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Professional Responsibility

Christopher D. Atwell

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I. INTRODUCTION

THE Survey period reveals major developments and changes in matters of professional responsibility.[1] Texas lawyers must consider the import of major decisions handed down from August 1991 through September 1992. These developments involved the standards governing limitations in malpractice suits, determinations the inception of the attorney-client relationship, attorney disqualification and procedures for disciplinary action against lawyers.[2] This Survey Article addresses the important decisions and changes during that time.[3] Every Texas practitioner[4] will be affected by these recent developments.[5]

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1. While rules governing attorneys constantly change with judicial rulings, the following sources offer excellent guidance on the general issues surrounding a lawyer's professional obligations. CHARLES F. HERRING, JR., TEXAS LEGAL MALPRACTICE & LAWYER DISCIPLINE, (1992); Robert P. Schuwerck & John F. Sutton, Jr., *A Guide to the Texas Disciplinary Rules of Professional Conduct*, 27A HOUS. L. REV. 1 (1990) (extensive analysis and treatment of Texas Rules of Disciplinary Procedure and Conduct).

Texas attorneys should also consider authority from outside the state. At least one excellent reference source that all attorneys should consider is the draft ALI Restatement of the Law Governing Lawyers. While this project is only in its fourth draft and is not expected to be complete for another five years, it offers an excellent compilation of authority from around the country. *See* RESTATEMENT OF THE LAW GOVERNING LAWYERS (Tentative Draft No. 4, 1991); *see also* THOMAS D. MORGAN & RONALD D. ROTUNDA, PROFESSIONAL RESPONSIBILITY: PROBLEMS & MATERIALS (5th ed. 1991); HAZARD & HODES, THE LAW OF LAWYERING (1991); CHARLES WOLFRAM, MODERN LEGAL ETHICS (1988); ABA/BNA LAWYER'S MANUAL ON PROFESSIONAL CONDUCT (1991).

2. Not to be overlooked are changes in the State Bar's attorney discipline system. *See infra* notes 98-106 and accompanying text. The State Bar also renamed the rules governing Texas attorneys. The rules are now entitled the "Texas Disciplinary Rules of Professional Conduct." SUPREME COURT OF TEXAS, STATE BAR RULES art. X, § 9 (Texas Disciplinary Rules of Professional Conduct) (1989) [hereinafter TEX. DISCIPLINARY RULES OF PROF. CONDUCT or TEXAS RULES] (located in the pocket part for Volume 3 of the Texas Government Code in Title 2, Subtitle G app., following § 83.006 of the Government Code).

3. While the author could report on the numerous sanctions cases handed down during the period, which more often than not also involve improper attorney behavior, most of these developments are more properly addressed in the Civil Procedure Survey article. *See* Ernest E. Figari, et al., *Civil Procedure, Annual Survey of Texas Law* 46 S.M.U. L. REV. 1055 (1993).

4. "Texas practitioners" include, of course, out of state attorneys specially admitted to practice by a court of this state for a particular proceeding. *See* TEXAS RULE 8.05 (1993). Likewise, an attorney subject to the rules may be disciplined for his rules violations occurring in other jurisdictions if they amount to a violation of Texas Rule 8.04. *Id.*

5. This is not to imply that there were no interesting or humorous decisions which merit

II. STATUTE OF LIMITATIONS FOR ATTORNEY MALPRACTICE

This area provided some of the most significant changes in Texas' law of professional responsibility. The limitations period for claims of attorney malpractice was the subject of two Texas Supreme Court decisions handed down within two weeks of each other, *Hughes v. Mahaney & Higgins*[6] and *Gulf Coast Investment Corp. v. Brown*.[7] With both decisions, the common law took a dramatic turn in favor of disgruntled clients.

In *Hughes* Justice Cornyn, writing for a unanimous court, held that the statute of limitations on attorney malpractice claims is tolled until all appeals in the underlying matter are resolved.[8] The *Hughes* litigation arose out the Hugheses' engagement of attorney Robert Mahaney to help them adopt a child. When the child was born, Mahaney obtained the birth mother's execution of an affidavit of relinquishment of parental rights naming Mahaney temporary managing conservator. After Mahaney initiated a suit on behalf of the Hugheses to terminate the mother's parental rights, the mother changed her mind, married the biological father, revoked her affidavit, and attempted to get a writ of habeas corpus against Mahaney for possession of the infant. The trial court denied the birth mother's application and appointed the Hugheses as temporary managing conservators.[9]

The birth mother fought back by filing a motion to dismiss the Hugheses' suit claiming they lacked standing to bring a suit affecting the parent-child relationship ("SAPCR"). This motion was denied and the Hugheses were given custody after a jury verdict in their favor. The Waco court of appeals, however, reversed the trial court's judgment on the standing argument raised in the biological mother's motion to dismiss.[10] The Texas Supreme Court later denied the Hugheses' application for writ of error.

The Hugheses then sued Mahaney because he failed to list them as the child's managing conservator, invalidating what otherwise could have been a successful adoption.[11] Mahaney filed a motion for summary judgment arguing the statute of limitations barred the Hugheses' claims. The trial court

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mention. The author has sought to balance the article's coverage. *See, e.g., Wavell v. Roberts*, 818 S.W.2d 462 (Tex. App.—Corpus Christi 1991, writ denied) (attorney sues former girlfriend and her husband who are both attorneys for alleged conspiracy to have him shot).

6. 821 S.W.2d 154 (Tex. 1991); *see also Aduddell v. Parkhill*, 821 S.W.2d 158 (Tex. 1991) (released simultaneously with *Hughes*).

7. 821 S.W.2d 159 (Tex. 1991).

8. *Hughes*, 821 S.W.2d at 155. *Cf.* Hibbard v. Taylor, 837 S.W.2d 500 (Ky. 1992). The *Hibbard* court reached a similar result reasoning a client discovers the malpractice "when the result of the appeal became final and the trial court's judgment became the unalterable law of the case." *Id.* at 502.

9. *Hughes*, 821 S.W.2d at 155.

10. In an exaltation of form over substance, the appellate court narrowly held the failure to list the adoptive parents as temporary managing conservator in the biological mother's affidavit was fatal to their quest to adopt a child for whom they had cared for and nurtured over a year. Ready v. Hughes, No. 10-84-112-CV (Tex. App.—Waco, Mar. 7, 1985) (not designated for publication), 1985 WL 69273.

11. They claimed Mahaney violated the Deceptive Trade Practices Act ("DTPA") and committed negligence in connection with the failed adoption.

granted the motion and, on appeal, the Waco court of appeals affirmed the trial court on the basis of the discovery rule.[12]

The Texas Supreme Court asserted its "judicial function to determine when a cause of action accrues."[13] According to the court, the issue before it was "the proper application of the statute of limitations in a legal malpractice case when the attorney allegedly commits malpractice while providing legal services in the prosecution or defense of a claim which results in litigation."[14] The court held "that when an attorney commits malpractice in [a matter] that results in litigation, the statute of limitations on the malpractice claim . . . is tolled until all appeals on the underlying claim are exhausted."[15] The court reasoned that a contrary rule would force victims of malpractice to take untenable positions while the underlying litigation continued. In brief, without the exhaustion of appeals rule, people like the Hugheses would be forced to defend their attorney's actions in the underlying litigation while simultaneously attacking that attorney's competence in a legal malpractice action.[16]

The court found support for its holding in a series of unrelated cases that basically held limitations were tolled for suits whose existence depended on an earlier suit still in litigation. For example, the court cited *Cavitt v. Amsler*,[17] which held limitations on a suit to collect dividends were tolled during

12. Specifically, the appellate court held the Hugheses' cause of action against Mahaney accrued at the latest on the date the appellate court in the earlier action ordered the trial court to dismiss the Hugheses' claims. Hughes v. Mahaney & Higgins, 822 S.W.2d 63, 66 (Tex. App.—Waco 1992), *rev'd*, 821 S.W.2d at 157.

13. *Hughes*, 821 S.W.2d at 156 n.4 (quoting Willis v. Maverick, 760 S.W.2d 642, 644 (Tex. 1988)).

14. *Id.* at 155.

15. *Id.* at 157. *See also* cases cited at *id.* at 157 n.5 (detailing other jurisdictions which accept and reject the "exhaustion of appeals" rule for limitations in attorney malpractice claims); Grunwald v. Bronkesh, 604 A.2d 126, 130 (N.J. Super. Ct. 1992) (quoting *Hughes* and citing numerous jurisdictions which follow the exhaustion of appeals rule).

16. *Hughes*, 821 S.W.2d at 156 (stating that in this type of case a contrary rule would "force the client into adopting inherently inconsistent litigation postures in the underlying case and in the malpractice case."). While the court mentioned the salutary rationales supporting other states' rejection of the exhaustion of appeals rule in passing, it failed to take these issues head on. *Id.* at 157 n.5 (stating that "because we base our decision on a different and more fundamental policy consideration, we do not address the policy considerations advanced by other jurisdictions"). The court did not note a concern mentioned in the *Hibbard* case. The *Hibbard* court pointedly noted that in this type of case, the attorney accused of malpractice will likely point the finger at the court which rendered a judgment adverse to the client, *Hibbard*, 837 S.W.2d at 502. Indeed, the client, not versed in the law, is likely to trust the lawyer whose judgment he has already relied upon and ignore any indication of malpractice. *Id.*

Some states rejecting the rule generally rely on the basic premise underlying the statute of limitations: *i.e.*, delay, loss of evidence, and presentation of stale claims. *See, e.g.*, Laird v. Blacker, 828 P.2d 691 (Cal. 1992), *cert. denied*, 61 U.S.L.W. 3337 (1992); Hennekens v. Hoerl, 465 N.W.2d 812, 818 (Wis. 1991). Other states rejecting the exhaustion of appeals rule simply hold that limitations begin to run from the date the cause of action accrued. *See* Wettanen v. Cowper, 749 P.2d 362, 365 (Alaska 1988); Zupan v. Berman, 491 N.E.2d 1349, 1351 (Ill. App. Ct. 1986); Sabes v. Richman, Inc. v. Muenzer, 431 N.W.2d 916, 918-19 (Minn. Ct. App. 1988); Dixon v. Shafton, 649 S.W.2d 435, 438 (Mo. 1983); Suzuki v. Holthaus, 375 N.W.2d 126, 128 (Neb. 1985); *Zimmie v. Calfee, Holter & Griswold*, 538 N.E.2d 398, 402 (Ohio 1989); Chambers v. Dillow, 713 S.W.2d 896, 898 (Tenn. 1986); Richardson v. Denend, 795 P.2d 1192, 1195 n. 7 (Wash. 1990).

