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I. INTRODUCTION

Conflicts: they're not just for lawyers any more. In fact, conflicts are part of the 24-hour news cycle we have consumed (or have been force fed) in recent years. The popular press thrives on:

- Accounting scandals that were allegedly brought on by a conflict between the auditing practice and the deals proposed by the high flying consultants;
- Lobbying scandals in which elected officials allegedly placed their duty to the public good in conflict with the sources of campaign contributions;
- Policy-making scandals in which the executive branch allegedly allowed secretive groups of contributors to influence policy; and
- Judicial scandals in which judges are accused of being chummy with the executive branch officials in the policy-making scandals.

Some of these alleged conflicts have had very serious consequences—from unseating an elected official that was bulletproof at the polls to destroying a major accounting firm. The seriousness of such “death penalty” consequences and the nature of the news coverage could lead one to believe that those who tolerate conflicts must be the “Spawn of Satan” or possibly even worse. I doubt it. Rarely does one recognize a fork in the road where the devil sits on one shoulder and an angel on the other, while one is completely verklempt about whether to do the “right thing” or sell one’s soul.

For example, I daresay that not a single participant in any accounting scandal went to the 9:30 team meeting and suddenly suggested:

You know what, fellas? These reporting standards are really pretty restrictive and kinda vague. If we just blow through some stop signs and rubber stamp some deals, our consulting group can make a boat load of money. Are you with me?

Real life is not like that. What ends as a disaster seldom begins with warning bells. On the contrary, it “feels right” and can easily be rationalized, often until close to the very end. At that point, one watches the evening news and sees the “Spawn of Satan.” The consequences are so severe, and the initial symptoms are so benign, it would behoove one to examine this topic. That is what this paper attempts to do.

Section II.A. is a brief discussion about problems in defining conflicts of interest and why you can’t just “know it when you see it.” Included in this discussion are the goals of laws regulating conflicts of interest, the dangers of failing to define conflicts in

a realistic manner, and the difficulties in having a conflict definition that is sufficiently flexible to adapt to changing facts and yet sufficiently concrete to be meaningful. Section II.B. is a discussion of fee forfeiture, which can occur when a conflict of interest ripens into a breach of fiduciary duty. Section II.C. briefly reports on “conflicts” for those who are supposed to be impartial: arbitral decision makers. Section II.D. addresses the topic of waiver and other prophylactic measures to ameliorate a conflict, including addressing the ABA’s new position on when sophisticated clients can waive conflicts even before they arise.

II. THE STUFF

A. Conflicts And Why They Are Not Like Pornography

Conflicts are dangerous. They can occur because of conduct by your law partners that you neither controlled nor even knew about. (You won’t even talk to some of your partners at the “Holiday” party, and yet you are typically presumed to know every secret they know.)¹ Then, if they ripen, they can result in disqualification or even fee forfeiture.² Add to this the difficulty in defining what a conflict is and the danger is magnified.

For example, one could declare that “no [lawyer] can serve two masters; for either he will hate the one, and love the other; or else he will hold to the one and despise the other.”³ Such a definition certainly enforces loyalty and recognizes the danger in conflicts; however, it fails to recognize that nearly every lawyer has more than one client, and indeed *must* have multiple clients in order to put food on the table. Likewise blind obedience to one client is sometimes wrong. There are some things even a client cannot demand—falsifying evidence or unreasonably refusing a request for extension of time, for example.⁴ In addition, what if both masters consented after full disclosure?⁵ Thus, in its breadth, a prohibition of “biblical proportions” would prohibit some of what one would want to allow and allow some of what one would want to prohibit.

¹ TEX. DISCIPLINARY R. PROF’L CONDUCT 1.09(b), reprinted in TEX. GOV’T CODE ANN., tit. 2, subtit. G app. A (Vernon 2005) (TEX. STATE BAR R. art. X, § 9) (imputing former client conflicts).

² See *infra* § II.B.

³ *Matthew* 6:24; see also GEOFFERY C. HAZZARD, JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING* § 10.1, p. 10-3 (3d ed. 2005).

⁴ See TEX. DISCIPLINARY R. PROF’L CONDUCT 3.04(b); *Standards For Appellate Conduct (Lawyers’ Duties to Lawyers)*, available at <http://www.tex-app.org/standards.html> (last visited May 16, 2006).

⁵ See, e.g., TEX. DISCIPLINARY R. PROF’L CONDUCT 1.07(a) (consent to lawyer acting as intermediary).

Moving forward in time, one could borrow a standard from the London Ordinance of 1280. The Ordinance contained prohibitions on conflicts of interest that were more specific. A practitioner was prohibited from “tak[ing] pay from both parties in any action.”⁶ Likewise, one could not “leave[] [one’s] client and league[] [oneself] with the other party.”⁷ Although modern penalties pale by comparison to the penalties under the Ordinance,⁸ this standard, in its specificity, leaves much misconduct unaddressed. For example, what about secrets of former clients?⁹ What about contracting for the client’s movie rights?¹⁰

So, yo-yo back to a broad standard, such as the Canons predating our modern rules. Under that broad standard, one could not “represent conflicting interests, except by express consent of all concerned, given after full disclosure of the facts.”¹¹ The prohibition was intended to enforce “the obligation to represent the client with *undivided* fidelity.”¹² While “undivided fidelity” is a laudable standard, it is frankly one that neither this author nor any of his readers have ever met. While I enjoy my profession, I do not enjoy it nearly as much as going for a run or riding my bike. Is my “fidelity” impermissibly “divided” because I prefer my hobbies over remaining at the office to serve my clients? As much as you may enjoy your office, you hopefully prefer going home rather than remaining at the end of the day. Is your “fidelity” impermissibly “divided” because you prefer your family and your home to your colleagues, clients and offices?

So we agree that conflicts are bad, but what is a bad conflict? The answer lies more in understanding *why* the rules are than in knowing *what* they are. Rules regulating conflicts of interest protect three of the core values of the legal profession: the duty of loyalty to the client, the duty to preserve client confidences, and the duty to zealously represent a client.¹³ Perhaps it is this nexus to our core values that accounts

⁶ See Jonathan Rose, *The Legal Profession In Medieval England: A History Of Regulation*, 48 SYRACUSE L. REV. 1, 65 (1998) (quoting 2 MUNIMENTA GILDHALLAE LONDONIENSIS: LIBER CUSTUMARUM 280 (reprint Kraus-Thomson 1968) (Henry Thomas Riley ed., 1859)).

⁷ *Id.* (quoting 2 MUNIMENTA GILDHALLAE, *supra* note 6 at 280).

⁸ If an attorney lost a client’s case because of negligence or default, the penalty was imprisonment “according to the statute of the King.” *Id.* at 66 (quoting 2 MUNIMENTA GILDHALLAE, *supra* note 6 at 280).

⁹ See, e.g., TEX. DISCIPLINARY R. PROF’L CONDUCT 1.05(b)(1).

¹⁰ *Id.* at 1.08(c).

¹¹ CANONS OF PROFESSIONAL ETHICS at Canon 6 (1908); see also THE LAW OF LAWYERING, *supra* note 3 at 10-3.

¹² THE LAW OF LAWYERING, *supra* note 3 at § 10.1.

¹³ See THE LAW OF LAWYERING, *supra* note 3 at § 10.1, p. 10-3; RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 121, cmt. b (1998).

for the extremely draconian consequences that can follow a conflict of interest.¹⁴ Defining impermissible conflicts, therefore, must be done in a manner that serves those core values. This is not accomplished if the prohibitions are too general. It is not accomplished if the prohibitions are too specific. It is likewise not accomplished if the prohibitions are unrealistic. Unrealistic prohibitions eventually lead parties ignoring the prohibitions altogether and make their own law.¹⁵

To keep the rules consistent with the goal of protecting clients, the modern approach to rule-making prohibits conflicts of interest with regard to their effect on the client. They speak in terms of (i) what kind of effect is prohibited? (ii) how significant must the effect be? (iii) what probability must there be that the effect will occur? and (iv) from whose perspective must the conflict be determined?¹⁶ One sees these factors at work every time an adverb appears in Texas' general prohibition on conflicts of interest:

a lawyer shall not represent a person if the representation of that person:

(1) involves a *substantially related* matter 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.

¹⁴ See *infra* § II.B.

¹⁵ One writer reports, for example, that many U.K. solicitors and law firms do not abide by the strict Law Society rules regarding conflicts. Indeed, two-thirds of the firms surveyed reported acting in a conflict of interest situation, and the majority reported having done so on a regular basis. Nancy J. Moore, Review Essay, *Regulating Law Firm Conflicts In the 21st Century: Implications Of The Globalization Of Legal Services And The Growth Of The "Mega Firm"*, 18 GEO. J. LEGAL ETHICS 521, 531-32 (2005) (reviewing JANINE GRIFFITHS-BAKER, *SERVING TWO MASTERS: CONFLICTS OF INTEREST IN THE MODERN LAW FIRM* (Oxford: Hart Publishing 2002)). The writer found it "remarkable the extent to which the large City firms openly acknowledge that while they are bound by the Law Society rules, they are nevertheless justified in ignoring them in their day-to-day practice." *Id.* at 532. These lawyers state their justifications in a matter-of-fact manner that "the Law Society is a hopelessly inadequate animal to guide the profession as it now stands," or "[t]he rules are fine in principle but they don't work for our particular firm" or "[i]f you took the rules literally out of the Law Society's guidelines, the City would come to a halt." *Id.*

¹⁶ RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 121, cmt. c (1998); see also THE LAW OF LAWYERING, *supra* note 3 at § 10.4.

