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Successive Conflicts of Interest and the Motion to Disqualify: The Impact of the Texas Rules of Professional Conduct

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SUCCESSIVE CONFLICTS OF INTEREST AND THE MOTION TO DISQUALIFY: THE IMPACT OF THE TEXAS RULES OF PROFESSIONAL CONDUCT

Jeffrey Garon

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I. INTRODUCTION
   A. THE PROBLEM

THE unrestrained growth of business and industry that defined the 1980s has ended, and the early 1990s have represented recession and a tightening of the corporate beltstrap. Not only has business been affected, forced into breakups and mergers, but the law firm philosophy has also undergone significant cognitive revision. The forced down-sizing of firms has required a substantial number of attorneys to relocate, transferring to other firms or practicing individually. The shifting of lawyers in conjunction with the reorganization of many corporate clients creates a consid-

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erable risk that attorneys may take on cases where they represent interests adverse to those of a former client.  

While representations adverse to a former client are typically not completely forbidden, both attorneys and their clients often prefer to avoid these situations for reasons ranging from the fear of disclosed confidences, to the desire to keep the integrity of the legal profession intact, or to the attempt to maintain a fair trial. The most immediate way to address a conflict of interest problem in litigation is by submitting a motion to disqualify to the court.

Such a motion can have quite drastic effects on the lawsuit. The mere submission of a motion to disqualify will be expensive to the clients in both time and money. Furthermore, in the case of a ruling for disqualification, the client will be deprived of the attorney of his choice and will also lose all of the work that his lawyer had already prepared. The disqualified attorney faces losing a substantial amount of effort as well as the fees which would have been received had his representation continued. Moreover, his professional reputation may suffer, and he may even face an ethical investigation. Also, through the principle of imputed disqualification, the entire law firm, including all of its offices in every state, risk being similarly disqualified.

In recent years, the rules that attorneys use as guidelines when presented with the problem of representing interests adverse to a former client have

2. Accord id. For example, as many as nine partners left due to client conflicts after the merger of Chicago's Winston & Strawn with D.C.'s Bishop, Cook, Purcell & Reynolds. Diane E. Ambler, Lateral Hiring Conflicts, PRENTICE HALL L. & BUS. INSIGHTS, June 1991, at 7 n.1.


4. For further discussion of these and other reasons, see both the ethical and procedural considerations infra at notes 28 to 42 and accompanying text.

5. See Harva Ruth Dockery, Note, Motions to Disqualify Counsel Representing an Interest Adverse to a Former Client, 57 TEX. L. REV. 726, 726 n.2 (1979). "Disqualification is the administrative remedy a court uses when it orders an attorney to withdraw from a case. It is not a civil remedy or a disciplinary action." Id.; see also Note, Disqualification of Attorneys for Representing Interests Adverse to Former Clients, 64 YALE L.J. 917, 917-21 (1955).

6. Developments in the Law—Conflicts of Interest in the Legal Profession, 94 HARV. L. REV. 1244, 1486-96 (1981) [hereinafter Developments—Conflicts] (stating not only will the court's attention be drawn away from the merits of the case, but the clients will be billed for the time spent arguing the motion).

7. See Spickelmier & Kattner, supra note 1, at 406.

8. See Dockery, supra note 5, at 741.


Disqualifying the associates of a disqualified attorney . . . may impede the formation of new firms, the growth of existing firms, and the mobility of attorneys. In addition vicarious disqualification may discourage specialization since many specialists have limited clientele. [Thus] [t]he risk of disqualification severely limits the number of potential clients for both the individual attorney and his entire firm.

Dockery, supra note 5, at 741 n.80.
been subjected to numerous changes. Because the dust from past revisions has only just begun to settle and the winds of change, blowing from unresolved dilemmas, have again begun to stir, this comment will attempt to explain the current conditions that govern courts' determinations of disqualification motions and also give an accurate forecast of the future.

B. SCOPE

In many instances, the propriety of an attorney's representation of a given client is questionable, and a party will entertain a motion to disqualify the opposing counsel. This comment will focus solely on those problems that arise in civil litigation due to conflicts of interest created by an attorney representing interests adverse to a former client. These conflicts of interest are often labeled "successive conflicts of interest" as opposed to "concurrent conflicts of interest" which arise when a law firm attempts to represent two clients at the same time who may have different interests.\textsuperscript{10} Determinations of the existence of successive conflicts and concurrent conflicts are governed by different standards, the latter being a much more stringent standard.\textsuperscript{11} The scope of this comment does not encompass attorney disqualifications in the criminal context; those, too, have a different, more restrictive standard.\textsuperscript{12}

The analysis of the law as it relates to motions to disqualify for successive conflicts of interest will focus primarily on the law as it is applied in Texas and the Fifth Circuit. The first section examines the ethical standards that govern an attorney's decision to oppose a former client. Thereafter, this comment addresses the court's authority to order a disqualification. Next, the reasons to use a motion to disqualify during a lawsuit rather than another remedy are considered. The manner in which disqualification motions are treated by courts with regard for the most recent court cases will also be addressed. Finally, some recalcitrant problems that occur in determining whether to disqualify an attorney for a conflict of interest with a former client will be examined.

\textsuperscript{10} Spickelmier & Kattner, supra note 1, at 406-07.
\textsuperscript{11} Id.


\textsuperscript{12} See Dockery, supra note 5, at 726 n.1.
II. ETHICAL CONSIDERATIONS

In Texas, the ethical rules articulate the circumstances in which an attorney should not represent an interest adverse to a former client. Although this comment addresses successive conflicts of interest as a basis for attorney disqualification rather than ethical sanctioning, the considerations have become so intertwined that an understanding of the relevant ethical principles is nonetheless required. The reason for this complex interrelationship is that Texas has no rule governing when an attorney should be disqualified for representing an interest adverse to a former client. The ethical rules, however, do provide a standard for judging whether the representation is proper. So, despite the fact that ethical rules are not procedural guidelines, their standards, which are couched in terms of how a reasonable attorney properly conducts himself, have a great impact on the determination of whether a representation is unreasonable, and thus should result in a disqualification.

A. HISTORY

Although the ethical behavior of lawyers is largely self-governing, the Supreme Court of Texas has the authority to oversee the practice of law and insure the proper administration of justice, and the State Bar administers the rules of the judicial branch. Until 1990, the standards of attorney conduct in Texas were set by a code of professional responsibility based, like most other states, on a model code. The Codes were made up of canons, ethical considerations, and disciplinary rules, varying in authority from mandatory to aspirational. This trifurcated format was very difficult for attorneys to understand and to use as a gauge for determining appropriate behavior.


15. See Dockery, supra note 5, at 729-30.

16. TEX. DISCIPLINARY R. PROF. CONDUCT preamble ¶ 9 (1993); Newton, supra note 13, at 557; see also TEX. DISCIPLINARY R. PROF. CONDUCT preamble ¶ 11 (stating "Compliance with the rules . . . depends primarily upon understanding and voluntary compliance").


18. Newton, supra note 13, at 557.


21. See Allen, supra note 11, at 740; Newton, supra note 13, at 559.
B. CURRENT STATE OF AFFAIRS

In 1990, Texas promulgated a set of new rules to establish proper conduct for attorneys which are entitled the Texas Disciplinary Rules of Professional Conduct.\textsuperscript{22} One of the overriding causes for the change was to make the rules easier to understand.\textsuperscript{23} Instead of combining aspirational and mandatory rules, the Texas Disciplinary Rules consist only of rules, all of which are mandatory.\textsuperscript{24} The Rules are intended as standards “for [the] purposes of professional discipline.”\textsuperscript{25} They make no attempt, nor were they intended, to suggest penalties or disciplinary procedures for their violation.\textsuperscript{26} Similarly, they neither make a legal duty nor create civil liability for lawyers.\textsuperscript{27}

C. TEXAS RULE 1.09\textsuperscript{28}

Before the advent of the Texas Disciplinary Rules, no one rule specifically protected the interests of clients who had to face their former attorney in an adverse situation.\textsuperscript{29} The duty to avoid a successive conflict of interest was expressed in conjunction with three different ethical rules.\textsuperscript{30} The code provisions were the duty of confidentiality (which continues even beyond termination of representation),\textsuperscript{31} the duty to exercise independent judgment on behalf of the client,\textsuperscript{32} and the duty to avoid even the appearance of impropriety.\textsuperscript{33} The lack of a clear rule devoted to the subject of former client conflicts resulted in uncertainty, thus Rule 1.09 was crafted to fill the void.\textsuperscript{34} The rule is based in part on the model rule, but includes significant alterations.\textsuperscript{35} Texas rule 1.09, entitled “Conflict of Interest: Former Client,” reads

