MOTIONS To DISQUALIFY In Texas State and Federal Court LITIGATION

BY DAVID HRICIK AND JAE ELLIS

This article describes several key procedural issues that trial lawyers in Texas face when litigating motions to disqualify or analyzing whether to bring a motion to disqualify. The article also analyzes how state and federal courts take different approaches to these issues and explains what to do about the problems that these approaches — and differences — create.

STANDING TO SEEK DISQUALIFICATION

In both Texas state[1] and federal courts,[2] the general rule is that only clients or former clients have standing to move to disqualify;[3] however, there are exceptions in both jurisdictions. Texas state courts and the U.S. Fifth Circuit recognize that an attorney's duty to preserve confidences exists even where his or her former client is not a party to the current suit — and even where the lawyer did not represent the movant. Motions to disqualify filed by parties who had a joint defense agreement (JDA) with a lawyer's former client present a key example.[4]

National Medical Enterprises, Inc. v. Godbey,[5] illustrates Texas' approach. National Medical Enterprises, Inc. (NME) sought to disqualify the plaintiff's attorney in a suit in which the attorney's former client was not a party.[6] NME's motion was based on the confidences that it had imparted to the attorney in the prior representation under a joint defense agreement. The Texas Supreme Court held that disqualification was proper, reasoning that an attorney has the same duty to preserve confidences in JDAs as when confidences are imparted directly by the client.[7] In addition, the court held that — just as when a former client moves — the presumption of shared confidences arises.[8]

Unlike Texas courts, the Fifth Circuit does not presume that confidences were imparted and shared during the former representation where the movant is not a former client.[9] In *Wilson P. Abraham Construction Corp. v. Armco Steel Corp.*, the Fifth Circuit refused to grant to the movant, who had been a co-defendant of the attorney's former client, the presumptions that confidences were imparted and shared.[10] The court reasoned that the presumptions are only for the benefit of the former client.[11]

In both jurisdictions, there are instances when parties that the lawyer had never represented may move to disqualify. In the context of JDAs, lawyers should use a written agreement to specify that the lawyer does not owe an obligation of loyalty or confidentiality to other parties to the JDA.

WAIVER OF DISQUALIFICATION MOTIONS THROUGH DELAY

Texas state courts are more likely than federal courts to observe that disqualification motions are used as a dilatory tactic.[12] To prevent a tactical delay, Texas courts believe that in explaining that "[t]he untimely urging of a disqualification motion lends support to any suspicion that the motion is being used as a tactical weapon."[13] In determining whether the objection has been waived, Texas courts consider not just the length of time between when a movant learned of the conflict to the filing of the motion,[14] but also "any additional evidence that indicates the motion is being filed as a dilatory trial tactic."[15] Numerous Texas courts have weighed the length of time passed against evidence of tactical delay and have reached different results on whether the delay constituted waiver.[16] Although Texas courts seek to protect against the divulgence of confidences, they are likely to find waiver where tactical use of disqualification poses a greater risk to the fairness of the trial. In *Enstar Petroleum Co. v. Mancias*,[17] the court found waiver where the motion for disqualification came four months after the movant learned of the conflict.[18] Since that decision, it has been a safe rule for attorneys to assume that a Texas court will find a delay of four months or longer constitutes a waiver.[19] Attorneys should consider both *NCNB Texas National Bank*'s express admonition that motions to disqualify should not be used as tactical weapons and *Enstar*'s *per se* waiver standard.[20]

The federal approach to waiver differs from that of the Texas courts as a result of the Fifth Circuit's emphasis on preventing the appearance of impropriety. Unlike the Texas courts, the federal courts do not apply an almost-*per se* waiver rule to cases where delay exceeded four months.[21] In *In re Corrugated Container Antitrust Litigation*, the Fifth Circuit cited Canon 9 of the Model Code, explaining that neither waiver — nor even consent to adverse representation — can dispose of the court's responsibility to weigh the likelihood of public suspicion of the legal profession.[22] The court reasoned that, although a client might be able to waive objection to a violation of another canon of the Model Code, any situation implicating Canon 9, including former client conflicts, requires the court to weigh the likelihood of public suspicion.[23] Recent district court decisions have recognized this approach.[24]

