



# ATTORNEY DISQUALIFICATION

BY KELLI HINSON AND DAVID ANDERSON

ILLUSTRATION BY GILBERTO SAUCEDA

**W**hile preparing for trial, a lawyer, to his dismay, finds out that opposing counsel intends to call him as an adverse witness against his own client. A party to a lawsuit discovers that a firm that had represented his co-defendant in a prior related matter has been retained by his current adversary. A mid-level associate ventures out to open his own plaintiff practice specializing in asbestos claims, which he happens to be well versed in defending. These individuals each face a common issue: potential disqualification, be it his own or his opponent's.

Disqualification of counsel implicates competing policies: honoring a client's right to the counsel of his choice on the one hand, and, on the other, protecting a former client's confidences, preventing confusion to the trier of fact, and shielding the legal community from the appearance of impropriety.

Nearly every Texas court considering a disqualification motion takes heed of these competing policies, observing that disqualification is a "severe remedy" that can result in "immediate and palpable harm." Exacting standards are therefore

applied to disqualification motions. The trial court's decision on disqualification is reviewable by mandamus, and mandamus will issue only if the trial court has committed a "clear abuse of discretion" and there is no adequate remedy at law.<sup>1</sup>

Disqualification claims can be waived by not bringing a motion in a timely manner. The proper timing for such a claim is left to the discretion of the court, but the movant's window of opportunity can be narrow.<sup>2</sup> The court's decision rests upon whether it finds the motion was raised as a dilatory trial tactic.<sup>3</sup>

## Standards for Disqualification

### *Disqualification Based on Conflict of Interest*

A motion to disqualify counsel can be brought either because the lawyer has a conflict of interest or because the lawyer will also be serving as a witness in the case. If the motion is based upon a conflict of interest, the movant must prove that confidential information was shared with the attorney and that the attorney is now adverse to him in a substantially related matter.<sup>4</sup> If the movant is a current or former client of the attorney, he enjoys an irrebuttable presumption that confidential information was in fact shared in the course of the representation.<sup>5</sup> A mere resemblance among issues is not sufficient for a court to find the matters to be “substantially related”; rather, the two cases must have specific factual similarities “capable of being recited in the disqualification order.”<sup>6</sup> Moreover, the lawyer and client must be materially and directly adverse to one another to warrant disqualification. The mere potential for adversity is not sufficient to support disqualification.<sup>7</sup>

If a lawyer is disqualified because he represents a current client against a former client in a matter where 1) the lawyer’s earlier representation of the former client will be questioned, 2) there is a reasonable probability that the former client’s confidences will be violated, or 3) the matter is substantially related to the representation of the former client, his entire firm is disqualified.<sup>8</sup> In addition, if the disqualification is brought for either of these first two reasons, the firm may still be disqualified even after the lawyer leaves the firm.<sup>9</sup>

### *Disqualification Based on Lawyer as Witness*

To disqualify a lawyer who will be serving as a witness in the same case, the movant must prove that the lawyer’s testimony will be used to prove an essential fact of the case, her testimony is necessary in order to prove that essential fact, and the movant will suffer actual prejudice if the lawyer is permitted to testify.<sup>10</sup> As stated in Rule 3.08, a lawyer may serve as a witness without being disqualified if she testifies only to an uncontested issue, the testimony is a formality, or it merely presents the nature and cost of her legal services.<sup>11</sup> The rule also allows a client to consent to the lawyer’s dual role as advocate and witness.<sup>12</sup> Opposing counsel’s mere announcement of an intention to call the lawyer as an adverse witness is not alone sufficient to support disqualification.<sup>13</sup>

When a lawyer’s testimony is necessary to establish an essential fact for his client, the lawyer may avoid disqualification by promptly notifying opposing counsel that he will be testifying and showing the court that disqualification would work a substantial hardship on his client.<sup>14</sup> Finally, in order for Rule 3.08 to apply, the lawyer who will serve as a witness must actually be an advocate before the court.<sup>15</sup> Disqualification is unnecessary as long as the lawyer-witness does not argue before the court.<sup>16</sup> A lawyer-witness may sign pleadings, participate in trial preparation and strategy, and negotiate settlements without violating Rule 3.08.<sup>17</sup>

## Current Issues in Disqualification

### *The Disciplinary Rules: Guidelines or Binding Standards?*

According to the preamble to the disciplinary rules, the rules are not controlling as standards to meet in a motion to disqualify but should be used as guidelines in considering the motion.<sup>18</sup> As a practical matter, this distinction between firm standards and instructive guidelines is a difficult line to draw. The comments to Rule 3.08 (Lawyer as Witness) state that the rule is not well suited to use as a standard for procedural disqualification, but note that it may furnish guidance when the movant can show actual prejudice resulting from opposing counsel acting in dual roles as advocate and witness.<sup>19</sup> The Texas Supreme Court has admonished that the Rules should not be used as a tactical weapon to prevent the opposing party from being represented by the lawyer of his choice.<sup>20</sup> Thus, even if a technical violation of a disciplinary rule has occurred, the Court requires that a motion to disqualify be denied unless actual prejudice can be shown.<sup>21</sup> Courts nevertheless commonly rule on disqualification motions by merely referring to whether a Rule has been violated and have even reasoned that there is a “duty” to grant a disqualification motion when the movant can show that the representation is prohibited by the Rules.<sup>22</sup>