\begin{itemize}
\item \textsuperscript{22} TEX. DISCIPLINARY R. PROF. CONDUCT (1993).
\item \textsuperscript{24} Id. “By promulgating only rules, the Texas Disciplinary Rules constitute a substantial improvement over the Code because they clarify the boundaries of permissive conduct that were unclear under the former standard.” Allen, supra note 11, at 740. Aspirational guidelines are still present in the form of comments, which aid interpretation of the rules and are purely advisory. See TEX. DISCIPLINARY R. PROF. CONDUCT preamble ¶ 10 (1990).
\item \textsuperscript{25} TEX. DISCIPLINARY R. PROF. CONDUCT preamble ¶ 10 (1990).
\item \textsuperscript{26} Id. ¶¶ 14-15.
\item \textsuperscript{27} Id.; see also Sutton & Newton, supra note 23, at 562 (explaining that the rules are “substantive law for disciplinary proceedings” [emphasis added]).
\item \textsuperscript{28} TEX. DISCIPLINARY R. PROF. CONDUCT 1.09 (1993).
\item \textsuperscript{30} Dockery, supra note 5, at 728.
\item \textsuperscript{31} See MODEL CODE OF PROF. RESPONSIBILITY, DR 4-101 (1980).
\item \textsuperscript{32} See MODEL CODE OF PROF. RESPONSIBILITY, DR 5-107 (1980).
\item \textsuperscript{33} See MODEL CODE OF PROF. RESPONSIBILITY, DR 9-101 (1980).
\item \textsuperscript{34} See generally Schuwerk & Sutton, supra note 29, at 147-48 (providing an exhaustive analysis of Rule 1.09, as well as, each of the other rules, published when the Texas Disciplinary Rules were first promulgated and filling an entire volume).
\item \textsuperscript{35} Model Rule 1.9 reads:
\begin{itemize}
\item (a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person’s interests are materially adverse to the interests of the former client unless the former client consents after consultation.
\item (b) A lawyer shall not knowingly represent a person in the same or a substan-
as follows:

(a) Without prior consent, a lawyer who personally has formerly represented a client in a matter shall not thereafter represent another person in a matter adverse to the former client:

(1) in which such other person questions the validity of the lawyer’s services or work product for the former client; or

(2) if the representation in reasonable probability will involve a violation of Rule 1.05 [which protects present and former client confidentiality];

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

The Rule also extends the prohibition of paragraph (a) to all of the members of a law firm:

(b) Except to the extent authorized by Rule 1.10 [the rule for former government employees], when lawyers are or have become members of or associated with a firm, none of them shall knowingly represent a client if any one of them practicing alone would be prohibited from doing so by paragraph (a).\(^3\)

The treatment of all lawyers in a firm as one for purposes of creating a conflict of interest is often called the principle of imputed disqualification or vicarious disqualification.

The Rule also addresses what representations are improper even after lawyers leave:

(c) When the association of a lawyer with a firm has terminated, the lawyers who were then associated with that lawyer shall not knowingly represent a client if the lawyer whose association with that firm has terminated would be prohibited from doing so by paragraph (a)(1) or if the representation in reasonable probability will involve a violation of Rule 1.05.\(^3\)

Prior to the incorporation of Rule 1.09, former clients were well protected from having privileged confidences later used against them; however, the former client had few disciplinary remedies against a lawyer who improperly switched allegiance and represented an opposing party.\(^3\) A primary concern of the loyalty component is to protect the work done for the former client from being later undermined by the same lawyer.\(^4\) In addition to protecting confidences and loyalty, the rule also seeks to protect other information given in confidence by the former client, even if not privileged.\(^4\)

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\(^3\) Initially related matter in which a firm with which the lawyer formerly was associated had previously represented a client

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter, unless the former client consents after consultation.


36. TEX. DISCIPLINARY R. PROF. CONDUCT 1.09(a) (1993).
37. TEX. DISCIPLINARY R. PROF. CONDUCT 1.09(b) (1993).
38. TEX. DISCIPLINARY R. PROF. CONDUCT 1.09(c) (1993).
40. Id. at 147-48.
41. Id. at 148.
The prohibitions of the rule are not designed to be so broad as to totally prohibit a lawyer from opposing the interests of a former client.\textsuperscript{42} Also, fact specific factors, such as the size of the law firm and scope of the former relationship, are relevant in determining whether opposing a former client is ethical.\textsuperscript{43} As the purpose of the rule is for the protection of the former client, the client may waive its protections.\textsuperscript{44} Finally, the strong competing interest of an individual to have the attorney of his choice serves to lessen the breadth of Rule 1.09.\textsuperscript{45}

III. AUTHORITY OF THE COURT

Despite the fact that an independent agency exists to determine whether an attorney has behaved unethically, the courts may be asked to rule on a motion for disqualification when a party believes the opposing lawyer is representing conflicting interests. Undeniably, the court is not the proper forum for conducting disciplinary hearings or ethically sanctioning lawyers.\textsuperscript{46} Courts do, however, have the authority over lawyers to determine whether an attorney's appearance before them will be permitted.\textsuperscript{47}

The Texas Supreme Court has authority to make the rules governing all persons practicing law in the state, and this power can be used to justify disqualifications.\textsuperscript{48} The Texas Supreme Court has also held that it is the trial court’s duty to be an internal regulator of the legal profession and disqualify counsel when necessary.\textsuperscript{49}

Similarly, federal courts have the power to discipline and regulate attorneys appearing before it.\textsuperscript{50} Authority for courts to do all that is reasonably necessary to administer justice in their jurisdiction is derived from the inherent powers doctrine.\textsuperscript{51} Also, federal statute dictates that the courts have the power to manage and conduct the cases before them.\textsuperscript{52} Federal courts have used these powers to justify attorney disqualification.\textsuperscript{53}

\begin{itemize}
\item \textsuperscript{42} \textit{Tex. Disciplinary R. Prof. Conduct} 1.09 cmt. 3 (1993).
\item \textsuperscript{43} \textit{Id.} cmt. 2.
\item \textsuperscript{44} \textit{Id.} cmt. 10.
\item \textsuperscript{45} Schuwerk & Sutton, \textit{supra} note 29, at 148-49. Typically courts have expressed the importance of a client’s undeniable right to obtain the attorney of his choice when invalidating even reasonable covenants not to compete among attorneys. \textit{See, e.g.}, Dwyer v. Jung, 348 A.2d 208 (N.J. Super. App. Div. 1975).
\item \textsuperscript{46} In Texas, the State Bar addresses those functions. \textit{Tex. Gov’t Code Ann.} § 81.012 (Vernon 1993).
\item \textsuperscript{47} \textit{See} Mark F. Anderson, \textit{Motions to Disqualify Opposing Counsel}, 30 \textit{Washburn L.J.} 238, 240 (1991).
\item \textsuperscript{48} \textit{Tex. Gov’t Code Ann.} § 81.071 (Vernon 1993). The statute gives jurisdiction over disciplinary matters to both the supreme court and a separate commission. \textit{Id.}
\item \textsuperscript{49} NCNB Tex. Nat’l Bank v. Coker, 765 S.W.2d 398, 400 (Tex. 1989).
\item \textsuperscript{50} \textit{See} 28 U.S.C. § 2071 (1988). Courts are permitted to adopt rules for the conduct of their business. \textit{Id.}
\item \textsuperscript{51} \textit{See} Anderson, \textit{supra} note 47, at 240.
\item \textsuperscript{52} 28 U.S.C. § 1654 (1988).
\item \textsuperscript{53} \textit{See, e.g.}, Field v. Freedman, 527 F. Supp. 935, 940 (D. Kan. 1981); \textit{see} Anderson, \textit{supra} note 47, at 240.
\end{itemize}
IV. THE PRACTICAL NECESSITY OF THE DISQUALIFICATION MOTION

The disqualification of an attorney from representing a particular interest in a lawsuit is neither a determination of proper conduct nor an ethical sanction. Nonetheless, courts have recognized that "[a] motion to disqualify counsel is the proper method for a party-litigant to bring the issues of conflict of interest or breach of ethical duties to the attention of the court." Courts are well aware of the implications that accompany disqualification motions. They understand that disqualification is a harsh remedy. In federal courts, a determination of a motion to disqualify cannot be immediately appealed. Similarly, in Texas, the extraordinary writ, mandamus, is often the only means to an immediate review. Courts also realize that a motion to disqualify can be used as an instrument of harassment. Accordingly, disqualification as a remedy is to be used judiciously, and when so used, the motion to disqualify is an immediate, palpable remedy for preventing harm to the movant.

The courts have confronted the issue, whether to deny consideration of a disqualification motion as a remedy for a successive conflict in order to prevent its misuse. The use of disqualification motions for improper purposes, such as delay, harassment, and embarrassment, has increased in recent years. Judges have frequently expressed their displeasure with such malapropos conduct. Courts, however, have not sacrificed the use of deter-

54. See Schuwerk & Sutton, supra note 29, at 147 n.4 ("Disciplinary sanctions, which include disbarment, suspension, reprimand, and similar penalties rendered after a quasi-criminal disciplinary hearing, are to be distinguished from procedural sanctions rendered by the court in which a lawyer is practicing such as disqualification from handling subsequent litigation for another client."); see also Dockery, supra note 5 and accompanying text.

55. American Airlines, 972 F.2d at 611 (quoting Musicus v. Westinghouse Elec. Corp., 621 F.2d 742, 744 (5th Cir. 1980)); see also NCNB Tex. Nat'l Bank, 765 S.W.2d at 398 n.50 ("A motion to disqualify counsel is the proper procedural vehicle to challenge an attorney's representation.").


57. Denial of a motion to disqualify an attorney is not a final judgment subject to judicial review. Firestone Tire and Rubber Co. v. Risjord, 449 U.S. 368, 375-78 (1981); see also Richardson-Merrell, Inc. v. Koller, 472 U.S. 424, 430-41 (1985) (holding that an order granting a motion to disqualify has no immediate appeal).

