Joint Defense Agreements and Disqualification of Co-Defendant's Counsel,

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Joint Defense Agreements and Disqualification of Co-Defendant’s Counsel

Arnold Rochvarg

I. Introduction

In civil cases involving more than one defendant, the defendants typically work together to coordinate their defense strategy. This involvement could be most easily accomplished if the multiple defendants were represented by one attorney. Often this type of representation is not possible, however, because conflicts may exist between the defendants. Even if separate counsel were not required, a defendant would often prefer to have his own attorney rather than share one with another defendant. Therefore, in order to coordinate their defenses, joint defendants represented by separate attorneys often enter into joint defense agreements.

The areas typically covered by joint defense agreements include exchanging information about the merits of the case, dividing responsibility for pre-trial motions and discovery, sharing costs of expert witnesses, discussing strategies of defense, and exchanging legal memoranda.
Although joint defense agreements may appear to be part of a conspiracy to thwart the integrity of litigation, in general, joint defense agreements are well accepted as beneficial to both litigants and the system in general. By permitting parties to cooperate in their defenses, litigation becomes more efficient. Fuller information is gathered more cheaply. Inconsistent defenses that put defendants in an unfair position and that may confuse the jury can be avoided.

Significant to the development and growth of joint defense agreements has been the evidentiary joint defense privilege. Under this privilege, communications among defendants and their respective counsel are protected from disclosure. If the privilege is to attach, the communication must be made in the course of the cooperative effort and intended to further that effort. The evidentiary joint defense privilege is an exception to the general rule that the attorney client privilege does not apply when a privileged communication between a client and his attorney is made in the presence of a third person. The joint defense privilege grants an evidentiary privilege for communications from non-clients to lawyers. The joint defense privilege also protects matters that are covered by the work product privilege and, in some respects, provides protection beyond that granted by the traditional work product doctrine. The evidentiary joint defense privilege, however, does not apply in litigation between members of the joint defense.

The joint defense privilege has endured some scholarly review. One particular issue studied is what occurs in a criminal case when one co-

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5 Bartel, supra note 4, at 882-83; Gerald Heller, Raising the Joint Defense Privilege, FED. LAW., Jan. 1997, at 46.
6 Report, supra note 1, at 309.
7 Bartel, supra note 4, at 873, 881.
8 Heller, supra note 5, at 46.
9 Id.
10 Id. at 48.
11 Id. at 46.
12 Rushing, supra note 2, at 1273.
13 Bartel, supra note 4, at 874.
14 Heller, supra note 5, at 48-49.
15 Bartel, supra note 4, at 871; Heller, supra note 5, at 46.
defendant decides to cooperate with the prosecution and testify against his former co-defendants.\textsuperscript{16} An issue that has received little commentary is the issue of the disqualification of an attorney and that attorney’s law firm in separate litigation based on a motion by a member of a prior joint defense agreement of which the attorney’s former client was also a member. Recently, various courts have addressed this issue.\textsuperscript{17} The purpose of this Article is to review and analyze the cases that have dealt with the issue of joint defense agreements and motions for disqualification of another member’s attorney in subsequent cases. The goal of this Article is to reach a better understanding of the present state of the law. The Article then proposes an analysis for use in future cases.

II. Doctrinal Development of the Joint Defense Privilege

The first case involving a member of a joint defense who sought to disqualify an attorney of another joint defense member in subsequent litigation was \textit{Wilson P. Abraham Construction Corp. v. Armco Steel Corp.},\textsuperscript{18} which involved alleged antitrust violations in the steel industry. In 1972, Whitlow Co., Inc. (Whitlow) was one of the targets of a federal grand jury investigation of the trade practices of the rebar steel industry in Texas.\textsuperscript{19} Whitlow was represented by Stephen Susman of the Fulbright & Jaworski law firm.\textsuperscript{20} After indictments were issued against various steel companies, including Whitlow, Armco Steel Corp., The Ceco Corp. and Laclede Steel Co., Susman, as counsel for Whitlow, met more than

\begin{itemize}
  \item\textsuperscript{16} See, e.g., Bartel, \textit{supra} note 4, at 872; Heller, \textit{supra} note 5, at 48; Matthew D. Forsgren, Note, \textit{The Outer Edge of the Envelope: Disqualification of White Collar Criminal Defense Attorneys Under the Joint Defense Doctrine}, 78 MINN. L. REV. 1219, 1222 (1994).
  \item\textsuperscript{17} In 1988, the United States Court of Appeals for the Sixth Circuit noted that disqualification motions were becoming more numerous because the changing nature of the legal profession was presenting a greater number of potential conflicts. Manning \textit{v. Waring, Cox, James, Sklar & Allen}, 849 F.2d 222, 224-25 (6th Cir. 1988). The court noted that firms were employing hundreds of lawyers, and that specialists were being concentrated under fewer roofs. \textit{Id.} at 224.
  \item\textsuperscript{18} 559 F.2d 250 (5th Cir. 1977).
  \item\textsuperscript{19} \textit{Abraham Const. Corp.}, 559 F.2d at 251.
  \item\textsuperscript{20} \textit{Id.}
\end{itemize}
once with representatives of the other defendants in order to develop a cooperative defense plan.\textsuperscript{21} At the same time as the Texas investigation, a related but separate antitrust investigation of the steel industry was taking place in Louisiana, which ultimately led to indictments and a civil action in Louisiana.\textsuperscript{22} Whitlow was not a defendant in the Louisiana actions, but several of the defendants in the Texas cases, namely Armco, Ceco and Laclede, were defendants in the Louisiana case.\textsuperscript{23}

Wilson P. Abraham Construction Corp. (Abraham Construction) was a plaintiff in the Louisiana civil action.\textsuperscript{24} Members of the Louisiana steel industry that were involved in the Texas litigation objected when Abraham Construction sought to hire Susman as co-counsel.\textsuperscript{25} The Louisiana steel industry defendants argued that Susman should be disqualified from representing Abraham Construction in its civil suit against them in Louisiana because Susman had been privy to confidential information as part of the cooperative defense discussions in Texas.\textsuperscript{26} The main issue was whether someone who was never a client of an attorney could seek disqualification of that attorney.\textsuperscript{27}

The Fifth Circuit noted that if the motion had been filed by a former client, disqualification would be required based solely on proof that a substantial relationship existed between the two matters.\textsuperscript{28} No proof would be required that any confidential information had been disclosed, nor that any confidential information would be used to the detriment of the attorney’s former client.\textsuperscript{29} The Fifth Circuit noted, however, that these rules did not apply when a non-client sought disqualification.\textsuperscript{30}

\textsuperscript{21} \textit{Id.} A civil suit was also filed in Texas involving the same antitrust issues which the grand jury had investigated. \textit{Id.} at 252. Susman was also the lawyer for Whitlow in this civil case; however, Susman denied doing anything of substance in defense of the civil case. \textit{Id.}

\textsuperscript{22} \textit{Id.} at 252.

\textsuperscript{23} \textit{Id.}

\textsuperscript{24} \textit{Abraham Constr. Corp.}, 559 F.2d 250.

\textsuperscript{25} \textit{Id.} at 252.

\textsuperscript{26} \textit{Id.}

\textsuperscript{27} \textit{Id.} at 253.

\textsuperscript{28} \textit{Id.} at 252.

\textsuperscript{29} \textit{Abraham Constr. Corp.}, 559 F.2d at 252.

\textsuperscript{30} \textit{Id.} at 253.
The Fifth Circuit did not state, however, that a disqualification motion could not be filed by a person who was never a client of the attorney in question.\textsuperscript{31} Rather, the court held that when information not intended for unlimited publication or use is exchanged between co-defendants and their attorneys, an attorney who has received such information owes a fiduciary duty to non-client co-defendants not to use it in a later representation of another client to the detriment of his former client's co-defendants.\textsuperscript{32} When a disqualification motion is filed by a party who was not a former client of the attorney whose disqualification is sought, the Fifth Circuit places the burden of proof on the moving party to show that confidential information had been disclosed to the attorney during an earlier cooperative defense.\textsuperscript{33} In \textit{Abraham Construction Corp.}, a remand was necessary to determine whether Susman had in fact received confidential information from Whitlow's Texas co-defendants.\textsuperscript{34} Upon remand, the district court found that Susman had not been privy to confidential information from any of the co-defendants in the Texas antitrust cases, and thus, Susman was not disqualified.\textsuperscript{35}

The Fifth Circuit's opinion in \textit{Abraham Construction Corp.} is significant for a few reasons. First, it recognized the right of a non-client to seek disqualification of an attorney absent an express joint defense agreement among the co-defendants and their attorneys.\textsuperscript{36} Second, although recognizing the non-client's right to seek disqualification, the Fifth Circuit refused to equate the non-client's rights with those of actual former clients.\textsuperscript{37} Unlike the former client situation, the court required proof by the non-client moving party of actual disclosure of confidential information before disqualification would be ordered.\textsuperscript{38}

\textsuperscript{31} See id.
\textsuperscript{32} Id.
\textsuperscript{33} Id.
\textsuperscript{34} \textit{Abraham Constr. Corp.}, 559 F.2d at 253.
\textsuperscript{36} See \textit{Abraham Constr. Corp.}, 559 F.2d at 252.
\textsuperscript{37} Id. at 253.
\textsuperscript{38} Id.
About the same time the Fifth Circuit was deciding the disqualification motion in *Abraham Construction Corp.*, the Eighth Circuit faced a similar issue in *Fred Weber, Inc. v. Shell Oil Co.*. Fred Weber, Inc. (Weber) brought a civil antitrust case against various oil companies, including Shell Oil Co. and American Oil Co. About ten years prior to this civil litigation, in a previous criminal antitrust case, Weber's counsel, Lashly, Caruthers, Thies, Rava & Hamel (Lashly), had also been counsel to co-defendants of Amoco and Shell. Amoco and Shell sought to disqualify Lashly from representing Weber, alleging that members of the law firm had access to confidential information obtained at meetings of co-defendants' counsel that were held to discuss defense strategy during the earlier criminal litigation. Lashly replied that it never represented Shell or Amoco; it never received confidential information from Shell or Amoco; and that absent proof that it had received confidential information from Shell or Amoco, disqualification was not warranted. The district court judge ordered an in-camera inspection of the alleged confidential information that Shell and Amoco had disclosed to members of Lashly in the earlier criminal case. Based upon this in-camera hearing, the judge found that no confidential information had been exchanged, and therefore he denied the motion to disqualify.