17. 242 S.W. 246 (Tex. Civ. App.—Austin 1922, writ dism'd).

the pendency of a suit to determine ownership of the underlying stock.[18] According to the court, limitations on an attorney malpractice claim, which arises out of a litigated matter, are tolled until the underlying matter is exhausted.[19]

One week after denying rehearing in *Hughes*, the Texas Supreme Court denied rehearing in a case which extended the application of the exhaustion of appeals rule.[20] *Gulf Coast Investment Corp. v. Brown* involved a malpractice claim brought by some of attorney Brown's former clients who claimed they were injured by Brown's professional malpractice in connection with a foreclosure sale. The salient difference between *Gulf Coast Investment Corp.* and *Hughes* was that in *Gulf Coast Investment Corp.* the attorney's malpractice led to a suit against the client for damages; *Hughes*, in contrast, involved an attorney's malpractice which led to the client losing a pending proceeding. The Texas Supreme Court did not perceive a material difference between the cases and held, again in clear and unmistakable language, that when an attorney's malpractice results in a wrongful foreclosure claim against the client, the limitations period on the client's malpractice claim does not begin running until "the wrongful foreclosure claim is finally resolved."[21] The unquestionable conclusion to be drawn from the *Hughes* and *Gulf Coast Investment* cases is that when the viability of a professional malpractice claim depends upon the outcome of another proceeding the statute of limitations is tolled on the malpractice claim until the earlier proceeding is concluded.

III. CONFLICTS OF INTEREST AND DISQUALIFICATION OF COUNSEL

The Fifth Circuit faced two cases during the survey period which should give pause to all lawyers weighing a conflicts decision. In *In re Dresser Industries, Inc.*[22] and *In re American Airlines, Inc., AMR Corporation*[23] the court announced that a federal district court's determination of a motion to disqualify must be guided by more than just the Texas Rules.[24] The *American* Court's opinion, authored by Justice Higginbotham, also took the opportunity to thoroughly examine the numerous authorities addressing the

18. *Id.* at 249.

19. *Hughes*, 821 S.W.2d at 156-57.

20. Gulf Coast Investment Corp. v. Brown, 821 S.W.2d 159 (Tex. 1991) (*per curiam*).

21. *Id.* at 160. The court clearly took pains to narrowly draft its holding. The court did not offer guidance as to the application of its holding to transactional malpractice in other fields such as securities, banking, labor, and environmental law etc.

22. 972 F.2d 540 (5th Cir. 1992).

23. 972 F.2d 605 (5th Cir. 1992).

24. Unfortunately neither court addressed the Texas Rules' explicit acknowledgement that this problem would inevitably arise. *See* TEXAS RULE 8.05, comment 3 (1993) ("A related problem arises with respect to practice before a federal tribunal, where the general authority of the state to regulate the practice of law must be reconciled with such authority as federal tribunals may have to regulate practice before them.") Neither court noted whether the parties focused on or briefed this provision.

issues surrounding disqualification motions based on alleged conflicts of interest.

The *Dresser* case arose out of the Susman Godfrey law firm's[25] effort to represent class action plaintiffs in a suit against Dresser and other defendants alleging defendants conspired to fix prices for drill bits sold in the United States.[26] Susman personally accepted the opportunity to represent the plaintiffs because he enjoyed the opportunity to be in a "case that was going to be active, big, [and] protracted."[27]

Unfortunately for the class plaintiffs, the Susman Godfrey firm concurrently represented Dresser in two other cases. Susman Godfrey perceived the potential difficulty in these concurrent representations and noted this in two letters to Dresser.[28] The law firm's letters apprised Dresser that name partner Steven Susman "chaired the plaintiffs' committee in the *Drill Bits* suit and the risk that Dresser might be made a defendant to that suit."[29] Dresser did not dismiss Susman Godfrey in the two preexisting suits.

About a week after the second letter, Dresser was joined as a defendant in the *Drill Bits* case. Dresser then moved to disqualify Susman Godfrey as plaintiffs' counsel. The trial court denied Dresser's motion. After determining the Texas Rules governed,[30] the trial judge held the two preexisting suits did not involve issues substantially related to the *Drill Bits* case.[31]

While one Susman Godfrey suit clearly did not involve substantially related issues,[32] the second, like *Drill Bits*, was an antitrust suit against Dresser in which Susman Godfrey enjoyed "relatively unfettered access to data concerning Dresser's management, organization, finances, and accounting practices."[33] Despite this far reaching access to information, Susman

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25. Susman Godfrey, L.L.P. (hereinafter "Susman Godfrey").

26. *See* Red Eagle Resources Corp. v. Baker Hughes, Inc., No. Civ. A. H-91-0627, 1992 WL 170614 (S.D. Tex. Mar. 04, 1992) [hereinafter *Drill Bits*].

27. *Dresser*, 972 F.2d at 541 n.1. The court wrote that the only apparent reason driving Susman's effort to represent the class plaintiffs was the "law firm's self-interest." *Id.* at 541.

28. Susman Godfrey, however, appeared to reasonably believe its representations of Dresser and its new clients would not be materially affected. *See* TEXAS RULE 1.06(c) (1993).

29. Susman Godfrey also offered to assist Dresser in a transition to new counsel in the two preexisting suits should Dresser chose to replace the firm.

30. Specifically, the court held its determination was "governed wholly by the Texas Disciplinary Rules of Professional Conduct." 972 F.2d at 542 (quoting trial court's order). The district court understandably reached its decision because the Southern District of Texas had adopted Texas' Disciplinary Rules as its own. *See* SOUTHERN DIST. TEX. LOCAL RULE 4B.

31. The trial court focused on TEXAS RULE 1.06(b) which provides in part:

> (b) In other situations and except to the extent permitted by paragraph (c), a lawyer shall not represent a person if the representation of that person:
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> (1) involves a substantially related mater in which that person's interests are materially and directly adverse to the interests of another client of the lawyer or the lawyer's firm; or
>
> (2) reasonably appears to be or become adversely limited by the lawyer's or law firm's responsibilities to another client or to a third person or by the lawyer's or law firm's own interests.

TEXAS RULE 1.06 (1993).

32. *See* TEXAS RULE 1.06 (1993).

33. *Dresser*, 972 F.2d at 541.

Godfrey contended it could both represent Dresser in the second suit and represent plaintiffs in the instant case.

The Fifth Circuit disagreed. While the court noted that in exceptional circumstances an attorney may concurrently represent and sue his client in separate matters,[34] such was not the case here. Susman Godfrey failed to establish that "some social interest [would] be served . . . that would outweigh the public perception of impropriety."[35] Accordingly, Texas Rule 1.06 barred Susman Godfrey's representation of the class plaintiffs. More importantly, the Fifth Circuit held the trial court clearly erred when it held the Texas Rules were the "sole" authority to be considered when determining a motion to disqualify.[36] In the Fifth Circuit, motions to disqualify in a generic civil case are "governed by the ethical rules announced by the *national* profession in the light of the public interest and the litigants' rights."[37] The court held the national standards barred a lawyer's suit against a current client unless the lawyer had both clients' consent.[38] Because Dresser never consented to Susman Godfrey's participation in *Drill Bits*, the Fifth Circuit issued a writ of mandamus directing the district court to order Susman Godfrey's disqualification as plaintiffs' counsel.[39]

The *American* case grew out of an antitrust dispute between American Airlines, Northwest Airlines and Continental Airlines. While the underlying facts promise an interesting dispute, the facts at issue in *American* are even more compelling. The issue before the court was whether Vinson & Elkins ("V&E") was disqualified from representing Northwest Airlines in the litigation. American contended V&E was disqualified for three reasons. First, American contended V&E was disqualified from representing Northwest because they had changed sides in the same case. American's second argument arose out of V&E's prior representation of American in substantially related matters. American contended V&E was prohibited, pursuant to the Texas Rules, from representing Northwest. American's third argument was that V&E's representation of Northwest in this case would likely rely on confidential information that V&E had accessed from earlier repre-

34. The court opined that societal interests may militate in favor of allowing concurrent adverse representations when "the balance clearly and unequivocally favored allowing [such a situation] to further the ends of justice." *Id.* at 545 n.12. The court also wrote that the provision in the Texas rules which allows concurrent adverse representations contemplates that such a situation is the exception and not the rule. *Id.*

35. *Id.*

36. *Id.* at 543.

37. *Id.* (Emphasis added). *See also* Brennan's Inc. v. Brennan's Restaurants, Inc., 590 F.2d 168, 171 (5th Cir. 1981); Woods v. Covington County Bank, 537 F.2d 804, 810 (5th Cir. 1976); American Can Co. v. Citrus Feed Co., 436 F.2d 1125 (5th Cir. 1971).

38. *Dresser*, 972 F.2d at 545. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 (1991); LAWYER'S MANUAL ON PROFESSIONAL CONDUCT, ABA/BNA 01:3-4 (1992 update) (45 states have adopted the Model Rules with changes); *Id.* at 51:101 (1990) (concluding all that is required to bring about disqualification is an attorney's concurrent representation of two clients "with potentially conflicting interests").

39. *Dresser*, 972 F.2d at 546. *Cf.* Conoco v. Baskin, 803 S.W.2d 416 (Tex. App.—El Paso 1991, no writ) (reported in last year's survey — holding Conoco not entitled to writ of mandamus directing trial court to order disqualification of counsel concurrently representing Conoco in other cases).

sentations. V&E, of course, disputed American's contentions and even filed its own motion to disqualify American's new counsel. Both Northwest's and American's motion to disqualify were denied by the trial court.[40] In reviewing American's mandamus petition, which challenged the trial court's order, the Fifth Circuit revisited these issues *de novo*.