58. Mandamus requires not only clear immediate harm, but also abuse of discretion by the trial court. Johnson v. Fourth Court of Appeals, 700 S.W.2d 916, 917 (Tex. 1985). Mandamus will more likely issue for an order granting disqualification than a denial. J.K. & Susie Wadley Research Inst. & Blood Bank v. Morris, 776 S.W.2d 271, 275 (Tex. App.—Dallas 1989, orig. proceeding) ("Granting a motion to disqualify sets forth at least a prima facie case that harm has occurred. . . . When a motion to disqualify is denied, however, no such prima facie case is established. Therefore . . . [review of a granted motion] would generally enjoy a rebuttable presumption that harm has in fact occurred; [review of denial] would generally not."). Additionally, courts have recognized that remedy by appeal (after a final judgment) can be inadequate in disqualification of counsel decisions. NCNB Tex. Nat'l Bank, 765 S.W.2d at 400.

59. Ussery, 804 S.W.2d at 236.

60. Id.

61. See, e.g., American Airlines, 972 F.2d at 611.


63. Recently, when confronted with "'dumbfoundingly voluminous pleadings' in motions
mining a disqualification motion because of the potential for misuse.\textsuperscript{64} The Fifth Circuit recently noted, “[o]ur prior cases disclose that a careful and exacting application of the rules in each case will separate proper and improper disqualification motions.”\textsuperscript{65} Also, rather than disregarding the disqualification motion, the court also has alternative means by which to prevent improper motions.\textsuperscript{66}

Arguably, the best practical solution to a successive conflict is a judicial ruling on a disqualification order. The court’s authority to supervise the attorneys practicing before it creates a duty to consider the motion.\textsuperscript{67} This power creates an obligation for the courts to prevent any improper conduct before them.\textsuperscript{68} The range of conduct that a court will allow may vary by jurisdiction,\textsuperscript{69} but the questionable conduct by the parties before it should not proceed unchallenged.

Another pragmatic consideration justifying the motion to disqualify as a necessary remedy to successive conflict problems is the fact that the court is often the first place the problem arises.\textsuperscript{70} Trial deadlines, as well as the scholarly principles of judicial economy, mandate that a court should not stop a trial to await the lengthy process of another agency’s determination.\textsuperscript{71} Because the disposition of the conflict could substantially undermine the work of the trial court,\textsuperscript{72} the interests of timeliness warrant relying on the trial court to make the initial determination of the issue in the form of disqualification.

\begin{quote}
the attorneys filed in attempts to disqualify each other,” the judge commented that “[r]arely had the court been presented with a more blatant example of the use of disqualification motions for tactical purposes,” and it was a “gross abuse of the resources of the court.” Brenda Sapino, Judge Clamps down in Airline Case: Kent Moves to Keep Big-Name Counsel in Line, TEXAS LAW., Aug. 3, 1992, at 5.
\end{quote}

\textsuperscript{64} American Airlines, 972 F.2d at 611.

\textsuperscript{65} Id. Similarly, Texas courts expect that adhering to an exacting standard when considering motions to disqualify will prevent use of the motion as a dilatory trial tactic. NCNB Tex. Nat’l Bank, 765 S.W.2d at 399.

\textsuperscript{66} See, e.g., FED. R. CIV. P. 11 (stating that motions must be grounded in good faith and “not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.” [emphasis added]).


\textsuperscript{68} American Airlines, 972 F.2d at 611; accord Woods v. Covington County Bank, 537 F.2d 804, 810 (5th Cir. 1976). The court’s duty to determine disqualification motions also addresses its propriety in doing so. See also supra notes 45 to 52 and accompanying text.

\textsuperscript{69} Some courts operate as “ethical watchdogs” and attempt to prevent any unethical conflicts before them. See, e.g., Matter of Consolidated Bancshares, Inc., 785 F.2d 1249, 1256 (5th Cir. 1986). Other courts, more wary of purely tactical disqualification motions, will only prevent conflicts that will serve to taint the trial. See, e.g., Armstrong v. McAlpin, 625 F.2d 433, 445-46 (2d Cir. 1980).

\textsuperscript{70} The adversarial nature of the judicial system especially increases the likelihood that an attorney’s representation of interests adverse to a former client will be brought first to the attention of the court. See Dockery, supra note 5, at 726. If for no better reason than to preserve an avenue to appeal, or just the conflict issue, any conflict will probably be noted to the court. Id.

\textsuperscript{71} For discussion of alternatives to a motion to disqualify see infra notes 73 to 81 and accompanying text.

\textsuperscript{72} Raising the subsequent disbarment of one’s trial attorney could be an excellent argument on a motion appealing for a new trial.
In the litigation context, the trial is where a conflict between an attorney and former client becomes most acute, and thus the court is the most logical place to begin addressing the ethical conflict. The judge is in an appropriate position to be an impartial mediator. Because the court already has the litigants before it, the conflict problem can be temporarily resolved, damage due to the impropriety can be prevented, and litigation on the merits can continue. The remedy for incorrect trial court decisions is an appeal. Thus, reasonable considerations, such as ease and the probability of determining the issue properly, justify a court's determination of disqualification motions arising from successive conflicts.

The notice function is an additional practical reason that justifies the liberal use of the motion to disqualify. The value of the notice function outweighs the problems associated with court determination of motions to disqualify in conflict situations. Problems that would cause a court to disqualify an attorney, or at least give consideration to the possibility, can also form the basis for an ethical action. Typically, court proceedings are public, and the attorneys will bring up all problems that will affect their client. Court action on disqualification motions can, therefore, provide notice of a possible ethical violation to the state bar. Clients and attorneys rarely file formal complaints about possible ethical violations, even when warranted. Thus, those responsible for investigating ethical violations might never discover situations where attorneys oppose their former clients in litigation were a disqualification motion not presented to the court.

Because different fundamental interests are protected in a trial than in an ethical proceeding, the motion to disqualify is justified by the ends it protects. Although many of the factors that necessitate the existence of the ethical rules do have a bearing on the court's disqualification decision, the overriding interest of a disqualification motion "may turn on factors not in-

73. Schuwerk & Sutton, supra note 29, at 153. A court in some instances may be the most qualified in evaluating adverse effects. Id. For example, in the successive conflict context, an attorney may be confronted with having to argue to minimize the beneficial effects of his former representation. See American Airlines, 972 F.2d at 615. A court is in a much better position than an ethical committee to determine whether any problems will arise, and if so the extent of conflict for the parties. Id.
74. See Developments — Conflicts, supra note 6, at 1486-96; Spickelmier & Kattner, supra note 1, at 406.
75. The appellate court can also take into consideration any later rulings by an ethical committee.
76. See John Sutton & John Dziemkowski, Cases and Materials on the Professional Responsibility of Lawyers 119 (1989) (stating that "The courtroom is often the best forum for disciplining lawyers.").
77. See supra note 70 and accompanying text.
78. Dockery, supra note 5, at 740 n.78.
80. Dockery, supra note 5, at 740 n.78; see also American Airlines, 972 F.2d at 611 ("To a very large extent, unless a conflict is addressed by courts upon a motion for disqualification, it may not be addressed at all.").
81. The primary goal of the ethical rule regarding an attorney's representation of interests adverse to a former client is to protect the client. For a discussion of the aims of those rules, especially Texas Rule 1.09, see supra notes 29 to 38 and accompanying text.
SUCCESSIVE CONFLICTS

volved in a disciplinary action by a bar committee."82 Furthermore, the disciplinary rule applies to a much broader scope of activities than just litigation, unlike the motion to disqualify.83 Since the ultimate goal of these interests differ, as well as the possible sanctions, neither forum infringes on the other's domain; in fact, the standards do not even have to be construed identically.84

Finally, as a practical matter, the motion to disqualify can procure results that are more satisfactory to the movant than the alternatives. Without using a disqualification motion, the former client's options are turning to the state bar for a disciplinary proceeding or instigating an action for legal malpractice.85 A disqualification motion addresses the harms of an improper successive representation before significant damages are incurred. A successful disciplinary prosecution punishes the offending attorney; but for the former client, the only consolation offered is the fulfillment of any desire for retribution and perhaps the option to make a collateral attack on the original judgment. A malpractice action is time consuming and costly for the parties as well as the judicial system. Also, a motion to disqualify does not foreclose other actions; they are still available to rectify harms beyond the scope of a disqualification motion.86

Justification for using the motion to disqualify in successive conflicts is derived from the many practical needs it promotes. Courts need to hold themselves open to solving the problems of those who come before them, and hearing these motions can be very useful to the parties. Thus, a motion to disqualify opposing counsel for a conflict of interest should be given thorough consideration by the court to which it is submitted.

V. TREATMENT OF DISQUALIFICATION MOTIONS

A 1953 decision by the Southern District of New York, disqualifying an attorney for a successive conflict, established the American precedent for

82. Ambler, supra note 2, at 5. Factors include, the integrity of the judicial process, motives of the motion, and the extent a decision will infringe upon the client's rights to counsel of his choice. Id. at n.13. Thus the fundamental goal of a motion to disqualify is protecting the fairness of the trial.

