DISQUALIFICATION OF COUNSEL IN CRIMINAL CASES ON THE
GROUNDGS OF CONFLICT OF INTEREST

EDWARD L. WILKINSON
Tarrant County District Attorney’s Office

State Bar of Texas
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EDWARD L. WILKINSON

LEGAL EXPERIENCE:

Employment:
- TARRANT COUNTY CRIMINAL DISTRICT ATTORNEY 1990-present  Fort Worth, Texas
- Assistant Chief, Appellate Division 1996-present
- Chief of Post-Conviction Writs 1994-1996

SHANNON, GRACEY, RATLIFF & MILLER 1988-1990  Fort Worth, Texas
Associate Attorney

Publications:

CLE Presentations:
- State Bar of Texas, National College of District Attorneys, American Bar Association, Albany Law School, St. Mary’s University School of Law, University of Texas School of Law, The Center for American and International Law, Texas District and County Attorney’s Association, Texas Criminal Defense Lawyers Association, Texas Center for the Judiciary, Tarrant County Bar Association, Denton County Bar Association, Tarrant County Criminal Defense Lawyer’s Association, Tarrant County Hispanic Bar Association, Tarrant County District Attorney’s Office, Dallas County District Attorney’s Office, Denton County District Attorney’s Office, Grayson County District Attorney’s Office, Texas Department of Public Safety

Honors and Awards:
Board Certified, Criminal Law, Texas Board of Legal Specialization 1994-1995 Award for Outstanding Appellate Advocacy in Capital Cases, Association of Government Attorneys in Capital Litigation

Member:
- Course Director, State Bar of Texas Advanced Criminal Law Course 2010
- National College of District Attorneys
- Ad Hoc Committee to Revise the NDAA Prosecution Standards
- Texas District and County Attorneys Association
- Discovery Working Group 2006
- Editorial Board, 1997-2005
- Habeas Corpus Committee, 1996-98
- Tarrant County Bar Association
- Appellate Section Chair – 1997-98
- State Bar Grievance Committee Local Panel (District 07A), 2002-2007
- College of the State Bar of Texas

EDUCATION:
- The UNIVERSITY OF NORTH CAROLINA at CHAPEL HILL Chapel Hill, North Carolina, M.A., English Literature, 1983
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DISQUALIFICATION OF COUNSEL IN CRIMINAL CASES ON THE GROUNDS OF CONFLICT OF INTEREST

Both prosecutors and defense counsel may face conflicts of interest arising from competing duties of loyalty to a client, former client, a third party, or their own interest. This article will examine the standards used to determine whether counsel is disqualified from a cause based upon a “representational” conflict of interest.

SECTION ONE: DISTRICT ATTORNEYS

A district attorney has a constitutional and statutory obligation to represent the State in all criminal cases. An exception to this duty arises when a prosecutor faces a potential conflict of interest between his duty to the State and his duties toward another individual involved in the case. Depending on the degree of conflict, a prosecutor may be disqualified from representing the State in a case. However, because the standard for disqualification is very high, more often a prosecutor may not be disqualified under law, but may wish to withdraw voluntarily because of a potential violation of the rules of ethics or the appearance of impropriety. This section will examine the standards for disqualification and recusal of a prosecutor in a case.

I. THE STANDARDS FOR DISQUALIFICATION AND RECUSAL

The difference between “disqualification” and “recusal,” at least for the purposes of this analysis, is simple. A prosecutor is “disqualified” from a case if he is barred by law from conducting the prosecution and an attorney pro tem must be appointed by the district court to serve in his place. In contrast, a prosecutor is “recused” when he voluntarily withdraws from the case, the court approves of his recusal – thus deeming him “disqualified” and an attorney pro tem is appointed to prosecute the case. A prosecutor may voluntarily recuse himself, but that responsibility lies with him; a trial court has no authority to force a recusal.

In civil courts, the terms “disqualified” and “recused” are more precise terms of art. A judge is “disqualified” in a civil case if he is prohibited from presiding under the Texas Constitution or the Government Code. See In re Union Pac. Resources Co., 969 S.W.2d 427, 428 (Tex. 1998); In re Chavez, 130 S.W.3d 107, 112 (Tex. App. – El Paso 2003, orig. proceeding). A judge is “recused” if he is barred from presiding over a case by the Rules of Civil Procedure. See In re Union Pacific, 969 S.W.2d at 428; In re Chavez, 130 S.W.3d at 112; see also TEX. R. CIV. P. 18a, 18b; TEX. R. APP. P. 16.

A “district attorney pro tem” is “appointed by the district court” after a district attorney has recused himself from a case or is absent, disqualified, or “otherwise unable to perform the duties of his office.” See TEX. CODE CRIM. PROC. ANN. art. 2.07(a) & (b-1)(Vernon 2005); see also Coleman, 246 S.W.3d at 81; In re Goodman, 210 S.W.3d 805, 808 (Tex. App. – Texarkana 2007, orig. proceeding), mand. granted, State ex rel. Young v. Sixth Jud. Dist. Court, 236 S.W.3d 207 (Tex. Crim. App. 2007); Marbut v. State, 76 S.W.3d 742, 748 (Tex. App. – Waco 2002, pet. ref’d).

A district attorney pro tem is “appointed by the district court” after a district attorney has recused himself from a case or is absent, disqualified, or “otherwise unable to perform the duties of his office.” See TEX. CODE CRIM. PROC. ANN. art. 2.07(a) & (b-1)(Vernon 2005); see also Coleman, 246 S.W.3d at 81-82; Marbut, 76 S.W.3d at 748; Mai v. State, 189 S.W.3d 316, 319 (Tex. App. – Fort Worth 2006, pet. ref’d). After taking the oath of office, see TEX. CODE CRIM. PROC. 2.07(c)(Vernon 2005)(attorney pro tem must file oath with clerk); Rogers v. State, 956 S.W.2d 624, 627 (Tex. App. – Texarkana 1997, pet. ref’d)(delay in filing oath with clerk a “mere irregularity” that did not deprive attorney pro tem of authority to act), an attorney “pro tem” assumes the duties of the elected district attorney and “in effect replaces the latter in performing germane functions of office for purposes contemplated by the appointment.” State v. Rosenbaum, 852 S.W.2d 525, 529 (Tex. Crim. App. 1993)(Clinton, J., concurring); see also Coleman, 246 S.W.3d at 82; In re Guerra, 235 S.W.3d 392, 409 (Tex. App. – Corpus Christi 2007, orig. proceeding); Marbut, 76 S.W.3d at 748; Stephens v. State, 978 S.W.2d 728, 731 (Tex. App. – Austin 1998, pet. ref’d). The decision whom to appoint as an attorney pro tem lies within the discretion of the trial court,
A. The standard for disqualification

A court may not disqualify the district attorney or his staff on the basis of a conflict of interest unless the conflict rises to the level of a due process violation.11 In State ex rel. Hill v. Pirtle, for example, the state attorney general filed a civil lawsuit against a nursing home and its directors.12 Shortly thereafter, the same defendants were indicted on criminal charges arising from the same misconduct as alleged in the civil suit.13 The Potter County District Attorney, who was to prosecute the indictments, deputed two assistants from the assistants from other cases which have held that the district attorney need not be absent, disqualified, recused, or otherwise unable to perform his duties, in order for him to appoint a special prosecutor, and the court’s approval for the appointment is unnecessary. See Pirtle, 887 S.W.2d at 926-27; Delapaz, 228 S.W.3d at 198; Marbut, 76 S.W.3d at 748; Mai, 189 S.W.3d at 319; Stephens, 978 S.W.2d at 731. A special prosecutor is at all times under the control and direction of the district attorney who appointed him, and serves at the district attorney’s pleasure. See Pirtle, 887 S.W.2d at 927; Delapaz, 228 S.W.3d at 197.