Though some of the material events were hotly contested, the following is a fair synopsis of what led to American's petition for writ of mandamus. On June 5, 1992, Northwest's counsel, Joe Jamail, spoke with Harry Reasoner of V&E about the possibility of V&E serving as Northwest's co-counsel in a suit against American. Reasoner assured Jamail that V&E would not enter the litigation until he discussed the matter with Jamail first. On June 9, American's in-house counsel, David Schwarte, contacted another V&E partner, Alison Smith; Smith, not knowing of Reasoner's conversation with Jamail, agreed, on behalf of V&E, to represent American after running a conflicts check.[41] On the next day, June 10, Smith contacted Schwarte in the morning. Schwarte inquired about the conflicts issue and Smith responded that she did not perceive any conflict. Smith and Schwarte "then discussed American's possible litigation strategy, focusing on American's desire to transfer the Galveston case to Chicago."[42] After that conversation, Smith called Schwarte back and confirmed "there were no conflicts that might prevent V&E from representing American."[43]

Smith then informed Reasoner of her actions by leaving him a note in his office. Upon learning of the note, he called Smith and advised her to tell American that they (Smith and Reasoner) would have to consult because "it was uncertain whether V&E would be able to accept."[44] Smith called Schwarte and informed him of the potential problem.[45]

Finally, on June 11, V&E decided it would represent Northwest, and not American. Reasoner informed the lawyers working on the case of this final decision. American responded the next day and a week later with two letters requesting V&E withdraw from the case. V&E refused and the issue was joined when American filed its motion to disqualify.[46] American's motion was denied on July 24. Five days later, American filed its petition for a writ of mandamus directing the trial court to vacate its order.

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40. Another interesting aspect of the trial court proceedings was overlooked by the opinion. After hearing the motions to disqualify, the court made an order which basically reproached counsel for their tactics. The court's order complained about the "sheer tonnage of pleadings and supporting materials" filed in support of the motions. *See* Brenda Sapino, *Judge Clamps Down in Airline Case*, TEXAS LAWYER, August 3, 1992, at 5 (reporting on United States District Judge Samuel B. Kent's rulings). The Fifth Circuit merely described the briefing as extensive.

41. American mailed V&E copies of Northwest's and Continental's complaints later that day.

42. *American*, 972 F.2d at 612.

43. *Id.*

44. *Id.* at 613.

45. The content of that conversation was disputed by the parties. Smith and Schwarte had a second conversation on June 10.

46. Northwest also filed a motion, which was denied, to disqualify American's "new" counsel.

The Fifth Circuit disposed of American's first contention, that V&E could not switch sides in the same litigation under the Texas Rules, by noting it need not rest its holding on that point.[47] Instead, the Fifth Circuit undertook a critical examination of the substantially related standard found in Texas Rule 1.09.[48] The court reaffirmed the recent *Dresser* holding and held that the Texas Rules represented only part of the authority governing its determination.[49] Northwest basically contended that a "taint" standard, which would only authorize disqualification of counsel when there is an actual threat to taint the fairness of the trial, should be the applicable rule.[50] Northwest's creative interpretation failed to persuade the court.[51] The court held Rule 1.09(a)(3) means exactly what it says, namely, a "party demonstrates a genuine threat by establishing a substantial relationship between past and present cases exists."[52] The Fifth Circuit reached its decision with-

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47. *American*, 972 F.2d at 614.

48. Rule 1.09 Conflict of Interest: Former Client

(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;

(2) if the representation in reasonable probability will involve a violation of Rule 1.05; or

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

(b) Except to the extent authorized by Rule 1.10, when lawyers are or have become members of or associated with a firm, none of them shall knowingly represent a client if anyone one of them practicing alone would be prohibited from doing so by paragraph (a).

(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.

TEXAS RULE 1.09 (1993).

49. *American*, 972 F.2d at 610 (quoting *Dresser* for the proposition that "motions to disqualify are substantive motions [that] . . . are determined by applying standards developed under *federal law.*"); *see also* In re Finkelstein, 901 F.2d 1560, 1564 (11th Cir. 1991); United States v. Miller, 624 F.2d 1198, 1200 (3rd Cir. 1980); Cord v. Smith, 338 F.2d 516, 524 (9th Cir. 1964).

50. Other courts have described this rule as requiring a functional analysis. *See e.g.* Regent Ins. Co. v. Insurance Co. of N. Am., 804 F. Supp. 1387, 1392 n.4 (D. Kan. Sept. 30, 1992) (rejecting irrebuttable presumption standard and holding court must make "factual determination whether attorney acquired material and confidential information during the prior representation"); *see also* MODEL RULES OF PROFESSIONAL CONDUCT RULES 1.9, 1.10, 1.11 (1983).

51. The court noted that even if it had adopted the taint standard it would have reached the same result. 972 F.2d at 611.

52. *American*, 972 F.2d at 615. *See also* Johnston v. Harris County Flood Control Dist., 869 F.2d 1565, 1569 (5th Cir. 1989); *In re* Corrugated Container Antitrust Litigation, 651 F.2d 1341, 1345 (5th Cir. 1981); Duncan v. Merrill Lynch, Pierce, Fenner & Smith, 646 F.2d 1020, 1028 (5th Cir.), *cert denied,* 454 U.S. 895 (1981); Brennan's, Inc. v. Brennan's Restaurants, Inc., 590 F.2d 168, 174 (5th Cir. 1979); Howard v. Texas Dept. of Human Services, 791 S.W.2d 313 (Tex. App.—Corpus Christi 1990, no writ) (if prior employment and substantial relationship are established, party moving for disqualification is entitled to conclusive presumption that confidences and secrets were imparted in prior representation); Petroleum Wholesale, Inc. v. Marshall, 751 S.W.2d 295 (Tex. App.—Dallas 1988, no writ) (construction of chinese wall will not prevent disqualification of counsel pursuant to Texas Rule 1.09); Note,

out examining numerous Texas authorities to the same effect.[53]

The Fifth Circuit held the dispositive determination is whether the prior representation is substantially related to the present one.[54] The *American* court undertook a lengthy examination of V&E's prior representations of American to determine if the standard was satisfied.[55] The court found that one of the cases V&E handled for American was premised on alleged violations of the antitrust laws; the court held this case did involve substantially related issues, practices, and procedures.[56] Once this hurdle has been cleared by a party seeking to disqualify its opponent's counsel, the Fifth Circuit rule "presume[s] that relevant confidential information was disclosed during the former period of representation."[57] Of course, the party moving for disqualification must clearly establish the subject matters, issues and causes of action which are common to the representation.[58]

The *American* court emphasized that an attorney's duty of loyalty involves more than the protection of a client's confidences. Rather, a lawyer's duty of confidentiality must be seen as part of the lawyer's primary duty of loyalty, a duty that is not exhausted by the preservation of a former client's secrets.[59] The *American* court issued a writ of mandamus directing the trial court to disqualify V&E. Texas lawyers should heed the court's admonition that the disqualification rules "not only preserve the purity of particular trials but also unavoidably affect the relationships among attorneys and clients in general."[60]

At least one Texas state court decision, *Davis v. Stansbury*,[61] discussed the important issues involved in the subsequent representation of a client adverse to a former client. The *Davis* case arose out of a unique set of facts which were arguably created intentionally by one of the parties. *Davis* involved a husband's effort to get his wife's divorce attorney disqualified from representing her. The parties had separated in 1986 and obtained counsel in anticipation of a divorce. The parties reconciled while their suit was in dis-

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In Defense of the Double Standard in the Rules of Ethics: A Critical Reevaluation of the Chinese Wall and Vicarious Disqualification, 20 U. MICH. J.L. REF. 245 (1986).

53. *See* cases cited *infra* at note 68.

54. *See* Home Ins. Co v. Marsh, 790 S.W.2d 749 (Tex. App.—Eastland 1990, no writ) (test centers on substantial relationship not substantial identity). *See also,* United States Football League v. Nat'l Football League, 605 F. Supp. 1448 (S.D.N.Y. 1985) (substantial relationship exists if some facts are relevant to prior and current representation).

55. *American*, 972 F.2d at 621-28.

56. *Id.* at 621 (citing *Duncan*, 646 F.2d at 1032 ("[a] substantial relationship exists when the prior representation concerns the particular practices and procedures which are the subject matter of [the present] suit.")).

57. *Id.* at 614 (quoting *Duncan*, 646 F.2d at 1028); *Accord Corrugated*, 659 F.2d at 1347 n. 1; T.C. Theater Corp. v. Warner Bros. Pictures, Inc., 113 F. Supp. 265, 268-69 (S.D. N.Y. 1953).

58. *American*, 972 F.2d at 614.

59. *Id.* at 619.

60. *Id. See also* Wilson B. Abraham Constr. Corp. v. Armco Steel Corp., 559 F.2d 250, 252 (5th Cir. 1977); *In re* Yarn Processing Patent Validity Litigation, 530 F.2d 83, 90 (5th Cir. 1976).

61. 824 S.W.2d 278 (Tex. App.—Houston [1st Dist.] 1992, *orig. proceeding*).

covery. During the proceeding, the wife was represented by an attorney named Foster. Foster's partner was Mike Orsak.

While the parties were still on good terms, husband met Orsak at a little league game. Later, in 1991, the parties again separated and obtained counsel. This time the husband sought out Orsak and dropped in for an appointment. At that time, the husband knew Orsak and Foster were partners and also that Foster was his wife's former divorce attorney. Two weeks later, the husband returned to Orsak's office, discussed non-confidential matters concerning the pending divorce, and gave Orsak a check in an effort to hire him. Orsak's receptionist,[62] when handed husband's check, recognized his name and told Orsak about Foster's earlier representation of the wife. Shortly thereafter either the receptionist or Orsak informed the husband that, due to the earlier representation, he could not be the husband's attorney.[63]

The parties then filed their respective petitions for divorce. Wife was again represented by Foster. Three months later, the husband moved to disqualify Foster as the wife's attorney. The trial court granted the motion after hearing conflicting testimony from the husband, Foster and Orsak. The wife sought mandamus relief from the Houston court of appeals (1st District) to overturn the trial court's order.