83. Disqualification motions typically occur in the context of litigation, while an ethical proceeding will consider attorney behavior in any context.

84. Schuwerk & Sutton, supra note 29, at 153 n.34 (stating that in regard to the standards governing successive conflicts of interest, "[i]t would be in keeping with the [drafting] committee's thinking ... to construe [the standard] narrowly for disciplinary purposes").

85. See Developments — Conflicts, supra note 6, at 1486-96; Dockery, supra note 5, at 740 n.79; Schneider, supra note 3, at 104. In a legal malpractice action, the former client could request injunctive relief, the result of which would be similar to a disqualification. See, e.g., Maritrans GP, Inc. v. Pepper, Hamilton & Scheetz, 602 A.2d 1277, 1280 (Pa. 1992). While this approach would work well in a non-litigation context, it becomes a redundant effort when the parties are already in an adversarial position.

86. For example, an attorney may be disqualified for inappropriately opposing a former client, thus preventing further harm, yet a disciplinary committee may still want to consider the attorney's ethics for accepting such a representation. See Dockery, supra note 5, at 740. The purpose of the ethical committee is to protect the public and maintain respect for the profession, not necessarily to protect an individual. See supra notes 45 to 52 and accompanying text.
courts to accept jurisdiction for conflict disputes.\textsuperscript{87} Since that time, courts have frequently been asked to resolve successive conflict dilemmas leaving both courts and commentators to attempt to clarify the issue.\textsuperscript{88} Because these motions have become the reality of today, the principles that guide a court in its consideration of whether to disqualify should be examined.

\textbf{A. HISTORY}

Long ago courts established a "general and well-settled rule that an attorney who has acted for one side cannot . . . assume a position hostile to his client, . . . and it makes no difference . . . whether the relation itself has been terminated, for the obligation of fidelity and loyalty still continues."\textsuperscript{89} Although in the beginning, sanctioning from an ethics committee was the predominant remedy for successive conflicts of interest, court orders prohibiting an attorney from appearing in court also became an accepted remedy.\textsuperscript{90} The main purpose of the disqualifications was for the protection of the former client; an attorney was prohibited from representing a client against a former client when he had knowledge or information obtained in the course of the former relationship.\textsuperscript{91}

In 1953, in \textit{T. C. Theatre Corp.},\textsuperscript{92} the court succinctly set forth a rule to govern a situation where an attorney should be disqualified from representing a client against a former client.\textsuperscript{93} Concern for the protection of clients' confidential information and the free flow of information between attorney and client justified the rule.\textsuperscript{94} The court determined that "the former client need show no more than that the matters embraced within the pending suit wherein his former attorney appears on behalf of his adversary are substantially related to the matters or cause of action wherein the attorney previously represented him, the former client."\textsuperscript{95} Use of the substantial relationship to create an irrebuttable presumption was a prophylactic mea-

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\textsuperscript{87} T. C. Theatre Corp. v. Warner Bros. Pictures, 113 F. Supp 265 (S.D.N.Y. 1953); \textit{American Airlines}, 972 F.2d at 940; Duncan v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 646 F.2d 1020, 1028 (5th Cir. 1981); \textit{NCNB Tex. Nat'l Bank}, 765 S.W.2d at 399.

\textsuperscript{88} For an excellent listing of many sources of commentary see Goldberg, \textit{supra} note 62, at 229 n.13.

\textsuperscript{89} \textit{In re Boone}, 83 F. 944, 952 (N.D. Cal. 1897). The court reasoned that "[an attorney] is not allowed to divulge information and secrets imparted to him by his client or acquired during their professional relationship, . . . the obligation solemnly rests upon the attorney to keep his lips forever sealed, and to preserve inviolate the confidence reposed in him." \textit{Id.} at 953.

\textsuperscript{90} See \textit{Brown} v. \textit{Miller}, 286 F. 994 (D.C. Cir. 1923); \textit{Weidekind} v. \textit{Tuolumne County Water Co.}, 19 P. 173 (Cal. 1887); \textit{Bowman} v. \textit{Bowman}, 55 N.E. 422 (Ind. 1899); \textit{Peirce} v. \textit{Palmer}, 77 A. 201 (R.I. 1910). One court pointedly stated that it would be strange "to hold that the proceedings . . . must come to naught because of a character more favorable to the [attorney] than might have been invoked against him." \textit{Brown}, 286 F. at 997.

\textsuperscript{91} \textit{Brown}, 286 F. at 997.

\textsuperscript{92} 113 F. Supp. 265 (S.D.N.Y. 1953).

\textsuperscript{93} \textit{Id.} at 268.

\textsuperscript{94} \textit{Id.} at 269 ("No client should ever be concerned with the possible use against him in future litigation of what he may have revealed to his attorney.").

\textsuperscript{95} \textit{Id.} at 268; \textit{accord} \textit{Porter} v. \textit{Huber}, 68 F. Supp. 132 (W.D. Wash. 1946).
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sure; proof of actual harm was irrelevant. Also, the test protected the client from having to reveal any confidential material to prove its confidentiality. Thus, the magic words "substantial relationship" were embraced by future courts who still attempt to define the parameters of the test in their opinions.

B. THE RULE IN TEXAS COURTS

Texas, like most other jurisdictions, based determinations of disqualification motions due to representation opposing a former client on the substantial relationship precedent derived from T. C. Theatre Corp. Prior to 1989, the rules for determining whether a substantial relationship existed were vague, thus the determinations depended on the individual facts. Finally in 1989, the Supreme Court of Texas, deciding NCB Texas National Bank v. Coker, considered the problem and attempted to set forth guidelines for determining whether a substantial relationship existed.

In Coker a Dallas law firm, Vial, Hamilton, Koch & Knox (Vial Hamilton) represented NCB in a suit against Western Fire and Walker General (Western Fire). For a period of five months, however, Vial Hamilton had previously represented Western Fire. Western Fire, afraid that Vial Hamilton would violate the confidences and secrets gained in its earlier representation, filed a motion to disqualify Vial Hamilton as counsel for NCB. Judge Coker granted the motion and ordered Vial Hamilton's disqualification.

The Supreme Court accepted mandamus and took the opportunity to examine the substantive law of disqualification due to a successive conflict. The court, finding support for its decision in principles of ethics, reasoned that because of the current prevalence of merging law-firms and consolidating businesses, a complete bar to any representation adverse to any former

96. Developments — Conflicts, supra note 6, at 1315-34; see In re Corn Derivatives Antitrust Litig., 748 F.2d 157, 162 (3d Cir. 1984).
98. See, e.g., P & M Elec. Co. v. Godard, 478 S.W.2d 79, 81 (Tex. 1972) (adopting the substantial relationship test, quoting the language of T. C. Theatre Corp.).
99. Allen, supra note 11, at 746; see Gleason v. Coman, 693 S.W.2d 564, 567 (Tex. App.—Houston [14th Dist.] 1985, writ ref’d n.r.e.); Lott v. Lott, 605 S.W.2d 665, 668 (Tex. App.—Dallas 1980, no writ); Meyerland Community Improvement Assoc. v. Temple, 700 S.W.2d 263, 267-68 (Tex. App.—Houston [1st Dist.] 1985, writ ref’d n.r.e.).
100. 765 S.W.2d 398 (Tex. 1989).
101. Id. at 400.
102. Id. at 400-01. The original order of disqualification was phrased in the substantial relationship language, which NCB objected to because the court did not specifically identify how the two matters were so related. Revising the order, Judge Coker omitted the substantially related language altogether and stated:

The court further finds the subject matter involved in both representations are similar enough for there to be an appearance that the attorney-client confidences which could have been disclosed by the defendant might be relevant to the law firm’s representation of the plaintiff in this suit.

103. When this case was decided, Texas ethics were still governed by the Code of Professional Responsibility. The Texas Disciplinary Rules of Professional Conduct were not adopted until the following year.
client would not be practical. The court, however, also realized that "un-
restrained representation of new clients against former clients would stifle the attorney-client communication . . . and destroy the public confidence in the legal profession."

Thus, in defining the test, the Court had to care-
fully balance the competing interests.

The Supreme Court declared that the proper test requires the showing of a substantial relationship between the present and prior representations. The court explained the test as follows:

The moving party must prove the existence of a prior attorney-client relationship in which the factual matters involved were so related to the facts in the pending litigation that it creates a genuine threat that confi-
dences revealed to his former counsel will be divulged to his present adversary. Sustaining this burden requires evidence of specific similari-
ties capable of being recited in the disqualification order. If this burden can be met, the moving party is entitled to a conclusive presumption that confidences and secrets were imparted to the former attorney.

The court justified its interpretation of the substantial relation test by ex-
plaining that it is designed to benefit both the former client and the attor-
ney. The former client is protected in that he will not have to reveal the very confidences that were to be hidden. If the test is met, as a matter of law, the appearance of impropriety exists, and the attorney should be disqualified.

The attorney receives protection from this statement of the rule as well. Because of the severity of the remedy to the attorney, a preponderance of the evidence is required to establish a substantial relationship. Also, the presumption that the attorney knows secrets and confidences of the former cli-
ent does not imply that the attorney revealed them.