(c) A lawyer may represent a client in the circumstances described in (b) if:

- (1) the lawyer *reasonably believes* the representation of each client will not be *materially affected*; and
- (2) each affected or potentially affected client consents to such representation after full disclosure of the existence, nature, implications, and possible adverse consequences of the common representation and the advantages involved, if any.¹⁷

Thus it is not every conceivable conflict that is prohibited, but those that are “materially and directly adverse” to another client. The likelihood that the conflict would harm the client is also regulated by the requirement that it be in a “substantially related” matter. Likewise, lest a client be endangered by another type of conflict, the rule picks up those conflicts that “adversely limit” a representation. The rules also handle the “specific” v. “general” prohibition problem by defining certain recurring situations as *verbotten*, including some that client consent cannot cure.¹⁸

This approach allows modern rules to be effectively applied to a dizzying array of situations, such as:

- Counsel who had previously represented overlapping interests of some asbestos claimants and an asbestos defendant prior to that defendant’s bankruptcy;¹⁹
- Plaintiff’s counsel that moved to an insurance defense firm representing two of the sued defendants in unrelated matters.²⁰
- Counsel who tried to avoid disqualification by limiting the scope of their representation.²¹

¹⁷ TEX. DISCIPLINARY R. PROF’L CONDUCT 1.06(b), 1.06(c) (emphasis added).

¹⁸ See, e.g., TEX. DISCIPLINARY R. PROF’L CONDUCT 1.06(a) (representing opposing parties to the same litigation); *id.* at 1.08(b) (drafting client’s testamentary gift to one’s self); *id.* at 1.08(f) (aggregate settlements); *id.* at 1.14(a) (commingling client property).

¹⁹ *Century Indem. Co. v. Congoleum Corp. (In re Congoleum Corp.)*, 426 F.3d 675 (3d Cir. 2005).

²⁰ *Reed v. Hoosier Health Sys., Inc.*, 825 N.E.2d 408 (Ind. Ct. App. 2005).

²¹ *Cal W. Nurseries, Inc. v. Superior Court of Orange County*, 29 Cal. Rptr. 3d 170 (Cal. App. 2005) (orig. proceeding).

- Counsel for an individual shareholder of closely held corporations.²²
- Counsel who concurrently represented a limited liability company and its majority shareholder.²³
- Lawyers who simultaneously tried to represent a debtor while owning an interest in an entity that was negotiating to make a secured loan to the debtor.²⁴
- A former associate representing a client in a lawsuit against his former firm.²⁵

This last case is my favorite, not because it is completely consistent with Texas law or for its scholarly discourse on conflicts of interest, but because it is a cautionary tale about creating opponents who are properly incentivized to hate your guts. In *King v. Fox*, the motion to disqualify was aimed at a former associate who had been refused a week's vacation before his resignation from the firm and had been asked to work as an independent contractor "so that the firm would no longer be responsible for paying his benefits."²⁶ When the associate left the firm, he filed suit over the refused vacation time but lost on dismissal.²⁷ While working at a subsequent firm, the associate was eventually retained to represent a client against his former firm in a fee dispute.²⁸ One can only imagine the zeal and vigor with which he undertook the representation. However, his former boss moved to disqualify him, and one of the grounds was essentially, "This isn't fair. He hates me."

Specifically, the defendant claimed "that Mr. Howard has feelings of animosity due to his alleged termination for cause from the Curtis firm and his unsuccessful suit against Mr. Curtis in small claims court" and argued "that these feelings have impaired Mr. Howard's professional judgement (sic)."²⁹ The court acknowledged that while the lawyer undoubtedly had strong feelings, strong feelings that have no potential to injure a client are immaterial.

²² *Philin Corp. v. Westhood, Inc.*, No. CV-04-1228-HU, 2005 WL 582695 (D. Or. Mar. 11, 2005); *Flores v. Willard J. Price Assocs., LLC*, 799 N.Y.S.2d 43 (N.Y. App. Div. 2005).

²³ *Bottoms v. Stapleton*, 706 N.W.2d 411 (Iowa 2005).

²⁴ *I.G. Petroleum, LLC v. Fenasci (In re W. Delta Oil Co.)*, 432 F.3d 347 (5th Cir. 2005).

²⁵ *King v. Fox*, No. 97 Civ. 4134 (RWS) (JCF), 2005 WL 741760 (S.D.N.Y. Mar. 31, 2005).

²⁶ *Id.* at *1.

²⁷ *Id.*

²⁸ *Id.* at *2.

²⁹ *Id.* at *5.

Even if Mr. Howard has a personal dislike for Mr. Curtis, Mr. Curtis has failed to show how this would adversely affect Mr. Howard's ability to represent Mr. King. An attorney will be disqualified only when his personal interests conflict with his client's interests. . . . Here, there is no evidence that there is a conflict between Mr. Howard's and Mr. King's interests. Furthermore, Mr. Curtis has not identified a single case where an attorney has been disqualified from representing a party because he felt animosity towards the adversary or the adversary's attorney. . . . Therefore, Mr. Howard cannot be disqualified on the grounds of his alleged animosity towards Mr. Curtis.³⁰

The point is that conflicts can come in so many variations and so many degrees of severity that one cannot just "know it when you see it." There is no substitute for knowing what the rules are. More importantly, it is easier to know *what* they are if you know *why* they are. Knowing the reason for the rules can help trigger the warning lights before one gets near enough to disaster to get hurt.

B. The Nuclear Option For Conflicts: *Fee Forfeiture*

The disciplinary standards are obviously not a per se basis for imposing liability upon a lawyer. That said, the conflicts rules help to protect the duty of loyalty to a client,³¹ and lawyer disloyalty can be a breach of fiduciary duty.³² Such a claim raises the specter of fee forfeiture under *Burrow v. Arce*.³³

In *Arce*, the attorneys were accused of breaching their fiduciary duty by, among other things, failing to adequately communicate with the client, settling without client approval, and threatening clients who questioned the settlement with no recovery.³⁴ Despite the defendant attorneys' argument that the clients received a "fair settlement" for their claim, the court held that a client need not prove actual damages to obtain forfeiture of an attorney's fee due to the attorney's breach.³⁵ The purpose of this remedy is to protect relationships of trust and is not measured by a principal's actual

³⁰ *Id.* at *6.

³¹ THE LAW OF LAWYERING, *supra* note 3 at § 10.1, p. 10-3.

³² *See Bright v. Addison*, 171 S.W.3d 588, 604 (Tex. App.—Dallas 2005, pet. filed) (attorney breached fiduciary duty to taking business opportunity for himself rather than disclosing to client).

³³ 997 S.W.2d 229 (Tex. 1999).

³⁴ *Id.* at 233.

³⁵ *Id.* at 240.

damages.³⁶ In fact, the court has discretion to determine how much, if any, of the fee is subject to forfeiture but is restricted to “clear and serious” violations of duty.

While each case in which fee forfeiture is awarded turns on its own unique facts, there are some common themes and or touchstones that can be observed among these cases. *Arce* lists several factors that a trial court must consider in determining whether a fiduciary breach is “clear and serious” enough to warrant fee disgorgement:

1. the gravity and timing of the violation;
2. its willfulness;
3. its effect on the value of the lawyer’s work for the client;
4. any other threatened or actual harm to the client;
5. the adequacy of other remedies; and
6. the public interest in maintaining the integrity of attorney-client relationships.³⁷

Based upon these factors, a “clear and serious breach” has been found where:

- exorbitant and unjustifiable fees were charged;³⁸
- an attorney settles a client’s claim without consent;³⁹ and
- attorneys failed to disclose pertinent information.⁴⁰

In contrast, courts have refused to find a clear and serious breach where:

³⁶ *Id.*

³⁷ *Id.* at 243-44.

³⁸ *Piro v. Sarofim*, No. 01-11-00398-CV, 2002 WL 538741, at *8 (Tex. App.—Houston [1st Dist.] Apr. 11, 2002, no pet.) (\$3,000,000 attorney’s fee for divorce found to be excessive); *In re Allied Physicians Group, P.A.*, No. 397-31267-BJH-11, Civ. A.3:04-CV-0765-G, 2004 WL 2965001, at *5 (N.D. Tex. Dec. 15, 2004) (unpublished) (trustee’s \$2,000,000 in fees for managing an estate of \$2,600,000 was forfeited), *aff’d*, 166 F. App’x 745 (5th Cir. 2006); *Lopez v. Muoz, Hockema & Reed, L.L.P.*, 980 S.W.2d 738, 743 (Tex. App.—San Antonio 1998, pet. granted) (partial fee forfeiture was upheld where attorneys fraudulently misled client into believing that an appeal was filed as justification for fee increase), *rev’d in part on other grounds*, 22 S.W.3d 857 (Tex. 2000).

³⁹ *Francisco v. Foret*, No. 05-01-00783-CV, 2002 WL 535455, at *4 (Tex. App.—Dallas Apr. 11, 2002, pet. denied) (forfeiture upheld where attorneys settled a multi-million dollar claim without first conferring with their clients).

⁴⁰ *Jackson Law Office, P.C. v. Chappell*, 37 S.W.3d 15, 22 (Tex. App.—Tyler 2000, pet. denied) (attorneys’ failure to disclose legal effect of assignment of proceeds from client’s properties as payment).