The court of appeals granted the wife's petition because the trial court erroneously excluded evidence during the hearing. The trial court had sustained objections by the husband's counsel to questions regarding what transpired during the husband's meetings with Orsak. The court held the trial judge's "determination [of the disqualification motion] was made without requisite information necessary to make a reasoned determination about whether an actual conflict of interest occurred."[64] The court focused on Texas Rules 1.09, 1.06, and 1.05 to guide its determination.[65] Because the wife's attorney-client relationship with Foster preceded the husband's effort to solicit Orsak's representation of him in a substantially related proceeding, Rule 1.09 barred Orsak's representation *ab initio*.[66] The trial court erred by not entertaining other options[67] to consider whether Orsak knew anything that was privileged; if it had, the appeals court reasoned, it would have found Orsak complied with the Texas Rules and there was no conflict of interest.[68]

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62. The court only recognized the receptionist by her first name, Hazel.

63. The husband was also instructed to pick up his uncashed check.

64. *Davis*, 824 S.W.2d at 283.

65. *Id.* at 280 (citing TEXAS DISCIPLINARY RULES OF PROF. CONDUCT, Rules 1.05, 1.06, 1.09 (1992)). The Houston court also undertook a careful examination of other confidentiality rules such as Tex. R. Civ. Evid. 503. It should be noted, however, that rules of professional conduct are not intended to influence or affect judicial formulations of the attorney client privilege. *See* TEXAS DISCIPLINARY RULES OF PROF. CONDUCT preamble (1992).

66. *Davis*, 824 S.W.2d at 283. The court importantly noted that Orsak's effort to prevent exactly what happened fully complied with the provisions of Texas Rule 1.06. *Id.*

67. According to the court, in addition to conducting an *in camera* inspection, the trial court "could have overruled objections based on attorney-client privilege when, in fact, the privilege had been waived, and could have compelled Husband to answer questions about unprivileged client information." *Id.* at 284.

68. Justice Mirabal dissented by noting a series of cases, led by *Clark v. Ruffino*, which

IV. ATTORNEY-CLIENT RELATIONSHIP

A. INCEPTION OF RELATIONSHIP

On September 21, 1989, 21 children died when a Coca-Cola delivery truck collided with their school bus outside Alvin, Texas. In addition to spawning predictable tort liability litigation against Coca-Cola, this incident also gave rise to a suit against Coca-Cola's attorneys for breach of an attorney-client relationship.[69] The day after the accident, the driver of the delivery truck, Perez, was recuperating in the hospital. He was visited there by lawyers from the Kirk & Carrigan law firm. Coca-Cola had already hired the firm to represent its interests in anticipation of litigation arising out of the accident. Two Kirk & Carrigan lawyers obtained the driver's sworn statement regarding the accident. According to the driver, the lawyers also represented to him "that they were [his] lawyers too, and that whatever [he] told them would be kept confidential."[70]

The driver later discovered that the lawyers who visited him were not "his" lawyers.[71] He also found out, after another counsel had been arranged for him, that the Kirk & Carrigan counsel released his sworn statement to the Hidalgo County District Attorney's office. Neither the driver nor his new counsel were informed of this decision until after the statement was released. The driver was then indicted on involuntary manslaughter charges for his role in the accident.

Perez sued the Kirk & Carrigan lawyers by intervening in the litigation against Coca-Cola arising out of the accident. He claimed the Kirk & Carrigan attorneys violated the attorney-client relationship by misrepresenting themselves as his lawyers, divulging his sworn statement, and violating the trust he had reposed in them.[72] Perez also alleged the lawyers, Coca-Cola,

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established the rule that the husband was entitled under Rule 1.09 to have Foster disqualified because the husband had an attorney-client relationship with Foster's partner in a substantially related matter. See Clark v. Ruffino, 819 S.W.2d 947 (Tex. App.—Houston [14th Dist.] 1991, *orig. proceeding*); Insurance Co. of North America v. Westergen, 794 S.W.2d 812, 815 (Tex. App.—Corpus Christi 1990, *orig. proceeding*); *Howard*, 791 S.W.2d at 315. *See also* NCNB Texas Nat'l Bank v. Coker, 765 S.W.2d 398, 400 (Tex. 1989) (holding appearance of impropriety exists when 1.09's predecessor rule is violated); Arkla Energy Resources v. Jones, 762 S.W.2d 694, 695 (Tex. App.—Texarkana 1988, *orig. proceeding, mand. motion overr.*). The majority opinion distinguished the *Clark* case because it involved the disqualification of a former client's attorney, based on confidential information obtained from the prior client. 824 S.W.2d at 282 n.2. This case, in contrast, involved a former client's ability to retain her counsel for a second substantially related proceeding when the moving party failed to establish that confidential information had been imparted. The *Davis* Court also noted the *Clark* opinion failed to consider TEXAS RULE 1.05(d)(2)(iii). *Id.* at 282. TEXAS RULE 1.05(d)(2)(iii) provides that an attorney may reveal unpriviledged client information when the lawyer has reason to believe he must do so in order to respond to allegations concerning the lawyer's representation.

69. Perez v. Kirk & Carrigan, 822 S.W.2d 261 (Tex. App.—Corpus Christi 1991, writ denied).

70. *Id.* at 263 n.1 (the driver's version of the facts was corroborated by affidavits given by family members who were also at the hospital).

71. The Kirk & Carrigan lawyers represented Coca-Cola; after obtaining the driver's statement, they made arrangements for another attorney to represent him. Both the Kirk & Carrigan lawyers and the driver's new lawyer were paid by Coca-Cola's insurer.

72. Specifically, Perez alleged breach of fiduciary duty, negligent and intentional infliction

and Coca-Cola's insurance company conspired to blame him for the accident to avoid inquiry into other potential causes.

Kirk & Carrigan responded by moving for summary judgment. The law firm argued there was no fiduciary relationship and that Perez suffered no damages as a result of any alleged breach.[73] The trial court granted the lawyers' motion and the appellate court reversed. The Corpus Christi court found the facts as alleged in Perez's petition amounted to a "type of deceitful and fraudulent conduct within the attorney-client relationship [that] has been treated as a tortious breach of duty in other contexts."[74] Even though third parties were present when Perez gave his statement to the Kirk & Carrigan lawyers, the court refused to allow the law firm to rely on this fact to claim his statement was not confidential.[75] The court also disagreed with the lawyers' claim that Perez could not recover damages for mental anguish.[76] Perez's intent to keep his statement confidential and any injury he suffered as a result of the statement's release represented factual issues the trial court was not empowered to determine. The court held the claims made in Perez's petition arose out of Kirk & Carrigan's wrongful procurement of Perez's statement and its unilateral decision to release it.[77] The court made clear that attorneys must be careful to delineate the existence and bounds of their relationship with potential clients and third parties before consulting with them.[78]

B. SIXTH AMENDMENT/RELATIONSHIP WITH ACCUSED CLIENT

While most indigent defendants demand effective assistance of counsel, a few still consider their defense impaired by the aid of counsel. Such was the case in *Ex parte Winton*.[79] In *Winton*, a defendant attacked his conviction by claiming the trial court's refusal to allow a *pro se* defense violated his Sixth Amendment right to counsel.[80]

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of emotional distress, violation of the DTPA and conspiracy to violate Article 21.21 of the Texas Insurance Code.

73. The motion was also grounded on claims that Perez's damages were for malicious prosecution, Perez was not a consumer, and Perez's complaint did not state a cause of action for conspiracy to violate the Texas Insurance Code.

74. *Perez*, 822 S.W.2d at 266. *Accord* Burgin v. Godwin, 167 S.W.2d 614 (Tex. Civ. App.—Amarillo 1942, writ ref'd w.o.m.); Sherwood v. South, 29 S.W.2d 805, 809 (Tex. Civ. App.—San Antonio 1930, writ ref'd).

75. *Perez*, 822 S.W.2d at 266.

76. *Id.* at 266-67.

77. *Id.* at 267-68. The court carefully noted that the later indictment "was merely the mechanism by which" Perez came to suffer damages from defendants' breach. *Id.* The court disposed of the other points supporting the summary judgment by noting that Perez did not need to be the actual purchaser of the attorneys' services to be their consumer and holding that the attorneys failed to establish that the facts Perez pleaded did not make up a conspiracy claim. *Id.* at 268-69.

78. *See also* CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 9.2.1 (1986) (discussing advisability of written contract); Vander Voort v. State Bar of Texas, 802 S.W.2d 332 (Tex. App.—Houston [1st Dist.] 1990, writ denied) (discussing discipline imposed on attorney for failing to notify court of termination of representation); TEXAS RULE 1.15 (1993) (entitled Declining or Terminating Representation).

79. 837 S.W.2d 134 (Tex. Crim. App. 1992, no pet.).

80. *Cf.* Heci Exploration Co. v. Clajon Gas Co., No. 3-91-268-CV, 1992 WL 259284 at 6

The defendant had counsel appointed for his defense upon his indictment but became dissatisfied with his lawyer before trial. The defendant then filed a *pro se* motion to represent himself. While the trial court acknowledged the defendant had timely asserted his right to represent himself, it denied the motion without notice, hearing, or attendance by the defendant. Trial proceeded with the defendant's appointed counsel conducting a defense. The defendant was convicted and sentenced to sixty years imprisonment.[81] In a terse opinion, the Court of Criminal Appeals vacated the defendant's conviction.[82] The court held that once a defendant has asserted his right to a *pro se* defense, the trial court must allow it after explaining the "consequences of self representation . . . so long as the assertion of the right . . . is unconditional and not asserted to disrupt or delay the proceedings."[83] Because the trial court did not find evidence that the defendant's demand to conduct his own defense was made to delay or disrupt the proceedings, the trial court erred in denying the defendant's motion.[84]

Another curious case involving Sixth Amendment issues was *Buntion v. Harmon*.[85] The *Buntion* court was faced with the unusual situation of a mandamus proceeding against a trial judge who had appointed new counsel to a convicted defendant for his appeal. The defendant alleged the judge's order amounted to an abuse of discretion because both the defendant and his trial counsel wished to continue the attorney-client relationship on appeal. The defendant's trial counsel was also originally appointed. The defendant contended the trial judge was under a ministerial duty to vacate his order replacing counsel and that he would be without an adequate remedy at law if the judge's order were not vacated.