After explaining the meaning of the substantial relationship test, the Supreme Court attempted to further clarify its scope. A substantial relation-
ship requires more than a superficial resemblance between the issues; the need for the existence of a genuine threat that confidences will be revealed still exists. When a substantial relationship is found, the precise factors

104. NCNB Tex. Nat'l Bank, 765 S.W.2d at 399.
105. Id.
106. Id. at 399-400. Although the Court was to refine the meaning of substantial relationship, the language of T. C. Theatre Corp. was retained. The court even noted that "the words 'substantially related' contain no magical properties." Id. at 400.
107. Id.; see Allen, supra note 11, at 747.
108. NCNB Tex. Nat'l Bank, 765 S.W.2d at 400.
109. Id. Although the former client does not have to reveal any confidences, he must make more than a conclusory statement that there was a substantial relationship. Morris, 776 S.W.2d at 278 (Tex. App.—Dallas 1989, orig. proceeding) (citing Hydril Co. v. Multiflex, Inc., 553 F. Supp. 552, 554-55 (S.D. Tex. 1982)); see supra note 102 and accompanying text.
110. NCNB Tex. Nat'l Bank, 765 S.W.2d at 400.
111. Id.
112. Id. This may be of particular importance because revealing confidential information of a former client is a basis for disciplinary action distinct from a successive conflict of interest. See TEx. DISCIPLINARY R. PROF. CONDUCT 1.05 (1993) (rule entitled "Confidentiality of Information").
113. NCNB Tex. Nat'l Bank, 765 S.W.2d at 400; see also Morris, 776 S.W.2d at 278.
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establishing that relationship should be easy for the court to specify. 114 The court found that the disqualification of Vial Hamilton was an abuse of discretion and granted mandamus should Judge Coker fail to vacate the order. 115

Shortly after the decision in NCNB v. Coker, however, the Code of Professional Responsibility was stricken and the Texas Disciplinary Rules were adopted. As mentioned above, Rule 1.09 not only codified the substantial relationship test, 116 but expanded the prohibition of opposing former clients to situations questioning the validity of former services or work product 117 and situations, although unrelated, that involve the risk of disclosure of confidences. 118 Because the Rules are not law which control disqualification decisions, 119 recent case law must be examined to determine the effect, if any, of the new ethical rules on the NCNB standard.

Of the Texas courts that have had the opportunity to consider motions to disqualify counsel for representing interests adverse to a former client, some have paused to consider the impact of the new Disciplinary Rules. 120 Other courts have simply applied the test of NCNB v. Coker as wholly determinative of the issue because the substantial relationship test is codified in the rule. 121

The decisions that have issued since the promulgation of the new Rules of Disciplinary Procedure have applied the substantial relation test in the same

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114. NCNB Tex. Nat'l Bank, 765 S.W.2d at 400. "To hold that the two representations were 'similar enough' to give an 'appearance' that confidences which could be disclosed 'might be relevant' to the representations falls short of the requisites of the established substantial relation standard." Id.; see also Morris, 776 S.W.2d at 278 (the court needs enough information to "engage in a painstaking analysis of the facts. [A movant] must delineate with specificity the subject matter, issues, and causes of action presented in former representation.").

115. NCNB Tex. Nat'l Bank, 765 S.W.2d at 400.


117. Id. at a(3).

118. Id. at a(2); see discussion of Rule 1.09 supra notes 29 to 45 and accompanying text.

119. TEX. DISCIPLINARY R. PROF. CONDUCT preamble ¶ 15 (1993). Indeed, the Texas Supreme Court recognizes that the Rules are not controlling, but "they have been viewed by the courts as guidelines that articulate considerations relevant to the merits of such motions." Spears v. Fourth Dist. Court of Appeals, 797 S.W.2d 654, 656 (Tex. 1990) (citing Ayres v. Canales, 790 S.W.2d 554, 556 n.2 (Tex. 1990, orig. proceeding)). However, a disqualification order of an attorney restraining him from opposing a former client that failed to reference the principles articulated in the Texas Disciplinary Rules was ruled to be an abuse of discretion. Davis v. Stansbury, 824 S.W.2d 278, 284 (Tex. App—Houston [1st Dist] 1992, no writ). Courts do apply the Texas Disciplinary Rules as law. See generally Conoco, Inc. v. Baskin, 803 S.W.2d 416, 419 (Tex. App.—El Paso 1991, no writ); Insurance Co. of N. Am. v. Westergren, 794 S.W.2d 812, 814 (Tex. App.—Corpus Christi 1990, orig. proceeding [leave denied]). One court, in its opinion, even criticized an attorney for failing to cite or mention the Texas Disciplinary Rules in his brief. Clarke v. Ruffino, 819 S.W.2d 947, 949 (Tex. App.—Houston [14th Dist.] 1991, orig. proceeding, writ dism’d w.o.j.).

120. See, e.g., Spears, 797 S.W.2d at 656; Davis, 824 S.W.2d at 284; Clarke, 819 S.W.2d at 949.

121. See HECI Exploration Co. v. Clajon Gas Co., 843 S.W.2d 622 (Tex. App.—Austin 1992, writ denied); Westergren 794 S.W.2d at 812; see also Central Tex. Hardware, Inc. v. First City, 810 S.W.2d 234, 238 (Tex. App.—Houston [14th Dist.] 1991, writ denied) (failing to even recognize that the Texas Disciplinary Rules had replaced the Code of Professional Responsibility).
manner as it was set forth in *NCNB Texas National Bank*. Subsequent cases have further explained the rule. In *Westergren*, the court refined the test from *NCNB Texas National Bank*, dividing it into two elements crucial to the determination of the issue of whether an attorney should be disqualified for opposing a former client: (1) the existence of an attorney-client relationship between the former client and the attorney; and (2) a substantial relationship in the factual matters of the issues.

The court's decision in *Westergren* significantly broadened the reach of a disqualification based on representation of an interest adverse to a former client by expanding the reach of the attorney-client relationship. In that case the Insurance Company of North America (INA) bonded a project for the Braselton Construction Company (Braselton). Braselton, which was represented by an attorney named Harris, became embroiled in litigation over the project. In the course of the suit, Harris signed some pleadings on behalf of INA as well as Braselton. Later, to save money for his client, Braselton, Harris designated himself as attorney in charge for both Braselton and INA, but withdrew as counsel for INA once disagreements arose. INA thereafter sued Braselton, who continued to be represented by Harris. The trial court denied INA's motion to disqualify Harris. The court of appeals, however, granted mandamus.

The court first considered whether an attorney-client relation existed. INA introduced the pleadings that contained Harris' signature as well as Harris' motion withdrawing as counsel for INA. Harris' contention was that his representation of INA was purely on a pro forma basis and that he did not even receive compensation for his representation.

The court, although it agreed the representation may have been pro forma, found that, as a matter of law, INA had shown an attorney-client relationship. Because nothing in the Disciplinary Rules permits pro forma representation, the court deemed the relationship sufficient to forbid a successive representation conflict. The court citing *NCNB Texas Na-
tional Bank, then applied the substantial relationship test, to the facts and, finding such a relationship, ordered Harris to be disqualified. The legal precept that attorneys can take from this case is that when involved with two or more parties, they should limit their legal representation to their client only. More broadly, this decision can impact lawyers whose only “representation” consisted of offhanded neighborly advice.

Other cases decided since the promulgation of the Texas Disciplinary Rules have not altered the substance of the substantial relationship test defined by *NCNB Texas National Bank*. The ban on representing interests adverse to a former client, however, has been expanded by other means. While *Westergren* dealt with the scope of the attorney-client relationship, other cases have expanded the reach of possible disqualifications under the rubric of Texas Disciplinary Rule 1.09. Two Texas appellate courts have delved into a consideration of the applicability of Part a(2) of the Rule 1.09, regarding the risk of disclosure of confidential information as a basis for disqualification.

In *Clarke v. Ruffino* the parties, Clarke and Lehtonen, had been involved in a constructive trust and fraud suit pertaining to some Texas property. During this litigation, Lehtonen refinanced the property through an attorney of the firm Thornton, Paine, Watson, & Kling, P.C. (Thornton Paine). A year later, still in the course of the original litigation, Clarke obtained a new attorney who was a member of Thornton Paine. Lehtonen submitted a motion to disqualify the Thornton Paine attorney which was granted by Judge Ruffino.