### *Is Familiarity with Company Practices Enough to Support Disqualification?*

In a recent case from the Southern District of Florida, currently pending before the 11th Circuit, a court denied a disqualification motion brought against a lawyer who had “switched sides.”<sup>23</sup> As a young associate, the lawyer had defended a brokerage firm in securities litigation matters. He later started his own law firm handling the same types of claims for plaintiffs, several of whom were adverse to the same brokerage firm he had previously defended. While the brokerage firm argued that the lawyer’s actions violated Florida’s version of Rule 1.09 (Conflict of Interest: Former Client), the lawyer reasoned that while he was taking a contrary position against a former client, he was not attacking the work he had performed for them. The court agreed, finding that the “substantially related” standard was not met because each involved “unique facts”: different claimants, securities, and brokers. The court characterized the lawyer’s familiarity with the brokerage firm’s “policies and practices” (including arbitrator selection and case settlement practices) as nothing more than information that could be “generally known.”<sup>24</sup>

In 2006, the San Antonio Court of Appeals held that disqualification was inappropriate in similar circumstances.<sup>25</sup> The lawyer whose potential conflicts were at issue had previously represented an appraisal district in ad valorem tax disputes. He then began to represent clients against the appraisal district in the same types of matters. The parties agreed that the cases all involved the same types of claims, but the court found that because the cases shared no specific facts, the claims were not “substantially related.” Like the Southern District of Florida’s opinion regarding the lawyer who was famil-

iar with the brokerage firm's "policies and practices," the San Antonio Court of Appeals held that the lawyer's familiarity with the appraisal district's "inner workings," including defense strategy, trial preparation, and settlement practices, did not warrant disqualification because the information was not confidential.<sup>26</sup>

### Joint Defense Agreements

Joint defense agreements can also expose lawyers to the risk of disqualification. While a lawyer generally does not owe duties to non-clients, a joint defense agreement may give rise to a duty to preserve the confidentiality of information shared pursuant to the agreement.<sup>27</sup> In *National Medical Enterprises, Inc. v. Godbey*, the Texas Supreme Court disqualified a law firm based on the fact that one of its attorneys had obtained confidential information from the opposing party under a prior joint defense agreement in a substantially related matter.<sup>28</sup> The Court reasoned that the lawyer "simply could not honor his obligations under the joint defense agreement and, at the same time, prosecute the pending claims" against a participant in the prior joint defense arrangement.<sup>29</sup> Unlike a former client, a non-client does not enjoy the presumption that confidential information was shared and must prove that the lawyer actually received confidential information.<sup>30</sup>

It is possible that a waiver clause in a joint defense agreement could prevent disqualification, but care must be taken in drafting the waiver. A waiver clause in a joint defense agreement is an uncertain safeguard against disqualification because of the difficulty in drafting such clauses with sufficient specificity to effectuate waiver. For example, in a joint defense agreement recently considered by the Northern District of California, the parties agreed to waive "any right to seek the disqualification of counsel ... based upon a communication of joint-defense privileged information."<sup>31</sup> Three years after the litigation ended, a lawyer who had represented one of the co-defendants became a partner in another firm as the result of a merger. The new firm was adverse to one of the lawyer's non-client co-defendants in substantially related litigation. The court disqualified the new firm, stating that the waiver clause was too vague for the parties to have waived their right to disqualification under the circumstances presented.<sup>32</sup>

### Conclusion

Disqualification motions raise important issues about the role lawyers play in our judicial system, as well as the nature and scope of a lawyer's duty to her clients. Moreover, the stakes are often high as the court considers whether to deprive a current client of the counsel of his choice. In view of these competing considerations, it is often wise for the attorney to consult outside counsel for objective advice about the appropriate response to a disqualification motion. Navigating the ethical and procedural issues presented by a disqualification motion can be difficult, and lawyers are advised to proceed with care.