The issue on appeal was whether a lawyer's representation of A, who was also a co-defendant with B in a prior suit, disqualified the lawyer as representative for C against B in a subsequent, related suit. The court identified the instant case as one of "first recorded impression." The Eighth Circuit first considered Canon 4 of the Code of Professional Responsibility, which concerns confidentiality. The court stated that

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39 566 F.2d 602 (8th Cir. 1977) (overruled on other grounds; overruled as to order denying disqualification motion being final and appealable).
40 *Fred Weber, Inc.*, 566 F.2d at 605.
41 *Id.*
42 *Id.*
43 *Id.*
44 *Id.*
45 *Fred Weber, Inc.*, 566 F.2d at 605.
46 *Id.* at 606.
47 *Id.*
48 MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 4 (1980) (providing that "[a] lawyer should preserve the confidences and secrets of a client").
Canon 4 is limited to the duty a lawyer owes his client. Therefore, in order to employ Canon 4 as a basis for an attorney’s disqualification, the moving party must have or have had an attorney-client relationship with the attorney who is the target of the disqualification motion.49 Because no members of Lashly “were engaged by, or advised or represented, Shell or Amoco in the prior antitrust suit,” Canon 4 was “inapplicable.”50

The Eighth Circuit also considered Canon 9 of the Code of Professional Responsibility, which provides for an injunction against conduct that creates an appearance of impropriety.51 The court stated the issue as whether a member of the public or the bar would see impropriety in the mere representation of C against B by a lawyer who had represented B’s co-defendant in a prior related suit.52 The court’s response was: “We think not” because “the public and the bar are aware that particular lawyers have specialized in certain areas . . . and that their number is limited within specific geographical limits.”53 The court believed that “[i]t would be neither surprising nor unexpected that the same lawyer would appear for plaintiffs and defendants, and that a present adverse party may have been on the other side in a prior case.”54 It also believed that “[t]o hold that every representation against a former client’s co-defendant in a related matter raises an appearance of impropriety” would unnecessarily restrict the choice of counsel available to litigants.”55

The Eighth Circuit also rejected the application of an irrebuttable presumption of shared confidences from B to A’s lawyers.56 The court was unwilling to presume a “lack of integrity” in A’s lawyer knowingly accepting representation against a party from whom or about whom confidential information had been obtained.57 The proper approach to Canon 9’s appearance of impropriety was to determine whether A’s

49 Fred Weber, Inc., 566 F.2d at 607-08.
50 Id. at 608.
51 Canon 9 provides: “A lawyer should avoid even the appearance of professional impropriety.” MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 9 (1980).
52 Fred Weber, Inc., 566 F.2d at 609.
53 Id.
54 Id.
55 Id.
56 Id.
57 Fred Weber, Inc., 566 F.2d at 609.
counsel, Lashly, had actually obtained confidential information while representing a co-defendant of Shell or Amoco in the prior litigation. 58 Shell and Amoco had the burden of showing an actual imparting of information. 59 Because the in-camera submissions failed to demonstrate that confidential information had been disclosed to members of Lashly, disqualification was not ordered. 60

A few points are worth noting about the *Fred Weber, Inc.* opinion. First, the court rejected using the ethical obligation of confidentiality as the basis of possible disqualification, relying instead on the appearance of impropriety. 61 Unlike the Fifth Circuit in *Wilson P. Abraham Construction Corp. v. Armco Steel Corp.*, 62 the Eighth Circuit did not view the relevant issue as one involving an attorney’s fiduciary duty to a non-client, but rather viewed the matter from the perspective of whether the public or the bar would see impropriety in the representation. 63 Although taking a different approach, the Eighth Circuit’s answer to the issue presented was identical to that of the Fifth Circuit’s opinion in *Abraham Construction Corp.* 64 The court’s answer was that disqualification was warranted only if the moving party demonstrated that confidential information had actually been transmitted to the lawyer from the lawyer’s former client’s co-defendant. 65 Both courts rejected any presumption of shared confidences. 66

The next significant case, *Kaskie v. Celotex Corp.*, was decided by a federal district judge in Illinois in 1985. 67 Felix Kaskie sued Atchinson, Topeka and Santa Fe Railway (Railway) and various asbestos manufacturers, including Celotex, claiming to have suffered from exposure to

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58 *Id.*
59 *Id.* at 610.
60 *Id.*
61 *Id.* at 609.
62 559 F.2d 250 (5th Cir. 1977).
63 *Fred Weber, Inc.*, 566 F.2d at 609.
64 559 F.2d at 250; see also *Woods v. Covington County Bank*, 537 F.2d 804 (5th Cir. 1976).
65 *Fred Weber, Inc.*, 566 F.2d at 609.
66 *Id.*
asbestos while working as a Railway employee. A few years prior to Kaskie’s lawsuit, various asbestos manufacturers, including Celotex, and various asbestos distributors had formed an Asbestos Defense Group (ADG) in response to asbestos litigation across the country. The purpose of this ADG was to coordinate discovery, plan strategy, and facilitate settlements.

In response to Kaskie’s complaint, Railway filed a cross-claim against the asbestos manufacturer defendants. Railway hired the law firm of Jacobs, Williams and Montgomery (JWM) as additional counsel to pursue this cross-claim. However, JWM had represented Standard Asbestos, an asbestos manufacturer. Standard was not a defendant in the Kaskie case, but it was a member of the ADG. As Standard’s counsel in other asbestos cases, JWM had attended meetings of the ADG with companies that were defendants in Kaskie’s lawsuit. Celotex moved to disqualify JWM as counsel for Railway, alleging that confidential information, which JWM could now use in litigating Railway’s cross-claim, had been exchanged during the ADG meetings. In asserting this claim, Celotex relied on Canons 4 and 9 of the Code of Professional Responsibility.

The judge first reasoned that “[i]f Canon 4 were read literally, Celotex might not have standing to assert this violation because [Celotex] ha[d] never been a client of [JWM].” However, the judge declined to read Canon 4 as narrowly and held that Celotex did have standing to seek disqualification of Railway’s attorney under Canon 4 because Celotex was claiming a breach of confidential information. Additionally, Celotex

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68 Kaskie, 618 F. Supp. at 697.
69 Id.
70 Id.
71 Id.
72 Id.
73 Kaskie, 618 F. Supp. at 697.
74 Id.
75 Id. at 698.
76 Id.
77 Id.
78 Kaskie, 618 F. Supp. at 698.
79 Id.
had standing under Canon 9 because Canon 9's purpose was to ensure public confidence in the legal profession, and create a "zone of interest" as broad, if not broader, than Canon 4.\textsuperscript{80} The judge's decision was influenced by the opinion of the United States Court of Appeals for the Seventh Circuit in \textit{Westinghouse Electric Corp. v. Kerr-McGee Corp.},\textsuperscript{81} which involved members of a trade association providing confidential information to the trade association's attorneys. The district court judge in \textit{Kaskie} interpreted \textit{Westinghouse} to have broadened the concept of client "to include a relationship between an attorney and another entity (person or corporation) that involves a fiduciary obligation resulting from 'the nature of the work performed and the circumstances under which confidential information is divulged.'"\textsuperscript{82}

After ruling that Celotex had standing to seek JWM's disqualification, the next issue was what would warrant JWM's disqualification.\textsuperscript{83} The court held that the irrebuttable presumption of shared confidences, which applied when a law firm switched sides to represent an adversary of a former client, only "makes sense" when an actual attorney-client relationship exists.\textsuperscript{84} However, no irrebuttable presumption is found in this co-defendant context because these co-defendants are not likely "to bare their souls to each other."\textsuperscript{85} The better approach in the co-defendant situation would be to apply a rebuttable presumption of shared confidences.\textsuperscript{86} In this regard, the judge ruled that JWM had an obligation to "show clearly and persuasively that it did not receive any confidences from Celotex during the ADG meetings"\textsuperscript{87} if it wanted to avoid disqualification in Kaskie's case. Because JWM only presented one affidavit denying receipt of confidential information, the court found JWM's showing to be insufficient to rebut the presumption of shared confi-

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\footnotesize
\textsuperscript{80} Id. at 698-99.
\textsuperscript{81} 580 F.2d 1311 (7th Cir.), \textit{cert. denied}, 439 U.S. 955 (1978).
\textsuperscript{82} \textit{Kaskie}, 618 F. Supp. at 698; see \textit{Westinghouse}, 580 F.2d at 1320.
\textsuperscript{83} \textit{Kaskie}, 618 F. Supp. at 699.
\textsuperscript{84} Id.
\textsuperscript{85} Id.
\textsuperscript{86} Id.
\textsuperscript{87} Id. at 700.
\end{flushleft}
However, the law firm had been "resting on the hope that Celotex would have the burden to prove confidential information was exchanged" (a position now rejected by the district judge); as a result, JWM was given another opportunity to prove that it had not received such information.