The court of appeals, in an original proceeding, refused to issue mandamus because the trial judge did not abuse her discretion by finding a substantial relationship. The court noted that the determination of which successive conflicts warrant disqualification has been altered by the promulgation of the new Disciplinary Rules. Consequently, the court found another basis by which to uphold the disqualification order; disqualification was proper because the representation could have, “in reasonable probability, involve[d] a violation of the new rules governing confidentiality

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130. *Westergren*, 794 S.W.2d at 815.
131. This case has the potential to expand the reach of disqualification quite considerably; it could affect not only joint parties to litigation, but also embrace transactional counsel when each client does not have his own attorney.
132. *Davis*, 824 S.W.2d at 284; *Clarke*, 819 S.W.2d at 949.
133. “Because of the ‘or’ strategically placed in this rule, there are [sic] now more than one bases [sic] for disqualification of an attorney.” *Clarke*, 819 S.W.2d at 950; see also *Tex. Disciplinary R. Prof. Conduct* 1.09 cmt. 3 (1993) (“representation is improper if any of three circumstances exists”).
134. 819 S.W.2d 947 (Tex. App.—Houston [14th Dist.] 1991, writ dism’d w.o.j.).
135. Id. at 950.
136. Id. at 951.
137. Id. at 950.
of information."\textsuperscript{138}

Considering the text of the rules, the court found that the new definition of confidential information\textsuperscript{139} is much broader than the definition under the former Code.\textsuperscript{140} Under the new Disciplinary Rules, confidential information encompasses not only privileged information, but also unprivileged information which is "all information \textit{relating to a client} or furnished by the client . . . during the course of or \textit{by reason of the representation of the client}".\textsuperscript{141}

The appellate court determined that Ruffino's order of disqualification was supported by the new rules and mandamus would not issue.\textsuperscript{142} Although this opinion sets a precedent that disqualifications based on the actual exchange of confidences may be used when the prior and current representations are not substantially related, it leaves many questions unanswered. First, the court did not rationalize its use of the Disciplinary Rules beyond the substantial relationship test. Use of the substantial relationship test is supported by both policy considerations and precedent existing prior to the new Rules.\textsuperscript{143} While application of Rule 1.09(a)(2) seems to support similar policy goals,\textsuperscript{144} its use should be justified in light of the Rule's intent not to be used as procedural standards.\textsuperscript{145}

The court also left open which particular confidences will be sufficient for a disqualification. In finding that the attorney violated Rule 1.09(a)(2), the court simply made the conclusory statement that "[h]e had information \textit{relating to [the former client] by reason of his representation of [the former client in the earlier case].}"\textsuperscript{146} The court did not identify what information

\textsuperscript{138} Id. at 950-51; see also \textsc{Tex. Disciplinary R. Prof. Conduct} 1.09(a)(2) (1993) (using the reasonable probability language and referring to Rule 1.05).

\textsuperscript{139} \textit{See} \textsc{Tex. Disciplinary R. Prof. Conduct} 1.05(a) (1992); \textit{see also} Schuwerk & Sutton, \textit{supra} note 29, at 74-95 (explaining the differences between the new and old rules).

"Confidential information" includes both "privileged information" and "unprivileged client information." "Privileged information" refers to the information of a client protected by the lawyer-client privilege of Rule 503 of the Texas Rules of Evidence or of Rule 503 of the Texas Rules of Criminal Evidence or by the principles of attorney-client privilege governed by Rule 501 of the Federal Rules of Evidence for the United States Courts and Magistrates. "Unprivileged client information" means all information relating to a client or furnished by the client, other than privileged information, acquired by the lawyer during the course of or by reason of the representation of the client.

\textsc{Tex. Disciplinary R. Prof. Conduct} 1.05(a) (1993).

\textsuperscript{140} \textsc{Clarke}, 819 S.W.2d at 950 (the "new definition of confidential information certainly expands on the former definition"). \textit{Compare} \textsc{Tex. Disciplinary R. Prof. Conduct} 1.05 (1993) with Supreme Court of Texas, Code of Prof. Responsibility DR 4-101(A) (Vernon Supp. 1988).

\textsuperscript{141} \textsc{Clarke}, 819 S.W.2d at 950; \textsc{see Tex. Disciplinary R. Prof. Conduct} 1.05 (1993). The former Code of Professional Responsibility protected privileged information (i.e., attorney-client), secrets that the client requested remain inviolate, and information of which the disclosure could be embarrassing or detrimental to the client. \textit{See} DR 4-101(A).

\textsuperscript{142} \textsc{Clarke}, 819 S.W.2d at 950-51.

\textsuperscript{143} \textsc{See} \textsc{NCNB Tex. Nat'l Bank}, 765 S.W.2d at 400; \textsc{Tex. Disciplinary R. Prof. Conduct} 1.09 cmt. 9 (1993); Schuwerk & Sutton, \textit{supra} note 29, at 150.

\textsuperscript{144} \textit{See supra} notes 89 to 99 and accompanying text.

\textsuperscript{145} \textsc{Tex. Disciplinary R. Prof. Conduct} 1.09 cmt. 9 (1993).

\textsuperscript{146} \textsc{Clarke}, 819 S.W.2d at 950.
that Thornton Paine had that could violate Rule 1.05.

Lastly, the court left no instruction on the application of 1.09(a)(2). No indication was given of how the law-firm's possession of confidential information constituted a representation that would, in reasonable probability involve a violation of the duty of confidentiality to the former client. Thus, the foundation has been laid for many future disputes on the applicability of Rule 1.09(a)(2) to successive conflict disqualifications.

The holding in Clarke has the potential to set a precedent which would be extremely limiting to attorneys who oppose a former client. Without the establishment of any criteria for using Rule 1.09(a)(2) to disqualify an attorney, other than the mere fact the lawyer did have confidential information in its broadest sense, future courts could determine that possession of such information creates a presumption of a violation that merits disqualification. Clearly, this case opens the door for disqualifications in more situations than does the substantial relationship test.

Another recent Texas case, Davis v. Stansbury, interpreted the requirements of confidentiality in a manner that would make disqualification much less likely than the ruling in Clarke would suggest. In Davis, the dispute was a divorce proceeding between Suzanne Davis (Wife) and Fred Thomas Davis (Husband). Prior to this dispute the couple had instigated divorce proceedings but then reconciled. In the original divorce action Wife was represented by Logene Foster. When the couple again decided to divorce, Husband consulted Mike Orsak, a law partner of Foster and met with him twice. Orsak, realizing that Foster was representing Wife, withdrew as counsel for Husband. At the trial Husband made a motion to disqualify Orsak/Foster from representing his wife which was granted.

The majority analyzed the motion for disqualification as if Mr. Davis sought the attorney’s disqualification because Foster represented his wife, thereby barring Orsak from representing him, rather than analyzing the motion on the basis that Husband feared Orsak/Foster possessed confidences which might be used against him. The Court’s holding was that Orsak’s representation of Husband would have been improper, thus Orsak justifiably withdrew as Husband’s counsel, and disqualification was inappropriate.

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147. The court did not construe Texas Rule 1.05 or any other duty of confidentiality in reaching its decision.
149. Rule 1.09(b) states that other members of a firm are disqualified if any one of them practicing alone would be. TEX. DISCIPLINARY R. PROF. CONDUCT 1.09(b) (1993). For simplicity’s sake, the two attorneys can be considered as one and the same for purposes of determining what information was revealed by Husband in the course of the firm’s representation of him. Thus, hereinafter the designation Orsak/Foster will be used.
150. Davis, 824 S.W.2d at 279.
151. See TEX. DISCIPLINARY R. PROF. CONDUCT 1.06 (1993) (rule barring concurrent conflicts of interest).
152. For discussion of the problems with the mischaracterization of the issue see supra notes 147 to 155 and accompanying text.
153. Davis, 824 S.W.2d at 284. The court used the substantial relationship test and Rule 1.09 to account for this determination. Id. at 281-82. However, Rule 1.06, prohibiting concur-
The court considered the impact of Rule 1.05 on the requirements of confidentiality needed to avoid disqualification.\(^{154}\) Orzak/Foster was found to possess unprivileged confidential information about Husband, and because the information was unprivileged, an exception to the prohibition of representation applied.\(^{155}\) The exception allows a lawyer to reveal unprivileged client information "[w]hen the lawyer has reason to believe it is necessary to do so in order to . . . respond to allegations in any proceeding concerning the lawyer's representation of the client. . . ."\(^{156}\) The court, relying on this rationale, found that Wife was entitled to hear the information, and no problem existed.\(^{157}\)

The *Davis* application of Rule 1.05 could significantly reduce the potential for disqualification under the *Clarke* analysis because only privileged client information would give rise to confidentiality problems.\(^{158}\) A few difficulties exist in the *Davis* analysis, however. First, the exception only authorizes that information be revealed in order to respond to challenges to the lawyer's representation. Thus, information may be revealed for the purpose of responding to the motion to disqualify, but not for representing the merits of the case. Second, as the comments to the rule indicate, the authorization varies depending on whether the disclosure is for the benefit of the client or adverse to him.\(^{159}\) When disclosure adverse to the client is permitted, it is usually to prevent criminal or fraudulent acts.\(^{160}\) Because a situation involving two clients was not contemplated in drafting the rule, an intent to permit this disclosure of client confidences is highly unlikely.

Justice Mirabal's dissenting opinion, however, is much better reasoned and more congruent with established policy than the majority opinion. As Mirabal points out, the court seemed to have misinterpreted the issue; thus the precedental value of this opinion is dubious. The majority determined the impact of disqualification from the point of view that his wife was the former client with whom to be concerned. They did not recognize that Mr. Davis was also a former client despite the fact that he made the motion and the trial court's express finding that Mr. Davis had hired Orsak to represent him.\(^{161}\) In fact, the court, stating the purpose of the rule, said "[t]his rule sets forth a strong policy statement that favors a former client's right to receive legal assistance from an attorney with whom the client had a previous attorney-client relationship."\(^{162}\)

The majority cited no authority for its novel interpretation of Rule 1.09, rent representations, would have been the proper rule to apply. See *Tex. Disciplinary R. Prof. Conduct* 1.06 (1993).

\(^{154}\) *Davis*, 824 S.W.2d at 282-83.

\(^{155}\) Id.


\(^{157}\) *Davis*, 824 S.W.2d at 283.