- an attorney loaned a client money;⁴¹
- attorneys acted under a court's order;⁴²
- an attorney was blamed for not advising his client about the terms of a settlement agreement;⁴³ and
- the court found the primary witness to be untruthful.⁴⁴

Since *Arce*, courts have applied this analysis to twenty-nine cases. Of these decisions, nine have resulted in total or partial forfeiture of fees.⁴⁵ Twenty have involved no forfeiture of fees.⁴⁶ These decisions govern not only attorneys but

⁴¹ See *Miller v. Kennedy S. Minshew, P.C.*, 142 S.W.3d 325, 338-40 (Tex. App.—Forth Worth, 2003, pet. denied) (it is improper for an attorney to loan his client money but not clear and serious enough to warrant fee forfeiture); *Spera v. Fleming, Horenkamp & Grayson, P.C.*, 25 S.W.3d 863, 867 (Tex. App.—Houston [14th Dist.] 2000, no pet. h.) (half of firm's fee was forfeited after the court found a conflict of interest over a fee dispute).

⁴² *Haase v. Herberger*, 44 S.W.3d 267, 270 (Tex. App.—Houston [14th Dist.] 2001, no pet.) (client's actions under a court order resulting in a conflict are not imparted to attorneys).

⁴³ *Hoover v. Larkin*, No. 14-00-00427-CV, 2001 WL 1046266, *6 (Tex. App.—Houston [14th Dist.] Sept. 13, 2001, pet. denied) (any breach by the attorney was not "clear and serious" when the client agreed to the settlement terms twice in open court).

⁴⁴ *Vu v. Rosen*, No. 14-02-00-8090-CV, 2004 WL 612832, at *8 (Tex. App.—Houston [14th Dist.] Mar. 30, 2004, pet. denied) (mem. op.) (unpublished) (trial court acted within its discretion in refusing to award fee forfeiture based on witness that lacked credibility and truthfulness)

⁴⁵ See *Fed. Trade Comm'n v. Certified Merch. Servs., Ltd.*, 126 F. App'x 651, 655 (5th Cir. 2005) (per curiam) (district court did not abuse its discretion in limiting fee forfeiture to 20% disgorgement of receiver's fees); *In re Allied Physicians Group, P.A.*, 2004 WL 2965001, at *5 (trustee's fees disgorged after paying himself and others approximately \$2,000,000 in fees for managing an estate of \$2,600,000); *Piro*, 2002 WL 538741, at *8-9 (entire \$3,000,000 in fees forfeited due to numerous clear and serious breaches of duty); *Francisco*, 2002 WL 535455, at *3-4 (summary judgment refusing fee forfeiture was in error where issues of fact remained); *Rush v. Barrios*, 56 S.W.3d 88, 93-94 (Tex. App.—Houston [14th Dist.] 2001, pet. denied) (trial court's reduction of attorney's fees from \$111,111 to \$29,999.99 is within its discretion under *Arce*); *Spera*, 25 S.W.3d at 867-68 (half of firm's fee was forfeited after the court found a conflict of interest over a fee dispute); *Jackson Law Office, P.C.*, 37 S.W.3d at 23 (appellate court upheld the \$5,000 partial forfeiture of a \$43,000 damage award); *Holder v. Garner, Lovell & Stein, P.C.*, No. 07-98-0175-CV, 1999 WL 642216, at *5 (Tex. App.—Amarillo Aug. 24, 1999, pet. denied) (damages not necessary for fee forfeiture); *Lopez*, 980 S.W.2d at 743 (court reversed summary judgment and awarded plaintiff a partial fee forfeiture of \$750,000).

⁴⁶ See *Liberty Mut. Ins. Co. v. Gardere & Wynne, L.L.P.*, 82 F. App'x 116, 121 (5th Cir. 2003) (refusing to allow forfeiture of fees paid by other party); *Home Loan Corp. v. Tex. Amer. Title Co.*, No. 14-03-01131-CV, 2006 WL 1148108, at *5 n.22 (Tex. App.—Houston [14th Dist.] Mar. 30, 2006, no pet.) (pleading failed to assert claim for fee forfeiture, only breach of fiduciary duty); *Goeth v. Craig, Terrill & Hale, L.L.P.*, No. 03-03-00125-CV, 2005 WL 850349, at *7 (Tex. App.—Austin Apr. 14, 2005, no pet.) (plaintiffs lacked standing to recover on behalf of corporation); *Goffney v. O'Quinn*, No. 01-02-00192-CV, 2004 WL 2415067, at *7-9 (Tex. App.—Houston [1st Dist.] Oct. 28, 2004, no pet.) (mem. op.) (court found no coercion or

bankruptcy trustees,⁴⁷ receivers,⁴⁸ and insurance agents.⁴⁹ Of these cases, the lower court's decision regarding fee forfeiture was disturbed only three times.⁵⁰ Thus, winning at the trial court is key, as is knowing the key limitations on the doctrine.

Some of those limitations are:

breach of fiduciary duty, thus, no forfeiture); *Ridge Oil Co. v. Guinn Invs., Inc.*, 148 S.W.3d 143, 162 (Tex. 2004) (fee forfeiture, if any, is awarded at the sole discretion of the court); *Dallas Fire Ins. Co. v. Tex. Contractors Sur. & Cas. Agency*, 128 S.W.3d 279, 303 (Tex. App.—Fort Worth 2004), *rev'd on other grounds*, 159 S.W.3d 895 (Tex. 2004) (whether to order fee forfeiture is in the court's discretion); *Vu* 2004 WL 612832, at *8 (trial court acted within its discretion in refusing to award fee forfeiture based on witness that lacked credibility and truthfulness); *Miller* 142 S.W.3d at 340 (attorney's loan to client was improper but did not warrant fee forfeiture); *Shands v. Tex. State Bank*, 121 S.W.3d 75, 77-78 (Tex. App.—San Antonio 2003, pet. denied) (failure to plead for fee forfeiture waives recovery); *Tanox, Inc. v. Akin, Gump, Strauss, Hauer & Feld, LLP*, 105 S.W.3d 244, 264 (Tex. App.—Houston [14th Dist.] 2003, pet. denied) (fee forfeiture is not allowed where there is no breach of fiduciary duty); *Ellis v. City of Dallas*, 111 S.W.3d 161, 167 (Tex. App.—Eastland 2003, no pet.) (refusal of jury instruction that forfeiture was mandatory); *Stewart A. Feldman & Assocs. v. Indus. Photographic Supply*, No. 14-01-00249-CV, 2002 WL 31042586, at *9 (Tex. App.—Houston [14th Dist.] Sept. 12, 2002, no pet.) (fee forfeiture was not properly pled in the trial court); *Rockefeller v. Grabow*, 39 P.3d 577, 580-81 (Idaho 2002) (fee forfeiture reversed where the trial court abused its discretion in not weighing factors or considering the facts of the case); *Haase v. Herberger*, 44 S.W.3d 267, 270 (Tex. App.—Houston [14th Dist.] Apr. 12, 2001, no pet.) (fee forfeiture not allowed where attorneys worked under court order); *Hoover*, 2001 WL 1046266, at *6 (any violation by the attorney was inadvertent and did not rise to the level of clear and serious); *Lee v. Lee*, 47 S.W.3d 767, 780-81 (Tex. App.—Houston [14th Dist.] 2001, pet. denied) (*Arce* does not apply because there was no pleading for the equitable remedy of fee forfeiture); *Affiliated Computer Servs., Inc. v. Kasmir & Krage, L.L.P.*, No. 05-98-00227-CV, 2000 WL 1702635, at *4-6 (Tex. App.—Dallas Nov. 15, 2000, pet. denied) (summary judgment award was in error where issues of fact still remained); *Upchurch v. Albear*, 5 S.W.3d 274, 283-84 (Tex. App.—Amarillo 1999, pet. denied) (summary judgment award was in error where issues of fact still remained); *Longaker v. Evans*, 32 S.W.3d 725, 733 (Tex. App.—San Antonio 2000, pet. withdrawn) (en banc) (a claim for fee forfeiture must be specifically pled); *Whiteside v. Hartung*, No. 14-97-00111-CV, 1999 WL 548211, at *3 (Tex. App.—Houston [14th Dist.] July 29, 1999, pet. denied) (no forfeiture allowed when unpled).

⁴⁷ See *In re Allied Physicians Group, P.A.*, 2004 WL 2965001, at *5 (N.D. Tex. 2004) (trustee's fees disgorged after paying himself and others approximately \$2,000,000 in fees for managing an estate of \$2,600,000).

⁴⁸ See *Fed. Trade Comm'n*, 126 F. App'x at 655 (district court did not abuse its discretion in limiting fee forfeiture to 20% disgorgement of receiver's fees).

⁴⁹ *Dallas Fire Ins. Co.*, 128 S.W.3d 279, 303 (Tex. App.—Fort Worth 2004), *rev'd on other grounds*, 159 S.W.3d 895 (Tex. 2004).

⁵⁰ *Rockefeller*, 39 P.3d at 582-83 (trial court erred by treating forfeiture as mandatory and not considering all factors under *Arce*); *Francisco*, 2002 WL 535455, at *4 (award of summary judgment was improper where plaintiff provided more than a "scintilla of evidence" regarding attorneys' breach of fiduciary duty); *Holder*, 1999 WL 642216, at *5 (trial court erred by relying on lack of evidence of actual damages in denying fee forfeiture).