In contrast, a “special prosecutor” is an attorney “permitted by the elected district attorney to participate in a particular case to the extent allowed by the prosecuting attorney, without being required to take the constitutional oath of office.” Rosenbaum, 852 S.W.2d at 529 (Clinton, J., concurring); see also Coleman, 246 S.W.3d at 82 n.19 (explaining the similarities and differences between attorney pro temp and special prosecutor); see also In re Guerra, 235 S.W.3d at 409; Delapaz v. State, 228 S.W.3d 183, 195-96 (Tex. App. – Dallas 2007, pet. ref’d); Marbut, 76 S.W.3d at 748; Mai, 189 S.W.3d at 319; Stephens, 978 S.W.2d at 731. The district attorney need not be absent, disqualified, recused, or otherwise unable to perform his duties, in order for him to appoint a special prosecutor, and the court’s approval for the appointment is unnecessary. See Pirtle, 887 S.W.2d at 926-27; Delapaz, 228 S.W.3d at 198; Marbut, 76 S.W.3d at 748; Mai, 189 S.W.3d at 319; Stephens, 978 S.W.2d at 731. A special prosecutor is at all times under the control and direction of the district attorney who appointed him, and serves at the district attorney’s pleasure. See Pirtle, 887 S.W.2d at 927; Delapaz, 228 S.W.3d at 197.

“the only statutory limitation being that the court must appoint a “competent attorney.” Shea v. State, 167 S.W.3d 98, 101 (Tex. App. – Waco 2005, pet. ref’d); see also In re Guerra, 235 S.W.3d at 425. A “competent attorney” is a “member in good standing” in the State Bar.” Shea, 167 S.W.3d at 102; see also In re Guerra, 235 S.W.3d at 426.

Since the defendants had never claimed, much less proved, a due process violation, the court held that the assistants had been improperly disqualified.20

The plurality opinion in Pirtle that a trial court may disqualify a district attorney only if a conflict of interest rises to the level of a due process violation is consistent with other cases which have held that the “mere” violation of ethical rules will not warrant reversal of a defendant’s conviction unless the ethical lapse also violated due process.21 Nevertheless, a number of courts after Pirtle, including the Court of Criminal Appeals itself, subsequently called the plurality holding in Pirtle into question, pointing to the plurality holding in State ex rel. Eidson v. Edwards that “the responsibility for acknowledging a need for

attorney general from the attorney general’s Medicaid fraud unit as assistant district attorneys in unpaid positions with the district attorney’s office.14 The assistant attorneys general were then assigned to the criminal action against the nursing homes, though other permanent district attorney staff members were also involved to the case and the district attorney retained “supervising authority” over the prosecution.15 The defendants moved to disqualify the assistants from the case on “a variety” of legal theories.16 The trial court granted the defendants’ motion and prohibited the assistants attorney general from participating in the case.17 The Potter County District Attorney sought to mandamus the trial court.18

The Court of Criminal Appeals held that the district attorney was entitled to the relief he sought. A trial court, it noted, “may not disqualify a district attorney or his staff on the basis of a conflict of interest that does not rise to the level of a due process violation.”19 Since the defendants had never claimed, much less proved, a due process violation, the court held that the assistants had been improperly disqualified.20

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12 See Pirtle, 887 S.W.2d at 921.

13 See id.

14 See id. at 923-24.

15 See id.

16 Id. at 923.

17 See id. at 924-25.

18 See id. at 925.

19 Id. at 927.

20 See id. at 927-28.


22 793 S.W.2d 1, 4 (Tex. Crim. App. 1990)(opinion on reh’g).
an attorney pro tem lies with the district attorney, and the trial court may not impose it” in support.\(^{23}\)

The Court of Criminal Appeals recently resolved the issue in \textit{Landers v. State}. In rejecting a defendant’s claim that prosecution by the attorney who had defended her in an earlier DWI case appeared unfair, the court held: “A district attorney may be disqualified only for a violation of the defendant’s due process rights, not for violations of the disciplinary rules of professional conduct alone.”\(^{24}\)

Disqualification of a district attorney extends to his staff; that is, where the district attorney has been disqualified, members of his staff must be disqualified as well.\(^{25}\) “If the District Attorney [is] disqualified, his assistant, who was appointed by him and who serves at his will and pleasure, would also be disqualified.”\(^{26}\)

Once a prosecutor is disqualified from a case, the “judge of the court . . . may appoint any competent attorney to perform the duties of office during the . . . disqualification of the attorney for the state.”\(^{27}\) The attorney thus appointed, an attorney pro tem, takes the place of the disqualified district attorney and assumes all the district attorney’s powers and duties in the case.\(^{28}\) He is not subject to the direction of the disqualified attorney as a subordinate, “but, for that case, he is the district attorney.”\(^{29}\) As such, he is subject to the rules of disqualification in the same manner as district attorneys.\(^{30}\)

The appointment of an attorney pro tem lasts “until the purposes contemplated by that appointment are fulfilled.”\(^{31}\) The duration of the appointment normally depends upon the terms of the appointment order; it is not “inexorably bound” by the duration of the district attorney’s disqualification.\(^{32}\) Thus, for example, a trial judge is not required to modify an order appointing an attorney pro tem after the disqualified district attorney has left office and been replaced by an individual with no conflict of interest, provided that the new district attorney does not seek to have the appointment withdrawn.\(^{33}\)

\textbf{B. The standard for recusal}

By statute, a prosecuting attorney who is not disqualified in a case may nevertheless withdraw from the prosecution “for good cause and upon approval by the court.”\(^{34}\) A prosecutor who has recused himself is “considered disqualified” from the case, and the trial

\(^{23}\) See \textit{In re Young v. Sixth Jud. Dist. Court of Appeals}, 236 S.W.3d 207, 213 (Tex. Crim. App. 2007)(rejecting mandamus on the grounds that disqualification on the basis of a violation of due process “is [not] of such indubitable provenance that the trial court . . . had a ministerial duty to apply it”); \textit{Marbut}, 76 S.W.3d 742, 748 (Tex. Pp. – Waco 2002, pet. ref’d); see also \textit{Fluellen v.State}, 104 S.W.3d 152, 161 (Tex. App. – Texarkana 2003, no pet.)(acknowledging Pirtle, but concluding that “if there is a conflict of interests on the part of the district attorney or his assistants . . . the responsibility of recusal lies with them – not the trial court”); see also \textit{State ex rel Guerra v. Robles}, No. AP-75,059 (Tex. Crim. App. December 15, 2004)(not designated for publication)(“A trial court judge is without legal authority to remove a district attorney and his entire staff from a case, and any order attempting to do so is void . . . If there is a conflict of interests on the part of the district attorney or his staff, the responsibility to recuse themselves is theirs and not that of the trial court judge”); see also \textit{Canady v. State}, 100 S.W.3d 28, 31 (Tex. App. – Waco 2003, no pet.) (“The law in this area is less than settled”); \textit{In re Reed}, 137 S.W.3d 676, 680 (Tex. App. – San Antonio 2004, orig. proceeding)(questioning precedential weight of Pirtle but deciding that no conflict of interest existed); but see \textit{Gonzalez v. State}, 115 S.W.3d 278, 286 (Tex. App. – Corpus Christi 2004, pet. ref’d) (“Only when a conflict of interest rises to the level of a due process violation can the trial court disqualify a district attorney or his staff”).