The Court of Criminal Appeals agreed with the relator/defendant and conditionally granted the writ pending the judge's compliance with its holding.[86] The court largely relied upon an earlier decision from that court which recognized that "a criminal defendant should not be subjected to a trial *and appeal* process without the counsel he had grown to accept and gain confidence in."[87] More importantly, the court opined that "[t]he attorney-client relationship between appointed counsel and an indigent defendant is no less inviolate than if counsel is retained."[88] Because the trial judge failed to enunciate a principled reason for its refusal to allow the relator's trial counsel to continue the representation, the relator's writ and his wish to

(Tex. App.—Austin Oct. 7, 1992, no writ) (holding that a civil litigant does not have a sixth amendment right to effective counsel).

81. Perhaps this was an indication that the defendant's rights were prejudiced by his lawyer's work.

82. *Ex parte* Winton, 837 S.W.2d at 135.

83. *Id.*; *accord* Blankenship v. State, 717 S.W.2d 578, 585 (Tex. Crim. App. 1984, no pet.).

84. *Ex parte* Winton, 837 S.W.2d at 136.

85. 827 S.W.2d 945 (Tex. Crim. App. 1992, *orig. proceeding*).

86. *Id.* at 949.

87. *Id.* at 948 (emphasis added) (quoting Stearnes v. Clinton, 780 S.W.2d 216, 225 (Tex. Crim. App. 1989, no pet.).

88. *Buntion*, 827 S.W.2d at 949 (*citing Stearnes*, 780 S.W.2d at 222). *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.1 comment (1992).

have the same counsel on appeal were granted.[89]

C. WITHDRAWAL FROM REPRESENTATION

The Tyler court of appeals faced a case of first impression regarding an indigent defendant's right to representation free from conflicts of interest.[90] In *Haley v. Boles*,[91] attorney Victor Haley sought a writ of mandamus directing the Honorable Bennie C. Boles to grant his motion to withdraw as counsel. Haley had been appointed to represent Larry Christopher in a criminal case pending in Shelby County. Haley filed the motion to withdraw because his law partner was married to the Shelby County District Attorney. Haley argued that Texas Rule 1.06(c) required his withdrawal. The trial court denied the motion.

The Tyler Court granted Haley's writ and ordered the trial court to grant his motion.[92] While the court clearly limited its holding to instances of appointments to represent criminal defendants, it made clear that the appearance of a conflict and/or impropriety required that Haley be allowed to withdraw.[93] The court reasoned that Haley and the District Attorney both stood to profit from Haley's appointment.[94] Whether or not Christopher was convicted, the District Attorney would potentially gain from Haley's adversarial position to the State in the same proceeding because Haley's law partner would also gain from whatever fees Haley collected from the State. The court also noted that the provisions contained in Rule 1.06(c) would not protect a criminal defendant as it would a paying civil litigant who had the opportunity to pick and choose among qualified counsel.[95] The criminal defendant does not have that option because the state decides which attorney receives the appointment.[96] The court's opinion concluded "the solution provided by Rule 1.06(c)(2) will not suffice to alleviate a conflict of interest where the defendant is indigent."[97]

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89. The relator obviously felt his original counsel offered the best chance for obtaining a reversal despite the fact that counsel's representation had led to relator's conviction for capital murder. The court could have found support for its holding under TEXAS RULE 1.09. *See Davis*, 824 S.W.2d at 281 (stating 1.09 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).

90. This right, of course, is guaranteed under the Sixth Amendment. *See* Glasser v. United States, 315 U.S. 60, 69-70 (1942).

91. 824 S.W.2d 796 (Tex. App.—Tyler 1992, no writ).

92. *Id.* at 798.

93. *Id.* at 797.

94. *Id.*

95. *Id.*

96. *Cf.* Simon v. State, 805 S.W.2d 519 (Tex. App.—Waco 1991, no pet.) (indigent defendant alleging his appointed counsel had a conflict of interest because she was paid by the state).

97. *Haley*, 824 S.W.2d at 798. *See also* Gideon v. Wainright, 372 U.S. 335, 345 (1963) (felony defendants in state proceeding entitled to counsel); Miranda v. Arizona, 384 U.S. 436, 469 (1966), *reh'g denied*, 385 U.S. 890 (1966) (indigent entitled to counsel at custodial interrogation); Coleman v. Alabama, 399 U.S. 1, 9-10 (1970) (indigent has right to counsel at preliminary hearing).

V. ATTORNEY DISCIPLINE

This area of professional responsibility promises major changes in the coming year. The procedural aspects of attorney discipline cases recently enacted in the Texas Rules of Disciplinary Procedure are now subject to revision on an ongoing basis. As part of the Sunset Review changes to the State Bar Act, the legislature added section 81.076 to the Government Code.[98] New section 81.076 established the Commission for Lawyer Discipline.[99] The Commission was created to "review the structure, function, and effectiveness of the disciplinary and disability procedures" and to "report its findings annually to the supreme court and the [State Bar] board of directors and include any recommendations concerning needed changes."[100] The Commission's first report is expected in January, 1993.

The Sunset Review also dramatically changed the procedure for administration of grievances. Under the amended rules, any person with a grievance against a licensed attorney should direct the grievance to the State Bar Office of the Chief Disciplinary Counsel ("Chief Counsel").[101] After reviewing the grievance, the Chief Counsel refers the complaint to the District Grievance Committee. The Committee then assigns the complaint to an investigatory panel which determines if there is just cause for investigating the complaint.[102] The panel's decision, in effect, determines if the complaint will be examined. A second panel then reviews the first panel's determination *de novo* if there has been a finding of just cause. At this stage, the attorney being investigated may: (i) agree to a specified sanction with the panel; (ii) choose to pursue further proceedings before an evidentiary panel; or (iii) elect a trial *de novo* in district court.[103]

The amended State Bar Act also requires attorneys to notify their clients of the grievance system available to them.[104] Texas lawyers may notify their clients by four methods: (1) making available brochures which describe the disciplinary process at the attorney's place of business; (2) prominently displaying signs at the place of business; (3) notifying the client in the contract of services between the parties; and (4) notifying the client in the billing

98. *See* TEX. GOV'T CODE ANN. § 81.076 (Vernon Supp. 1993).

99. New § 81.076 abolished the Grievance Oversight Committee which formerly proposed changes to Texas' attorney discipline system. *See also* Jerome Shestack, *Assault on Lawyers has Gone Beyond Joking Stage*, DALLAS MORNING NEWS, Oct. 28, 1992, at 25A (noting "no profession has a more comprehensive code of ethical standards or seeks to monitor their [sic] members as carefully as the legal profession").

100. TEX. GOV'T CODE ANN. § 81.076(a), (e) (Vernon Supp. 1993).

101. SUPREME COURT OF TEXAS, STATE BAR RULES, T.2, subt. G, app. A-1 (TEXAS RULES OF DISCIPLINARY PROCEDURE) Rule 5.02 (1993). (The old system provided that grievances be filed with the District Grievance Committees located throughout the State).

102. Just cause is "such cause as is found to exist upon a reasonable inquiry that would induce a reasonably intelligent and prudent person to believe that an attorney either has committed an act or acts of Professional Misconduct requiring that a sanction be imposed, or suffers from a disability that requires either suspension as an attorney licensed to practice law in the State of Texas or probation." TEX. RULES OF DISCIPLINARY PROC., Rule 1.06.P (1993).

103. TEX. RULES OF DISCIPLINARY PROC., Rule 2.13 (1993).

104. *See* TEX. GOV'T CODE ANN. § 81.079(b) (Vernon 1992).

statement for the account.[105] The new amendments also prohibit an attorney from suing a complainant or witness who testified in a false or misleading fashion during a grievance proceeding.[106]

VI. ATTORNEYS FEES

A. COLLECTION SUITS

Bloom v. Graham[107] demonstrates the extraordinary lengths some lawyers will go to in order to recover a fee. Unfortunately for attorney Bloom, his crusade to recover fees from a client who discharged him ended up in sanctions against him for filing groundless pleadings in bad faith. Bloom's dispute with his former client arose of his representation of Karen Jean Graham ("Graham"). Bloom represented Graham in her divorce from Edward Graham ("husband"). When he billed Graham for his services she promptly discharged him as her attorney.[108] Not to be brushed aside so easily, Bloom wrote back and explained that he would need to file a motion to withdraw as her counsel and that he would bill her for his time in preparing the motion. Graham failed to reply to Bloom's letter and Bloom "responded" by failing to withdraw.

Without notice to Bloom of an upcoming hearing, Graham and husband appeared in court and consented to an agreed decree of divorce.[109] When Bloom found out about the agreed decree, he filed a motion for new trial. He also filed a motion for Rule 13 sanctions against husband and his counsel for their participation in an *ex parte* hearing. Graham responded[110] to Bloom's motions by stating she had not discussed the motions with him, and had asked him to withdraw them and discontinue representing himself as her attorney.

While most would expect the filings to end there, Bloom continued his barrage by filing a supplement to the motion for new trial, a supplement to

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105. *Id.*; *Grievance Update: Texas Lawyers Required to Notify Clients about Grievance System*, 55 TEX. B.J. 515 (1992). For compliance, the State Bar suggests the following language for use in billing correspondence:

> NOTICE TO CLIENTS
>
> The State Bar of Texas investigates and prosecutes professional misconduct by Texas attorneys. Although not every complaint against or dispute with a lawyer involves professional misconduct, the State Bar Office of General Counsel will provide you with information about how to file a complaint. For more information, please call 1/800/932-1900. This is a toll-free phone call. 55 TEX B.J. at 515.

The State Bar has also employed a new staff attorney to provide limited nonbinding advice to Texas lawyers who have questions about the Disciplinary Rules. *See* Richard Connelly, *Bar to Provide Answers to Ethics Questions*, TEXAS LAWYER, August 3, 1992, at 20. Perhaps the hope is that Texas lawyers will call the new staff attorney to resolve a potential problem before a disgruntled client calls the 800 number to make a complaint. Both calls are toll-free.