- Fee forfeiture is not feasible unless it is specifically plead in the petition.⁵¹
- Purpose of fee forfeiture is to protect fiduciary-client relationships, not reward the client.⁵²
- The court, in its discretion, may choose not to award any fee forfeiture.⁵³
- The breach must be “clear and serious.”⁵⁴

Thus, a breach by itself does not automatically warrant the disgorgement of fees. In *Miller v. Kennedy & Minshew, P.C.*, for example, the attorneys were sued for breach of fiduciary duty and the attorneys counterclaimed to recover fees. The jury found that the attorney negligently misrepresented his expertise to the client as well as gave unreasonable assurances as to the outcome of the case.⁵⁵ The jury, however, found that this incident was too remote in time to be reasonably related to the fees for the case at issue.⁵⁶ In addition, there was no evidence of willful misconduct on Minshew’s behalf.⁵⁷ Lastly, Minshew was instrumental in effectively complying with the client’s request and was entitled to a fee.⁵⁸

⁵¹ See *Home Loan Corp.*, 2006 WL 1148108, at *5 n.22 (plaintiff’s breach of fiduciary duty claim sought only actual and punitive damages); *Shands*, 121 S.W.3d at 77-78 (fee forfeiture not raised in the trial court, thus, not preserved for appeal); *Lee*, 47 S.W.3d at 780-81 (*Arce* does not apply because there was no pleading for the equitable remedy of forfeiture); *Longaker*, 32 S.W.3d at 733 n.2 (*Arce* is not applicable where the client does not seek fee forfeiture but rather seeks damages); *Whiteside*, 1999 WL 548211, at *3 (plaintiff specifically plead for actual damages and did not request a forfeiture of the fees).

⁵² See *Liberty Mut. Ins. Co.*, 82 F. App’x at 121 (refusing to allow forfeiture of fees paid by other party); *Haase*, 44 S.W.3d at 270 (despite the apparent conflict of interest in representing two adverse parties, attorneys were operating under a court order).

⁵³ See *Dallas Fire Ins. Co.*, 128 S.W.3d at 303 (whether to order fee forfeiture is in the court’s discretion); *Ellis*, 111 S.W.3d at 167 (refused jury instruction that forfeiture was mandatory).

⁵⁴ See *Miller*, 142 S.W.3d at 338-40 (it is improper for an attorney to loan his client money but not clear and serious enough to warrant fee forfeiture); *Hoover*, 2001 WL 1046266, at *6 (any violation by the attorney was inadvertent and did not rise to the level of clear and serious).

⁵⁵ *Miller*, 142 S.W.3d at 331.

⁵⁶ *Id.* at 340.

⁵⁷ *Id.*

⁵⁸ *Id.*

C. Conflicts And The Decision Maker

*"It's acceptable practice to socialize with executive branch officials when there are not personal claims against them. That's all I'm going to say for now. Quack, quack."*⁵⁹

We expect a different type of loyalty from the individuals that determine our disputes. We expect them to be loyal to no one, that is, to be impartial. The quote set out above comes from an alleged conflict that gained notoriety, the duck hunting trip by Vice President Cheney and Associate Justice Antonin Scalia. The trip resulted in a disqualification motion, though judging by the consequences of the Vice President's subsequent hunting trips, this was a small price to pay. In customary Supreme Court fashion, Justice Scalia determined his own disqualification status and was not subject to review.⁶⁰ Issues about conflicts are not restricted to judicial decision makers; rather, they impact arbitral decision makers as well. In fact, the standards for disclosing potential conflicts are very demanding but potentially unfamiliar to the average practitioner. In addition, from an appellate standpoint, the strict standards represent an uncharacteristically solid avenue for vacating an arbitration award.

The style case on this topic, *Commonwealth Coatings Corp. v. Continental Casualty Co.*,⁶¹ is an alphabet soup of opinions.⁶² In *Commonwealth Coatings*, the Supreme Court vacated an arbitration award under the Federal Arbitration Act (the "FAA") because of an arbitrator's "evident partiality."⁶³ The losing party sought vacatur of the arbitration

⁵⁹ Gina Holland, *Justice Scalia: No Apologies for Hunting Trip With Cheney*, WASH. POST, Feb. 11, 2004.

⁶⁰ See *Cheney v. U.S. Dist. Court*, 541 U.S. 913 (2004) (mem.); see also Marianne M. Jennings & Nim Razook, *Duck When A Conflict Of Interest Blinds You: Judicial Conflicts Of Interest In The Matters Of Scalia And Ginsburg*, 39 U.S.F. L. REV. 873, 882-83 (2005).

⁶¹ 393 U.S. 145 (1968).

⁶² Justice Black wrote for the majority to which Justices White and Marshall concurred. Justices Fortas, Harlan and Stewart dissented. The lineup of the Justices has created confusion among the circuits with some choosing to adopt Justice Black's opinion as controlling precedent while other courts treat Justice Black's opinion as a plurality decision. See, e.g., *Positive Software Solutions, Inc. v. New Century Mortgage Corp.*, 436 F.3d 495, 500 n.29 (5th Cir. 2006) ("*Positive Software II*") (treating *Commonwealth Coatings* as binding precedent); *Schmitz v. Zilveti*, 20 F.3d 1043, 1045 (9th Cir. 1994). (treating *Commonwealth Coatings* as binding precedent); *Morelite Constr. Corp. v. N.Y. City Dist. Council Carpenters Benefit Funds*, 748 F.2d 79, 82 (2d Cir. 1984) (treating *Commonwealth Coatings* as a plurality opinion).

⁶³ The FAA states, in relevant part, that:

In either of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration –

....

award because the supposedly neutral arbitrator⁶⁴ failed to disclose that he had an ongoing business relationship with a party to the arbitration.⁶⁵ The court vacated the award under the “broad statutory language” of Section 10 of the FAA.⁶⁶

The court recognized that arbitrators cannot sever ties with the business world.⁶⁷ Nonetheless, courts are required to “be even *more* scrupulous to safeguard the impartiality of arbitrators than judges, since the former have completely free rein to decide the law as well as the facts and are not subject to appellate review.”⁶⁸ Relying not only on Section 10, but also on the American Arbitration Association’s (“AAA”) rules⁶⁹ and on the Canons of Judicial Ethics, the court held that arbitrators must disclose “any dealings that might create an impression of possible bias.”⁷⁰

Commonwealth Coatings was recently applied in this circuit. In *Positive Software Solutions, Inc. v. New Century Mortgage Corp.*, the United States District Court for the Northern District of Texas determined whether an arbitration award should be vacated as a result of the arbitrator’s nondisclosure of a previous relationship with New

(b) where there was evident partiality . . . in the arbitrators, or either of them . . .

9 U.S.C. § 10.

⁶⁴ The case law discussed in this section involves neutral arbitrators unless otherwise specified. When a party appoints an arbitrator, the party-appointed arbitrator may be non-neutral. In that case, the party-appointed arbitrator is permitted to be predisposed toward the party appointing him. See THE CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES (“CODE OF ETHICS”) CANNON IX, available at <http://www.adr.org/sp.asp?id=21958> (last visited Apr. 17, 2006).

⁶⁵ *Commonwealth Coatings*, 393 U.S. at 146. The court concluded that this relationship was repeated and significant involving fees of \$12,000 over a four to five year period and including services rendered on projects that were the subject of this lawsuit. *Id.*

⁶⁶ *Id.* at 148.

⁶⁷ *Id.* The concurring opinion attempted to clarify the obligations of arbitrators. “[A]rbitrators are not automatically disqualified by a business relationship with the parties before them if both parties are informed of the relationship in advance, or if they are unaware of the facts but the relationship is trivial.” *Id.* at 150 (White, J., concurring). Balancing this interest against that of the parties, Justice White stated that arbitration works best when there is full disclosure by the arbitrator at the outset of the arbitration. *Id.* at 151. This allows the parties to accept or reject the arbitrator with full knowledge of his prior relationships to the parties. *Id.*

⁶⁸ *Id.* at 148-49 (emphasis added).

⁶⁹ Generally, the courts have only relied on the AAA rules if the arbitration was governed under the AAA. See, e.g., *Positive Software II*, 436 F.3d at 503. Where the arbitration agreement provides for other governing rules, the courts have generally referred to those rules in determining the breadth of disclosure required. See, e.g., *Schmitz*, 20 F.3d at 1044-45.

⁷⁰ *Commonwealth Coatings*, 393 U.S. at 149. *Schmitz* clarified the court’s holding and announced that “a reasonable impression of partiality” is the best expression of *Commonwealth Coatings*. 20 F.3d at 1047. The Fifth Circuit later adopted this test. See *Positive Software II*, 436 F.3d at 502.

Century Mortgage Corporation's ("New Century") counsel.⁷¹ New Century's outside law firm and the arbitrator's law firm had been co-counsel in lengthy litigation prior to the arbitration.⁷² New Century argued that the arbitrator and its counsel never served together; however, the district court found that both persons' names were on the pleadings together.⁷³

The district court relied on *Commonwealth Coatings* and other circuits' interpretation of *Commonwealth Coatings*. In so doing, the district court recognized that there is a possible circuit split in application of *Commonwealth Coatings*. Most courts addressing an arbitrator's nondisclosure have adopted a strict "reasonable impression of partiality" standard, which requires no showing of actual bias.⁷⁴ This language was used by the Ninth Circuit to clarify the rule announced in *Commonwealth Coatings*.⁷⁵ Many other courts have followed *Commonwealth Coatings* and the Ninth Circuit's interpretation of it.⁷⁶ However, not all courts have defined "evident partiality" so strictly. The Second Circuit held there is "evident partiality" when "a reasonable person would have to conclude that an arbitrator *was partial* to one party to the arbitration."⁷⁷ Other circuits have adopted this test.⁷⁸ At the same time, these cases are

⁷¹ 337 F. Supp. 2d 862, 865 (N.D. Tex. 2004) ("*Positive Software I*").