\(^{24}\) See \textit{Landers v. State}, 256 S.W.3d 295, 310 (Tex. Crim. App. 2008); see also \textit{Ex parte Reposo}, No. AP-75,965, slip op. at 9 n.28, 2009 WL3478455, at *8 n.28 (Tex. Crim. App. October 28, 2009)(“When an alleged conflict of interest is at issue, a district attorney or his or her staff may not be disqualified unless an actual conflict of interest exists and that conflict rises to the level of a due process violation”).


\(^{26}\) \textit{May}, 270 S.W.2d at 684.

\(^{27}\) TEX. CODE CRIM. PROC. ANN. art. 2.07(a)(Vernon 2005).


\(^{29}\) \textit{Rosenbaum}, 852 S.W.2d at 528 (emphasis in original).


\(^{32}\) Id.

\(^{33}\) See id.; see also \textit{State ex rel Eidson v. Edwards}, 793 S.W.2d 1, 5-7 (Tex. Crim. App. 1990)(recusal is a matter within discretion of district attorney).

\(^{34}\) TEX. CODE CRIM. PROC. ANN. art. 2.07(b-1)(Vernon 2005).
court must thereafter appoint an attorney *pro tem*. The standard for “good cause” has not been defined; clearly, however, it is something less than the standard of actual harm required to disqualify a prosecutor. Prosecutors have elected to recuse themselves because they might be called upon to testify, because the defendant had filed complaints against them with state investigative agencies, because members of their staff might be called upon to testify, and because they had initially prosecuted a case in which the defendant had been a State’s witness and may have perjured himself in the prior proceeding.

II. DISQUALIFICATION ON THE GROUNDS OF CONFLICT OF INTEREST WITH A FORMER CLIENT

A. The district attorney and former clients

1. Former client in the same case

Both under statute and case law, a court can and should disqualify the district attorney from representing the State in a case in which the district attorney once represented the defendant in the matter to be tried. As the Court of Criminal Appeals has observed, the reasoning underlying *per se* disqualification under such circumstances is simple:

> When a district attorney prosecutes someone whom he previously represented in the same case, the conflict of interest is obvious and the integrity of the prosecutor’s office suffers correspondingly. Moreover, there exists the very real danger that the district attorney would be prosecuting the defendant on the basis of facts acquired by him during the existence of his former professional relationship with the defendant. Use of such confidential knowledge would be a violation of the attorney-client relationship and would be clearly prejudicial to the defendant.

Since the dangers from the conflict are “manifest and severe,” no specific prejudice need be shown by the defendant in order to disqualify a district attorney who has formerly represented him in the same cause.

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35 Id.; see also Coleman v. State, 246 S.W.3d at 81; Rosenbaum, 852 S.W.2d at 527; Marbut, 76 S.W.3d at 748.

36 Compare House v. State, 947 S.W.2d at 253; Brown v. State, 921 S.W.2d at 232 with Rosenbaum, 852 S.W.2d at 525-26.

37 See Rosenbaum, 852 S.W.2d at 525.


40 See Coleman, 246 S.W.3d at 80.

41 See TEX. CODE CRIM. PROC. ANN. art. 2.01 (Vernon Supp. 1999) (“Each district attorney shall represent the State in all criminal cases . . . except in cases where he has been, before his election, employed adversely”); Landers v. State, 256 S.W.3d 295, 304 (Tex. Crim. App. 2008) (“The Legislature has decreed that this conflict of interest is both obvious and actual, and we have so held”); *Ex parte Morgan*, 616 S.W.2d 625, 626 (Tex. Crim. App. 1981) (district attorney who had represented defendant on original conviction disqualified from representing the State in probation revocation); *Ex parte Spain*, 589 S.W.2d 132, 134 (Tex. Crim. App. 1979) (district attorney who originally represented defendant on plea of guilty disqualified from representing State upon probation revocation); *Garrett v. State*, 94 Tex. Cr. R. 556, 252 S.W. 527, 528-29 (1923) (district attorney who represented defendant before indictment was handed down, but who had nevertheless discussed the case with the defendant, disqualified); *In re Reed*, 137 S.W.3d 676, 679 (Tex. App. – San Antonio 2004, no pet.) (district attorney’s representation of former justice of the peace on civil matters and her office’s advice on appealing a suspension order did not create conflict of interest); *Canady v. State*, 100 S.W.3d 28, 31 (Tex. App. – Waco 2003, no pet) (defendant failed to prove a conflict of interest where he did not establish that district attorney gained any knowledge about the case from his prior representation of defendant on a separate criminal law matter).

42 *Ex parte Spain*, 589 S.W.2d at 134 (emphasis in original); see also *Smith v. Whatcott*, 757 F.2d 1098, 1100 (10th Cir. 1985) (“Once a substantial relationship has been found, a presumption arises that a client has indeed revealed facts to the attorney that require his disqualification”).

43 *Ex parte Spain*, 589 S.W.2d at 134; see also *Landers*, 256 S.W.3d at 304 (“For a prosecutor to ‘switch sides’ in the same criminal case is an actual conflict of interest and constitutes a due process violation, even without a specific showing of prejudice”); *Garrett*, 252 S.W. at 528 (district attorney who did not even remember having represented defendant nevertheless disqualified from prosecuting the case); *Wilkins v. Bowser*, 933 F.Supp. 1496, 1523 (W.D. Mo. 1996), aff’d, 145 F.3d 1006 (8th Cir. 1998), cert. denied, 525 U.S. 1094 (1999) (attorney-client relationship raises an “irrefutable presumption” that confidences were disclosed, so that defendant need only show that a “substantial relationship” exists between present prosecution and former representation and that prosecutor will be called upon to use confidential information gained through prior relationship).
prosecuting a particular case, his assistants will also be disqualified.\textsuperscript{44}

This hard and fast rule of disqualification has its limits, of course. An attorney who was appointed to represent the defendant, but who withdrew without having talked to the defendant or investigated the case in any way, is not subject to disqualification if he later prosecutes the same case.\textsuperscript{45} Similarly, an imputed disqualification will not carry over to a subordinate who may later work for a disqualified assistant.\textsuperscript{46}