106. TEX. GOV'T CODE ANN. § 81.072(g) (Vernon Supp. 1992).

107. 825 S.W.2d 244 (Tex. App.—Fort Worth 1992, writ denied).

108. Karen discharged Bloom in writing.

109. Bloom was not notified of the hearing and did not attend.

110. The court did not state whether Edward filed another response or joined in Karen's response.

the motion for sanctions, a motion requesting the court to appoint an attorney *ad litem* for the Grahams' children, and, finally, a motion: to (1) disqualify Graham's new counsel; (2) remove any legal instruments not filed by himself; and (3) disregard husband's motion requesting that Bloom substantiate his authority to act as Graham's counsel.

Bloom appeared for the first part of what became a bifurcated hearing.[111] The hearing concluded with an order sanctioning Bloom under Rule 13 for filing frivolous pleadings. Bloom appealed and the trial court's judgment was affirmed. The Fort Worth court, upholding the denial of a new trial, held that Bloom was not acting in his client's best interests, but rather was doing his best to collect a fee without regard to his (former) client's interest.[112] Additionally, Bloom failed to show error that could be remedied by a new trial.[113] In regard to the Rule 13 sanctions, the court noted that Bloom was required to consult with his client to ensure his actions were authorized.[114] The court, however, failed to point to important authority on the issue. Texas Rule 1.15(a)(3) clearly provides that a lawyer in Bloom's position shall withdraw when he is discharged.[115] Moreover, it is the attorney's duty to conscientiously evaluate whether the dispute should be resolved by a fee dispute committee.[116]

Overly fee-minded attorneys practicing in the Fifth Circuit should refer to that court's decision in *Engra, Inc. v. Gabel*.[117] *Engra* arose out of attorney Van McFarland's representation of Engra in a securities fraud suit brought against Gabel. McFarland and Engra's attorney-client relationship was memorialized in 1986 with a contingency fee agreement.[118] Pursuant to the agreement, Engra transferred 40% of any recovery against Gabel to McFarland. McFarland subsequently filed suit in federal district court on Engra's behalf. Prior to the trial in June 1987, Engra filed a petition in bankruptcy "which automatically terminated McFarland's right to control the litigation as Engra's counsel."[119] Engra listed McFarland as one of its creditors.

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111. According to the Fort Worth Court, he made a lengthy opening statement but failed to testify. Bloom then skipped the second part of the hearing held approximately two weeks later.

112. *Bloom*, 825 S.W.2d at 248.

113. *Id.* at 247.

114. *Id.* at 248. The only saving grace for Bloom was the Fort Worth court's refusal to assess Tex. R. App. P. 84 sanctions against him for filing an appeal for the purposes of delay and without sufficient cause. *Id.*

115. TEXAS RULE 1.15(a)(3) (1993); *see also* TEXAS RULE 1.15 comment 4 (providing client may discharge his attorney at any time); comment 9 (lawyer must "take all reasonable steps to mitigate the consequences to the client," whether or not the termination was fair).

116. *See* MODEL RULES OF PROFESSIONAL CONDUCT, Rule 1.5 comment (1992). *See also* Smith, *Pitfalls of Suing Clients for Fees*, 69 A.B.A. J. 776 (1983); Debra T. Landis, Annotation, *Fee Collection Practices as Ground for Disciplinary Action*, 91 A.L.R.3D 583 (1979). The Dallas Bar Association, for example, sponsors a Fee Dispute Committee.

117. 958 F.2d 643 (5th Cir. 1992) (*per curiam*).

118. For a sensible discussion of fee options and an attorney's duties in negotiating a fee, *see* Walter W. Steele, Jr., *Some Pointers on Ethical Fee Contracting*, 55 TEX. B.J. 1028-32 (1992); Joanne Pitulla, *Truth in Billing*, 1992 A.B.A. J. 120 (Dec. 1992) (discussing practice of fee padding and ethical implications).

119. *Engra*, 958 F.2d at 644. *See* 11 U.S.C.A. § 541 (West 1979 & Supp. 1991). *See also* In re Goff, 706 F.2d 574, 578 (5th Cir. 1983) (automatic transfer of debtor's property into estate).

Later in March 1988, the bankruptcy judge handling the Engra bankruptcy approved a settlement agreement between Engra and Gabel which resulted in the underlying litigation being dismissed with prejudice. McFarland knew about the settlement and corresponded with Gabel's counsel regarding its terms. McFarland, however, apparently forgot to timely assert any claim against the bankruptcy estate.

In December 1988, McFarland filed a number of pleadings in the securities fraud action between Engra and Gabel which had been dismissed with prejudice. McFarland basically asserted a 40% interest in the outcome of the suit which had been settled eight months earlier and sought to intervene by filing an amended intervention motion and notice of real party in interest. The district court granted Gabel's motion for summary judgment on McFarland's claims. McFarland appealed.

The Fifth Circuit was not amused with McFarland's effort to bring the case back to life. The court held McFarland's intervention to be untimely as a matter of law.[120] The court also found that McFarland's late effort prejudiced Gabel who thought he had entered into a full and complete settlement of all claims against him.[121] The court noted that McFarland had "full opportunity to protect whatever rights he had under the fee agreement . . . in the bankruptcy proceedings" of which he was fully aware.[122] The court sanctioned McFarland $1,500 for his unreasonable attempt at intervention and vexatious multiplication of proceedings.[123] Like the attorney in *Bloom*, McFarland's litigious effort to use the judicial process, instead of a sanctioned fee dispute mechanism, to recover his unpaid fees was rebuffed.

B. Referral Fees

In *Polland & Cook v. Lehmann*,[124] the Houston court of appeals (1st District) addressed an attorney's entitlement to a referral fee under the old rules of disciplinary conduct.[125] At trial, Polland & Cook ("Polland") contended Lehmann had breached an agreement to split his fees with Polland. Under a variety of theories Polland sought to enforce the agreement; Lehmann responded by contending the agreement was unenforceable under old DR 2-107. The trial court agreed but a divided appeals court reversed.

The trial court basically held the agreement between the attorneys was unenforceable because it violated DR 2-107.[126] The underlying facts demonstrate the paradox the trial court was left to wrestle with. Polland represented a Chapter 11 bankruptcy debtor in possession. After the debtor filed for bankruptcy protection, an investment firm named Quorum con-

120. *Engra*, 958 F.2d at 645.

121. *Id.* The court did not note, perhaps because it was unnecessary, that McFarland's actions also potentially prejudiced his client. McFarland's actions arguably implicated a number of ethical rules of conduct.

122. *Id.*

123. *Id.* The court relied on 28 U.S.C. § 1927 (1992).

124. 832 S.W.2d 729 (Tex. App.—Houston [1st Dist.] July 16, 1992, writ denied).

125. *See supra* note 2 and accompanying text.

126. DR 2-107 reads:

tacted Polland to see if he would represent investors who held an equity stake in the bankruptcy debtor during the bankruptcy proceedings.[127] Polland recognized the conflict of interest and told Quorum it could not represent the investors. Polland offered, however, to assist Quorum in finding capable counsel for the investors. Polland then contacted Lehmann about representing the investors. Lehmann accepted the employment. Quorum, in turn, sent a letter to all investors it knew of, advising them of the pending litigation, that Lehmann would represent their interests, and that the investors represented by Lehmann would share the cost of the representation. Quorum also requested the investors sign an enclosed power of attorney form, designating Quorum as the investors' representative, and mail in a check for fees.[128]

Eventually, Quorum obtained 279 investor clients for Lehmann. Quorum collected the investors' checks and power of attorneys and forwarded them to Lehmann. Quorum also consented to Lehmann's payment of a referral fee to Polland. Shortly thereafter, Polland, Quorum, and Lehmann met to discuss Lehmann's representation of the investors. Quorum informed Lehmann that it wanted motions for relief from the stay filed on behalf of the investors so that their property would be removed from the bankruptcy. Polland raised the issue of the referral fee agreement and Lehmann consented, with reservations.

After this meeting, Lehmann stopped returning Polland's calls about the referral fee. Only when Polland left a message informing Lehmann that he

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(A) A lawyer shall not divide a fee for legal services with another lawyer who is not a partner in or associate of his law firm or law office, unless:

(1) the client consents to employment of the other lawyer after a full disclosure that a division of fees will be made.

(2) the division is made in proportion to the services performed and responsibility assumed by each, or is made with a forwarding lawyer.

(3) the total fee of the lawyers does not clearly exceed reasonable compensation for all legal services they rendered the client.

(B) This Disciplinary Rule does not prohibit payment to a former partner or associate pursuant to a separation or retirement.

SUPREME COURT OF TEXAS, CODE OF PROFESSIONAL RESPONSIBILITY, DR2-107 (1988). The new rule provides:

(f) A division or agreement for a division of a fee between lawyers who are not in the same firm shall not be made unless:

(1) the division is:

(i) in proportion to the professional services performed by each lawyer;

(ii) made with a forwarding lawyer; or

(iii) made by written agreement with the client, with a lawyer who assumes joint responsibility for the representation;

(2) the client is advised of and does not object to the participation of all the lawyers involved; and

(3) the aggregate fee does not violate paragraph (a).

TEXAS RULES OF PROF. CONDUCT, Rule 1.04(f) (1993). The new rule does not require the client's consent to a fee sharing arrangement after full disclosure. Under the new rule, a forwarding attorney only needs to advise the client. If the client does not object, a forwarding attorney may participate (profit) in the new representation.

127. Quorum was interested in obtaining representation for the investors because it had encouraged and arranged their participation in the failing company.

128. Each investor's fee was determined on the basis of their investment in the bankruptcy debtor.

had a $20,000 check from one of the investors did Lehmann agree to meet with Polland. When they did meet, "Polland told Lehmann that if they could not agree to the one third referral fee, Polland would send the investors to other counsel."[129] Polland and Lehmann then agreed on a referral fee agreement which both parties intended to be effective. Pursuant to the agreement, Lehmann agreed to pay Polland one third of all legal fees generated from Lehmann's representation of the investors. The agreement also provided that if Lehmann did not receive at least $150,000 in attorneys fees, the parties could mutually agree on a new referral fee.