This does not mean that the Fifth Circuit will never find that a client's right to a disqualification motion has been waived. In *Corrugated Container*, the court was careful to explain that there could be a factual situation where a court's refusal to find waiver could raise more public suspicion than would waiver.[25]

Despite the Fifth Circuit's admonition, a few Texas federal district courts have found waiver under analysis similar to that undertaken by Texas state courts.[26] For example, in *Abney v. Wal-Mart*,[27] the District Court for the Eastern District of Texas held that a one-year delay constituted waiver when the motion for disqualification was filed one month before the trial date.[28]

There are two consequences that lawyers need to consider. First, motions should not be delayed in either forum, but delay will be deemed more significant in state court. Second, in both jurisdictions, the waiver "clock" obviously stops running when the motion to disqualify is filed. But when does it begin to run?

A critical issue may be what starts the waiver clock ticking. In some circumstances, the filing of the suit or of an amended pleading clearly indicates that the lawyer is adverse to a present client or a former client in a substantially related matter.[29] At other times, a party asserting delay by waiver can rely on pre-suit knowledge of the client or former client to demonstrate

that the movant knew of the conflict prior to filing suit.[30] Other evidence, such as when the movant claims "anticipation of litigation" for purposes of protecting work product from disclosure, may be used to show that the movant knew of the conflict but delayed filing the motion. However, at least one Texas court has held that the mere threat of a suit does not start the clock to run.[31] Some courts have held that time spent working to resolve the conflict does not "count" for purposes of waiver.[32] A party seeking to avoid disqualification may be able to argue that the clock has been running for longer than it seems.

Lawyers should be careful to avoid couching a disqualification motion solely in terms of a Texas rule, even when filing a motion in Texas state court. Doing so may foreclose the argument that, even if the rule is not violated, disqualification is still required. Conversely, lawyers who rely on the rules should consider whether there is a need to explain why there are reasons to disqualify in addition to the ethical violation.

THE ROLE OF THE DISCIPLINARY RULES

Despite the gravity of ethical matters, no statute or procedural rule specifically applies to disqualification motions or ethical disputes in either state or federal court. For example, no rules directly control the question of whether a court should disqualify an attorney on the ground that the attorney currently represents the litigant in other matters.

Instead, courts decide disqualification motions in common law fashion. In deciding ethical matters that arise during litigation, virtually every court relies, at least for "guidance," on rules adopted to govern attorney discipline, even though those codes specifically state that they should not be used outside the context of attorney discipline — such as in deciding attorney disqualification or civil liability.[33]

Texas state courts sometimes require proof of violation of a disciplinary rule to make disqualification proper;[34] other times, proof of a violation is insufficient.[35] Sometimes, the rules are held as merely guidelines and a violation is not dispositive of disqualification.[36] At still other times, the courts almost let the parties decide what matters: "When parties to a disqualification dispute confine their arguments to whether a particular attorney has complied with the disciplinary rules, courts have accordingly directed their analysis to the rules."[37]

What this means is that lawyers should be careful to avoid couching a disqualification motion solely in terms of a Texas rule, even when filing a motion in Texas state court. Doing so may foreclose the argument that, even if the rule is not violated, disqualification is still required. Conversely, lawyers who rely on the rules should consider whether there is a need to explain why there are reasons to disqualify *in addition to* the ethical violation.[38] Obviously, the lessons are reversed for lawyers opposing motions to disqualify.

Federal courts take an entirely different view, not on the role of the rules, but on the role of the Texas rules in federal court. In 1992, the Fifth Circuit confronted a key distinction between the Texas rules and the ABA Model Rules and Model Code. A district court reasoned that, since its local rules had adopted the Texas rules, the Texas rules controlled.[39] On mandamus review, the Fifth Circuit held that the Texas rules did not — indeed *could* not — bind a federal judge in deciding the propriety of attorney conduct in matters arising before it.[40] Instead, the court held that "national standards" of ethics controlled in federal court, even if the district court in its local rules had expressly adopted the state rules as governing matters arising before it.[41]