Despite the seemingly mandatory language of Article 2.01, at least one court has concluded that a defendant may waive a prosecutor’s actual conflict of interest. In \textit{Simons v. State}, the attorney who had represented the defendant when he entered into a plea agreement under which he was sentenced to probation later served as prosecutor in a motion to revoke his probation.\textsuperscript{47} When the prosecutor raised the conflict of interest issue, the defendant assured the court that he was “comfortable” with the proceeding.\textsuperscript{48} The defendant was again granted probation, which was later revoked.\textsuperscript{49} On appeal from this later revocation, the defendant argued that the prosecutor’s failure to be disqualified violated Article 2.01 of the Code of Criminal Procedure.\textsuperscript{50} The Amarillo Court of Appeals rejected the complaint, holding that the prohibition against the prosecution of a defendant by his former attorney is not absolute and thus had been affirmatively waived by the defendant at the revocation hearing.\textsuperscript{51}

The opinion in \textit{Simons}, however, focuses on only one side of the conflicts equation: the harm to the defendant. While there is a danger that the prosecutor may use knowledge gained while representing a defendant to the defendant’s disadvantage, or he may be harsher toward the defendant to show that no favoritism exists, it is equally possible that given their prior relationship, a prosecutor will be more lenient toward a defendant due to their prior relationship or because, as in \textit{Simmons}, the attorney has already staked a position in the case. A defendant cannot waive the latter conflict, and it is difficult to believe that a district attorney can accurately determine whether he will be influenced by the prior relationship. The legislature has thus made the decision for him in the form of Article 2.01.

2. \textit{Client in a previous case}

If the State’s attorney represented the defendant upon a different matter than the one to be tried, he is not \textit{per se} disqualified from prosecuting the case.\textsuperscript{52} In

\textsuperscript{44} \textit{See State ex rel. Eidson v. Edwards, 793 S.W.2d 1, 5 n.5 (Tex. Crim. App. 1990)(opinion on reh’g); Canady, 100 S.W.3d at 32; Scarbrough v. State, 54 S.W.3d 419, 424 (Tex. App. – Waco 2001, pet. ref’d); State v. May, 270 S.W.2d 682, 684 (Tex. Civ. App. – San Antonio 1954, no writ).}

\textsuperscript{45} \textit{See Kizlee v. State, 312 S.W.2d 661, 663 (Tex. Crim. App. 1958); see also Pelley v. State, 901 N.E.2d 494, 506-07 (Ind. 2009)(prosecutor not disqualified where he had no recollection of interview with defendant and defendant failed to establish that confidential information was conveyed during interview).}

\textsuperscript{46} \textit{See Scarbrough, 54 S.W.3d at 425 (“Texas courts have rejected [the] theory of ‘double imputation’”).}


\textsuperscript{48} \textit{See id. at 653.}

\textsuperscript{49} \textit{See id.}

\textsuperscript{50} \textit{See id.}

\textsuperscript{51} \textit{See id. at 655.}

\textsuperscript{52} \textit{See Landers v. State, 256 S.W.3d 295, 304 (Tex. Crim. App. 2007)(“A district attorney is not automatically disqualified from prosecuting a person whom he had previously represented, even when it is for the same type of offense”); Munigia v. State, 603 S.W.2d 876, 878 (Tex. Crim. App. [Panel Op.] 1980); see also Eleby v. State, 172 S.W.3d 247, 249-50 (Tex. App. – Beaumont 2005, no pet.)(defendant failed to show prejudice where defendant pleaded true to prior convictions used for enhancement in which prosecutor had represented defendant); In re Reed, 137 S.W.3d 676, 679-80 (Tex. App. – San Antonio 2004, no pet.)(district attorney not disqualified from prosecuting justice of the peace on the charge of indecent exposure because justice of the peace failed to establish that the civil matters the district attorney’s office had advised the justice of the peace on were “substantially related” to the criminal prosecution); Canady v. State, 100 S.W.3d 28, 31 (Tex. App. – Waco 2002, no pet.)(district attorney not disqualified from prosecuting defendant where defendant had failed to show that counsel had ever discussed the subsequent prosecution with the defendant); Cooks v. State, No. 06-07-00002-CR, 2008 WL 313050, at *6 (Tex. App. – Texarkana February 6, 2008, pet. ref’d)(not designated for publication)(prosecutor not disqualified where he had represented defendant ten years before in case later used as an enhancement, where conviction was a public record and defendant “failed to show any link between the previous decades-old representation . . . and the current case which would have either benefitted the State or would have acted to [the defendant’s] detriment”); Wilkins v. Bowersox, 933 F.Supp. 1496, 1523 (W.D. Mo. 1996), aff’d, 145 F.3d 1006 (8th Cir. 1998), cert. denied, 525 U.S. 1094 (1999)(prosecutor disqualified only if there is a “substantial relationship between subject matter of prior representation and present prosecution); United States v. Wilson, 497 F.2d 602, 606 (8th Cir. 1974), cert. denied, 419 U.S. 1069 (1974)(prosecutor not disqualified from prosecuting defendant for counterfeiting even though he had represented the same defendant three years earlier in another jurisdiction).
Munigia v. State, for example, the prosecuting attorney had once represented the defendant on a prior rape charge that had ultimately been dismissed.\(^{53}\) Though the defendant had discussed the details of that prior offense with the prosecutor, as well as details of his criminal record, there had been no discussion of the facts of the case later prosecuted.\(^{54}\) The court held that the prosecutor was not disqualified, since there was no direct conflict of interest.\(^{55}\) Similarly, a district attorney who has advised a county employee regarding civil matters surrounding county business was not disqualified on that basis from prosecuting the same employee for unrelated criminal conduct.\(^{56}\)

However, Reed v. State suggests how narrow the exception to disqualification actually is.\(^{57}\) There, the Court of Criminal Appeals held that a special prosecutor was not disqualified from representing the state simply because he had previously represented the defendant in entirely different case.\(^{58}\) The court went to some lengths, however, to point out that the prosecutor had learned of the defendant’s prior criminal record “by virtue of his former position” as an assistant criminal district attorney, and that the State did not call any character witnesses at trial.\(^{59}\) The court thus implied that where a prosecutor, through his prior association with the defendant, has gained important strategic knowledge that might aid him in the prosecution of the case, he might be disqualified, even though the information gained may not directly benefit the prosecution.\(^{60}\)

Three decades after Reed, the Court of Criminal Appeals, relying upon “guidance” from Rule 1.09(a)(3) of the Disciplinary Rules,\(^{61}\) finally announced a two part test for examining a conflict of interest between a prosecutor and a former client that does not involve prior representation in the same criminal matter. “A due process violation occurs only when the defendant can establish ‘actual prejudice,’ not just the threat of possible prejudice to his rights by virtue of the district attorney’s prior representation,” the court opined.\(^{62}\) Actual prejudice will occur when: (1) the prosecuting attorney has previously personally represented the defendant in a “substantially related matter,” and (2) the prosecuting attorney obtained “confidential” information by virtue of that prior representation which was used to the defendant’s disadvantage.\(^{63}\)

Under the test, prosecution for the same type of offense does not, by itself, make the two proceedings “substantially related.”\(^{64}\) The danger in a prosecutor representing the defendant in one case and the State later in another against his former client is that the lawyer may use confidential information obtained in the former when he prosecutes the latter.\(^{65}\) Thus, the issue is not whether both charges are for the same criminal offense, or both offenses involve guns, drugs, or other specific facts; rather, the question is whether the same or inextricably related facts, circumstances, or legal questions are at issue in both proceedings, and

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\(^{53}\) See 603 S.W.2d at 878.