Lehmann became evasive again after the parties entered into the agreement. About two months later, Lehmann and Polland met. Just before their meeting, Lehmann delivered a letter to Polland expressing concern that their agreement did not comply with DR 2-107. Lehmann claimed the agreement had possibly not been consented to by his clients. Polland responded with two demand letters and, finally, this suit.

The trial court held the agreement was unenforceable for three reasons: (i) failure to notify the client/investors; (ii) failure of a condition precedent; and (iii) Polland's conflict of interest. Polland appealed and prevailed before a split panel of the court of appeals.[130] The appellate court held DR 2-107's requirement that the client consent to sharing of fees was satisfied by Quorum's execution of the consent letter on behalf of all the investors.[131] The court focused on the fact that "Quorum had authority to consent on behalf of the [client] investors to whatever attorney-client arrangement was made."[132] The court further held that the agreement's lack of clarity regarding the alleged condition precedent that $150,000 in fees be collected prior to Lehmann's obligation thereunder did not prevent the enforcement of the contract.[133] The court held that the agreement's latent ambiguity when weighed with the parties' clear intent to split the fees required the trial court to ascertain what Lehmann's obligation under the contract was.[134]

The hotly contested issue in this case, however, was Polland's alleged conflict of interest. Lehmann and the dissent argued Polland's conflict of inter-

129. *Polland*, 832 S.W.2d at 732.

130. Justice O'Connor filed a dissent to the court's holding. *Id.* at 740. Justice O'Connor saw the facts giving rise to Polland's referral to Lehmann in a different light. According to Justice O'Connor, Polland was forced to refer the case due to a conflict of interest. In such an instance, she wrote "the old and the new disciplinary rules presuppose that the forwarding lawyer [Polland] does not have a disability that would prevent the formation of an attorney-client relationship." *Id.* at 741 (n. omitted). The persuasive dissent argued that allowing Polland to enforce the agreement "would enable [him] to benefit from conduct that is forbidden under the disciplinary rules and contrary to the public interest." *Id.* at 743; *see also* RESTATEMENT (SECOND) OF CONTRACTS §§ 179, 181 (1979).

131. *Polland*, 832 S.W.2d at 738.

132. *Id.* The majority disagreed with the arguable merits of Lehmann's position that each of the individual investors were entitled and required to consent to the referral fee agreement.

133. *Id.* at 739.

134. *Id.* The court relied on the familiar contract rule that the absence of a price term does not render a contract unenforceable if the other requisites for formation are present. *Id.* at 740 (citing Bendalin v. Delgado, 406 S.W.2d 897, 899 (Tex. 1966) for proposition that "if parties have complied with an agreement, then the failure to supply a price in the contract does not leave the contract so incomplete that it cannot be enforced").

est, which was transparent, barred the enforcement of the contract. The majority disagreed and held Polland never had an attorney-client relationship with the investors and never rendered his services to them.[135] The only service Polland provided to the investors was the referral to Lehmann. The majority did not see a conflict raised by Polland's behavior; his enforcement of the agreement was not tantamount to the collusion which characterizes conflicts of interest the disciplinary rules are designed to prohibit.[136]

VII. ABA MODEL RULES[137]

The ABA House of Delegates considered three proposed changes/additions to the Model Rules during the survey period. The first, a new Model Rule 5.7, would ban all ancillary business activity by law firms. By a close margin, the ABA House of Delegates adopted the new rule. The rule's strict terms are qualified by an exception for ancillary business activity already maintained with existing clients by a firm's own personnel.[138] The rule prohibits "separate entities owned and/or controlled by [a] law firm" from performing ancillary business activity; the rule also outlaws any ancillary business activity conducted for the benefit of "a person who is not already a client of a law firm."[139]

The House of Delegates rejected a proposed amendment to Model Rule 1.6 which would allow an attorney to reveal client confidences "to rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services had been used."[140] Model Rule 1.6 currently provides, in important part, a lawyer must not reveal confidences unless the client consents or the lawyer reasonably believes disclosure is necessary to prevent the commission of a crime resulting in imminent death or substantial bodily harm. . . ."[141] Finally, the House of Delegates approved a sensible amendment to Model Rule 8.3 which eliminated a lawyer's obligation to report peer's professional misconduct if knowledge of the misconduct was obtained while formally participating in an approved lawyer assistance program.[142]

VIII. MISCELLANEOUS AND EMERGING DEVELOPMENTS

A. *EX PARTE* COMMUNICATIONS

An interesting sanctions case out of Houston demonstrates some unforeseen perils in seeking sanctions against an adversary. In a case that received state wide attention, two sole practitioners from Houston were sanctioned

135. *Polland*, 832 S.W.2d at 737.
136. *Id.*
137. Developments with the Model Rules are important because a vast majority of states, including Texas, have modelled their professional rules on the Model Rules' framework.
138. *Ethics Update*, ALAS LOSS PREVENTION J., Sept. 1991, at 14-15.
139. *Id.*
140. *Id.* at 15.
141. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(1).
142. *Id.*

almost one million dollars for filing frivolous pleadings.[143] After the sanctions were handed down, its victims discovered opposing counsel had actively aided the court in determining the correct procedure for assessing the sanctions. Opposing counsel allegedly researched the law, drafted orders, and advised the judge on how to sanction the offending lawyers.

As all practitioners realize, *ex parte* communications with a court regarding matters pending in the court are strictly forbidden.[144] Texas Rule 3.05 provides:

> A lawyer shall not:
>
> (a) seek to influence a tribunal concerning a pending matter by means prohibited by law or applicable rules of practice or procedure;
>
> (b) except as otherwise permitted by law and not prohibited by applicable rules of practice or procedure, communicate or cause another to communicate *ex parte* with a tribunal for the purpose of influencing that entity or person concerning a pending matter other than:
>
> (1) in the course of official proceedings in the cause;
>
> (2) in writing if he promptly delivers a copy of the writing to opposing counsel or the adverse party if he is not represented by a lawyer;
>
> (3) orally upon adequate notice to opposing counsel or to the adverse party if he is not represented by a lawyer.[145]

Judges are also subject to a similar constraint found in the Texas Code of Judicial Conduct.[146] Finally, the Texas Rules of Civil Procedure explicitly provide that all written communications with a court must be served on opposing counsel.[147] While it is entirely too early and inappropriate to speculate on the outcome of the sanctioned lawyers' latest effort to set aside the order, Texas' rules and interpretations[148] indicate the sanctioned attorneys may have a credible argument for reversal of the trial court's sanctions order.

B. THREATS OF CRIMINAL PROSECUTION

The Texas Disciplinary Rules of Professional Conduct are explicit in their prohibition of a lawyer's threat to "present criminal or discipline charges

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143. Mark Ballard, *$1M Sanction's Targets Fight On*, TEXAS LAWYER, August 3, 1992, at 1 (reporting on largest Rule 13 sanction ever handed down; lawyers sanctioned for filing frivolous pleadings); *see also* Mark Ballard, *Losers Face $1M Fine for Trial Tactics*, TEXAS LAWYER, May 25, 1992, at 1 (also reporting on order).

144. Kahn v. Garcia, 816 S.W.2d 131, 133 (Tex. App.—Houston [1st Dist.] 1991, no writ) (reported in last year's survey).

145. TEXAS RULE 3.05 (1993). The definitions are as follows:

> (c) for purposes of this rule:
>
> (1) "Matter" has the meanings ascribed by it in Rule 1.10(f) of these Rules;
>
> (2) A matter is "pending" before a particular tribunal either when that entity has been selected to determine the matter or when it is reasonably foreseeable that entity will be so selected. *Id.*

146. *See* TEX. CODE JUD. CONDUCT, Canon 3, pt. A(5) (1993). ("A judge, except as authorized by law, shall not directly or indirectly initiate, permit nor consider *ex parte* or other communications concerning the merits of a pending or impending judicial proceeding.")

147. *See* TEX. R. CIV. P. 21; *see also* TEX. R. CIV. P. 21b (providing mechanics for sanctions against attorneys who do not serve their adversary with filed pleadings).

148. *See, e.g.*, *Kahn*, 816 S.W.2d at 133.

solely to gain advantage in a civil matter."[149] The Texas rules were drafted in large part from the Model Rules of Professional Conduct.[150] During the summer of 1992, the ABA issued an opinion that a lawyer may make such a threat "when the criminal charges are well founded in fact and law, stem from the same matters that the civil claim, and are used to gain legitimate relief for the client."[151] This opinion is contrary both to the current Texas Rules and old Texas Rules.[152] Furthermore, a 1992 West Virginia Supreme Court decision interpreting a rule comparable to Texas Rule 4.04, dismissed disciplinary charges against an attorney who had allegedly violated the terms of West Virginia's rules by threatening criminal prosecution.[153] While the West Virginia court basically obliterated the terms of its own rule, the court noted that it did not condone extortionate behavior by counsel to obtain more than what their client is due. Such an instance would be prohibited by the terms of West Virginia's and, obviously, the ABA's rules.[154] These developments may represent a trend Texas lawyers should consider in the coming years.

C. TEXAS RULES AS A DEFENSE

An unreported opinion out of the Dallas court of appeals, *Law Offices of Windle Turley v. Giunta*, reaffirmed Texas' decided rule that the Texas Rules, as quasi-statutory enactments, may be used to defend against the enforcement of a contract.[155] *Giunta* involved the Law Offices of Windle Turley's effort to enforce a non-competition agreement between Turley and

149. TEXAS RULE 4.04(b) (1993).

150. The model rules are not as explicitly written, and they "do not prohibit a lawyer from using the possibility of criminal charges against the opposing party" to his advantage so long as "the lawyer does not attempt to exert or suggest improper influence over the criminal process." *See* Joanne Pitulla, *Pay or I'll File Charges*, A.B.A. J., October, 1992, at 106 (quoting ABA Comm. on Ethics and Professional Responsibility, Formal Op. 92-363 (1992)).

151. *Id.*

152. *See* TEXAS RULE 4.04 (1993); SUPREME COURT OF TEXAS, CODE OF PROFESSIONAL RESPONSIBILITY, DR-7-105(A) (1988). Texas, along with 15 other jurisdictions, remains in a minority adhering to the old view that a lawyer may not threaten his adversary. Texas, however, may soon be left in a sole state minority provided the terms of the new ABA rules.