The approach of the Kaskie court differs in a couple of respects from the earlier approaches adopted by the Fifth and Eighth Circuits. First, Kaskie held that a non-client could rely on the ethical obligation of confidentiality found in Canon 4 of the Code of Professional Responsibility as a basis for disqualification of a joint defense member's attorney. Second, although agreeing that an irrebuttable presumption of shared confidences was inappropriate, the Kaskie court placed the burden of proof on the law firm that was the subject of the disqualification motion in order to show that confidential information had not been exchanged. This aspect is different from the earlier cases that placed the burden of proof on the moving party to show that such information had been exchanged.

The next significant discussions regarding this issue occurred in 1995 when the American Bar Association Committee on Ethics and Professional Responsibility (ABA) issued Ethics Opinion 95-395. This Opinion involved a lawyer who had represented one member of a joint defense group and then, after changing law firms, was asked to represent a new client against a different member of the original joint defense group. The ABA Opinion first stated that the lawyer owed no ethical responsibility under Rule 1.6 of the Model Rules of Professional Conduct (Confidentiality of Information) to non-client members of the joint

88 Kaskie, 618 F. Supp. at 700.
89 Id.
90 Id. at 698.
91 Id. at 700.
94 Id.
defense group. The lawyer's duty under Rule 1.6 applied only to the lawyer's client. Therefore, disclosure and use of any relevant confidential information would be ethically permissible if the former client consented. The ABA Opinion noted, however, that if the former client contractually agreed with the other members of the joint defense group to preserve the confidentiality of the exchanged information, and the former client then consented to the lawyer's use of the information, although the lawyer would have satisfied his ethical obligation under Rule 1.6, the client could be held liable for breaching the confidentiality agreement. The ABA Opinion also rejected any duty of a lawyer to his former client's co-defendants under Rule 1.9 of the Model Rules of Professional Conduct because in such a situation no attorney-client relationship exists with the former client's co-defendants. The ABA Opinion continued, however, that although there was no duty of the lawyer to the former client's co-defendants under the Model Rules of Professional Conduct provides in relevant part that "[a] lawyer shall not reveal information relating to representation of a client unless the client consents after consultation." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1980) (amended 1995).

ABA Opinion, supra note 93.

Id.

Id. Rule 1.9 of the Model Rules of Professional Conduct provides:

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; unless the former client consents after consultation.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client.

Professional Conduct, the lawyer "almost surely has a fiduciary obligation to the other members that might lead to his disqualification under case law."  

In 1995 the Texas Court of Appeals decided *Rio Hondo Implement Co. v. Euresti.* George and Frances Nixon, d/b/a Nixon Farms, hired Bruce Hodge to represent them in a lawsuit against Porteous Fasteners and Rio Hondo Implement Co. (Rio Hondo) for damages resulting from the alleged improper repair of farm equipment. Anthony James represented Porteous Fasteners. Patricia Kelly represented Rio Hondo. Although Porteous Fasteners and Rio Hondo had cross actions against each other, Kelly and James met to discuss trial strategy in the Nixons' case against them. Allegedly, at this meeting, confidential documents were examined, and the attorneys jointly decided how to present evidence of their affirmative defenses and how to use their peremptory challenges. Before trial, Porteous Fasteners settled with the Nixons. After Porteous Fasteners settled, James (Porteous Fasteners's former lawyer) and Hodge (the Nixons' attorney) decided to become partners. Briefly after formation of the new partnership, Rio Hondo moved to disqualify Hodge and the law firm of Hodge & James as the attorneys for the Nixons. The motion was based upon Rio Hondo's sharing of confidential information with James when he represented Porteous Fasteners. James denied that confidential information had

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99 The ABA Opinion did not address whether the attorney would be in breach of a duty to his client if the attorney asked for consent to permit disclosure. ABA Opinion, *supra* note 93.

100 *903 S.W.2d 128* (Tex. App. 1995).

101 *Rio Hondo, 903 S.W.2d* at 129. Rio Hondo made the repair. *Id.* Porteous Fasteners was an upstream supplier of the allegedly defective lockwashers installed by Rio Hondo. *Id.*

102 *Id.*

103 *Id.*

104 *Id.* at 129.

105 *Id.*

106 *Rio Hondo, 903 S.W.2d* at 130.

107 *Id.*

108 *Id.*

109 *Id.*
been shared because the cross actions between Rio Hondo and Porteous Fasteners had been serious.\textsuperscript{110}

The Texas appeals court first held that the Texas Disciplinary Rules involving confidentiality\textsuperscript{111} or former client conflict of interest\textsuperscript{112} did not address the issue presented.\textsuperscript{113} The Texas court, however, relying on both \textit{Wilson P. Abraham Construction Corp. v. Armco Steel Corp.}\textsuperscript{114} and \textit{Fred Weber, Inc. v. Shell Oil Co.}\textsuperscript{115} held that, in order for Rio Hondo’s disqualification motion to be granted, Rio Hondo must prove that confidential information had been shared with James while James was Porteous Fasteners’s attorney, and that the present matter was substantially related to the previous matter during which confidential information had been exchanged.\textsuperscript{116} The Texas appeals court held that Rio Hondo had not met its burden of proving that confidential information had been exchanged.\textsuperscript{117}

Although the Texas appeals court cited \textit{Abraham Construction Corp.} and \textit{Fred Weber, Inc.}, the \textit{Rio Hondo} holding appears narrower than the holdings in those cases.\textsuperscript{118} The court required the party moving for disqualification to prove the exchange of confidential information and that the two matters were substantially related.\textsuperscript{119}

At about the same time the Texas appeals court decided \textit{Rio Hondo}, a federal district court in Texas decided \textit{Turner v. Firestone Tire & Rubber Co.}\textsuperscript{120} \textit{Turner} was a toxic tort case brought by past and present

\begin{thebibliography}{9}
\item \textsuperscript{110} \textit{Id.}
\item \textsuperscript{111} TEXAS DISCIPLINARY RULE OF PROFESSIONAL CONDUCT 1.05.
\item \textsuperscript{112} TEXAS DISCIPLINARY RULE OF PROFESSIONAL CONDUCT 1.09.
\item \textsuperscript{113} \textit{Rio Hondo}, 903 S.W.2d at 131. The court accepted the position that the Texas Rules of Evidence recognized a joint defense privilege as part of the attorney-client privilege, but rejected Rio Hondo’s claim that the evidentiary privilege essentially makes counsel for one defendant the counsel for all defendants with respect to confidential information obtained through a joint defense. \textit{Id.}
\item \textsuperscript{114} 559 F.2d 250 (5th Cir. 1977).
\item \textsuperscript{115} 566 F.2d 602 (8th Cir. 1977).
\item \textsuperscript{116} \textit{See Rio Hondo}, 903 S.W.2d at 132.
\item \textsuperscript{117} \textit{Id.}
\item \textsuperscript{118} \textit{Id.}
\item \textsuperscript{119} \textit{Id.}
\item \textsuperscript{120} 896 F. Supp. 651 (E.D. Tex. 1995).
\end{thebibliography}
employees of the Red River Army Depot alleging injuries resulting from exposure to toxic fumes, steam, smoke and other toxic substances released into the atmosphere from rubber products manufactured by various defendants. A few years earlier in Fleenor v. Goodyear Tire & Rubber Co., other employees at the same army depot brought a similar suit against rubber manufacturers Goodyear, Firestone, and Tocco, Inc. The defendants in Fleenor entered into a joint defense agreement in which their defense lawyers "agreed to pool resources, divide work assignments, and . . . discuss defense strategy." Defense counsel in this case met monthly at which time each participant would sign a confidentiality agreement verifying that none of them had made any settlement with the plaintiffs, and that any information exchanged was to be considered confidential. The law firm of Gooding and Dodson (G&D) represented Tocco in the Fleenor case.

Monty Murry was a member of G&D while G&D represented Tocco in Fleenor. Although Murry did some work for Tocco in the Fleenor case, he never attended any of the joint defense meetings or signed any of the confidentiality agreements, although he apparently did attend a meeting with attorneys for the other defendants regarding discovery. At this discovery meeting, the parties' counsel decided which attorney

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121 Turner, 896 F. Supp. at 652.
122 Id.
123 Id. The joint defense agreement provided:

Each of the undersigned are attendees at the Joint Defense Counsel meeting referred to above. Each of the undersigned represent that at the time of this meeting neither they nor their clients have made any type of settlement with the Plaintiffs or any other party or non-party to this matter and further represent that they have not made any type of . . . deal where they would share information disclosed in this meeting to anyone other than their clients and those persons who are necessarily involved in the defense of that client. It is understood that the communications which take place today are intended to be confidential and are subject to any and all privileges which are commonly referred to as the joint defense privileges, which privileges may be raised by any one or more of the undersigned and will be honored by all of the undersigned.