\(^{54}\) See id.; see also Eleby, 172 S.W.3d at 249-50 (no prejudice established where defendant failed to show that prosecutor had learned any information from his brief prior representation of defendant that he intended to use in the later prosecution).

\(^{55}\) See id.

\(^{56}\) See In re Reed, 137 S.W.3d 676, 679-80 (Tex. App. – San Antonio 2004, no pet.).

\(^{57}\) See 503 S.W.2d 775 (Tex. Crim. App. 1974).

\(^{58}\) See id. at 776.

\(^{59}\) See id.

\(^{60}\) See id.; see also In re Goodman, 210 S.W.3d 805, 814 (Tex. App. – Texarkana 2006, orig. proceeding) (district attorney disqualified because underlying proceeding was “substantially related” to actual disclosures that occurred during prior representation); In re Young v. Sixth Jud. Dist. Ct., 236 S.W.3d 207 (Tex. Crim. App. 2007) (orig. proceeding) (prosecutor disqualified where he possessed, and might have used, confidential communications regarding defendant’s alcohol consumption); Cooks v. State, No. 06-07-00002-CR, 2008 WL 313050, at *6 (Tex. App. – Texarkana 2008, pet. ref’d)(not designated for publication) (prosecutor not disqualified where ten year old case in which he had represented defendant merely used for punishment and constituted a public record generally available); Havens v. State of Indiana, 793 F.2d 143, 145 (7th Cir.). cert. denied, 479 U.S. 935 (1986) (no due process violation where a prosecutor who had previously represented the defendant elicited information which was already a matter of public record).

\(^{61}\) TEX. DISCIPLINARY R. PROF’L CONDUCT 1.09(a)(3) (“Without prior consent, a lawyer who personally has formerly represented a client in a matter shall not thereafter represent another person in a matter adverse to the former client . . . if it is the same or a substantially related matter”).


\(^{63}\) Id. at 305.

\(^{64}\) See id. at 307.

\(^{65}\) See id. at 306; In re EPIC Holdings, Inc., 985 S.W.2d 41, 51 (Tex. 1998).
therefore are likely to involve the same confidences;\textsuperscript{66} Ultimately, as the Court of Criminal Appeals has cautioned, the substantial relationship test “is not a formalistic inquiry into degrees of closeness, but is in large measure a judgment as to whether the former client’s confidences are at risk of being turned against him.”\textsuperscript{67}

“Confidential communications” under the second prong of the test include both privileged and unprivileged client information which the prosecutor learned by virtue of the former attorney-client relationship.\textsuperscript{68} “Confidential communications” do not include information that is generally known, since the expectation of harm resulting from a prosecutor’s use of information already a matter of public record, or already generally known, is low.\textsuperscript{69}

Landers well illustrates the parameters of a conflict of interest between a prosecutor and a former client. Beth Landers was represented in a 2002 DWI case in by Gary Young.\textsuperscript{70} In 2005, she was indicted for intoxication manslaughter; the district attorney at the time was the same Gary Young who had represented her in the 2002 DWI.\textsuperscript{71} Before trial she moved to disqualify the district attorney on the basis of a conflict of interest.\textsuperscript{72} After a hearing, the motion was overruled.\textsuperscript{73} Landers was convicted and appealed.\textsuperscript{74}

After reviewing the test for a conflict of interest where the prosecutor once represented a defendant in a separate case, the court concluded that any conflict of interest did not rise to the level of a due process violation. Since the defendant’s prior criminal convictions were a matter of public record, and her long history of drug and alcohol abuse were generally known – indeed, much of it was detailed in the police report of the 2002 DWI, and the defendant and family members recounted it at trial – the court concluded that Young’s prosecution of the case had not violated Landers’s due process rights.\textsuperscript{75}

The fact that the prosecution has not strayed outside of the bounds of due process, however, does not always mean that it has behaved correctly, the court warned:

\begin{quote}
Appellant’s real complaint is that it simply was not fair that the district attorney, who had represented her in the past, should be allowed to cross-examine her about either [her] prior offense or her background. Indeed, discretion being the better part of valor, an experienced district attorney might well err on the side of caution and voluntarily disqualify himself from representing the State in the criminal prosecution of a former client, but neither trial nor appellate courts can patrol the outskirts of the possible appearance of impropriety by a duly elected district attorney. A district attorney may be disqualified only for a violation of the defendant’s due-process rights, not for violations of the disciplinary rules of professional conduct alone.\textsuperscript{76}
\end{quote}

Though not required to relinquish such a case, a prosecutor might be wise to recuse himself under such circumstances.

3. Former client is a witness in the case

A prosecutor’s prior representation of a witness in a case also would not appear to automatically bar the prosecutor from representing the State in the cause, unless the representation involved a joint defense or the sharing of defense information between the witness and the defendant as co-defendants.\textsuperscript{77} A defendant presumably would otherwise lack standing to complain

\begin{quote}
\textsuperscript{66} See Landers, 256 S.W.3d at 307.  
\textsuperscript{67} Id.  
\textsuperscript{68} See id. at 307-08.  
\textsuperscript{69} See Landers, 256 S.W.3d at 307-08; see also TEX. DISCIPLINARY R. PROF’L CONDUCT 1.05(b)(3)(“a lawyer shall not knowingly . . . use confidential information of a former client to the disadvantage of the client unless the client consents after consultation or the confidential information has become generally known”); see also Goodman v. State, 302 S.W.3d 462, 469 (Tex. App. – Texarkana 2009, pet. ref’d)(no due process violation where prosecutor, who had previously represented defendant is substantially related matter, did not use any confidential information; following test in Landers).  
\textsuperscript{70} See Landers, 256 S.W.3d at 298, 300-01  
\textsuperscript{71} See id. at 298.  
\textsuperscript{72} See id.  
\textsuperscript{73} See id. at 298, 300-01.  
\textsuperscript{74} See id. at 300. The defendant was sentenced to 99 years imprisonment and a $10,000 fine. See id.  
\textsuperscript{75} See id. at 309-10. See also Tex. Comm. on Prof’l Ethics, Op. 595, 78 Tex. Bar J. 478, 478 (2010) (noting difference under Rule 1.05(b) between information that may be of “public record” and information that is “generally known)  
\textsuperscript{76} Id. at 310.  
\textsuperscript{77} See Ex parte Spain, 589 S.W.2d 132, 134 (Tex. Crim. App. 1979)(once a “substantial relationship” between matters being tried has been established, a presumption arises that a client has revealed facts that require his disqualification).
that the prosecutor might use confidential information gained from the witness.\footnote{\textit{See} Briggs \textit{v. State}, 789 S.W.2d 918, 923 n.7 (Tex. Crim. App. 1990)(in order to challenge constitutionality of proceeding, party must establish that it is unconstitutional as applied to him); cf. Alderman \textit{v. United States}, 394 U.S. 165, 174 (1969)(defendant lacked standing to contest seizure of evidence in violation of co-defendant’s rights); but see Kubsh \textit{v. State}, 866 N.E.2d 726, 732-33 (Ind. 2007)(potential conflict where charges against witness had been dismissed, so that potential dismissal of charges against defendant or plea bargain threatened witness).}