\(^{158}\) The *Davis* court actually criticized *Clarke* for failing to distinguish between privileged and unprivileged information and for ignoring the exception. *Davis*, 824 S.W.2d at 282 n.2.

\(^{159}\) *Tex. Disciplinary R. Prof. Conduct* 1.05 cmts. 6-16 (1993).

\(^{160}\) Id. cmts. 10-14.

\(^{161}\) *Davis*, 824 S.W.2d at 284 (Mirabal, J., dissenting).

\(^{162}\) Id. at 281.
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which contradicts a multitude of other authority that the rule is for the protection of former client confidences.\textsuperscript{163} Were the court's interpretation of the underlying policy for Rule 1.09 correct, the rule would simply forbid an attorney to oppose a former client altogether, absent his or her consent. Additionally, separate ethical rules explaining how an attorney may properly decline or terminate his representation of a client could have been examined by the majority.\textsuperscript{164} The policy stated by the majority, if accepted, could lead to the use of Rule 1.09 in circumstances totally unrelated to a conflict of interest thereby expanding the application of the rule far beyond its intended scope.\textsuperscript{165}

Had the issue, whether Orsak/Foster's former representation of Mr. Davis required disqualification from representing his wife, been discussed, the result would likely have been different. The dissent and the majority agreed that the two lawsuits were substantially related, thus making disqualification appropriate under Rule 1.09.\textsuperscript{166} The trial court's finding, that an attorney-client relationship existed between Husband and the lawyers, however, could have been challenged.

The guidelines delineating when an attorney should be disqualified for opposing a former client are by no means well settled in Texas. The substantial relationship test seems to be the primary analysis,\textsuperscript{167} but the other possible grounds, namely Rules 1.09(a)(2) & (3) have yet to be clarified.

C. THE RULE IN THE FIFTH CIRCUIT

The United States Supreme Court has not yet created a uniform law for determining when an attorney should be disqualified from representing interests adverse to a former client. Not all of the circuits have identical rules, but this comment will only consider the rules as applied in the Fifth Circuit, with emphasis on application of Texas law.

Recently the Fifth Circuit considered motions to disqualify attorneys for both successive conflicts\textsuperscript{168} and concurrent conflicts\textsuperscript{169} in light of the new ethical standards. In In re American Airlines\textsuperscript{170} Judge Higginbotham, au-

\textsuperscript{163} See, e.g., TEX. DISCIPLINARY R. PROF. CONDUCT 1.09 cmts. 8, 10 (1993); HECI, 843 S.W.2d at 622; Clarke, 819 S.W.2d at 950-51; Westergren, 794 S.W.2d at 815; Schuwerk & Sutton, supra note 29, at 146-49; Allen, supra note 11, at 742-44; see also TEX. DISCIPLINARY R. PROF. CONDUCT 1.09 cmt. 1 (1993) (“Rule 1.09 addresses the circumstances in which a lawyer... may represent a client against a former client.” [emphasis added]).

\textsuperscript{164} See TEX. DISCIPLINARY R. PROF. CONDUCT 1.15 (1993).

\textsuperscript{165} For example, this policy could be used as support for an indigent criminal defendant's right to retain his original counsel on appeal. See Christopher D. Atwell, Professional Responsibility, Annual Survey of Texas Law, 46 SMU L. REV. 1681, 1693 n.88, 89 (1993).

\textsuperscript{166} Davis, 824 S.W.2d at 284 (Mirabal, J., dissenting).

\textsuperscript{167} However, no Texas court has yet considered the effect of no longer having a rule prohibiting the appearance of impropriety. See Supreme Court of Texas, Code of Prof. Responsibility, canon q. The present test from NCNB Tex. Nat'l Bank, 765 S.W.2d at 400 justified its holding, in part, on that rule.

\textsuperscript{168} In re American Airlines, Inc. 972 F.2d 605 (5th Cir. 1992).

\textsuperscript{169} In re Dresser Indus., 972 F.2d 540 (5th Cir. 1992). Although the case discusses a concurrent conflict of interest, much of its holding is applicable to successive conflicts, through general discussion of how the Fifth Circuit will consider motions to disqualify in general.

\textsuperscript{170} 972 F.2d 605 (5th Cir. 1992).
Author of the court's opinion, systematically re-evaluated the law regarding disqualifications for successive conflicts of interest. The lawsuit, an antitrust private enforcement issue between American Airlines, Northwest Airlines and Continental Airlines, involved many of the Texas legal behemoths. At trial, counsel for both sides tried to disqualify the opposing counsel for any imaginable conflict.\textsuperscript{171} The trial court refused to disqualify any attorneys, but the appellate court, in an original proceeding, considered whether counsel for Northwest Airlines, Vinson & Elkins, should be disqualified on the basis of opposing American Airlines, a former client.\textsuperscript{172}

American desired to disqualify the firm of Vinson & Elkins (VE) from representing Northwest because VE was its antitrust counsel in Houston since 1987. VE had represented American in prior antitrust suits, including two brought by Continental, an opposing party in the instant suit. Also, VE had advised American on antitrust issues relating to a proposed acquisition of Continental.

The court thoroughly analyzed the law in making its ruling. Federal courts in Texas recognize that the Rules of Disciplinary Procedure are the applicable law.\textsuperscript{173} However, the court expanded the basis of the applicable law. The court said:

The Texas Rules, as adopted by the Southern District of Texas, are not the "sole" authority governing a motion to disqualify." . . . [citing In re Dresser] . . . In reviewing a motion to disqualify, "we consider the motion governed by the ethical rules announced by the national profession in light of the public interest and the litigants' rights."\textsuperscript{174}

The court determined that the national standards as set forth by the ABA are also applicable,\textsuperscript{175} however, the corresponding Texas Rules are not materially different and were sufficient for a determination of the merits of a disqualification.\textsuperscript{176}

The determination that local rules are not the sole authority governing the motion to disqualify was rationalized by the court in finding that "[m]otions to disqualify are substantive motions . . . [in that they affect] . . . the rights of the parties," thus federal standards should apply.\textsuperscript{177} The main thrust of this

\textsuperscript{171} For discussion of the extravagance of the briefs on motions to disqualify, see Sapino, supra note 64, at 3.

\textsuperscript{172} Some of the allegations arose from initial confusion that arose when the parties tried to obtain counsel, and different Vinson & Elkins partners were approached by Northwest and American. Violations of concurrent representation were not considered because the court found disqualification necessary on other grounds. American Airlines, 972 F.2d at 614.

\textsuperscript{173} For example, in the Southern District of Texas, the local rules had adopted the TEX. DISCIPLINARY R. PROF. CONDUCT as they are amended. TEXAS RULES OF CONDUCT, Federal App. A, Rule 4B. The Fifth Circuit recognized the TEX. DISCIPLINARY R. PROF. CONDUCT as an amendment of the Code. See, e.g., In re Medrano, 956 F.2d 101, 102 n.3 (5th Cir. 1992) (setting forth the corresponding local Rule for the Western District of Texas); American Airlines, 972 F.2d at 609-10.

\textsuperscript{174} American Airlines, 972 F.2d at 610 (quoting Dresser Indust., 972 F.2d at 543).

\textsuperscript{175} Id.; accord Dresser Indust., 972 F.2d 540, 543 (5th Cir. 1992); Brennan's Inc. v. Brennan's Restaurants, Inc., 590 F.2d 168 (5th Cir. 1979); Woods v. Covington County Bank, 537 F.2d 804 (5th Cir. 1976).

\textsuperscript{176} American Airlines, 972 F.2d at 610.

\textsuperscript{177} Dresser Indust., 972 F.2d at 543; accord American Airlines, 972 F.2d at 610. These
decision was not to suggest that a motion should be argued in terms of the public interest and the litigants’ rights, but rather that national ethical principles apply as well as the Texas Rules.\textsuperscript{178}

In broadening the basis of ethical principles that could control decisions, the \textit{American Airlines} court was forced to address the tests of other Circuits.\textsuperscript{179} Ultimately the court concluded that the primary goal in the Fifth Circuit is to prevent conflicts of interest, rather than to apply a more narrow standard that addresses only the fairness of the trial.\textsuperscript{180}

With the above factors in mind, the court proceeded to consider whether the substantial relationship test, the test applied in the Fifth Circuit prior to the promulgation of the Texas Rules,\textsuperscript{181} had to change under the new rules.\textsuperscript{182} First, the court determined that the new rules do not add any new bases for disqualification even though they prohibit successive relations for more than just substantial relationships.\textsuperscript{183} Citing \textit{Duncan v. Merrill Lynch, Pierce, Fenner & Smith}\textsuperscript{184} as authority, the court said:

The Rules are not, however, broader than the protections [for former clients] provided by our precedents. While the focus of our cases has been on the substantial relationship test, we have indicated that a former client could also disqualify counsel by showing that his former attorney possessed relevant confidential information in the manner contemplated by Rule 1.09(a)(2).

As \textit{Duncan}, for example, stated:

[The moving party may disqualify counsel on the basis of prior representations] either by establishing that the present and previous representations are substantially related or by pointing to specific instances where it revealed relevant confidential information regarding its practices and procedures.\textsuperscript{185}

Next, the court considered whether the Rules provide less protection to former clients than precedent.\textsuperscript{186} Two arguments were presented by counsel opposing the motion to disqualify. One contention, based on a commentary to Rule 1.09,\textsuperscript{187} was that disqualification due to a substantial relationship cases were not diversity cases. In a diversity action or conflicts of law issue, in a jurisdiction which uses the first \textit{Restatement of Conflict of Laws}, the issue of whether the motion to disqualify is a substantive question rather than a procedural decision may not reach the same outcome.