### Notes

1. *In re Cerberus Capital Management, L.P.*, 164 S.W.3d 397, 382 (Tex. 2005).
2. *See Wasserman v. Black*, 910 S.W.2d 564, 569 (Tex. App. — Waco 1995, no writ). Compare *Wasserman* (two months was reasonable time to bring a disqualification motion) and *Rio Hondo Implement Co. v. Euresi*, 903 S.W.2d 128, 131 (Tex. App. — Corpus Christi 1995, mand. motion overr.) (three months was acceptable time for party to bring motion to disqualify) with *Conoco Inc. v. Baskin*, 803 S.W.2d 416, 419 (Tex. App. — El Paso 1991, no writ) (four months' delay waived party's right to bring motion to disqualify).
3. *See Spears v. 4th Court of Appeals*, 797 S.W.2d 654, 656 (Tex. 1990) (orig. proceeding).
4. *NCNB Texas Nat'l Bank v. Coker*, 765 S.W.2d 398, 399–400 (Tex. 1989).
5. *In re Mitcham*, 133 S.W.3d 274, 276 (Tex. 2004).
6. *NCNB Texas Nat'l Bank*, 765 S.W.2d at 400.
7. *Arteaga v. Tex. Dep't of Protective and Regulatory Servs.*, 924 S.W.2d 756, 763 (Tex. App. — Austin 1996, pet. denied).
8. Texas Disciplinary R. of Prof'l Conduct 1.09(a)–(b); *In re Mitcham*, 133 S.W.3d at 276; *Nat'l Med. Enters. v. Godbey*, 924 S.W.2d 123, 131–132 (Tex. 1996).
9. Texas Disciplinary R. of Prof'l Conduct 1.09(c); *In re Mitcham*, 133 S.W.3d at 276.
10. *In re Slusser*, 136 S.W.3d 245, 248 (Tex. App. — San Antonio 2004, no pet.); *In re Nitla*, 92 S.W.3d 419, 422–423 (Tex. 2002) (per curiam); *In re Bivins*, 162 S.W.3d 415, 421 (Tex. App. — Waco 2005, no pet.) (per curiam).
11. Texas Disciplinary R. of Prof'l Conduct 3.08(a).
12. Texas Disciplinary R. of Prof'l Conduct 3.08(b), (c).
13. *In re Slusser*, 136 S.W.3d at 248.
14. Texas Disciplinary R. of Prof'l Conduct 3.08(a)(5).
15. *Anderson Producing, Inc. v. Koch Oil Co.*, 929 S.W.2d 416, 422–423 (Tex. 1996).
16. *Id.*
17. *Id.* at 418–419.
18. *See* Texas Disciplinary R. of Prof'l Conduct, Preamble: Scope; *see also Nat'l Med. Enters.*, 924 S.W.2d at 132 ("The Texas Disciplinary Rules of Professional Conduct do not determine whether counsel is disqualified in litigation, but they do provide guidelines and suggest the relevant considerations.")
19. Texas Disciplinary R. of Prof'l Conduct 3.08 cmt. 9, 10.
20. *See In re Nitla*, 92 S.W.3d at 422–23.
21. *Id.*
22. *In re Frost*, 2008 WL 2122597 at \*2 (Tex. App. — Tyler 2008).
23. *Morgan Stanley & Co. v. Solomon*, 2009 WL 413519 (S.D. Fla. Feb. 19, 2009).
24. *Id.*
25. *In re Drake*, 195 S.W.3d 232 (Tex. App. — San Antonio 2006, no pet.).
26. *See id.*
27. *Nat'l Med. Enters.*, 924 S.W.2d at 129; *Rio Hondo*, 903 S.W.2d at 131–133 (citing *Wilson P. Abraham Constr. Corp. v. Armco Steel Corp.*, 559 F.2d 250, 252 (5th Cir. 1977) (per curiam)).
28. *Nat'l Med. Enters.*, 924 S.W.2d at 129–131. The lawyer's conflict was imputed to his firm despite efforts to screen the confidential information from other lawyers at the firm. *Id.*; *see also* Texas Disciplinary R. of Prof'l Conduct 1.09 (Texas rules contain no provision for screening) and *Meza v. H. Muehlstein & Co.*, No. B201427 (Cal. Ct. App. 2d Dist. Aug. 18, 2009) (finding that non-clients in a joint defense agreement had standing to disqualify both an attorney-participant in the joint defense agreement as well as the attorney's new firm, which represented the plaintiff; an extensive screening process did not prevent disqualification of entire firm).
29. *Id.* at 129.
30. Compare *Wilson P. Abraham Constr. Corp. v. Armco Steel Corp.*, 179-1 Trade Cas. (CCH) Para. 62,569, 1979 WL 1614 (E.D. La. March 28, 1979) (finding on remand that disqualification was not warranted because no confidential information was shared with the attorney pursuant to a joint defense agreement) with *Nat'l Med. Enters.*, 924 S.W.2d at 129 (holding that disqualification was appropriate where the lawyer had obtained confidential information from the opposing party pursuant to a prior joint defense agreement).
31. *All American Semiconductor, Inc. v. Hynix Semiconductor, Inc.*, 2008 WL 5484552 at \*2 (N.D. Cal Dec. 18, 2008).
32. *Id.* at \*10.

### KELLI HINSON and DAVID ANDERSON

are partners in Carrington, Coleman, Sloman & Blumenthal, L.L.P. in Dallas. Hinson leads the firm's professional malpractice group, and Anderson is chair-elect of the Texas Young Lawyers Association. The authors thank Diana Cochrane for her assistance in preparing this article.