More interesting is the unresolved question of whether the witness could remove the district attorney on the grounds that his representation of the State might reveal the witness’s client confidences. Since such a claim probably would not rise to the level of a due process violation, it would not support grounds for disqualification; however, it may constitute an adequate reason for the district attorney to recuse himself.\footnote{\textit{See} State \textit{ex rel. Hill v. Pirtle}, 887 S.W.2d 921, 927-28 (Tex. Crim. App. 1994)(orig. proceeding) (prosecutor may disqualified only on basis of due process violation); \textit{Tex. Code Crim. Proc. Ann. art. 2.07(b-1)(Vernon Supp 2001)(prosecutor may withdraw “for good cause and upon approval of the court”).}

Furthermore, if the witness’s objection did rise to the level of a constitutional violation, that potential violation might enable the defendant to assert vicarious standing.\footnote{\textit{See} Powers \textit{v. Ohio}, 499 U.S. 400, 410-11 (1991)(to establish third-party standing, party must satisfy “three important criteria”: (1) that there has been an “injury in fact”; (2) that he has a close relationship to the third party; and (3) that there exists some hindrance to the third party’s ability to protect his own interests).}

\textbf{B. Assistant prosecutors and former clients}

Consistent with the general rule that in order to disqualify a district attorney and his staff a defendant must demonstrate that his right to due process will be violated by the prosecutor’s handling of the case, a district attorney and his office may not be disqualified simply because an assistant district attorney once represented the defendant.\footnote{\textit{See} Marbut \textit{v. State}, 76 S.W.3d 742, 749 (Tex. App. – Waco 2002, pet. ref’d)(“if only an assistant is disqualified, the entire staff is not”); Scarborough \textit{v. State}, 54 S.W.3d 419, 424 (Tex. App. – Waco 2001, no pet.) (same); Hernandez \textit{v. State}, 24 S.W.3d 846, 852 (Tex. App. – El Paso 2000, pet. ref’d)(district attorney’s office not disqualified after it hired an attorney who had formerly represented the defendant in a single hearing, where counsel did not discuss the case with staff); Clarke \textit{v. State}, 928 S.W.2d 709, 721 (Tex. App. – Fort Worth 1996, pet. ref’d)(prosecution not disqualified by presence of ADA who had once worked as a clerk in her father’s office at the time father was representing defendant, where ADA never discussed case with anyone); see also Carson \textit{v. State}, No. 02-07-0158-CR, 2008 WL 1867148, at *2-3 (Tex. App. – Fort Worth April 24, 2008, no pet.)(not designated for publication)(“As the law stands today, imputed disqualification is applicable only from an \textit{elected} district attorney to those staff members who ‘serve at his [or her] will and pleasure’”); Susan W. Brenner & James Geoffrey Durham, \textit{Towards Resolving Prosecutor Conflicts of Interest}, 6 GEO. J. LEGAL ETHICS 415, 498 (1993)(“We propose that conflicts only be imputed down rather than up the chain of command within a prosecutor’s office. For example, if the chief prosecutor has a conflict, the conflict is imputed to the entire office . . . . if an assistant prosecutor with no administrative responsibilities has a conflict, it is imputed to no one”).

Contrary to the general rule, the Amarillo Court of Appeals in \textit{State ex rel. Sherrod v. Carey} concluded that the trial court had not abused its discretion in disqualifying the entire district attorney’s office based upon an assistant district attorney’s prior representation of the defendant.\footnote{\textit{See} 790 S.W.2d 705, 709 (Tex. App. – Amarillo 1990, orig. proceeding).}

Before joining the district attorney’s office, an assistant district attorney had been appointed to represent the defendant in a juvenile case in which the State sought to certify the defendant as an adult.\footnote{\textit{See} id. at 707.}

In the course of this representation, the assistant “interviewed the child on numerous occasions, interviewed witnesses, researched the law, and formed certain undisclosed opinions concerning the child’s maturity and sophistication.”\footnote{\textit{Id}. at 707.}

Reasoning that Article 2.01 “must be construed broadly enough to protect a defendant from conflicts of interest involving not only the elected district attorney himself, but also members of his staff,” the court held that the entire staff of a district attorney’s office could be disqualified “on constitutional grounds as well as under the Disciplinary Rules of Professional Conduct.”\footnote{\textit{Id}.}

The court held that since the trial court could in its discretion disqualify the district attorney and his staff on the basis of a potential violation of the
Disciplinary Rules, it would not grant a mandamus to force the withdrawal of an order of disqualification.\(^87\)

The rational underlying Sherrod has been characterized as “unpersuasive,” and its holding that the Disciplinary Rules alone may serve as a basis for disqualification flatly rejected, by the Court of Criminal Appeals.\(^88\) Furthermore, a close reading of Sherrod suggests that the court of appeals’ real concern was not with a potential conflict of interest the assistant may have had in representing opposing parties, since counsel would not have represented the State in the action against her former client.\(^89\) Rather, the court seems to have anticipated that the assistant would become a witness for the defense in the certification hearing.\(^90\) Such a prospect was not a foregone conclusion, however; the defense should have been required to show actual harm before the court found a due process violation.\(^91\) Moreover, the disciplinary rules and case law applicable to a lawyer as a witness would seem to more appropriately address the possible danger.\(^92\)

Like many other trial court errors, a conflict of interest between an assistant prosecutor and a former client, even one which may rise to the level of constitutional error, may be waived.\(^93\) In Worthington, the defendant asserted that one of the two prosecutors in the case had served as the court-appointed counsel for the co-defendant in the case.\(^94\) The Houston Court of Appeals noted that while the defendant had filed a motion to disqualify the prosecutor, he had never obtained a ruling on the motion.\(^95\) Error, if any, therefore had not been properly preserved.\(^96\)

III. DISQUALIFICATION AND THE DISINTERESTED PROSECUTOR

A. A defendant’s right to a disinterested prosecutor at common law

The courts appear in little doubt that a defendant enjoys a right to be prosecuted by a “disinterested prosecutor.”\(^97\) Yet it is very unclear whether this right stems from the defendant’s right of due process or from ethical obligations intendant upon a district attorney’s almost limitless discretion in prosecuting criminal cases.

A number of early cases suggested that a defendant had a right to a disinterested prosecutor as simply one aspect of due process.\(^98\) In the seminal case of Granger v. Peyton, the prosecuting attorney represented the defendant’s wife in her divorce action against the defendant, which was pending at the time of the defendant’s criminal trial, and which was based upon the same alleged assault of the wife charged in the criminal case.\(^99\) The prosecuting attorney offered to drop the criminal charges against the defendant if he

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\(^87\) See \textit{id.}.


\(^89\) See Sherrod, 790 S.W.2d at 707 (“The district attorney instructed [his assistant] to isolate himself from discussions about the case and ‘have nothing to do with that case.’”).

\(^90\) See \textit{id.}.