The benefits of this approach are obvious. Within the Fifth Circuit, all federal courts will apply the same standards to attorney conduct. Further, in the same proceeding, all attorneys will be subject to the same standards, even if the attorneys are from different states. Uniformity among the federal courts is achieved at the expense of uniformity between state and federal courts in the same state.[42] Other federal courts have adopted the Fifth Circuit's approach or taken hybrid approaches. However, most federal courts do not give the state court rules controlling legal effect on the propriety of attorney conduct occurring in connection with federal court litigation.[43]

As a result of the Fifth Circuit's decision, distinctions between the Model Code, the Model Rules, and the Texas rules often become the focal point of federal court disqualification motions.[44] While Texas state courts continue to rely primarily on the disciplinary standards in the Texas rules, federal courts have relied on broader sources to determine ethical standards. This "national standard of ethics" approach consults the Model Code, the Model Rules, any rules adopted by or contained in the local rules of the district court, and even the American Law Institute's *Restatement of the Law Governing Lawyers*.[45] The fact that no one set of rules governs attorney conduct in federal court litigation in Texas means that there is "a brooding omnipresence in the sky over Texas."[46] More turmoil arises from the fact that, on occasion, federal courts have asserted jurisdiction to apply their ethical rules to the conduct of lawyers who have not even formally appeared in federal court.[47]

Lawyers litigating motions to disqualify or other ethical issues in federal court cannot rely solely upon any single set of ethical

rules, let alone the Texas rules.[48] Familiarity with *all* major ethical rules is required. This becomes difficult when the courts and bar associations split on an issue. Predicting what "federal common law" is when the question is not so simple as whether a lawyer can steal from a client can be incredibly difficult. In state court, care should be given before too much emphasis is placed on the Texas rules. Disqualification may be proper even if discipline would not be.

TURNOVER OF WORK PRODUCT TO REPLACEMENT COUNSEL

If the counsel is disqualified, a critical question is whether the work product that the firm created while engaged in the unethical representation can be handed on to replacement counsel. On this point, the state and federal courts appear to agree generally on the rules.

Federal and Texas state courts generally hold that simply because a lawyer is disqualified does not mean that all of the work product should not be made available to replacement counsel. Instead, the courts apply a multi-factor approach that analyzes whether the work product is likely to include misused confidential information.[49]

Under this approach, absent extraordinary circumstances, replacement counsel must be able to have access to documents that are already part of the public record, such as pleadings and motions.[50] Only if the party that obtained disqualification shows that these materials reveal confidential information can replacement counsel be denied access.[51]

With respect to internal work product, the purposes underlying disqualification "will often require a partial or total restriction on the successor counsel's access to the disqualified counsel's work product."[52] This requires examining the basis for the disqualification order.

If disqualification was required because the lawyer had been in position to misuse the movant's confidential information, then restricting access to the work product may be required to avoid deliberate or inadvertent disclosure of those same confidences. Likewise, if the disqualification was required because the firm was attacking its own work product, a turnover bar may be appropriate to prevent successor counsel from seeing the legal theories that disqualified counsel developed in violation of the ethical rules.[53]

Most courts, however, do not use an "all or nothing" approach even when some bar is required.[54] This is because some work product may not be "tainted" even if some is. The standard by which courts approach this question is unsettled in the federal courts; the Texas Supreme Court has adopted the view that there is a rebuttable presumption that work product created by disqualified counsel contains client confidences where that is the basis for disqualification.[55] Successor counsel and the disqualified firm's client may move to rebut that presumption, but the disqualified firm must provide an inventory of the work product — somewhat like a privilege log — so that whether it is "tainted" may be evaluated.[56] If the log is insufficient, then — as with privilege challenges — an *in camera* examination may be required.

It is important for firms on both sides of a disqualification motion to consider this problem when the motion is filed — not when it is decided. If the movant truly believes that its confidences are being misused, then it may need to move for expedited consideration, both to avoid waiving this argument and to prevent deliberate or inadvertent "publication" of confidences in court filings. Conversely, a lawyer faced with a motion to disqualify may need to warn the client that one possible outcome is not just disqualification, but a turnover bar.

