

7TH ANNUAL WEST TEXAS SEMINAR

OCTOBER 7, 2005

MOTIONS TO DISQUALIFY COUNSEL

BY: PAT LONG WEAVER

**STUBBEMAN, McRAE, SEALY, LAUGHLIN & BROWDER, INC.
FASKEN CENTER - TOWER TWO
550 WEST TEXAS AVENUE, SUITE 800
MIDLAND, TEXAS 79702
432-682-1616**

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A. **FORMER CLIENTS**

An attorney is disqualified from representing a current client against a former client in a matter that involves a reasonable probability that confidences will be violated or is substantially related to the earlier representation. If a matter is substantially related, the conclusive presumption arises that confidential information has been shared and is at risk. This case involves the substantial relationship test. Texas Rule of Disciplinary Conduct 1.09, *In re Mitchum* 133 S.W.3d 274,276 (Tex. March 26, 2004).

Disqualification applies to every case at a firm where an attorney works, whether or not they work on the matter (*In re Mitchum* 133 S.W.2d 274 (Tex. 2004)).

B. **THE GENERAL RULES ON FORMER CLIENTS**

The starting point is *Tx. R. Professional Conduct* 1.09. The Western District, pursuant to Local Rule AT-4, requires attorneys to comply with the Texas Disciplinary Rules of Professional Conduct and has further required that the Code of Professional Responsibility of the American Bar Association be followed.

If an attorney accepts representation of a client that is adverse to a former client, the lawyer is disqualified if the matters in the former lawsuit are "substantially related" to the fact matters involved in the new matter. *In re Bell Helicopters*, 87 S.W.3d 139 (Tex. 2002). Citing *Phoenix Founders, Inc. v. Marshall*, 887 S.W.2d 831,833 (Tex. 1994). "This strict rule is based on a conclusive presumption that confidences were imparted to

the attorney during the prior representation...The purpose of the presumption is to prevent the party seeking disqualification from being forced to reveal the very confidences sought to be protected." *In re Bell Helicopter*, 87 S.W.3d at 145, citing *In re American Home Products*, 985 S.W.2d 68,74 (Tex. 1998). In looking at Rule 1.09, then, if the substantial relationship exists, there is no need to demonstrate that there is a risk that the confidential information was communicated to the attorney, it is presumed.

If an attorney moves from one law firm to another, there is also a conclusive presumption that the attorney, who would have been disqualified from representation at his old firm, shares confidential information with his new firm, and they are likewise disqualified. *In Re Bell Helicopters*, 87 S.W.3d at 145.

The key, again, is the substantial relationship test. In this case, the facts and issues involved in both the former and present litigation are so similar there is a genuine threat that confidences revealed to the Defendant's former counsel will be revealed to the present adversary, McDiffitt. *In Re Bell Helicopters, Inc.*, 87 S.W.3dc 46.

It is required that the similarities be capable of being recited in a disqualification order. In this matter they include; corporate re-organization, performance reviews of individual employees, review of specific positions, implementation of a reduction in force, complaints of retaliations or discrimination, allegations of wrongful discharge and knowledge of the internal structure and strategy of the corporation.

A substantial relationship exists where cases involve similar liability questions, defenses and strategies. Distinct claims can be substantially related. The inquiry revolves around the existence of similar liability and defensive issues. *National Medical Ent. v. Godbey*, 924 S.W.2d 123 (Tex. 1996). Once the burden has been met, as here,

disqualification is mandated. See *Texaco Inc. v. Garcia*, 891 S.W. 2d. 255,257 (Tex. 1995).

The Fifth Circuit has reviewed disqualification of counsel in *American Airlines AMR* 972 F.2d 605 (5th Cir. 1992) and *In Re: Epic Holding Inc.*, 985 S.W.2d 41, 45, 48 (Tex. 1998). The Court carefully reviewed both the Texas Rules and the ABA model. The American Bar Association Code of Professional Conduct generally mirrors the Texas Rules. They held parties seeking to disqualify opposing counsel on the ground of a former representation must establish; (1) an actual attorney client relationship between the moving party and the attorney he seeks to disqualify; and (2) a substantial relationship between the subject matter at the former and present representations. *Id* at 614. A removing party may disqualify counsel either by establishing that the present and previous representations are substantially related or by pointing to specific instances where it revealed relevant and confidential information regarding its practice and procedures. *Id*. The substantial relationship test is not solely concerned with the adverse use of confidential information. The substantial relationship test is concerned with both the lawyer's duty of confidentiality and his duty of loyalty. A lawyer who has given advice in a substantially related matter must be disqualified whether or not he has gained confidences. *Id* at 619.

The Texas Supreme Court notes, an attorney's knowledge is imputed by law to every other attorney in his firm. There is in effect a conclusive presumption that an attorney in a law firm has access to the confidence of the clients and former clients of every other attorney in the firm. "One reason for this presumption is that it would always be virtually impossible for a former client to prove that attorneys in the same firm had

not shared confidences...Also the presumption helps guard the integrity of the legal practice from undue suspicion that clients' interests are not being fully protected. *National Medical Enterprises, Inc. v. Godbey* 924 S.W.2d. 123 (Tex. 1996). The same result is required under Model Rule 1.9. Level of participation is not the issue, the prior representation is the issue.

C. CO-COUNSEL ISSUES

The issue of co-counsel disqualification was considered in *In Re American Home Products*, 985 S.W.2d 68 (Tex. 1998). In that matter, as plaintiff's firm had hired a legal assistant who had previously worked for a defendant. The legal assistant was not isolated. The firm was held disqualified. The Court did not extend the disqualification to co-counsel in another law firm.

D. THE LAWYER AS A WITNESS

(a) A lawyer in certain circumstances is not disqualified even if a witness. The key is the nature of the testimony. The *Texas Rules of Professional Conduct* 3.08 covers the lawyer as a witness. The rule provides:

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

- (1) the testimony relates to an uncontested issue;
- (2) the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony;

(3) the testimony relates to the nature and value of legal services rendered in the case;

(4) the lawyer is a party to the action and is appearing pro se; or

(5) the lawyer has promptly notified opposing counsel that the lawyer expects to testify in the matter and disqualification of the lawyer would work substantial hardship on the client.

(b) A lawyer shall not continue as an advocate in a pending adjudicatory proceeding if the lawyer believes that the lawyer will be compelled to furnish testimony that will be substantially adverse to the lawyer's client, unless the client consents after full disclosure.

(c) Without the client's informed consent, a lawyer may not act as advocate in an adjudicatory proceeding in which another lawyer in the lawyer's firm is prohibited by paragraphs (a) or (b) from serving as advocate. If the lawyer to be called as a witness could not also serve as an advocate under this Rule, that lawyer shall not take an active role before the tribunal in the presentation of the matter."