Turner, 896 F. Supp. at 652 n.3.
125 Id.
126 Id.
127 Id. at 652 n.2
would argue at an upcoming hearing. Before the Fleenor case was resolved, Murry left G&D to become a founding member of the law firm, Murry & Griffin (M&G). Shortly thereafter, the plaintiffs in Turner retained M&G. The original defendants in the Turner lawsuit included not only Goodyear and Firestone, but also Tocco. Shortly after the filing of the complaint, however, Tocco was dismissed with prejudice. Tocco subsequently agreed to waive any conflict it might have with M&G’s representation of the plaintiffs in Turner. Goodyear and Firestone, however, sought M&G’s disqualification, arguing that Murry’s representation in Turner violated the conflict of interest rules of the Texas Disciplinary Rules. Murry was also presumed to have gained confidential information from Firestone and Goodyear in the Fleenor case while he was a member of G&D.

The federal district court judge refused to disqualify Murry and ruled that Goodyear and Firestone were not clients of G&D because members of a joint defense group are not clients of another joint member’s attorney. Only Tocco’s consent was required for a valid waiver under the disciplinary rules. Additionally, an irrebuttable presumption of shared confidential communications was inappropriate because Firestone and Goodyear were not clients of G&D, and an irrebuttable presumption only applied when an attorney-client relationship developed. Support for this position was found in the Eighth Circuit’s opinion in Fred Weber, Inc., which the judge viewed as “virtually identical to the question facing this Court.” Finally, no evidence existed in support of the proposition

128 Id.
129 Turner, 896 F. Supp. at 652.
130 Id. at 653.
131 Id. at 652.
132 Id. at 653.
133 Id.
134 TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT 1.06 & 1.09.
135 Turner, 896 F. Supp. at 653.
136 Id. at 654.
137 Id.
138 Id.
139 Id.
that Murry actually received any confidential information from or about Firestone or Goodyear.\textsuperscript{140}

Two important items are worth noting. First, the judge clearly rejected the position that joint defense members are clients of the attorney for another joint defense member.\textsuperscript{141} Second, the judge was not troubled by the seemingly quid pro quo nature of the prejudicial dismissal of Tocco after Tocco's waiver of conflict.\textsuperscript{142}

\textit{Insurance Co. of North America v. Puerto Rico Marine Management, Inc.}\textsuperscript{143} presents a different variation of the same theme found in the cases previously discussed. Carl Coste sustained a work related injury and sued Puerto Rico Marine Management, Inc., Klinge Corp., and Copeland Corp.\textsuperscript{144} During the trial, Copeland was dismissed with prejudice by the plaintiff.\textsuperscript{145} Shortly thereafter, a mistrial occurred as a result of Coste falling while leaving the witness stand.\textsuperscript{146} Before a second trial could be held, Marine Management sought to retain Copeland's former lawyer for the upcoming trial.\textsuperscript{147} Insurance Co. of North America (INA), Coste's insurance carrier, objected to Marine Management's motion to substitute Copeland's former counsel because after Copeland had been dismissed as a defendant, Copeland's counsel and Copeland's expert witness met with INA's counsel.\textsuperscript{148} An allegation was put forth that during this meeting INA's counsel disclosed confidential information to Copeland's attorney.\textsuperscript{149} In response to Marine Management's defense that no confidential information had been exchanged, the plaintiff filed affidavits indicating that Copeland's counsel and expert witness met with INA's counsel to discuss the expert's potential testimony and problems with it.\textsuperscript{150}

\begin{itemize}
  \item \textsuperscript{140} \textit{Turner}, 896 F. Supp. at 654.
  \item \textsuperscript{141} \textit{Id.}
  \item \textsuperscript{142} \textit{Id.}
  \item \textsuperscript{143} 903 F. Supp. 1004 (E.D. La. 1995).
  \item \textsuperscript{144} \textit{Insurance Co. of N. Am.}, 903 F. Supp. at 1005.
  \item \textsuperscript{145} \textit{Id.}
  \item \textsuperscript{146} \textit{Id.}
  \item \textsuperscript{147} \textit{Id.}
  \item \textsuperscript{148} \textit{Id.}
  \item \textsuperscript{149} \textit{Insurance Co. of N. Am.}, 903 F. Supp. at 1005.
  \item \textsuperscript{150} \textit{Id.} at 1006.
\end{itemize}
The federal district judge first stated that Marine Management’s conclusory, general statements that no confidential information had been disclosed were insufficient in light of plaintiff’s detailed affidavit setting forth what had transpired at the meeting.\textsuperscript{151} The judge thus found that confidential information was disclosed. In response to Marine Management’s argument that Copeland’s former lawyer never signed an agreement with Marine Management not to assist the other defendants, the district judge ruled that such an agreement was “inconsequential” to the disqualification issue.\textsuperscript{152} Relying on \textit{Wilson P. Abraham Construction Corp. v. Armco Steel Corp.},\textsuperscript{153} the judge ruled that regardless of the absence of an agreement not to assist any other defendant, Copeland’s former attorney had a fiduciary duty to not use confidential information received from plaintiff.\textsuperscript{154} The court therefore refused to permit Marine Management to substitute Copeland’s former counsel as its own counsel.\textsuperscript{155}

The next relevant case, \textit{GTE North, Inc. v. Apache Products Co.},\textsuperscript{156} involved a cost recovery action under the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA)\textsuperscript{157} by GTE North, Inc. against five defendants, one of which was Dean Foods Co. GTE sought to disqualify Dean Foods’s counsel, Jon Faletto, and his firm of Howard & Howard (H&H).\textsuperscript{158}

In 1989, the United States Environmental Protection Agency (EPA) issued notification of Potentially Responsible Party (PRP) status to various companies for possible liability under CERCLA.\textsuperscript{159} Five of the companies notified of PRP status formed the Appleton Road Committee and executed a joint remedial cost sharing agreement that allocated each member’s share of the response cost.\textsuperscript{160} Members of this committee also

\textsuperscript{151} Id.
\textsuperscript{152} Id.
\textsuperscript{153} 559 F.2d 250, 253 (5th Cir. 1977).
\textsuperscript{154} \textit{Insurance Co. of N. Am.}, 903 F. Supp. at 1006.
\textsuperscript{155} Id. at 1007.
\textsuperscript{156} 914 F. Supp. 1575 (N.D. Ill. 1996).
\textsuperscript{157} 42 U.S.C.A. §§ 9601-9675 (West 1995).
\textsuperscript{158} \textit{GTE North}, 914 F. Supp. at 1577.
\textsuperscript{159} Id.
\textsuperscript{160} Id.
agreed to cooperate in investigating and identifying additional PRPs.\textsuperscript{161} Also part of the agreement was that all information would be held in strict confidence among the members, and that no member would take any civil action against any other member.\textsuperscript{162} Two of the members of the Appleton Road Committee were Chrysler Corporation and GTE.\textsuperscript{163} Some members of the Appleton Road Committee agreed to a second agreement concerning the joint investigation of additional PRPs.\textsuperscript{164} Chrysler and GTE signed this second joint agreement.\textsuperscript{165} During this period, Jon Faletto of the H&H law firm represented Chrysler.\textsuperscript{166}

As a result of the joint investigatory effort, information was gathered and disseminated regarding the legal merit of possible lawsuits against other PRPs, one of which was Dean Foods.\textsuperscript{167} At the conclusion of the joint investigation, Chrysler decided not to participate in any litigation for cost recovery against PRPs identified by the joint investigation.\textsuperscript{168} However, GTE and some other members of the joint agreement, on the other hand, decided to pursue cost recovery litigation against other PRPs, including Dean Foods.\textsuperscript{169} Dean Foods then hired Faletto, Chrysler’s former counsel, as its own counsel.\textsuperscript{170} Chrysler gave Faletto its permission for him and his firm to represent Dean Foods.\textsuperscript{171} GTE, however, filed a motion to disqualify Faletto and H&H claiming that Faletto owed GTE a fiduciary duty to maintain its confidences based on an implied attorney-client relationship.\textsuperscript{172} This implied attorney-client relationship arose from the “peculiar relationship between the members of the Cost Recovery Committee and the circumstances under which confidential

\textsuperscript{161} \textit{Id.}
\textsuperscript{162} \textit{Id.}
\textsuperscript{163} \textit{GTE North}, 914 F. Supp. at 1577.
\textsuperscript{164} \textit{Id.} at 1577-78.
\textsuperscript{165} \textit{Id.}
\textsuperscript{166} \textit{Id.} at 1578.
\textsuperscript{167} \textit{Id.}
\textsuperscript{168} \textit{GTE North}, 914 F. Supp. at 1578.
\textsuperscript{169} \textit{Id.}
\textsuperscript{170} \textit{Id.}
\textsuperscript{171} \textit{Id.}
\textsuperscript{172} \textit{Id.}
information was disclosed."\textsuperscript{173} GTE emphasized in support of its position the express confidentiality provisions in the two agreements, and the fact that confidential information and legal strategy had been freely exchanged between the companies and their attorneys.\textsuperscript{174} Faletto and H&H contended that, in order for an implied attorney-client relationship to exist, GTE must show that it supplied information to Faletto with the reasonable belief that Faletto was acting as GTE's attorney.\textsuperscript{175}