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APPEALABILITY AND MANDAMUS

While direct appeal is generally unavailable for the grant or denial of a motion to disqualify, Texas state courts are much more willing than federal courts to reach the merits of a petition for mandamus review of the grant or denial of a motion to disqualify. Although it is impossible without empirical study to verify that statement, the sheer number of mandamus proceedings involving disqualification matters in state court, as opposed to federal court, bears this out.[57]

What this means is that in federal court, more than in Texas state court, the parties are likely to have only one decision on disqualification; there will be no review until, and unless, there is a final judgment.

CONCLUSION

Motions to disqualify are sensitive matters to both judges and lawyers. Yet sensitivity — in the sense of who can move to disqualify and under what circumstances, or whether a motion can be waived, or whether an appellate court will provide review — turns significantly on which court is hearing the motion.

NOTES

1. *E.g.*, In *re Goodman*, 210 S.W.3d 805, 808 (Tex. App. — Texarkana 2007, orig. proceeding) ("A party seeking to disqualify an attorney must show the existence of a prior attorney-client relationship. …").
2. *See* In *re Yarn Processing Patent Validity Litig.*, 530 F.2d 83 (1976).
3. *See Jamieson v. Slater*, 2006 WL 3421788 (D. Ariz. Nov. 27, 2006) (Arizona law); *Meza v. H. Muehlstein & Co.*, 2009 WL 118883 (Ct. App. Cal. Jan. 20, 2009) (California law); *United States v. Walker River Irrig. Dist.*, 2006 WL 618823 (D Nev. March 10, 2006) (Nevada law); *British Int'l Ins. Co., Ltd. v. Seguros La Republica, S.A.*, 2002 WL 31307165 (S.D.N.Y. Oct. 15, 2002 (New York law); *Love v. Tyson*, 460 S.E.2d 204 (Ct. App. N.C. 1995) (North Carolina law); *Prosser v. Nat'l Rural Utilities Coop. Fin. Corp.*, 2009 WL 1605637 (D. V.I. June 8, 2009) (applying general principles). *See generally*, Ivy Johnson, *Standing to Raise a Conflict of Interest*, 23 N. Ill. U. L. Rev. 1 (2002); James M. Fischer, *Non-Client Standing to Move to Disqualify for Conflicts of Interest*, 3 Prof. Lawyer 1 (May 1997).
4. *See Wilson P. Abraham Constr. Corp. v. Armco Steel Corp.*, 559 F.2d 250 (5th Cir. 1977); *National Med. Enters. Inc. v. Godbey*, 924 S.W.2d 123 (Tex. 1996).
5. 924 S.W.2d at 123.
6. *See id.* at 131.
7. *See id.* at 131–32 (citing *Abraham Constr. Corp.*, 559 F.2d at 253); *see also Westinghouse Elec. Corp. v. Kerr-McGee Corp.*, 580 F.2d 1311, 1319 (7th Cir. 1978), *cert. denied*, 439 U.S. 955 (1978) (suggesting that the test requires determination of the scope of the former representation and the likelihood that confidences were given to the lawyer in that representation that are relevant to the current litigation).
8. *National Med. Enters.*, 924 S.W.2d at 132.
9. *See Abraham Constr. Corp.*, 559 F.2d at 250
10. *Id.*
11. *See Spears v. Fourth Court of Appeals*, 253.
12. *See NCNB Tex. Nat'l Bank*, 765 S.W.2d at 399.
13. 797 S.W.2d 654 (Tex. 1990); *See Wasserman*, 910 S.W.2d at 568; *Rio Hondo Implement Co. v. Euresti*, 903 S.W.2d 128 (Tex. App. 1995), *no writ; H.E.C.I. Exploration Co.*, 843 S.W.2d at 628–29 (finding failure to timely seek disqualification also supports suspicion that motion is being used as tactical weapon); *Conoco*, 803 S.W.2d at 420; *INA v. Westergren*, 794 S.W.2d 812, 815 (Tex. App. 1990), *no writ*; *Enstar Petroleum*, 773 S.W.2d at 664.
14. *See Wasserman v. Black*, 910 S.W.2d 564, 568 (Tex. App. 1995, *no writ*); *see also Vaughan v. Walther*, 875 S.W.2d 690, 690–91 (Tex. 1994).
15. *Wasserman*, 910 S.W.2d at 568; *see also Spears*, 797 S.W.2d at 656.
16. For Texas cases holding that the complaint was waived by delay, see *Turner*, 385 S.W.2d at 236; *Grant*, 888 S.W.2d 466; *Vaughan*, 875 S.W.2d 690; *H.E.C.I. Exploration Co.*, 843 S.W.2d at 628; *Conoco*, 803 S.W.2d 416; *Enstar Petroleum*, 773 S.W.2d at 664.

