercise that discretion. *See Salas-Porras*, 6 F. Supp. 2d at 626 n.11; *Islander E. Rental Program*, 917 F. Supp. at 514-15.

3. **Appeal from Final Judgment**

An order granting or denying a motion to disqualify is reviewable on appeal from a final judgment. *See Brennan's, Inc.*, 590 F.2d at 171. The major difference between an appeal from a final judgment and a mandamus—aside from the timing of relief—is that an appellant must show harmful error. In an appeal from a final judgment, an appellant must show that the trial court's order probably caused "the rendition of an improper judgment." *Warrilow*, 791 S.W.2d at 520. *See also Bullock v. Kehoe*, 678 S.W.2d 558, 560 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.).

CONCLUSION

Disqualification is a potentially harsh penalty. Texas attorneys should be aware of the circumstances that may require disqualification—*e.g.*, creating potential conflicts of interest with former or current clients, receiving confidential information from other parties, initiating events that may require them to testify as witnesses at trial, and communicating with another party's employees or witnesses. By being wary of these circumstances, Texas attorneys may take appropriate steps to avoid the trap of disqualification.