\(^92\) See \textsc{Tex. Code Crim. Proc. Ann.} art. 2.01 (Vernon 2005); \textsc{Tex. Disciplinary R. Prof’l. Conduct} 1.06(a); \textsc{Tex. Disciplinary R. Prof’l. Conduct} 3.08(b); see also Edward L. Wilkinson, \textit{Legal Ethics and Texas Criminal Law: Prosecution and Defense} at 181-198 (Texas District and County Attorneys Association 2006)(examining disqualification under the advocate-witness rule).


\(^94\) See Worthington, 714 S.W.2d at 465.

\(^95\) See \textit{id.}

\(^96\) See \textit{id.}


\(^99\) See 379 F.2d at 711.
would make a favorable property settlement in the parallel divorce action.\textsuperscript{100}

The Fourth Circuit concluded that the dual representation “clearly denied [the defendant] the possibility of fair minded exercise of the prosecutor’s discretion.”\textsuperscript{101} “Because of the prosecuting attorney’s own self-interest in the civil litigation,” the court explained, he was not in a position to exercise “fairminded” judgment with respect to the decision whether to prosecute, the decision whether reduce the charge, or the decision as to the correct sentence recommendation to advance.\textsuperscript{102} The conflict of interest therefore violated due process, the court concluded, even though the defendant had been tried and found guilty of a lesser offense.\textsuperscript{103}

But courts after Granger focused more upon the near-limitless discretion afforded prosecutors discussed in Granger than the due process holding of the case. Ten years after Granger, the Supreme Court expressed concern over the discretion afforded prosecutors, and suggested that it might have wider constitutional implications:

There is no doubt that the breadth of discretion that our county’s legal system vests in prosecuting attorneys carries with it the potential for both individual and institutional abuse. And broad though that discretion may be, there are undoubtedly constitutional limits upon its exercise.\textsuperscript{104}

Only two years later, in Marshall v. Jerico, the Court again cautioned that because discretionary decisions of prosecutors often have significant repercussions for individual defendants and society as a whole, any “scheme injecting a personal interest, financial or otherwise, into the enforcement process may bring irrelevant or impermissible factors into the prosecutorial decision” and raise “serious constitutional questions.”\textsuperscript{105} Though the Court did declare that the “rigid requirements” of neutrality designed for officials “performing judicial or quasi-judicial functions” were not applicable to prosecutors, it declined to outline what limits, if any, there might be upon prosecutorial discretion or from what source those limits might spring.\textsuperscript{106}

Finally, in Young v. United States \textit{ex rel. Vuitton et Fils, S.A.}, the Court appeared poised to directly address the issue.\textsuperscript{107} Louis Vuitton, S.A., a French leather goods manufacturer, sued Sol Klayminc and others, alleging trademark infringement.\textsuperscript{108} Klayminc and the others settled with Vuitton.\textsuperscript{109} As part of the settlement, Klayminc consented to the entry of a permanent injunction prohibiting him from manufacturing or selling fake Vuitton goods.\textsuperscript{110} Several years later, as a result of an undercover sting operation, Klayminc was discovered to be involved in the manufacture and sale of counterfeit Vuitton goods.\textsuperscript{111} Vuitton’s attorneys asked the district court to appoint them as special prosecutors in a criminal contempt action for the violation of the settlement injunction.\textsuperscript{112} The court granted the motion.\textsuperscript{113} Klayminc was eventually convicted by a jury of criminal contempt of court.\textsuperscript{114}

Before trial and on appeal, Klayminc and his associates argued that the appointment of Vuitton’s lawyers as special prosecutors violated their right to prosecuted by an impartial prosecutor.\textsuperscript{115} Both the district court and the Second Circuit Court of Appeals rejected the contention.\textsuperscript{116}

The Supreme Court, however, reversed the convictions. In a criminal prosecution, it observed, the State’s interest “is not that it shall win a case, but that justice shall be done.”\textsuperscript{117} A prosecutor, “as representative of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all,” must see both “that guilt shall not

\textsuperscript{100} See id.

\textsuperscript{101} Id. at 712.

\textsuperscript{102} Id.

\textsuperscript{103} See id.


\textsuperscript{106} Id. at 249.

\textsuperscript{107} See 481 U.S. 787 (1987).

\textsuperscript{108} See id. at 790.

\textsuperscript{109} See id.

\textsuperscript{110} See id.

\textsuperscript{111} See id.

\textsuperscript{112} See id.

\textsuperscript{113} See Vuitton, 481 U.S. at 791.

\textsuperscript{114} See id. at 792.

\textsuperscript{115} See id. at 793.

\textsuperscript{116} See id.

\textsuperscript{117} Id. at 803 (quoting Berger v. United States, 295 U.S. 78, 88 (1935)).
escape nor innocence suffer.” The Court also noted numerous disciplinary and ethical rules outlining a prosecutor’s “unique responsibility” and prohibiting potential conflicts of interest.

Since private attorneys appointed to prosecute criminal contempt actions represent the United States, not the party that is the beneficiary of the court order allegedly violated “a private attorney appointed to prosecute a criminal contempt should be as disinterested as a public prosecutor who undertakes such a prosecution.” Moreover, the Court cautioned, appointment of counsel for an interested party to bring a contempt prosecution at a minimum creates “opportunities for conflicts to arise,” and creates “at least the appearance of impropriety.”

The Court also warned of the tremendous discretion in the hands of a prosecutor:

A prosecutor exercises considerable discretion in matters such as the determination of which persons should be the targets of investigation, what methods of investigation should be used, what information will be sought as evidence, which persons should be charged with what offenses, which persons should be utilized as witness, whether to enter into plea bargains and the terms on which they will be established, and whether any individuals should be granted immunity.

Having sketched the ethical basis for a disinterested prosecutor in any given prosecution, the Court then shifted gears, and rather than examine the constitutional source of a defendant’s right to a disinterested prosecutor, if any, instead looked to the extent to which a prosecutor must be disinterested. It noted that the level of disinterestedness required of prosecutors is not as stringent as that of judges, and that the courts have therefore declined to find a prosecutorial conflict of interest in situations in which a similar conflict would be “intolerable” in a judge. The Court suggested that this diffidence was due at least in part to the courts’ inability to separate and weigh the myriad motivations which might prompt prosecutors to action. Courts “ordinarily . . . can only speculate whether other interests are likely to influence an enforcement officer, and it is this speculation that is informed by appreciation of the prosecutor’s role.”

One of the few instances in which a court need not “speculate” about whether other interests influence a prosecutor, the Supreme Court declared, is the situation in which “a prosecutor represents an interested party,” because “the ethics of the legal profession require that an interest other than the Government’s be taken into account.” Given this inherent conflict of roles, the Court concluded, “there is no need to speculate whether the prosecutor will be subject to extraneous influence.”

Yet despite language and reasoning which other court have described as “strong,” and the focus throughout the opinion on “the prosecutorial function and potential conflict of interests, concerns which are equally at issue in due process challenges to the fundamental fairness of a trial,” the Court specifically declined to hold that the prosecutorial conflict of interest at issue was unconstitutional.