The federal district judge evaluated the disqualification issue under Rule 1.9 regarding former client-conflict of interest\textsuperscript{176} and Rule 1.10 regarding law firm disqualification,\textsuperscript{177} of the Rules of Professional Conduct for the Northern District of Illinois.\textsuperscript{178} The judge first discussed whether GTE satisfied the threshold requirement of being a former client for purposes of Rule 1.9.\textsuperscript{179} Because GTE obviously never shared an express attorney-client relationship with Faletto or H&H, the issue became "whether some sort of fiduciary relationship arose between them that would make GTE a 'former client'" of Faletto and H&H.\textsuperscript{180} Regarding this point, the judge looked to \textit{Westinghouse Electric Corp. v. Kerr-McGee Corp.}, decided by the Seventh Circuit.\textsuperscript{181} \textit{Westinghouse} involved a law firm's representation of a trade association and the receipt of confidential information from the trade association's members.\textsuperscript{182} The district judge cited \textit{Westinghouse} to support the proposition "that a 'fiduciary relationship [on a lawyer's part] may result because of the nature of the work performed and the circumstances under which [the] confidential information is divulged."\textsuperscript{183} In the GTE case, because

\begin{enumerate}
\item \textit{GTE North}, 914 F. Supp. at 1578.
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.} at 1578-79.
\item \textit{Id.}
\item \textit{GTE North}, 914 F. Supp. at 1578-79.
\item \textit{Id.} at 1579.
\item \textit{Id.}
\item \textit{Id. (citing Westinghouse Elec. Corp. v. Kerr-McGee Corp., 580 F.2d 1311 (7th Cir.), cert. denied, 439 U.S. 955 (1978)).}
\item \textit{Westinghouse}, 580 F.2d at 1313.
\item \textit{GTE North}, 914 F. Supp. at 1580 (quoting \textit{Westinghouse}, 580 F.2d at 1319).
\end{enumerate}
counsel for each joint defense member freely discussed investigation results, strategy, and the merits of cases against additional PRP's, including Dean Foods, a fiduciary relationship existed between GTE and Faletto.\textsuperscript{184} This duty occurred because information collected by GTE was jointly shared, discussed, and disseminated as part of a joint defense.\textsuperscript{185} Therefore, GTE had the right to seek Faletto's disqualification under Rule 1.9.

When the court applied Rule 1.9 to the situation where no direct or express attorney-client relationship existed, it believed that no presumption of shared confidences was appropriate.\textsuperscript{186} The court required a showing that the attorney subject to the disqualification motion was actually privy to confidential information.\textsuperscript{187} The undisputed facts as presented to the court proved that confidential information had been exchanged.\textsuperscript{188} Therefore, Faletto's representation of Dean Foods violated Rule 1.9, and this violation required his disqualification.\textsuperscript{189} In regard to the disqualification of Faletto's law firm, H&H, the court found an irrebuttable presumption that Faletto shared confidences with others in the law firm.\textsuperscript{190} Thus, Rule 1.10 required disqualification of the entire firm.\textsuperscript{191}

This district court opinion was important in two respects. First, the judge believed that in order to disqualify Faletto, it must decide whether GTE was a "former client" of Faletto.\textsuperscript{192} Second, the court applied an irrebuttable presumption of shared confidences to vicariously disqualify Faletto's entire law firm.\textsuperscript{193}

\textsuperscript{184} Id. at 1581.
\textsuperscript{185} Id.
\textsuperscript{186} Id. at 1580.
\textsuperscript{187} Id.
\textsuperscript{188} GTE North, 914 F. Supp. at 1581.
\textsuperscript{189} Id.
\textsuperscript{190} Id.
\textsuperscript{191} Id. This was so even though Illinois follows a minority approach and permits screening when the law firm is not switching sides. See Analytica, Inc. v. NPD Research, Inc., 708 F.2d 1263 (7th Cir. 1983).
\textsuperscript{192} GTE North, 914 F. Supp. at 1578-80.
\textsuperscript{193} Id. at 1581.
The next significant case involving a disqualification motion resulting from a joint defense agreement was *National Medical Enterprises Inc. v. Godbey*, a decision by the Texas Supreme Court.\(^{194}\) National Medical Enterprises (NME) and others had been targets of a criminal investigation and various related civil lawsuits involving allegations of mistreatment of patients and the defrauding of insurance companies in connection with the operation of more than seventy psychiatric hospitals across the United States.\(^{195}\) Employees and former employees of NME also faced possible personal liability for their conduct on behalf of NME.\(^{196}\) NME agreed to retain independent counsel to represent these employees.\(^{197}\) NME hired Ed Tomko, an attorney with the law firm of Doke & Riley (but who later joined the law firm of Baker & Botts), to represent one of its employees, Ronald Cronen.\(^{198}\) Cronen was a target of the grand jury investigation.\(^{199}\) Tomko advised Cronen on various matters relating to the criminal investigation and discovery in the civil actions.\(^{200}\) Although Cronen was never indicted by the grand jury, he was named as a defendant in over thirty civil cases.\(^{201}\) In every civil case, however, the claims against him were dismissed with no finding of liability.\(^{202}\)

Tomko was retained by NME to provide legal advice to James Wicoff, another NME employee who was also a target of a grand jury investigation and a defendant in numerous civil suits.\(^{203}\) Like Cronen, Wicoff was never indicted or held liable in any of the civil cases.\(^{204}\) Tomko’s joint representation of Cronen and Wicoff lasted about one year.\(^{205}\) During the first seven months of his joint representation, Tomko was at Doke &

\(^{194}\) 924 S.W.2d 123 (Tex. 1996).
\(^{195}\) *Godbey*, 924 S.W.2d at 124.
\(^{196}\) *Id.*
\(^{197}\) *Id.*
\(^{198}\) *Id.*
\(^{199}\) *Id.*
\(^{200}\) *Godbey*, 924 S.W.2d at 124.
\(^{201}\) *Id.*
\(^{202}\) *Id.*
\(^{203}\) *Id.* at 125.
\(^{204}\) *Id.*
\(^{205}\) *Godbey*, 924 S.W.2d at 125.
Riley and billed approximately $18,000. The last five months of the joint representation were while Tomko was with Baker & Botts; the billing for this period was only about $700. NME paid these bills. Tomko received confidential communications from Cronen and Wicoff, as well as from NME (which was separately represented by counsel). Tomko’s discussions with NME were subject to a written joint defense agreement which Tomko and Wicoff signed and Cronen and NME acknowledged applied to them. The agreement protected disclosures to any third party, but reserved the right of each member to take action against any other member. This agreement also provided that each client understood that only its own attorney represented it, and that an attorney owed a duty of loyalty to his own client only.

Shortly after the joint defense agreement was executed, Tomko and Baker & Botts withdrew from representing Cronen and Wicoff for reasons

206 Id.
207 Id.
208 Id. at 124.
209 Id. at 125.
210 Godbey, 924 S.W.2d at 125.
211 Id.
212 The agreement in relevant part read:

1. Unless expressly stated in writing to the contrary, any communications between or among any of the client members and/or the attorney members concerning the [investigations and litigation involving NME] are confidential and are protected from disclosure to any third party by the joint defense privilege, the attorney-client privilege and the work product doctrine.

3. None of the information obtained by any client member or attorney member pursuant to this agreement shall be disclosed to any third party without the consent of the attorney member who disclosed the information in the first instance.

6. Each client member understands and acknowledges ... that he or she is represented only by his or her own attorney in this matter; that while the attorneys representing the other members have a duty to preserve the confidences disclosed to them pursuant to this agreement, they will not be acting as his or her attorney in this matter; and that the attorney representing the other client members will owe a duty of loyalty to their own respective clients only. Each client member further understands and acknowledges that the attorney members representing other client members have the right, and may well have the obligation, to take actions against his or her own interest.

Godbey, 924 S.W.2d at 125.
unrelated to the issue in the present case. About seventeen months later, lawyers at Baker & Botts who had not been involved in the prior representation of Cronen and Wicoff sued NME on behalf of a large number of former patients at NME hospitals. The lawsuit was based on grounds similar to the earlier cases. Neither Cronen or Wicoff were named as defendants in these civil suits, although Cronen’s immediate predecessor as regional administrator for NME was named as a defendant. NME moved to disqualify Baker & Botts. The trial judge denied NME’s motion. Because the trial judge found none of these circumstances to have been established, NME’s motion was denied.

The Texas Supreme Court reversed and ordered the disqualification of Baker & Botts. The court first recognized that the present action was substantially related to the earlier representation involving Cronen and Wicoff. If Tomko had represented NME in the earlier action, then Baker & Botts would clearly be disqualified in this case. However, the court held that Tomko had not represented NME either by his representation of Cronen and Wicoff or by virtue of the joint defense agreement.