    For Texas cases holding that the complaint was not waived by delay, see *Wasserman*, 910 S.W. 2d 564; *Rio Hondo*, 903 S.W.2d 128; *Westergren*, 794 S.W.2d at 815.
17. 773 S.W.2d 662 (Tex. App. 1989), *no writ*.
18. *See id.* at 664.
19. *See id.*
20. *See NCNB Tex. Nat'l Bank*, 765 S.W.2d at 399; *see also Enstar Petroleum*, 773 S.W.2d at 664.
21. *See Islander East Rental Program v. Ferguson*, 917 F. Supp. 504, 508 (S.D. Tex. 1996) (citing *Atasi Corp. v. Seagate Tech.*, 847 F.2d 826, 832 (Fed. Cir. 1988)).
22. *In re Corrugated Container Antitrust Litig.* 659 F.2d 1341,1349 (5th Cir. 1981) (citing Model Code Canon 9).
23. *See id.*
24. *E.g., Vinewood Capital, LLC v. Dar Al-Maal Al-Islami Trust*, 2010 WL 1172947, *8 (N.D. Tex. March 25, 2010) ("Unlike violations of other ethical rules … [a] violation of Canon 9 cannot be waived by the former client's delay. …").
25. *See id.*
26. *See, e.g., American Sterilizer Co. v. Surgikos, Inc.*, 24 U.S.P.Q.2d 1547, 1550-51 (N.D. Tex. 1992).
27. 984 F. Supp 526, 530 (E.D. Tex. 1997).
28. *Id.*
29. *Synteck Fin. Corp.*, 880 S.W.2d at 34 (amended complaint demonstrating adverse substantial relationship and so began time to determine waiver by delay).
30. *See Vinewood Capital, LLC v. Dar Al-Maal Al-Islami Trust*, 2010 WL 1172947 (N.D. Tex. March 25, 2010).
31. In *re Hoar Constr.* LLC, 256 S.W.3d 790, 798 (Tex. App. — Houston [14th Dist.], orig. proceeding).
32. In *re Epic Holdings*, 985 S.W.2d 41, 52–53 (Tex. 1998) (orig. proceeding).
33. *See* Tex. Disciplinary Rules of Professional Conduct preamble (1989) [hereinafter Tex. rules]; *see also* Model Rules of Professional Conduct preamble (1983) [hereinafter Model Rules].
34. In *re Sandoval*, 308 S.W.3d 31 (Tex. App. — San Antonio 2009, orig. proceeding) ("The party moving for disqualification must establish with specificity a violation of one or more of the disciplinary rules.") (citing *Spears v. Fourth Court of Appeals*, 797 S.W.2d 654, 656 (Tex. 1990) (orig. proceeding).
35. In *re Users Sys. Serv., Inc.*, 22 S.W.2d 331, 334 (Tex. 1999) ("Technical compliance with ethical rules might not foreclose disqualification, and, by the same token, a violation of ethical rules might not require disqualification. …").
36. *Nat'l Med. Enterp., Inc. v. Godbey*, 924 S.W.2d 123, 132 (Tex. 1996) (orig. proceeding) ("The Texas … Rules … [d]o not determine whether counsel is disqualified in litigation, but they do provide guidelines and suggest the relevant considerations."); In *re Brittingham*, __ S.W.3d __, 2010 WL 1608885 (Tex. App. — San Antonio Apr. 21, 2010, orig. proceeding) ("We look to the disciplinary rules to decide disqualification issues, but the disciplinary rules are merely guidelines and not controlling standards for motions to disqualify.").
37. In *re Hoar Constr. LLC*, 256 S.W.3d 790, 798 (Tex. App. — Houston [14th Dist.], orig. proceeding). *See Anderson Producing Inc. v. Koch Oil Co.*, 929 S.W.2d 416, 421 (Tex. 1996) (discussing use of rules where no party offers countervailing reason why they should not be applied); In *re Users Sys. Serv., Inc.*, 22 S.W.2d 331, 334 (Tex. 1999) ("Technical compliance with ethical rules might not foreclose disqualification, and, by the same token, a violation of ethical rules might not require disqualification; however, the parties and the lower courts have all focused on … Rule 4.02; hence so do we."). *See generally*, Kelli Hinson & David Anderson, *Attorney Disqualification*, 72 Tex. B.J. 828 (Nov. 2009); In *re Goodman*, 210 S.W.3d 805 (Tex. App. — Texarkana 2007, orig. proceeding) (collecting cases).
38. Some Texas courts have said "taint" of the proceedings is required, at least in some circumstances. *E.g., Smith v. Abbott*, 311 S.W.3d 62, 73 (Tex. App. — Austin 2010, no pet. h.).
39. *See In re Dresser Indus., Inc.*, 972 F.2d 540, 543 (5th Cir. 1992).
40. *See id.*
41. *See id.* at 439–40.
42. The approach of *not* following one set of ethical rules in federal court has been justified on the basis that "slavishly following the different state rules … would balkanize litigation." *Rand v. Monsanto Co.*, 926 F.2d 596, 600 (7th Cir. 1991).