\textsuperscript{178} \textit{American Airlines}, 972 F.2d at 610.
\textsuperscript{179} \textit{Id.} For example, the Second Circuit adopted a “taint” test for determinations of disqualification motions. For further discussion, see infra note 206.
\textsuperscript{180} \textit{American Airlines}, 972 F.2d at 610.
\textsuperscript{182} \textit{See, e.g., TEX. DISCIPLINARY R. PROF. CONDUCT} 1.09 (1993).
\textsuperscript{183} \textit{American Airlines}, 927 F.2d at 614.
\textsuperscript{184} 646 F.2d 1020, 1032, (5th Cir.), \textit{cert. denied}, 454 U.S. 895 (1981).
\textsuperscript{185} \textit{American Airlines}, 927 F.2d at 614.
\textsuperscript{186} \textit{Id.}
\textsuperscript{187} \textit{TEX. DISCIPLINARY R. PROF. CONDUCT} 1.09 cmt. 8 (1993) (“[S]ome courts, as a procedural decision, disqualify a lawyer for representing a present client against a former client when the subject matter of the present representation is so closely related to the subject matter of the prior representation that confidences obtained from the former client might be useful in representation of the present client.”).
should only result when there is an actual threat of revealed confidences affecting the integrity of the trial.\textsuperscript{188} The court, however, denied that an actual threat needs to be demonstrated. Instead, the former client need only show that the two matters are substantially related.\textsuperscript{189}

The other argument was based on the "conscious omission of the 'appearance of impropriety' standard" that was contained in the Code, but not the Rules. The court refused to sustain this contention, stating:

\[\text{W}e\text{ adhere to our precedents in refusing to reduce the concerns underlying the substantial relationship test to a client's interest in preserving his confidential information. [One of the] fundamental concern[s] protected by the test is not the public interest in lawyers avoiding "even the appearance of impropriety," but the client's interest in the loyalty of his attorney.}\textsuperscript{190}

The court found that loyalty, as well as confidentiality, is protected by the Texas Disciplinary Rules that encompasses the protection of the professional's integrity.\textsuperscript{191} Thus, the use of the substantial relationship test as defined by precedent in the Fifth Circuit was not altered by the adoption of the Texas Disciplinary Rules of Professional Conduct.

After establishing the status of the substantial relationship for attorney disqualification, the court determined the issue of whether Vinson & Elkins' (V&E) prior representations of American Airlines were substantially related to the present case.\textsuperscript{192} V&E had represented American in several matters, earning over $676,000 in legal fees. The court focused on three of V&E's prior representations for a substantial relationship with the current matter.

In the early 1980s, Continental alleged that American's president attempted to illegally monopolize the Dallas-Fort Worth International Airport. The court found this to be substantially related because the present case would focus on the Dallas-Fort Worth market that was also at issue in the first case.\textsuperscript{193} V&E disputed this finding, basing its argument on the fact that a ten year old incident would be inadmissible as evidence. Noting that this factor was "helpful, but not dispositive," the court said the standard is not relevance in the evidentiary manner.\textsuperscript{194} The matter "need only be akin to the present action in a way reasonable persons would understand as important to the issues involved."\textsuperscript{195} Thus, the court held this representation

\begin{footnotes}
\item[188] The argument urged the adoption of the "taint of trial" standard that is used in some circuits. This standard allows an attorney to continue representing a client absent a showing of actual danger to the fairness of the trial.
\item[189] American Airlines, 972 F.2d at 617.
\item[190] Id. at 616.
\item[191] Id. at 617. Commentary to Rule 1.06 (which forbids concurrent adverse representations), provides that it is important for the lawyer to be loyal to his client. TEX. DISCIPLINARY R. PROF. CONDUCT 1.06 cmt. 1 (1993). Also, the ABA rules prohibiting conflicts with former clients mentions loyalty as a rationalization. MODEL R. PROF. CONDUCT 1.9 cmts. 3-10 (1983).
\item[192] American Airlines, 972 F.2d at 621.
\item[193] Id. at 623.
\item[194] Id.
\item[195] Id.; accord In re Corrugated Container Antitrust Litig., 659 F.2d 1341, 1346 (5th Cir. 1981).
\end{footnotes}
to be of a substantially related matter.\textsuperscript{196}

Another antitrust action in which VE defended American involved the use of American's CRS market. VE argued that the CRS knowledge from the former case will not be at issue and is barred from further litigation by res judicata. The court rejected this argument, finding that the scope of categories to be argued was not clear at the early stage of litigation when the disqualification motions were presented.\textsuperscript{197} In this situation, the former client will certainly be hurt, because the attorney will attempt to minimize the good effects of the earlier case by limiting their effect on the present case.\textsuperscript{198} Furthermore, the court found areas that Northwest admitted would be at issue in the present case to be substantially related to VE's prior representation.\textsuperscript{199}

Finally, the court examined VE's representation in its capacity as American's antitrust advisor in the proposed Continental merger. One of the major issues was market definition. The court found that VE, in the course of its representation, made a detailed market evaluation and was privy to American's views and other confidential information.\textsuperscript{200} Finding these matters substantially related, the court reiterated that this barred VE from attempting to show that it had received no actual confidences.\textsuperscript{201}

In all of the instances of prior representations, the court delineated with specificity all of the matters from the former suit which were substantially related to the current action.\textsuperscript{202} The court compiled all relevant precedent and, in conjunction with the new Texas Disciplinary Rules of Professional Conduct, specified precisely how a substantial relationship should be determined. Although the determination remains largely fact specific, the court's opinion gives clarity and predictability to attorneys in determining whether a representation adverse to a former client will be barred.

VI. THE FUTURE FOR THE MOTION TO DISQUALIFY

A. Problems

Despite the usefulness of disqualification motions as a remedy for an attorney representing interests adverse to a former client, there are problems with the disciplinary rules. One problem is that the rules of ethics are just that, rules, and not law.\textsuperscript{203} They were meant to be standards for disciplinary actions to be brought by an independent prosecuting agency, not as rules of procedure for a court.\textsuperscript{204} A different standard should be used when determining a disqualification motion especially since they are being urged by a

\textsuperscript{196} American Airlines, 972 F.2d at 623.
\textsuperscript{197} Id. at 624.
\textsuperscript{198} Id.
\textsuperscript{199} Id. at 625.
\textsuperscript{200} Id. at 626-27.
\textsuperscript{201} Id. at 628.
\textsuperscript{202} Id.; see Duncan, 646 F.2d at 1029.
\textsuperscript{203} James Lindgren, Toward a New Standard of Attorney Disqualification, 24 AM. B. FOUND. RES. J. 419 (1982).
\textsuperscript{204} See TEX. DISCIPLINARY R. PROF. CONDUCT preamble § 15 (1993).
self interested party. Compounding that effect, opponents to the use of the disqualification motion contend that the effect of the motion is an unjustified delay to proceeding on the merits of the case.

Another concern arises from the differing objective of the ethical sanctions as opposed to the disqualification motion. While the primary objective of the ethical rules is the protection of the client, a disqualification motion's main objective should be to have a fair trial for all concerned. A related complaint about the use of disqualification motions for successive conflict issues is that they fail to promote loyalty, protect the integrity of the legal profession, or protect client confidences as various jurisdictions purport.

A final problem arises from the new formulation of the disciplinary rules. The rules of professional conduct adopted the substantial relationship test as developed through case law. Although the same test is used, it is interpreted differently. A disciplinary action will construe the test much more strictly than a motion to disqualify. While the standards for disqualification and ethical sanctioning need to be different, this dichotomy makes the function of attorney self-assessment rather complex.

B. Conclusion

At the time being, the motion to disqualify an attorney for opposing a former client in a successive representation will be considered by the courts in Texas. Despite the fact that the substantial relationship test has been codified as a rule of disciplinary conduct, the application of that test to disqualification motions remains virtually unchanged from its meaning before the advent of the new rules. The ethical rules, however, may herald a change in the Texas state courts. As Texas appellate courts have indicated, the argument that a successive representation may in reasonable probability violate confidences from the former representation will be considered as a basis separate and distinct from the substantial relationship standard. The Fifth Circuit, however, maintains that the new rules have neither added nor subtracted from the former standard. With any luck, the rules will continue to remain constant so the potential for a disqualification can be accurately gauged before the need to embark on a dispute of the propriety of representation in a lawsuit.

205. Andra Greene, Everybody's Doing It — But Who Should Be? Standing to Make a Disqualification Motion Based on an Attorney’s Representation of a Client With Interests Adverse to Those of a Former Client, 6 U. PURDUE L. REV. 205 (1982).

206. See Lindgren, supra note 203, at 419.


208. See Goldberg, supra note 62, at 264.


211. See American Airlines, 972 F.2d at 615; see also Sutton & Schuwerk, supra note 29, at 153 n.34 (the drafter's idea was “to construe ‘substantially related’ narrowly for disciplinary purposes.” [emphasis added]).