213 Godbey, 924 S.W.2d at 125.
214 Id. at 126.
215 Id.
216 Id.
217 Id. Cronen also filed his own motion seeking Baker & Botts' disqualification. Id.
218 Godbey, 924 S.W.2d at 126.
219 Id.
220 Id. Cronen's motion was also denied because although this case was substantially related to Cronen's case, the trial judge ruled that this case was not adverse to Cronen, and that it was not reasonably probable that Cronen's confidences would be misused. Id. at 126-27.
221 Id.
222 Id. at 129.
223 Godbey, 924 S.W.2d at 129.
The court did find, however, that the joint defense agreement created a duty for Tomko regarding non-clients.\textsuperscript{224} Under the joint defense agreement, Tomko had "strictly promised" not to disclose information to third parties.\textsuperscript{225} Pursuant to the joint defense agreement, Tomko admittedly had obtained confidential information from NME.\textsuperscript{226} Tomko thus owed a duty of confidentiality to NME.\textsuperscript{227} Citing \textit{Wilson P. Abraham Construction Corp. v. Armco Steel Corp.},\textsuperscript{228} the Texas Supreme Court noted that, although the Fifth Circuit described the relationship between the attorney and his client's co-counsel as "resembling an attorney-client relationship," that "quasi-relationship" was not the basis of its decision.\textsuperscript{229} Instead, the Fifth Circuit "based its disqualification analysis on a duty to preserve confidences implied in the circumstances of a joint defense."\textsuperscript{230} This case was somewhat easier to decide because Tomko had expressly agreed to a duty of confidentiality; no implication of any duty was required. The Texas Supreme Court also cited two decisions from the United States Court of Appeals for the Seventh Circuit—\textit{Westinghouse Electric Corp. v. Kerr-McGee Corp.}\textsuperscript{231} and \textit{Analytica, Inc. v. NPD Research, Inc.}\textsuperscript{232}—for the proposition that disqualification can be based on a duty to preserve confidences even when those confidences are not those of a former client. Because Tomko could not personally represent the new plaintiff group against NME without dishonoring his obligations under the earlier joint defense agreement, Tomko's disqualification was warranted.\textsuperscript{233}

Tomko, however, never intended to represent any of the new plaintiffs. Only lawyers at Baker & Botts who were not involved in the earlier representation were involved in the new case against NME.\textsuperscript{234} The issue

\begin{itemize}
\item \textsuperscript{224} \textit{Id.}
\item \textsuperscript{225} \textit{Id.}
\item \textsuperscript{226} \textit{Id.}
\item \textsuperscript{227} \textit{Id.}
\item \textsuperscript{228} 559 F.2d 250 (5th Cir. 1977); see text supra notes 18-65.
\item \textsuperscript{229} \textit{Godbey}, 924 S.W.2d at 130; see also \textit{Abraham Constr. Corp.}, 559 F.2d at 253.
\item \textsuperscript{230} \textit{Id.}
\item \textsuperscript{231} 580 F.2d 1311 (7th Cir.), \textit{cert. denied}, 439 U.S. 955 (1978).
\item \textsuperscript{232} 708 F.2d 1263 (7th Cir. 1983).
\item \textsuperscript{233} \textit{Godbey}, 924 S.W.2d at 131-32.
\item \textsuperscript{234} \textit{Id.} at 129.
\end{itemize}
thus became whether every lawyer at Baker & Botts must be disqualified.\textsuperscript{235} The court first noted that if NME had been an actual client of Tomko, an irrebuttable presumption of shared confidences between Tomko and all the lawyers at his firm would apply, thus vicariously disqualifying the entire firm.\textsuperscript{236} However, no attorney-client relationship existed between Tomko and NME. Based on the joint defense agreement, the court nevertheless believed that the same irrebuttable presumption should apply.\textsuperscript{237} This irrebuttable presumption was justified because an “attorney’s duty to preserve confidences shared under a joint defense agreement is no less because the person to whom they belong was never a client. The attorney’s promise places him in the role of a fiduciary, the same as toward a client.”\textsuperscript{238} NME’s motion to disqualify Baker & Botts was granted, although no evidence supported the disclosure of information that Tomko received from NME to anyone at the firm.\textsuperscript{239}

Two justices dissented on the issue of Baker & Botts’ disqualification and emphasized that Tomko had not disclosed any confidential information from NME to any attorney at Baker & Botts.\textsuperscript{240} Moreover, the joint defense agreement had expressly stated that Tomko owed no duty of loyalty to NME, and that Tomko had the right to take action adverse to NME.\textsuperscript{241} Therefore, adopting the irrebuttable presumption of shared confidences was inappropriate.\textsuperscript{242}

Two points are most noteworthy in this case. First, despite the express language of the joint defense agreement eschewing any duty of loyalty

\textsuperscript{235} \textit{Id.} at 131.
\textsuperscript{236} \textit{Id.}
\textsuperscript{237} \textit{Id.} at 132.
\textsuperscript{238} \textit{Godbey,} 924 S.W.2d at 132.
\textsuperscript{239} \textit{Id.} In regard to Cronen’s motion to disqualify Baker & Botts, the Texas Supreme Court disagreed with the trial judge’s conclusion that this case was not adverse to Cronen. \textit{Id.} at 133. The court said that adversity must be evaluated based on “the likelihood of the risk and the seriousness of the consequences.” \textit{Id.} at 132. Even though the likelihood of Cronen being harmed by the new lawsuit was small, the risk involved was serious. \textit{Id.} at 132-33. Moreover, the court believed that Cronen’s anxiety that he would be added as a defendant at some point in the new litigation was relevant to a finding that the new case was adverse to his interest. \textit{Id.} at 133.

\textsuperscript{240} \textit{Id.} at 135 (Baker, J., dissenting).
\textsuperscript{241} \textit{Id.} at 136.
\textsuperscript{242} \textit{Id.} at 137.
by an attorney for one member to another member of the agreement, the confidentiality provision of the joint defense agreement provided an adequate basis for Tomko's disqualification.243 Second, despite holding that no attorney-client relationship existed between Tomko and the joint defense members who filed the disqualification motion, an irrebuttable presumption of shared confidences was used to vicariously disqualify every lawyer at Tomko's current law firm.244

*International Trust Corp. v. Pirtle,* an unpublished opinion by the Texas Court of Appeals (and thus not intended to be cited as authority), involved a joint defense but no written joint defense agreement.245 Again, the issue was whether a non-client joint defense member could seek disqualification of a former co-defendant’s attorney.246 A limited partnership (77-2 Ltd.) was involved in this case and the general partner was a corporation, Amarillo Equity Investors, Inc. (AEI), controlled by Dean Lively.247 In 1994, Lively and AEI deeded land owned by 77-2 Ltd. to International Trust Corporation (ITC), also controlled by Lively.248 Shortly after ITC received the property from 77-2 Ltd., ITC conveyed it to Colonies Joint Venture (Colonies), a joint venture comprised of ITC and Anthony Saikowski.249 The limited partners of 77-2 Ltd. alleged that the sale from 77-2 Ltd. to ITC was below fair market value, and that it constituted a fraudulent conveyance and a breach of fiduciary duty owed to them as limited partners.250 The limited partners sued ITC, AEI, Colonies, Lively and Saikowski.251

On March 30, 1995, Saikowski, on his own behalf and on behalf of Colonies, retained the law firm of Garner, Lovell & Stern (GL&S).252 On April 20, 1995, Lively, who controlled ITC (the other joint venturer

243 *Godbey,* 924 S.W.2d at 132.
244 *Id.*
246 *Pirtle,* 1997 WL 20870, at *4.
247 *Id.* at *1.
248 *Id.*
249 *Id.*
250 *Id.*
251 *Pirtle,* 1997 WL 20870, at *1.
252 *Id.*
in Colonies), wrote to Saikowski reminding him that under the Colonies joint venture agreement, approval of both joint venturers was required before counsel could be retained, and that ITC was not consenting to the hiring of GL&S.253 On the same date, the law firm of Foster, Lewis, Langley, Gardner & Banack (Foster) sent a letter on behalf of ITC to GL&S reiterating ITC's objection to GL&S's representation of Colonies, and complaining that the answer filed by GL&S on behalf of Saikowski and Colonies "offered up ITC as a sacrificial lamb" in order to protect Saikowski.254 Shortly after sending this letter, however, Foster authorized GL&S to file an amended answer on behalf of Colonies—subject to prior approval by ITC's in-house attorney.255 In September, 1995, disputes arose between ITC and Saikowski over their joint venture agreement.256 In October 1995, GL&S wrote Lively, on behalf of Saikowski and Colonies, that ITC's status as a joint venturer was terminated.257 In February 1996, ITC made a formal demand for arbitration.258 GL&S filed a response and counterclaim on behalf of Saikowski and Colonies.259

One issue presented was whether GL&S should be disqualified from representing Colonies and Saikowski in the arbitration proceeding.260 ITC contended that disqualification was required based upon fiduciary duties owed to a non-client co-defendant who participated in the joint defense of the 77-2 Ltd. limited partners' case, and because of the appearance of impropriety if GL&S was not disqualified.261 In response to this motion, a contention was raised that no substantial relationship existed between the joint defense in the prior litigation and the subject matter of the arbitration and claims against Lively and AEI.262

253 Id. at *2.
254 Id.
255 Id.
256 Pirtle, 1997 WL 20870, at *3 (disputes involving, inter alia, responsibility for development costs, and Saikowski's performance as managing venturer).
257 Id.
258 Id.
259 Id.
260 Id.
262 Id.
The Texas Court of Appeals first ruled that the substantial relationship test was not the only test that governed the decision whether to disqualify an attorney. It next held that, though no formal attorney-client relationship existed between ITC and GL&S, because ITC and GL&S participated in a joint defense in the original 77-2 Ltd. lawsuit, GL&S had a duty to preserve any confidences exchanged as part of the joint defense. Even absent an attorney-client relationship and even absent a joint defense agreement, the court held that a fiduciary duty is owed to a non-client co-defendant who participated in a joint defense.