    A troublesome question is whether, under *Erie* application of federal law, the attorney-client relationship should follow its forum state's standards for attorney conduct since the lawyer-client relationship is plainly one of state law. *See Hanna v. Plumer*, 380 U.S. 460 (1965) (holding that federal courts must apply state substantive law and federal procedural law). *See generally* Hricik, *supra* note 17, at 716–17 (questioning whether *Erie* is implicated by application of different standards to attorney-client relationships in federal court than in the forum's state courts).
43. *See, e.g., Cole v. Ruidoso Mun. Sch.*, 43 F.3d 1373, 1383 (10th Cir. 1994) (adopting Fifth Circuit's approach); *Rand*, 926 F.2d at 600 (applying similar approach to Fifth Circuit). Courts have extended the Fifth Circuit's approach, reasoning that "even when a federal court utilizes state ethics rules, it cannot abdicate to the state's view of what constitutes professional conduct, even in diversity cases." *McCallum v. CSX Transp. Inc.*, 149 F.R.D. 104, 108 (M.D.N.C. 1993). However, other courts have specifically rejected the approach of the Fifth Circuit, holding that lawyers are held only to those ethical rules which they "pledged to follow." *In re Potash Antitrust Litig.*, 1994-1 Trade Cas. P70, 644 n.21 (D. Minn. 1993).

    It is noteworthy that the jurisdictions that follow state rules more closely than is permitted by the Fifth Circuit's approach may do so only because they have failed to confront the conflicts between the various standards. The Ninth Circuit's approach to ethical issues arising in California federal courts provides a good example of this. The Ninth Circuit in 1983 reasoned that since "[a]dvance notice is essential to the rule of law [and] since it is desirable that an attorney or client be aware of what actions will not be countenanced," if the federal district court adopted the *California Rules* in its local rules, they would apply to ethical issues arising in federal court. *Paul E. Iancono Structural Eng'r, Inc. v. Humphrey*, 722 F.2d 435, 438-39 (9th Cir. 1983). (The Ninth Circuit has not decided what rules apply where a district court has not adopted the California Rules. *See Christensen v. U.S. Dist. Court*, 844 F.2d 694, 698 n.6 (9th Cir. 1988)). At the time the Ninth Circuit decided *Paul E. Iancono*, the Model Rules were just being promulgated by the ABA. The Model Code and the California Rules apparently did not differ in significant ways so the Ninth Circuit looked to the Model Code for guidance, just as California state courts did. *See Paul E. Iancono*, 722 F.2d at 439-40.