⁷² *Id.* at 878.

⁷³ *Id.*

⁷⁴ *Id.* at 881.

⁷⁵ *Schmitz*, 20 F.3d at 1048-49.

⁷⁶ See, e.g., *Olson v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 51 F.3d 157, 159-60 (8th Cir. 1995) (vacating an arbitration award because the arbitrator failed to disclose an ongoing relationship between his employer and a party to the arbitration); *Middlesex Mut. Ins. Co. v. Levine*, 675 F.2d 1197, 1204 (11th Cir. 1982) (vacating an arbitration award where the third and neutral arbitrator failed to disclose that his family business was in a dispute with some of the parties to the arbitration); *Crow Constr. Co. v. Jeffrey M. Brown Assoc. Inc.*, 264 F. Supp. 2d 217, 222-23 (E.D. Pa. 2003) (vacating an arbitration award where two of the arbitrators failed to disclose relationships with one of the parties); *Burlington N. R.R. Co. v. TUCO Inc.*, 960 S.W.2d 629, 637 (Tex. 1997) (applying the reasoning of *Commonwealth Coatings* in vacating an award where the neutral arbitrator failed to disclose that he had accepted a substantial referral from the non-neutral arbitrator during the arbitration).

Other courts have adopted *Commonwealth Coatings* but have nonetheless failed to find "evident partiality." See, e.g., *Ormsbee Dev. Co. v. Grace*, 668 F.2d 1140, 1150-51 (10th Cir. 1982) (applying the majority's opinion in *Commonwealth Coatings*, the court declined to vacate an arbitration award where the neutral arbitrator had common clients with a law firm representing the party because it was a trivial relationship that did not require disclosure); *ANR Coal Co. v. Cogentrix of N.C., Inc.*, 173 F.3d 493, 500 (4th Cir. 1999) (refusing to vacate an award where the arbitrator failed to disclose the full extent of his relationship to a party stating that a failure to disclose facts is relevant in determining "evident partiality" but that does not in itself justify vacatur).

⁷⁷ *Morelite Constr.*, 748 F.2d at 84 (emphasis added).

potentially distinguishable because, for the most part, they do not involve an allegation of nondisclosure.⁷⁹

According to the district court, nondisclosure cases focus on the right of the parties to have facts disclosed at the outset of the arbitration so that the parties can make an intelligent selection.⁸⁰ Thus, where nondisclosure is in issue (as distinguished from an allegation of actual bias), the relevant inquiry for the district court was whether the very fact of nondisclosure creates *an appearance* of bias and not whether the undisclosed facts would support a finding of *actual* bias.⁸¹ The district court therefore adopted the harsher standard, holding that: “[I]n nondisclosure cases, an arbitration award must be vacated where there is a reasonable impression of partiality.”⁸² Under this test, there are two ways to assess whether undisclosed facts may create a reasonable impression of partiality. The court may determine whether the undisclosed facts would be material to a reasonable lawyer in the party’s position in selecting the arbitrator.⁸³ The court may also determine if the nondisclosure created an impression of possible bias.⁸⁴

Under the first prong, the district court found that the arbitrator’s previous relationship to New Century’s counsel was material.⁸⁵ It based its decision on (1) the contentious nature of the dispute; (2) the duration and the importance of the prior litigation; and (3) the fact that there was only a single arbitrator in the current dispute.⁸⁶ Like *Commonwealth Coatings*, the district court also looked at the AAA rules.⁸⁷ Because the AAA rules plainly required disclosure,⁸⁸ the arbitrator’s failure to abide by the

⁷⁸ See, e.g., *Peoples Sec. Life Ins. Co. v. Monumental Life Ins. Co.*, 991 F.2d 141, 146 (4th Cir. 1993); *Apperson v. Fleet Carrier Corp.*, 879 F.2d 1344, 1358 (6th Cir. 1989); *Nationwide Mut. Ins. Co. v. Home Ins. Co.*, 429 F.3d 640, 645 (6th Cir. 2005) (applying the *Morelite* test to a nondisclosure case).

⁷⁹ See *Positive Software II*, 436 F.3d at 501; see also *Crow Constr.*, 264 F. Supp. 2d at 222-23; *TUCO Inc.*, 960 S.W.2d at 633. *Nationwide Mutual* is also distinguishable. Although it involved nondisclosure, the arbitrator was not neutral and the non-appointing party was the complaining party. 429 F.3d at 645.

⁸⁰ *Id.*; see also *Commonwealth Coatings*, 393 U.S. at 150-51 (White, J., concurring).

⁸¹ *Positive Software I*, 337 F. Supp. 2d. at 883.

⁸² *Id.* at 885.

⁸³ *Id.*

⁸⁴ *Id.* (citing *Commonwealth Coatings*, 393 U.S. at 149).

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.* at 883-85 (a requirement of full disclosure reinforces the parties’ expectations that the arbitrators will abide by the AAA rules).

⁸⁸ *Id.* at 884-85. “It is clear from [the AAA] rules that arbitrators are expected by the AAA as well as the parties to provide extremely broad disclosure, certainly including servicing as co-counsel

disclosure requirement heightened the inference that he had purposefully concealed the relationship and the appearance of impropriety.⁸⁹ Under the second prong, the court also found that the nondisclosure created an impression of possible bias.⁹⁰ The court based its decision on the extensiveness of the prior relationship.⁹¹

The Fifth Circuit affirmed the district court's finding of "evident partiality."⁹² In affirming the district court's holding, the court agreed that the prior relationship with New Century's counsel "might have conveyed an impression of possible partiality to a reasonable person."⁹³ The court dispelled concerns that most attorneys at large firms would be disqualified from acting as arbitrators stating that lawyers merely have to disclose [their] relationships.⁹⁴ It is then up to the parties to decide if the arbitrator is qualified to hear their case.⁹⁵

The court of appeals expressly adopted the "reasonable impression of partiality" standard for nondisclosure cases.⁹⁶ The court held that:

an arbitrator selected by the parties displays evident partiality by the very failure to disclose facts that might create a reasonable impression of the arbitrator's partiality. The evident partiality is demonstrated from the nondisclosure, *regardless of whether actual bias is established.*⁹⁷

The appellate court approved of a broad disclosure requirement because it ensures that the parties to the arbitration will be aware of an arbitrator's potential biases

with one of the party's law firms and, more specifically, one of the party's lawyers." *Id.* at 885. Furthermore, the AAA specifically reminded the arbitrator of this obligation on at least four occasions prior to the arbitration. *Id.* at 879-80. The arbitrator was specifically asked if he had a relationship with counsel for any party or the firms where they worked to which the arbitrator answered no. *Id.* at 879.

⁸⁹ *Id.* at 885. It was not an excuse that the arbitrator forgot about his previous relationship with New Century's counsel. *Id.* at 886. An arbitrator should investigate potential conflicts. *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Positive Software II*, 436 F.3d at 496 ("We hold that the arbitrator was required to disclose the relationship because it might have created an impression of possible bias, and we affirm the district court's judgment vacating the arbitration award. . . .").

⁹³ *Id.* at 504.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.* at 502. The court recognized that not all circuits have adopted *Commonwealth Coatings* standard for "evident partiality." *See supra* note 14.

⁹⁷ *Positive Software II*, 436 F.3d at 502 (emphasis added).

at a time when they can either reject the arbitrator or proceed with full knowledge of potential biases.⁹⁸ Furthermore, a broad disclosure requirement limits the courts' involvement in determining arbitrator's conflicts of interest and minimizes the arbitrator's discretion in what relationships require disclosure.⁹⁹ This rule also mirrors the disclosure requirements under the AAA.¹⁰⁰

As discussed above, the Supreme Court and the Fifth Circuit consider the AAA rules to be "highly significant" when reviewing nondisclosure cases.¹⁰¹ The AAA rules and guidelines outline the arbitrator's duty to disclose in numerous places. Rule 19 of the Commercial Arbitration Rules and Mediation Procedures (Including Procedures for Large, Complex Commercial Disputes) requires arbitrators to disclose "any circumstance likely to give rise to justifiable doubt as to the arbitrator's impartiality or independence, including any bias or any financial or personal interest in the result of the arbitration or any past or present relationship with the parties or their representatives."¹⁰² All doubts "should be resolved in favor of disclosure."¹⁰³

⁹⁸ *Id.* (quoting *Commonwealth Coatings*, 393 U.S. at 151 (White, J., concurring)). This more lenient standard is necessary in nondisclosure cases because Section 10 instructs that the parties should choose their arbitrators intelligently. *Id.* at 501 (quoting *Schmitz*, 20 F.3d at 1047). The parties can only choose their arbitrators intelligently if facts showing potential partiality are disclosed at the outset. *Id.* at 501 (quoting *Schmitz*, 20 F.3d at 1047). Where the parties do not select their arbitrator, the courts may apply a narrower definition of "evident partiality." See, e.g., *id.* at 502 n.38.

⁹⁹ *Id.* at 502.

¹⁰⁰ *Id.* at 503. Like the district court, the appellate court found it significant that the arbitration was conducted pursuant to AAA procedures and that the AAA specifically reminded the arbitrator of his duty to disclose prior relationships with the parties or their counsel. *Id.* at 496-97.