Citing Rio Hondo Implement Co. v. Euresti, the Pirtle court said that the relevant inquiry in deciding the disqualification motion before it was threefold: (1) was there a prior joint defense; (2) was confidential information shared; and (3) was the matter in which the confidential information was shared substantially related to the matter in which disqualification is sought. A joint defense existed in this case. Though ITC never gave its written consent to the hiring of GL&S on behalf of the joint venture—and even objected to GL&S's representation—GL&S was never discharged, and ITC consented to GL&S filing an amended answer and seeking a settlement on ITC's behalf. ITC's own attorney also conferred with GL&S about various issues in the defense of the case brought by the limited partners. In regard to the requirement that confidential information must have been disclosed by ITC to GL&S in order for the court to disqualify GL&S, the court stated that, "[w]hile our determination that there was a joint defense may replace the need to establish an attorney-client relationship, it does not obviate the necessity to show that confidential information was disclosed." ITC then argued that "a party seeking disqualification is not required to establish exactly what confidences were shared with the attorney whose disqualification

263 Id.
264 Id. at *10.
265 Id. at *11.
266 903 S.W.2d 128 (Tex. App. 1995).
267 Pirtle, 1997 WL 20870 at *11 (citing Rio Hondo, 903 S.W.2d at 132).
268 Id. at *11.
269 Id.
270 Id. at *12.
is sought." The court rejected this argument and found that ITC had not shown that it had disclosed confidential information to GL&S. Next, to satisfy the substantial relationship aspect of the disqualification analysis, the court stated that the party seeking disqualification "must prove that the facts of the previous representation are so related to the facts in the present litigation that a genuine threat exists that confidences revealed to the former counsel will be divulged to a present adversary." In this case, no substantial relationship occurred between the two matters; therefore, disqualification of GL&S was denied. Finally, the court rejected the contention that the appearance of impropriety was an "independent ground of disqualification," although the court said it "may be a factor to consider in a disqualification analysis." The court gave no hint of what it meant by this.

This case is noteworthy for a few reasons. Although the court could have easily concluded that an attorney-client relationship actually existed between ITC and GL&S in that ITC was a joint venturer of GL&S's client (the joint venture), the court instead emphasized the duty owed by an attorney to a non-client. Second, the court found a duty owed based on a joint defense—even absent a joint defense agreement. Third, the moving party had the burden of proving that confidential information had been disclosed. Fourth, the court seemed to require not only proof of the exchange of confidential information, but also that the prior matter that involved a joint defense was substantially related to the matter in which disqualification was sought. Finally, the court rejected appear

271 Id. at *11.
272 Pirtle, 1997 WL 20870, at *12.
273 Id. at *13.
274 Id.
275 Id.
276 Id. at *10.
277 Pirtle, 1997 WL 20870, at *11.
278 Id.
279 Id. at *12. The court's opinion is confusing here. At one point, the court noted that proof of substantial relationship replaces the need to prove exchange of confidential information "where the trial court is asked to disqualify an attorney because his current representation involves his former representation of a client on a substantially related matter". Id. The court continued this irrefutable presumption of shared confidences
The federal district court for New Jersey decided the most recent case relevant to this Article—Essex Chemical Corp. v. Hartford Accident & Indemnity Co. In 1988, Essex Chemical Corp. (Essex) was the target of a hostile takeover. Essex retained the law firm of Skadden, Arps, Slate, Meagher and Flom (Skadden) to defend it in the takeover attempt. Skadden arranged for a white knight, Dow Chemical Co., to acquire Essex, thus defeating the hostile takeover. Skadden represented Essex in the acquisition negotiations and subsequent litigation. In 1993, Essex brought suit based upon environmental claims arising from contamination at Essex properties, and one of the defendants was The Home Insurance Co., one of Essex's insurers. Home Insurance retained Skadden in this matter. In 1996, the defendants in Essex's environmental case executed a joint defense agreement to manage the litigation, including the coordination of discovery. Subsequent to this agreement, and during discovery, Essex filed a motion to disqualify Skadden from the next paragraph, never noting in this context that it had already held that ITC was never a client of GL&S. Therefore, this irrebuttable presumption was inapplicable. The court never directly stated that when the moving party never had an attorney-client relationship with the target of the disqualification motion that an irrebuttable presumption was not appropriate. When the court set forth its three part test, however, the confidential information requirement was joined to the substantial relationship requirement by an "and" not an "or." On the other hand, earlier in its opinion, the court disagreed with the position that substantial relationship is a "necessary element of proof on all disqualification theories except suing a current client."
representing Home Insurance and to disqualify the attorneys for the other defendants who were also members of the joint defense agreement with Home Insurance. \(^{289}\) Skadden immediately voluntarily withdrew its appearance on behalf of Home Insurance; however, the attorneys for the other defendants opposed Essex’s motion. \(^{290}\)

The disqualification motion was first ruled upon by a magistrate who, without holding a hearing, disqualified attorneys for all the defendants who were members of the joint defense agreement. \(^{291}\) The magistrate first found that “Skadden’s participation in the joint defense group created a risk that the confidential information acquired by Skadden during the former representation may be used to the detriment of Essex.” \(^{292}\) The magistrate then applied an irrebuttable presumption that Skadden had shared this confidential information with the other members of the Joint Defense Agreement. \(^{293}\) Defense counsels’ certifications that no confidential information had been shared were irrelevant. \(^{294}\) The magistrate further reasoned that “defendants’ participation in the Joint Defense Agreement, together with Skadden’s former representation of Essex, gave rise to an implied attorney-client relationship between Essex and all defense counsel.” \(^{295}\) Based upon this implied attorney-client relationship, another irrebuttable presumption of shared confidences applied to all defense counsel. \(^{296}\) The magistrate also found that disqualification of the attorneys for all the members of the joint defense agreement was appropriate under New Jersey’s Rule of Professional Conduct 1.9(b), which prohibits conduct that creates an “appearance of impropriety.” \(^{297}\)

A federal district court judge reviewed the disqualification motion and strongly disagreed with the magistrate. \(^{298}\) The judge noted that “[t]he
parties have not cited, and the Court’s research has not yielded, any
controlling or even persuasive authority directly on point." The federal
district judge then ruled that an irrebuttable presumption of shared
confidences among joint defense lawyers should not be applied. Only
if Skadden had actually disclosed confidential information to the other
joint defense members would disqualification of all defendants’ attorneys
be required. Because the magistrate did not hold a hearing, a remand
was necessary on the issue regarding whether actual disclosure had
occurred. Additionally, the district judge ruled that the magistrate erred
in implying an attorney-client relationship between Essex and counsel
for all the members of the joint defense group. In this case, an implied
attorney-client relationship was "contrary to law and unsupported by the
record." Because the record did not contain the joint defense agree­
ment, one could not refer to the factors relevant to an implied attor­
ney-client relationship, such as the "defendants’ and counsel’s intent,
[and] the extent and nature of counsels’ interaction." Nor did any case
support the proposition that a "collaborative counsel relationship renders
a participating attorney implied counsel for the former client of a
collaborating attorney."

III. Issues to Be Addressed by the Courts

This Article has set forth the analysis of cases that have attempted to
resolve the issues relevant to the disqualification of attorneys involved

299 Id. at 246.
300 Id. at 251.
301 Id. at 251-52.
302 Essex Chem., 993 F. Supp. at 252. A remand was also necessary on the appear­
ance of impropriety issue because the magistrate had not considered the relevant facts,
and had incorrectly relied upon a presumption of shared confidences in concluding that
an ordinary citizen would find an appearance of impropriety in defense counsels’ of
the other joint defense members continuing to represent Essex’s claim. Id. at 254.
303 Id. at 253.
304 Id.
305 Id.
306 Id.
in joint defense agreements. Unfortunately, the opinions are not always easily understood. However, one point is clear, no generally accepted analysis of this disqualification issue has occurred. The remainder of this Article attempts to develop a coherent approach based on the recurring issues that have been addressed in these past cases.