153. Committee on Legal Ethics v. Printz, 416 S.E.2d 720 (W. Va. 1992).

154. *See* Pitulla, *supra* note 150, at 106.

155. *See* Law Offices of Windle Turley v. Giunta, No. 05-91-00776-CV, 1992 WL 57464 (Tex. App.—Dallas, March 23, 1992) (not designated for publication); *see also* Kuhn, Collins & Rash v. Reynolds, 614 S.W.2d 854, 856 (Tex. App.—Texarkana 1981, writ ref'd n.r.e.) (holding old Texas Rules are quasi statutory); Baron v. Mullinax, Wells, Mauzy, & Babb, Inc., 623 S.W.2d 457, 461 (Tex. App.—Texarkana 1981, writ ref'd n.r.e.) (holding old Texas Rules are part of State's public policy); State v. Baker, 539 S.W.2d 367, 372 (Tex. Civ. App.—Austin 1976, writ ref'd n.r.e.), *aff'd on remand*, 559 S.W.2d 145 (Tex. Civ. App.—Austin 1977, writ ref'd n.r.e.). *Cf.* TEXAS RULES preamble para. 15 (1993) which provides in part that "violation of a [disciplinary] rule does not give rise to a private cause of action nor does it create any presumption that a legal duty to a client has been breached. . . . Accordingly, nothing in the rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such a duty." TEXAS RULES preamble (1993). The Preamble to the Model Rules contains a similar provision disclaiming the creation of any ground for affirmative relief premised upon the Model Rules. "Violation of a Rule should not give rise to a cause of action nor should it create a presumption that a legal duty has been breached . . . [The Rules] are not designed to be a basis for civil liability." ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT at 10 (2d ed. 1992).

Giunta, a former legal assistant in Turley's offices. Giunta moved for summary judgment on Turley's claims, assenting that DR 2-108(A) barred Turley's claims.[156] Specifically, Giunta argued the agreement unduly restrained her ability to work in the legal profession and placed an unwarranted burden on other attorneys who would utilize her services. The trial court granted Giunta's motion and the court of appeals affirmed because the noncompetition clause violated DR 2-108(A).[157] Texas lawyers need to remember that the Texas Rules are more than just a sword to be wielded against them in a disciplinary proceeding; they can also be a an effective shield to potential liability.

D. JUDICIAL ETHICS

Texas' rules governing the behavior and conduct of its judiciary have been described as comparatively lax.[158] While this opinion has some adherents, Texas' judiciary has taken dramatic steps over the last year to counter this impression. Apparently recognizing the anachronistic nature of some of its rules, the Texas Supreme Court appointed the Task Force on Judicial Ethics to propose changes to the current rules governing judges.[159] The court has also moved during the survey period to improve the quality of education available to Texas judges.[160]

In addition to these quasi-statutory developments, one case released during the survey period touched directly on a potentially recurring judicial ethics problem. In *Nevarez v. State*,[161] a defendant convicted for possession of a controlled substance appealed his conviction on a number of grounds. The most interesting argument for reversal was rejected by the Waco court. Nevarez' conviction had been "enhanced" pursuant to Texas' repeat offender statute.[162] On appeal, Nevarez argued that the trial judge's participa-

156. DR 2-108(A) (1988) provides:

> A lawyer shall not be a party to or participate in a partnership or employment agreement with another lawyer that restricts the right of a lawyer to practice law after the termination of a relationship created by the agreement, except as a condition to payment of retirement benefits.

SUPREME COURT OF TEXAS, CODE OF PROFESSIONAL RESPONSIBILITY, DR 2-108A (1988).

157. Arguably the same result would follow under the new Texas Rules. The new Rule provides:

> A lawyer shall not participate in offering or making:
>
> (a) a partnership or employment agreement that restricts the rights of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement.

TEXAS RULE 5.06 (1993).

158. Mark Ballard, *$1M Sanction's Targets Fight On*, TEXAS LAWYER, August 3, 1992, at 33.

159. The Task Force's findings will be released on January 1, 1993. *See* Ballard, *supra* note 158. These changes, which may be substantive and far reaching, will be addressed in next year's survey.

160. *See* Janet Elliot, *Trial Judges Unload on Supreme Court*, TEXAS LAWYER, Nov. 2, 1992, at 2. This move was countered by a resolution passed by the Center for the Judiciary which criticized the diversion of funds from judicial education conferences to a new office created to improve judicial education. *Id.* at 2-3.

161. 832 S.W.2d 82 (Tex. App.—Waco 1992, no writ).

162. TEX. PENAL CODE ANN. § 12.42(d) (Vernon Supp. 1992).

tion in Nevarez' previous convictions required his disqualification from the case. The trial judge had served both as Nevarez' counsel during a rape trial which resulted in a conviction and "had served as counsel for the state in [Nevarez'] murder conviction [which was also] used for enhancement."[163] Relying on established Texas law, the Waco court held the trial judge's "refusal to disqualify himself was not error."[164] While this result would be questionable in a civil court proceeding,[165] and may be arguable in the criminal context,[166] it appears criminal lawyers in Texas may serve as both advocate and judge of the accused on separate occasions.

E. PRO BONO REQUIREMENTS OR LACK THEREOF

After much handwringing, the State Bar has again decided Texas lawyers are not required to contribute their skills to the cause of the indigent by providing pro bono services. In a carefully worded announcement,[167] the State Bar declared attorneys will not be required to aid the poor as a condition of maintaining their license.[168] On May 28, 1992, the State Bar resolved that each Texas attorney should aspire to render at least 50 hours of pro bono publico services to the poor each year.[169]

The State Bar, after having struggled with this issue for at least a year, adopted a standard most lawyers should not find objectionable.[170] The announcement also detailed the establishment of a Pro Bono College. The College's membership is open to all lawyers contributing at least 75 hours of annual pro bono service. One possible explanation for the State Bar's compromise position is the potential problem a pro bono requirement poses for rural attorneys. The State Bar reasoned that rural attorneys, who already

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163. 832 S.W.2d at 88. Arguably, this should have led to a difference in treatment.

164. *Id. See* Hawthorne v. State, 459 S.W.2d 826 (Tex. Crim. App. 1970), *cert. denied*, 91 S. Ct. 1398 (1970); O'Dell v. State, 651 S.W.2d 48 (Tex. App.—Ft. Worth 1983, writ ref'd).

165. *See* TEXAS RULE 1.09 (1993). The judge's participation would amount to an adversarial position in a substantially related proceeding.

166. *See Ex parte Spain*, 589 S.W.2d 132 (Tex. Crim. App. 1979, no pet.) (successful *habeas corpus* challenge to prosecutor participating in parole revocation hearing who had originally represented defendant during criminal trial).

167. *See also*, Letter from *Texas Young Lawyers Association* (October 2, 1992) (announcing same).

168. Compare SMU School of Law's requirements that its students render 40 hours of *pro bono publico* service in order to graduate. SMU joined at least five other law schools, including Tulane and Valparaiso, in requiring its law students aid the poor as part of their legal education.

169. *See* STATE BAR UPDATE (July 1992); *see also* PBI BULL. BOARD, Sept. 1989, at 3 (noting Wisconsin and West Virginia State Bars reaching same conclusion). Notably, the voluntary El Paso local bar organization requires its members to donate pro bono time to the indigent.

170. The new exhortatory standard conforms to the preamble to the Texas Rules which provides, in part, that "[a] lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance, and should therefore devote professional time and civic influence in their behalf." TEXAS RULES preamble para. 5 (1993). *See also id.* at preamble para. 6 (basic responsibility to help poor lies with individual lawyers); Note, *Why Mandatory Pro Bono is a Bad Idea*, 3 GEO. J.L. ETHICS 623, 632-38 (1990) (noting failure of other bar associations to adopt a mandatory pro bono requirement for their members).

face an undue burden due to numerous criminal appointments,[171] should not be "forced" to contribute more of their time to the indigent.[172] Supporters of the compromise also note that 75% of all the legal problems faced by poor people are resolved without the necessity of attorney involvement.

CONCLUSION

While some of the ethics rules governing attorneys will never change,[173] this Survey period demonstrated lawyers must stay abreast of developments.[174] More than ever before, lawyers need to look beyond the Texas Rules to find answers to professional responsibility questions.[175] Texas lawyers need to be familiar with secondary authority governing their professional obligations. Furthermore, while the Texas Rules "are rules of reason,"[176] reference to them and their interpretation must be updated. The author hopes the foregoing professional responsibility developments will aid Texas' officers of court in weighing their duties and obligations to their clients and the judicial system.

171. *See, e.g.*, Comment, *Constitutional Challenges to Court Appointment: Increasing Recognition of an Unfair Burden*, 44 SW. L.J. 1229 (1990); Comment, *The Uncompensated Appointed Counsel System: A Constitutional and Social Transgression*, 60 KY. L.J. 710 (1972); Sam J. Ervin, Jr., *Uncompensated Counsel: They Do Not Meet The Constitutional Mandate*, 49 A.B.A. J. 435 (1963) (Senator Ervin's prescient view of the problem).

172. *See* State Bar Update, *supra* note 169 and accompanying text.

173. *See* Plumlee v. Paddock, 832 S.W.2d 157, 158-59 (Tex. App.—Ft. Worth 1992, no writ) (reaffirming Texas' long standing policy against barratry in suit by ambulance company owner to enforce purported fee contract with attorneys); *see also* State Bar v. Faubion, 821 S.W.2d 203 (Tex. App.—Houston [14th Dist.] 1991, writ denied) (reported in last year's survey); TEXAS RULE 5.04 (1993) (which embodies Texas barratry rule).

174. Not to be overlooked are the developments which undoubtedly occurred since the submission of this article in November, 1992.

175. *See American*, 972 F.2d at 605; *Dresser*, 972 F.2d at 540.

176. TEXAS RULES preamble (1993). The Texas Rules are also changing to reflect societal changes. The Sunset Review changes to the State Bar Act included a new provision which provides for probationary licensing of new attorneys suffering from a chemical dependency. *See* TEX. GOV'T CODE ANN. § 81.038 (Vernon Supp. 1992).