¹⁰¹ See *Commonwealth Coatings*, 395 U.S. at 149; *Positive Software II*, 436 F.3d at 503; *Positive Software I*, 337 F. Supp. 2d at 883-85. Following the AAA's broad disclosure requirements (including running a conflicts check) should, therefore, go a long way in avoiding vacatur. That said, in both *Commonwealth Coatings* and *Positive Software I* and *II*, the arbitration agreement specifically stated that it was to be governed by the AAA rules. Thus, a court may not require strict adherence to the AAA rules if the arbitration in question is not governed under them. See, e.g., *Schmitz*, 20 F.3d at 1044-49 (the court vacated the award because the arbitrator did not comply with the National Association of Securities Dealers' rules for arbitration). Regardless, the court probably will require the arbitrator to meet a similar standard. For example, the NASD's rules closely follow the AAA rules. See A CODE OF ARBITRATION PROCEDURE Section 10312 (a)-(c), available at http://nasd.complinet.com/nasd/display/display.html?rbid=1189&record_id=1159001049&highlight=code+of+arbitration+procedure (last visited Apr. 18, 2006).

¹⁰² COMMERCIAL ARBITRATION RULES AND MEDIATION PROCEDURES RULE 16(a), available at <http://www.adr.org/sp.asp?id=22440> (last visited Apr. 17, 2006). This rule applies throughout the entire arbitration. *Id.* The disclosure is to be made to the AAA who will pass the information on to the parties. *Id.* at Rule 16(b). If both parties agree on the affect of the disclosure, the AAA will inform the arbitrator whether or not he will serve. DISCLOSURE AND CHALLENGE OF AN ARBITRATOR QUESTIONS AND ANSWERS ("DISCLOSURE Q&A"), available at <http://www.adr.org/sp.asp?id=22024> (last visited Apr. 17, 2006). If the parties do not agree, the AAA will determine whether the arbitrator will serve. *Id.* One possible exception to this is where the arbitrator is a non-neutral. At least one circuit has applied a stricter rule for vacatur where the arbitrator was non-neutral. See *Nationwide Mut.*, 429 F.3d at 645. The AAA rules "require[] all party-appointed arbitrators, whether neutral or not, to make pre-appointment disclosures of

Disclosure should be made to all parties including other arbitrators that are serving on the panel.¹⁰⁴

The CODE OF ETHICS expands upon the scope of disclosure:

(A) Persons who are requested to serve as arbitrators should, before accepting, disclose:

(1) any known direct or indirect financial or personal interest in the outcome of the arbitration;

(2) any known existing or past financial, business, professional or personal relationships which might reasonably affect impartiality or lack of independence in the eyes of any of the parties. For example, prospective arbitrators should disclose any such relationships which they personally have with any party or its lawyer, with any co-arbitrator, or with any individual whom they have been told will be a witness. They should also disclose any such relationships involving their families or household members or their current employers, partners, or professional or business associates that can be ascertained by reasonable efforts;

(3) the nature and extent of any prior knowledge they may have of the dispute; and

(4) any other matters, relationships, or interests which they are obligated to disclose by the agreement of the parties, the

any facts which might affect their neutrality, independence, or impartiality. “ See CODE OF ETHICS NOTE ON NEUTRALITY, available at <http://www.adr.org/sp.asp?id=21958> (last visited Apr. 17, 2006).

¹⁰³ CODE OF ETHICS CANNON II (D), available at <http://www.adr.org/sp.asp?id=21958> (last visited Apr. 17, 2006). The DISCLOSURE Q&A states that:

the following circumstances were deemed sufficient by the courts to require vacature of the award on the ground of partiality: (1) Present or recent attorney-client relationship; (2) Relationship of consanguinity within six degree (e.g. second cousins); (3) Business dealings which are significant, ongoing, or regularly conducted; (4) Close social relations or friendships; [and] (5) Arbitrator had a case in which the arbitrator was a party or counsel before one who is now a party or counsel.

DISCLOSURE Q&A, available at <http://www.adr.org/sp.asp?id=22024> (last visited Apr. 17, 2006).

¹⁰⁴ CODE OF ETHICS CANNON II (E), available at <http://www.adr.org/sp.asp?id=21958> (last visited Apr. 17, 2006).

rules or practices of an institution, or applicable law regulating arbitrator disclosure.¹⁰⁵

Disclosure should include (1) if the relationship is in the past, present or future; (2) the nature of the relationship; (3) the duration of the relationship; (4) whether the relationship is direct or indirect; (4) the extent of the relationship; and (5) if the relationship will affect the arbitrator's partiality.¹⁰⁶ This duty to disclose continues throughout the entire arbitration.¹⁰⁷

The CODE OF ETHICS also imposes a duty on arbitrators to "make a reasonable effort to inform themselves of any interests or relationships" that the arbitrator has a duty to disclose.¹⁰⁸ Thus, an arbitrator probably has an obligation not only to disclose those facts of which he is aware, but also to run a conflicts check to ensure that there are no potential conflicts of which he is not aware.¹⁰⁹

D. Preventing The Nuclear Option

1. Chinese Walls

There is one area where practicality may be gaining a foothold: limiting the scope of conflicts and disqualifications through "Chinese" walls. The conflict of interest rules typically protect client confidences by imposing a presumption that every attorney in a firm is tainted with the guilty knowledge of a lawyer that is disqualified directly.¹¹⁰ Some courts, however, have allowed attorneys to rebut the presumption of imputed knowledge. In part, this reflects a recognition that attorneys and even partners in large law firms are often, in fact, complete strangers. Under such circumstances it is an untenable fiction to presume that the knowledge, *if any*, known to one partner is ever

¹⁰⁵ CODE OF ETHICS CANNON II (A), available at <http://www.adr.org/sp.asp?id=21958> (last visited Apr. 17, 2006).

¹⁰⁶ DISCLOSURE Q&A, available at <http://www.adr.org/sp.asp?id=22024> (last visited Apr. 17, 2006).

¹⁰⁷ CODE OF ETHICS CANNON II (C), available at <http://www.adr.org/sp.asp?id=21958> (last visited Apr. 17, 2006).

¹⁰⁸ CODE OF ETHICS CANNON II (B), available at <http://www.adr.org/sp.asp?id=21958> (last visited Apr. 17, 2006).

¹⁰⁹ *Schmitz* held that the arbitrator had a duty to investigate and the violation of that duty resulted in a failure to disclose creating a reasonable impression of partiality under *Commonwealth Coatings*. 20 F.3d at 1044, 1048-49; see also *Positive Software I*, 337 F. Supp. 2d at 886 ("[r]equiring arbitrators to make investigations in certain circumstances gives arbitrators an incentive to be forthright with the parties"); but see *Al-Harbi v. Citibank, N.A.*, 85 F.3d 680, 682 (D.C. Cir. 1996) (finding no duty to investigate possible conflicts of interest where the party complained about the arbitrators former firm's connection to parties to the arbitration).

¹¹⁰ See, e.g., TEX. DISCIPLINARY R. PROF'L CONDUCT 1.06(f); *id.* at 1.09(b).

shared with the other. Such a shift might be evidence of growing concern for both the mobility of lawyers and non-lawyers alike as well as a concern expressed by some for the “tax” imposed on both clients and the legal profession by cumbersome professional rules impeding ease of access to legal services.¹¹¹

For example, the court in *Edwards v. 360 [degrees] Communications*, 189 F.R.D. 433, 438-439 (D. Nev. 1999), refused to disqualify a solo practitioner from representing a plaintiff in an action in which his former employer represented defendants, based on the solo practitioner’s presentation of evidence that he was not directly involved in the matter. In so doing, it observed a trend in some jurisdictions toward a “functional analysis” methodology found in ABA Model Rule 1.9:

Preserving confidentiality is a question of access to information. Access to information, in turn, is essentially a question of fact in particular circumstances, aided by inferences, deductions or working presumptions that reasonably may be made about the way in which lawyers work together. . . . [Model Rule 1.9] operates to disqualify the lawyer only when the lawyer involved has actual knowledge of information. . . . Thus, if a lawyer while with one firm acquired no knowledge or information relating to a particular client of the firm, neither the lawyer individually nor the second firm is disqualified from representing another client in the same or a related matter even though the interests of the two clients conflict.¹¹²

The court held, “The lack of any direct, focused evidence of confidence-sharing is a relevant factor in the consideration of attorney disqualification.”¹¹³ The approach of the *Edwards* court, however, effectively shifts the burden onto clients attempting to disqualify opposing counsel to prove exposure to confidential information, thereby undercutting the broad protection of client confidences, which the irrebuttable presumptions were meant to serve.

The Second Circuit has also shown favor for a more “functional analysis” of conflicts. In *Hempstead Video, Inc. v. Incorporated Village of Valley Stream*, 409 F.3d 127 (2d Cir. 2005), the court refused to disqualify an “of counsel” attorney who was unaware of the conflict at the time it arose, and took steps to screen as soon as he became aware of

¹¹¹ *Current Trends in Conflict of Interest Law*, 53 BAYLOR L. REV. 1, 24-25 (2001).

¹¹² *Edwards v. 360 [degrees] Commc’ns*, 189 F.R.D. 433, 438-39 (D. Nev. 1999) (quoting MODEL RULES OF PROF’L CONDUCT R. 1.9 cmt.).