A threshold issue is whether an attorney for one member of the joint defense effort owes any duty to another member of the joint defense who has not shared an express attorney-client relationship. Courts have recognized some duty based either on an implied attorney-client relationship theory or upon a duty arising out of the joint defense. The better approach to this issue is to eschew an analysis that relies on creating an attorney-relationship in favor of recognizing that any duty owed by an attorney for one joint defense member to another joint defense member springs independently from the attorney’s participation in the joint defense. The reason for this conclusion is that the implied attorney-client relationship model is based on a misunderstanding of the relationship between members of a joint defense and their attorneys. One rationale for the implied attorney-client relationship approach is the analogy between joint defense members and multiple clients of one lawyer. However, this analogy is faulty. Joint defense defendants do not share the “unity of interest” that multiple clients of one lawyer share. Separate attorneys are often retained by joint defense members to “avoid the pitfalls of multiple representation.” Also, one should not analogize joint defense members to trade association members. Trade association members communicate directly to the trade association’s attorneys. Joint defense members usually do not communicate directly with attorneys for other joint defense members. Moreover, the degree of unity of interest among joint defense members is different than among trade association members. The “legal fate” of one joint defense member “has no

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307 See Rushing, supra note 2, at 1273; Fred Weber, Inc. v. Shell Oil Co., 566 F.2d 602 (8th Cir. 1977).
308 Bartel, supra note 4, at 876.
309 Forsgren, supra note 16, at 1219.
310 See generally Bartel, supra note 4, at 875-918.
311 Id. at 876-79.
necessary impact upon any other co-defendant," unlike the trade association situation.\textsuperscript{312} 

Unlike multiple clients and trade association members, joint defense members do not share a relationship of trust; rather the joint defense agreement is often required from a relationship of mistrust and lack of confidence. Moreover, the expectations of each member of the joint defense agreement differ from that of multiple clients or trade association members. Joint defense members, for example, fully expect that they may be cross-examined by attorneys representing other joint members.\textsuperscript{313} Importantly, joint defense members realistically expect loyalty only from their own lawyer, not from the attorneys of other joint members.\textsuperscript{314} Joint defense members therefore should not be considered the clients of other joint defense members' attorneys. In this regard, one commentator stated that those courts that have held that joint defense members do have an attorney-client relationship with other members' attorneys are "engaged more in hyperbole than in thoughtful analysis."\textsuperscript{315} Because the duty owed by an attorney in a joint defense situation is a duty based on the joint defense itself, the proper threshold issue, therefore, is not whether the record establishes that an attorney-client relationship existed by implication but whether a joint defense has been proven between the party seeking disqualification and the former client of the attorney who is the target of the disqualification motion.

Because the attorney's duty is defined based on participation in a joint defense, and not dependent on any attorney-client relationship, consent by the attorney's actual former client becomes irrelevant to a disqualification motion filed by a non-client, former, co-joint defense member. This position avoids the need to resolve another ethical issue—the propriety of a new client who is asked to forego suit against a former client of the new client's attorney (when the former client was part of an earlier joint defense agreement).

\textsuperscript{312} Id. at 878.

\textsuperscript{313} See generally Forsgren, supra note 16, at 1251 n.134.

\textsuperscript{314} See generally Bartel, supra note 4, at 878.

\textsuperscript{315} Id. at 901; see, e.g., Ageloff v. Noranda, Inc., 936 F. Supp. 72 (D. R.I. 1996) (ruling that an attorney-client relationship would not be implied because the dispute was between members of the joint defense agreement, but that an attorney-client relationship would be implied if a third party's rights were involved).
defense) as bartered to obtain the former client’s consent to the attorney’s new representation.\textsuperscript{316}

Once the relevant threshold issue is accepted to be whether a joint defense existed, the next issue is what needs to be proven to establish a joint defense that could form the basis of the disqualification motion. Often joint defense members draft written joint defense agreements setting forth the rights and obligations of the members and their attorneys.\textsuperscript{317} If these agreements include clauses that provide that all information shared among the members and their attorneys relating to the joint defense can be used only for purposes of the joint defense, and that no attorney can use any information obtained pursuant to the joint defense agreement on behalf of any client other than the joint defense member client, clearly a duty has been imposed upon the attorney, which will inure to the benefit of all joint defense members. In such a situation, an attorney could be properly disqualified in a subsequent case based on a motion filed by a joint defense member different than that attorney’s client.

More problematic is when no express joint defense agreement exists regarding confidentiality and subsequent use of joint defense information.\textsuperscript{318} This author suggests that it should be more difficult for a disqualification motion to be granted when the motion is filed by a joint defense member against the attorney for another defense member if no express joint defense agreement occurred.

The next issues to be resolved involve matters regarding burden of proof and presumption of shared confidences. When a former client is seeking disqualification of its attorney in a substantially related matter, no need arises for the former client to prove that confidential information was actually given to the attorney. Nor is the attorney, who is the target of the disqualification motion, allowed to defend by proving that confidential information was not disclosed. Regarding the former client, substantially related matter situation, there is an irrebuttable presumption


that confidential information was disclosed. Such an irrebuttable presumption should be rejected in the situation where a member of a joint defense is seeking disqualification of another member’s attorney in a subsequent matter. No attorney-client relationship exists between the party moving for disqualification and the target attorney. Nor does the attorney owe any duty of loyalty to this member of the former joint defense. The duty imposed by a joint defense arises solely out of the possession of confidential information. Moreover, because joint defense members are not as forthcoming with information for other joint defense members as they would be with their own attorneys, an irrebuttable presumption does not appear to be appropriate.

The next issue thus becomes whether a rebuttable presumption of disclosed confidential information is appropriate. If this is true, the party moving for disqualification would meet its burden by proving merely that a joint defense (and perhaps a joint defense agreement) existed. To avoid disqualification, the attorney subject to the disqualification motion would then have the burden of proving that he had not received confidential information from the moving party. An alternate approach would be to put the burden on the moving party not only to prove the existence of a joint defense or joint defense agreement, but also to prove that it had given confidential information to the attorney it is now seeking to disqualify. Under this alternate approach, if the moving party met these two burdens, the attorney, to avoid disqualification, would then need to convince the fact finder that he had not received confidential information.\textsuperscript{319}

In deciding whether the “rebuttable presumption” approach or the “burden on the moving party” approach is more desirable, this author submits it is relevant whether an express joint defense agreement with a confidentiality provision exists. If an express agreement exists, the rebuttable presumption approach should be used. On the other hand, if no express joint defense agreement exists (only a joint defense among joint defendants), the burden should be placed on the moving party to prove that confidential information was given to the attorney whose disqualification is now being sought.

The next issue in deciding whether the disqualification motion should be granted is whether the confidential information that was disclosed as

\textsuperscript{319} Under either alternative, in-camera presentation would be appropriate.
part of the joint defense or joint defense agreement should be substantially related to the subsequent action in which disqualification is sought. This author submits that the answer to this question should be yes. The accepted law today is that an attorney will only be disqualified in a subsequent action based on a motion by an actual former client if the subsequent action is substantially related to the attorney’s prior representation of that client. Considering that joint defense members do not have an attorney-client relationship with other joint defense members, the requisite proof for a disqualification motion brought by a non-client joint defense member should be at least as burdensome as required when a former client files such a motion. Moreover, a substantial relationship requirement avoids the situation where an attorney is locked into being either a plaintiff’s or defendant’s lawyer. For example, assume that Attorney A represented Defendant A in an asbestos personal injury matter brought by Plaintiff X against ten asbestos manufacturers, and that a joint defense agreement was entered into among all the defendants. Under this author’s proposal, in subsequent years, Attorney A would be disqualified from representing Plaintiff Y in an action against any member of earlier joint defense agreement only if the cases were substantially related. Absent a substantial relationship requirement, Attorney A, having defended one asbestos defendant, which was part of a joint defense agreement, would be precluded forever from representing any plaintiff against any asbestos defendant (assuming some confidential information had been disclosed as part of the joint defense).

Assuming that the former joint defense member’s motion to disqualify the attorney of its former joint defense member is granted, the next issue involves the disqualification of other members of the disqualified attorney’s law firm. The current majority position is that when an individual attorney is disqualified based on a motion by a current or former client, an irrebuttable presumption exists that the attorney whose earlier representation led to his individual disqualification shared confidential information with the other attorneys in his law firm, and thus every attorney at the law firm is disqualified. A minority position creates a rebuttable presumption of shared confidences, and thus permits the other law firm members to avoid disqualification if the firm members can prove that confidential information was not shared. This author’s conclusion is that in the joint defense situation where a motion to disqualify is being
filed by a non-client, an irrebuttable presumption of shared confidences with other members of the law firm is not appropriate. The closer issue is whether even a rebuttable presumption is appropriate that would require the law firm to prove adequate screening mechanisms and that confidential information had not been disclosed from the tainted lawyer to others, or whether the burden should be placed on the moving party to prove that confidential information had been disclosed. Because the duty owed to a non-client member of a joint defense should not be equated to the duty owed to a former client, the better approach would be to require the non-client moving party who seeks to disqualify all members of a law firm to have the burden of establishing that confidential information had been disclosed to members of the law firm. A similar analysis should be applied when the motion seeks disqualification of counsel for all members of a subsequent joint defense such as the situation in Essex Chemical Corp. v. Hartford Accident & Indemnity Co.\(^{320}\)

As a final point, the appearance of impropriety standard should not be used to evaluate disqualification motions filed by non-client former joint defense members. Appearance of impropriety is too vague to provide a meaningful standard. To the extent it has been defined with reference to the public’s perspective of the impropriety of the situation,\(^{321}\) it overlooks the complexities involved in defining a lawyer’s duty to a non-client, and the obligations among joint defense members and their attorneys.

IV. Conclusion

In recent years, courts have struggled when ruling on motions seeking to disqualify an attorney that are filed not by that attorney’s former client, but by the attorney’s former client’s former joint defense members. The courts have not accepted a single approach to decide this issue. This author, after reviewing and analyzing the cases on this issue, proposes an analysis that incorporates the issues and concerns discussed by the


\(^{321}\) See, e.g., Fred Weber, Inc. v. Shell Oil Co., 566 F. 2d 602, 609 (8th Cir. 1977); Green, supra note 281, at 315.
cases. Hopefully, the analysis will simplify the resolution of the issue in future cases, and will help litigants and attorneys better evaluate the benefits and risks of involvement in joint defenses.