    More recently, the Ninth Circuit has held that — even though the Model Rules are not binding on California lawyers practicing in California federal courts — they "are a collateral source that may be consulted for guidance, particularly when California's State Bar Act and Rules of Professional Conduct are imprecise or incomplete." *Securities and Exchange Comm'n v. Rana Research, Inc.*, 1993 WL 445101, at *2 (9th Cir. Nov. 3, 1993). Apparently for this reason,

California federal district courts, though adopting the California Rules in their local rules, have continued to mention the Model Code and Model Rules along with the California Disciplinary Rules. *See, e.g., Hoffman-La Roche Inc. v. Promega Corp.*, 33 U.S.P.Q.2d 1641, 1651 (N.D. Cal. 1994). California courts have not yet confronted a direct conflict between the standards; it may prove difficult to continue to apply all of the standards to ethical matters once that occurs.

44. *See, e.g., Federal Deposit Ins. Co. v. U.S. Fire Ins. Co.*, 50 F.3d 1304, 1315–16 (5th Cir. 1995) (separately analyzing each set of rules); *Ayus v. Total Renal Care, Inc.*, 48 F. Supp. 2d 714, 715–17 (S.D. Tex. 1999) (same).
45. *See Federal Deposit Ins.*, 50 F.3d at 1311-12; *see also* Hricik, *supra* note 17, at 716–17. Because it has not limited itself to only one or two sets of rules, the Fifth Circuit has been criticized as creating imprecise definitions and lending little guidance to lawyers and trial judges. *See* John F. Sutton, *Introduction to Conflicts of Interest Symposium: Ethics, Law, and Remedies*, 16 Rev. Litig. 491, 511–12 (1997); *see also* Edward A. Carr and Allan Van Fleet, *Professional Responsibility Law in Multijurisdictional Litigation: Across the Country and Across the Street*, 36 S. Tex. L. Rev. 860, 896, 898–900 (1995). Critics further argue that, where the sources of ethical guidance are not identical, a lawyer must predict how a federal judge would weigh the merits of those differing approaches, and then act accordingly. *See generally Carr & Van Fleet*, at 899.
46. Geoffrey C. Hazard, Jr., *Uniform Discrepancies*, 17 Nat'l L.J. 21, A19 (1995).
47. *See, e.g., Fund of Funds, Ltd. v. Arthur Andersen & Co.*, 567 F.2d 225, 235-36 (2d Cir. 1977) (asserting jurisdiction to disqualify attorney who had not appeared in federal court from representing party that had); *E.F. Hutton & Co. v. Brown*, 305 F. Supp. 371, 379-80 (S.D. Tex. 1969) (same). Neither case was decided when different ethical standards existed.
48. *See Securities & Exchange Comm'n v. Powell*, 2007 WL 3256250 (E.D. Tex. Nov. 2, 2007) ("The court applies federal common law taking into account both national and local norms of behavior. The Texas … Rules … are relevant but by no means dispositive. …"); *Hill v. Hunt*, 2008 WL 4108120 (N.D. Tex. Sept. 4, 2008) (similar statements).
49. In *re George*, 28 S.W.3d 511 (Tex. 2000); *First Wisc. Mortgage Trust v. First Wisc. Corp.*, 584 F.2d 201 (7th Cir. 1978); *EZ Paintr Corp. v. Padco, Inc.*, 746 F.2d 1459 (Fed. Cir. 1984).
50. *See* In *re George*, 28 S.W.3d at 514.
51. *Id.* The court stated that public documents were presumptively available to replacement counsel.
52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.*
56. *Id.*
57. *See generally*, Leah Epstein, *A Balanced Approach to Mandamus Review of Attorney Disqualification Orders*, 72 U. Chicago L. Rev. 667 (2005).

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DAVID HRICIK
is a professor at Mercer University School of Law in Macon, Ga., and a member of the State Bar of Texas. He teaches ethics, patent law, and federal civil procedure, among other courses.

JAE ELLIS
is senior manager at Deloitte Services, L.P. in Dallas. He was formerly a litigation attorney with Gardere Wynne Sewell, L.L.P. Ellis has been a member of the State Bar of Texas since 1999.