¹¹³ *Id.* at 439.

it.¹¹⁴ The court expressed approval for the use of screening with of-counsel attorneys to avoid the imputation of conflicts:

‘[W]e believe screens should be accepted as a means of ensuring that part time lawyers are not deemed to be “associated” with a law firm.’ . . . An ‘of counsel’ attorney, who handles matters independent of his firm and scrupulously maintains files for his private clients separate from the files of the firm, is less likely to be considered associated with the firm with respect to those clients than another attorney in the same position whose client files are not effectively segregated from those of the firm. ¹¹⁵

The court set forth a resounding argument in favor of functional analysis:

A *per se* rule has the virtue of clarity, but in achieving clarity, it ignores the caution that “[w]hen dealing with ethical principles, . . . we cannot paint with broad strokes. . . . Given the wide variation in the nature and substance of relationships lumped together under the title “of counsel,” a *per se* approach is ill-equipped to respect appropriately “both the individual’s right to be represented by counsel of his or her choice and the public’s interest in maintaining the highest standards of professional conduct.”¹¹⁶

Ethical screening, however, is no panacea. Courts in other jurisdictions have refused to bless ethical screening where a conflict remains unaddressed for any period of time or where there is a lack of informed consent by the client. In *Concat LP v. Unilever, PLC*, 350 F. Supp. 2d 796 (N.D. Cal. 2004), an ethical wall was ineffective to cure a breach of client loyalty. Further, the court held that even if an ethical wall could have been used, the firm delayed too long in setting up an ethical wall for it to have been effective. The court stated:

Although an ethical wall may, in certain limited circumstances, prevent a breach of confidentiality, it cannot, in the absence of an informed waiver, cure a law firm’s breach of its duty of loyalty to its client. . . . Screening measures like those instituted by Morgan, Lewis do nothing

¹¹⁴ *Hempstead Video, Inc.*, 409 F.3d at 136.

¹¹⁵ *Hempstead Video, Inc.*, 409 F.3d at 134 (citing N.Y. State Bar Ass’n Comm. on Prof’l Ethics, Op. 715 (1999)).

¹¹⁶ *Id.* at 135 (internal citations omitted).

to mitigate conflict arising from concurrent adverse client relationships, since the purpose of the prohibition against such relationships is to preserve the attorney's duty of loyalty, not confidentiality, to his client.

Under this standard, an effective ethical screen must be set up at the same time the potentially disqualifying event occurs. A delay of even eleven to eighteen days may be too long.¹¹⁷

The court in *Anderson v. Nassau County Department of Corrections*, 376 F. Supp. 2d 294 (E.D.N.Y. 2005), likewise held that then-concurrent adverse representation is *prima facie* improper and resulting taint can only be removed by full disclosure and consent of the client *prior* to commencing the adverse representation:

Attorneys are under an ethical obligation to disclose to their clients, at the earliest possible time, any conflicting interests that might cloud their representation. Disclosure alone is not enough. The lawyer may not act for the client unless the client has given his informed consent to further representation. . . . To be effective, "full disclosure, by definition, requires an act on the part of the attorney to inform the client not only of any potential conflict but also of the possible effect of such representation on the exercise on [sic] independent professional judgment on behalf of the client."¹¹⁸

Texas courts have not widely embraced the functional analysis. This reflects the language of the Disciplinary Rules of Professional Conduct, which recognize the validity of screening for former government lawyers, but make no provision for it elsewhere.¹¹⁹ Based upon this language (and this silence), Texas courts impute conflicts among attorneys, but have allowed only non-lawyers the opportunity to rebut the presumption that confidential information is shared with a new employer.

¹¹⁷ *Concat LP v. Unilever, PLC*, 350 F. Supp. 2d 796, 822 (N.D. Cal. 2004) (citing *Cobb Publ'g, Inc. v. Hearst Corp.*, 907 F. Supp. 1038, 1047 (E.D. Mich. 1995)). The court in *Concat* also held that a prospective waiver of conflict obtained from a client is alone insufficient. Rather an attorney must request a second, more specific waiver, " 'if the [prospective] waiver letter insufficiently disclosed the nature of the conflict that subsequently arose between the parties.' " *Id.* at 821 (citing *Visa U.S.A., Inc. v. First Data Corp.*, 241 F. Supp. 2d 1100, 1106 (N.D. Cal. 2003)).

¹¹⁸ *Anderson v. Nassau County Dept. of Corrections*, 376 F. Supp. 2d 294, 299 (E.D.N.Y. 2005) [citations omitted].

¹¹⁹ Compare TEX. DISCIPLINARY R. PROF'L CONDUCT 1.09(b) with 1.10(b).

The Supreme Court of Texas restated the standard in *In re Mitcham*, 133 S.W.3d 274 (Tex. 2004):

For attorneys, there is an irrebutable [sic] presumption they gain confidential information on every case at the firm where they work (whether they work on them or not). . . , and an irrebutable [sic] presumption they share that information with the members of a new firm. . . . For legal assistants, there is an irrebutable [sic] presumption they gain confidential information only on cases on which they work, and a rebuttable presumption they share that information with a new employer. . . . The last presumption is rebutted not by denials of disclosure, but by prophylactic measures assuring that legal assistants do not work on matters related to their prior employment.¹²⁰

That said, Chinese walls will not cure every conflict situation involving non-lawyer staff, and not every Chinese wall is adequate. In *In re Relators Bell Helicopter Textron, Inc.*, 87 S.W.3d 139 (Tex. App.—Fort Worth 2002, orig. proceeding), for example, the court held that a paralegal could not be effectively screened because,

the issues in the underlying case and those in the lawsuits on which Vale worked for Bell are substantially related, and the genuine threat of disclosure exists simply because of the similarity of the matters involved in the former and the current cases. Vale’s actual disclosure of confidences need not be proven before disqualification is required. . . . [D]isqualification will always be required when the nonlawyer necessarily would be required to work on the other side of the same or a substantially related matter.¹²¹

Thus, the *Bell Helicopter* court did not employ a functional analysis approach and gave no weight to any evidence that the paralegal did not actually share confidential information with her new employer.

While disqualifying the paralegal’s employer, the court articulated a suggested guideline for effectively screening non-lawyers:

¹²⁰ *In re Mitcham*, 133 S.W.3d at 276 (internal citations omitted); see also *In re Dawn Gayken*, No. 09-05-169-CV, 2005 Tex. App. LEXIS 4688, at *5 (Tex. App.—Beaumont June 16, 2005, pet. filed).

¹²¹ *In re Relators Bell Helicopter Textron*, 87 S.W.3d at 148 (citing *Phoenix Founders, Inc. v. Marshall*, 887 S.W.2d 831 (Tex. 1994)).

[T]he new firm can rebut application of the presumption if (1) it strictly adheres to a screening process and (2) the nonlawyer does not reveal any information relating to the former employer's clients to any person in the new firm. . . .

The screening process requires the following steps:

- The newly hired nonlawyer must be cautioned not to disclose any information relating to the representation of a client of the former employer.
- The nonlawyer must be instructed not to work on any matter on which she worked during the prior employment, or regarding which she has information relating to the former employer's representation.
- The new firm should take other reasonable steps to ensure that the nonlawyer does not work in connection with matters on which she worked during the prior employment, absent client consent after consultation.¹²²

Courts evaluating such a screening process should consider:

[T]he substantiality of the relationship between the former and current matters; the time elapsed between the matters; the size of the firm; the number of individuals presumed to have confidential information; the nature of their involvement in the former matter; and the timing and features of any measures taken to reduce the danger of disclosure. . . . Also, if the old firm and new firm represent adverse parties in the same proceeding, rather than in different proceedings, the danger of improper disclosure by the nonlawyer is increased. . . . But even if the new employer uses the screening process, disqualification will always be required—absent the former client's consent—under some circumstances, such as:

- when information relating to the representation of an adverse client has in fact been disclosed; or
- when screening would be ineffective or the nonlawyer necessarily would be required to work on the

¹²² *In re Relators Bell Helicopter Textron, Inc.*, 87 S.W.3d at 145-46.

other side of a matter that is the same as or substantially related to a matter on which the nonlawyer has previously worked.¹²³

2. *Waive conflicts goodbye*

One of the most effective ways to avoid the “nuclear option” of fee forfeiture or liability arising out of a conflict of interest is disclosure and consent by the clients involved. The Texas Disciplinary Rules of Professional Conduct provide for a valid waiver of conflict under some circumstances.¹²⁴ The comments explain in more detail that “there may be circumstances where it is impossible to make the full disclosure necessary to obtain informed consent.”¹²⁵ They further add:

Disclosure and consent are not formalities. Disclosure sufficient for sophisticated clients may not be sufficient to permit less sophisticated clients to provide fully informed consent. While it is not required that the disclosure and consent be in writing, it would be prudent for the lawyer to provide potential dual clients with at least a written summary of the considerations disclosed.¹²⁶

The Supreme Court of Texas recently found an adequate waiver in *In re Cerberus Capital Management, L.P.*¹²⁷ In *Cerberus*, movant sought disqualification of a law firm that was representing shareholders in an action brought against movant. Previously that same law firm had been hired to draft an asset purchase agreement. The documents were prepared and forwarded to movant, however, the following day the law firm was instructed that all work should cease.¹²⁸

Movant’s shareholders instituted a derivative suit and contacted the law firm regarding representation.¹²⁹ Prior to appearing in the case, the law firm contacted movant’s general counsel and obtained his verbal agreement that the former client would waive any potential conflict of interest.¹³⁰ Following such conversation, the law firm sent a letter to movant’s general counsel disclosing its proposed representation of

¹²³ *Id.* at 146 (citations omitted).

¹²⁴ TEX. DISCIPLINARY R. PROF’L CONDUCT 1.06(c)(2) & 1.09(a).

¹²⁵ TEX. DISCIPLINARY R. PROF’L CONDUCT 1.06 cmt. 7.

¹²⁶ *Id.* at cmt. 8.

¹²⁷ 164 S.W.3d 379 (Tex. 2005) (per curiam) (orig. proceeding).

¹²⁸ *Id.* at 380.

¹²⁹ *Id.* at 380-81.

¹³⁰ *Id.* at 381.

the shareholders, the subject matter of its prior work for movant, the time period involved, the attorney involved, the nature of the discussion, and how the prior representation concluded.¹³¹ Movant's general counsel forwarded the letter to a senior executive, who reviewed it and signed it.¹³²

Movant nevertheless argued that the waiver was ineffective because the law firm did not adequately disclose the conflict.¹³³ The court disagreed and concluded that the waiver was valid and met the requirements set forth in Comment 10 to Rule 1.09.¹³⁴ The movant contended that the waiver letter signed by the client's executive vice president and chief financial officer, at the behest of the company's general counsel was ineffective because it did not fully and accurately disclose the conflict.¹³⁵ The supreme court found to the contrary as a matter of law and issued a writ of mandamus requiring that the lower court's disqualification order be undone. The court said:

The waiver letter in this case disclosed V & E's proposed representation of the relators in the shareholder derivative suit, the subject matter of its prior work for [the client], the time period involved, the attorney involved, the nature of the discussion with [the client's] general counsel, and how the prior representation concluded. This disclosure meets the requirements set forth in comment 10 of Rule 1.09. Furthermore, it is undisputed that [the client's representative] signed the waiver letter after reviewing the petition and chose not to consult [the client's] outside counsel before signing the waiver. The record reveals that [the client's] files contained information regarding V & E's prior work for [the client], including an email from V & E partner Patrick Breeland to [the client's] representative disclosing his work for [the client] and a draft of the asset purchase agreement. In addition, it is undisputed that [the client's] general counsel verbally agreed to waive any potential conflict of interest, which is a permissible, albeit inadvisable, manner of providing disclosure and obtaining consent under the Disciplinary Rules. Accordingly, [the

¹³¹ *Id.* at 382-83.

¹³² *Id.* at 381.

¹³³ *Id.* at 382.

¹³⁴ *Id.* at 383.

¹³⁵ *Id.* at 382.

client] was adequately informed of V & E's prior representation and knowingly waived any conflict.¹³⁶

The presence of a written waiver was obviously key to obtaining mandamus relief. Written waivers are likewise key to obtaining relief for future conflicts. The ABA recently issued a new standard for advance waivers of future conflicts of interest, Formal Ethics Opinion 05-436.¹³⁷ Opinion 436 relied on Comment 22 to revised Rule 1.7 of the 2002 ABA rules. Model Rule 1.7 provides:

Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law;
- (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
- (4) each affected client gives informed consent, confirmed in writing.¹³⁸

Comment 22 supports “the likely validity of an ‘open-ended’ informed consent if the client is an experienced user of legal services, particularly if, for example, the client has had the opportunity to be represented by independent counsel in relation to such consent and the consent is limited to matters not substantially related to the subject of the prior representation.”¹³⁹

Absent an explicit agreement, waiver can nonetheless occur through conduct where knowledge of a conflict and the material facts related to representation exist.¹⁴⁰ In *Flores*, appellants, Rogelio Flores, individually and as representative of the estate of

¹³⁶ *Id.* at 382-83.

¹³⁷ ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 05-436 (2005).

¹³⁸ MODEL RULES OF PROF'L CONDUCT R. 1.7(b).

¹³⁹ ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 05-436 (2005); *see* MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 22.

¹⁴⁰ *Flores v. Skaro*, No. 13-03-358-CV, 2005 WL 2885841, at *5-6 (Tex. App. – Corpus Christi Nov. 3, 2005, no pet. h.) (mem. op.) (not yet released for publication).

Teresa Flores, and intervenors, Teodoro and Elida Flores, individually and as next of friends of June Flores, appealed a summary judgment granted in favor of appellee, Ann Skaro, on a claim for breach of an employment contract. Appellee represented appellants in a personal injury case in which she negotiated a wrongful death settlement on her clients' behalf.¹⁴¹ The proceeds were to be distributed based on the employment contract between the parties, the settlement agreement, and a final judgment.¹⁴²

Prior to the court's final approval of the settlement, appellee sent a letter to all her clients advising them a conflict existed between the parties regarding the division of the funds. She suggested Rogelio seek the services of another attorney. Appellee subsequently sent a second letter to Rogelio advising him that the court was holding a hearing for the purpose of resolving any concerns regarding the distribution, again suggesting he seek independent counsel.¹⁴³ Rogelio attended the hearing, however, voiced no concern regarding the terms of the settlement or appellee's continued representation of him.¹⁴⁴ Appellee's clients signed a settlement statement and the trial court signed a final judgment approving the settlement.¹⁴⁵

The propriety of the settlement distribution depended on whether Rogelio waived the conflict of interest, thereby consenting to appellee's continued representation.¹⁴⁶ The court, however, recognized that the Supreme Court of Texas has found that clients may waive conflicts of interest and retain a single attorney to jointly represent them in trial by consenting after full disclosure of all material facts related to the dual representation.¹⁴⁷ Rogelio did not object to the conflict, nor did he complain of appellee's continued representation of him. The court concluded that because he was provided with written notice regarding the conflict and the material facts related to such representation, but continued settlement with appellee as his attorney, Rogelio waived the conflict of interest.¹⁴⁸

A delay in moving for disqualification can waive that right. It is well established that "[a] party who fails to file its motion to disqualify opposing counsel in a timely manner waives the complaint."¹⁴⁹ In *Vaughan*, Nancy Vaughan sought mandamus

¹⁴¹ *Id.* at *1.

¹⁴² *Id.* at *4.

¹⁴³ *Id.*

¹⁴⁴ *Id.* at *5.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*; see *In re B.L.D.*, 113 S.W.3d 340, 346 n.5 (Tex. 2003), *cert. denied*, 541 U.S. 945 (2004).

¹⁴⁸ *Flores*, 2005 WL 2885841, at *6.

¹⁴⁹ *Vaughan v. Walther*, 875 S.W.2d 690, 690 (Tex. 1994) (per curiam).

relief from a trial court order disqualifying her attorney from representing her in a child custody action. In 1991, Vaughan hired attorney Thomas Goff to represent her daughter in a custody matter. Two weeks after the case was filed it was dismissed. In March of 1993, Vaughan again hired Goff, this time to represent her in a conservatorship action against her daughter. At a temporary hearing that same month, the issue of Goff's prior representation of Vaughan's daughter was discussed and Goff maintained that he would not withdraw from the case. In October of 1993, the day of the final hearing, Vaughan's daughter filed a motion to disqualify Goff based on his prior representation of her. The trial court granted the motion.¹⁵⁰

Vaughan's daughter was aware of Goff's possible conflict of interest at the temporary hearing in March, yet failed to take any action until six and a half months later on the day of the final hearing.¹⁵¹ The Supreme Court of Texas concluded that Vaughan's daughter waived her right to disqualify Goff by failing to timely file her motion.¹⁵²

In contrast, the same court has found that a delay in filing a motion of eleven months did *not* waive disqualification of counsel.¹⁵³ In *Epic*, the parties waited over four months after suit was filed to raise the issue and seven more months to file their motions. For four months after suit was filed, counsel was unaware of any connection that may have created a conflict. The parties were exchanging information and correspondence in an effort to identify and resolve disqualification issues before discovery commenced.¹⁵⁴ The information available to the parties at any time prior to trial did not establish that counsel should have been disqualified; only at trial did it become apparent, at which time the motions were filed. The court concluded that the parties did not waive grounds for disqualification.¹⁵⁵

III. CONCLUSION

This is the portion of the paper where one must try to tie this montage together and make some connections. Are there such connections to make? Absolutely.

Conflicts can be disablingly dangerous. They are slippery when you try to pin them down (§ II.A.) and yet the consequences can be both concrete and severe (§ II.B.).

¹⁵⁰ *Id.* at 690.

¹⁵¹ *Id.* at 690-91.

¹⁵² *Id.* at 691 (citing *Spears v. Fourth Court of Appeals*, 797 S.W.2d 654, 656 n.2 (Tex. 1990) ("Courts must adhere to an exacting standard when considering motions to disqualify counsel so as to discourage their use as a dilatory trial tactic.")).

¹⁵³ *In re Epic Holdings, Inc.*, 985 S.W.2d 41, 52 (Tex. 1998) (orig. proceeding).

¹⁵⁴ *Id.* at 52-53.

¹⁵⁵ *Id.* at 53.

As a result, an ounce of prevention is worth a pound of cure. Full and scrupulous disclosure and consent can avoid many conflicts, and sometimes appropriate screening can protect the interests of all concerned. (§§ II.C. & D.) Indeed, a study of the cases can educate one on a level of disclosure and consent that should pass muster as a matter of law. See *In re Ceberus*, discussed *supra*. Rather than make law concerning whether your fees ought or ought not to have been forfeited, disclose early, disclose often, get consent in writing, and let's be careful out there.