Instead, it relied upon its “supervisory authority” over the procedures to be employed by federal courts to enforce their orders. Only one justice, in fact, voted to hold that the appointment at issue violated due process.

Moreover, the Court also split as to whether the conflict of interest was subject to harmless error analysis. A plurality of the court opined that it was. An actual conflict of interest in a prosecutor, the plurality concluded, constitutes systemic error which is not subject to harmless error analysis. Prosecution by someone with conflicting loyalties “calls into question the objectivity of those charged with bringing a defendant to justice,” and raises “doubts” about “the integrity of the criminal justice system.” It is therefore error that is “so fundamental and pervasive

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118 Vuitton, 481 U.S. at 803 (quoting Berger, 295 U.S. at 88).
119 Id. at 803-04.
120 Id. at 804.
121 Id. at 806.
122 Vuitton, 481 U.S. at 807.
123 Id.

124 Id.
125 Id. (emphasis in original).
126 Id.
128 See Vuitton, 481 U.S. at 809 n.21.
129 Id. at 809.
130 See id. at 814-15 (Blackmun, J., concurring).
131 See id. at 809-10.
132 Vuitton, 481 U.S. at 809-10.
that [it] requires reversal without regard to the facts or circumstances of the particular case.”

But an equal number of justices – four – argued that since the error was not of constitutional dimension, the case should have been remanded to the lower courts for harm analysis. Three of the dissenters acknowledged that the “effect of a conflicting interests on the integrity of prosecutorial decisions may be subtle,” but pointed to the defendants’ conviction by an impartial jury, and the lack of any reason to believe that the private prosecutors in the case acted unethically, as indications that the appointment was harmless.

B. The right to a disinterested prosecutor and disqualification of the prosecutor

The divided Vuitton court did not settle the issue of whether a prosecutor’s lack of “disinterestedness” can constitute a per se violation of due process or whether “disinterestedness” is subject to harmless error analysis. Vuitton, then, failed to resolve the question of the source and nature of a defendant’s constitutional right to a “disinterested prosecutor.”

In an unpublished decision in Ex parte Reposa, the Court of Criminal Appeals has resolved the issue by ignoring the Supreme Court’s waffling in Vuitton and relying on the Court’s earlier pronouncements in Marshall v. Jerrico. The Court of Criminal Appeals concluded that a prosecutor may be disqualified on the basis of lack of disinterested only when a defendant can demonstrate that an actual conflict of interest exists which prejudices the prosecutor “in such a manner as to rise to the level of a due-process violation.”

The one situation in which the courts have almost unanimously concluded that a prosecutor cannot be sufficiently “disinterested” so as to satisfy constitutional concerns is when a state’s attorney prosecutes a case at the same he holds a financial interest in a related civil action. As already noted, the Supreme Court has concluded that in a prosecution in which a prosecutor also represents an interested party in a companion civil case, “the ethics of the legal profession require that an interest other than the Government’s be taken into account.” Given this inherent conflict of roles,” the Court has reasoned, representation of an interested party, which demands that counsel seek to forward the client’s interest to the exclusion of other interests, and the simultaneous representation of the government, creates an actual conflict of interest -- “an arrangement” whose “potential for misconduct is deemed intolerable.”

133 Id. (quoting Delaware v. Van Arsdall, 475 U.S. 673, 681 (1986)).

134 Justice Scalia, in a sole concurrence, maintained that under the separation of powers doctrine, the district court had “no power to prosecute condemners for disobedience of court judgments,” and hence had no authority to appoint a special prosecutor. Vuitton, 481 U.S. at 825 (Scalia, J., concurring).

135 Id. at 826-27 (Powell, J., concurring in part, dissenting in part).


138 Id. slip op. at 9-10, 2009 WL 3478455, at *10.

139 See Fred C. Zacharias, The Professional Discipline of Prosecutors, 79 N.C. L. REV. 721, 723 nn.7 & 7 (2001)(observing that “many of the cases in which prosecutors actually have been disciplined involve part-time prosecutors” and breaking down types of violations committed by part-time prosecutors); Susan W. Brenner & James Geoffry Durham, Resolving Prosecutor Conflicts of Interest, 6 GEO. J. LEGAL ETHICS 415, 484-495 (1993)(noting that prosecutor conflicts most often arise in jurisdictions which do not require “full-time” prosecutors).

140 Vuitton, 481 U.S. at 807 (emphasis in original); see also In re Toups, 773 So.2d 709, 716-717 (La. 2000)(sanctioning assistant district attorney for prosecuting criminal charges and representing the victim in a divorce action simultaneously).

141 Vuitton at 807 n.18; see also Polo Fashions v. Stock Buyers Int’l, 760 F.2d 698, 704 (6th Cir. 1985), cert. denied, 482 U.S. 905 (1987)(“a privately employed attorney has the single permissible objective of forwarding his client’s interests. A public prosecutor, on the other hand, must consider the public interest which lies as much as in seeing
Though Vuitton and Granger provide guidance in situations in which financial interests create a conflict of loyalty, their reasoning is not easily transferred to other potential conflicts which a prosecutor might face. As courts have noted, the “concept” of a “disinterested prosecutor” is “not altogether easy to define.” To be “disinterested” does not mean that a prosecutor must have no opinion as to the guilt or innocence of the accused:

a prosecutor need not be disinterested on the issue [of] whether a prospective defendant has committed the crime with which he is charged. If honestly convinced of the defendant’s guilt, the prosecutor is free, indeed obliged, to be deeply interested in urging that view by any fair means. . . . True disinterest on the issue of such a defendant’s

justice done in every case as in the successful prosecution of any particular case”); Bh. of Locomotive Fire & Engine v. United States, 411 F.2d 312, 319 (5th Cir. 1969)(prosecutors in criminal contempt action who were also counsel for private party in civil case faced conflict of generating pressure on opposing party to “come to book” as soon as possible by placing them “in an awkward or disadvantageous position” and the “obligation to make sure that [contemnor’s] rights were scrupulously preserved”); see also Ky Bar Ass’n v. Lovelace, 778 S.W.2d 651, 654 (Ky. 1989) (prosecutor suspended for participating in civil and criminal actions arising from same facts); In re Jolly, 239 S.E.2d 490, 491 (S.C. 1977)(per curiam)(circuit solicitor reprimanded); In re Truder, 17 P.2d 951, 952 (N.M 1932)(district attorney disciplined for participating in civil and criminal cases); In re Truder, 17 P.2d 951, 952 (N.M 1932)(district attorney disciplined for participating in civil and criminal cases); In re Wilmarth, 172 N.W. 921, 926 (S.D. 1919)(state’s attorney censured); In re Schull, 127 N.W. 541, 542-53 (S.D. 1910)(county attorney disciplined for participating in civil and criminal actions); In re Wilmarth, 172 N.W. 921, 926 (S.D. 1919)(state’s attorney censured); In re Schull, 127 N.W. 541, 542-53 (S.D. 1910)(modified on rehearing on other grounds, 128 N.E. 321 (S.D. 1919)(district attorney suspended); cf. In re Snyder, 559 P.2d 1273, 1275 (Or. 1976)(district attorney disciplined for violating statutes prohibiting concurrent practice of civil law); but see State v. Condon, 152 Ohio App.3d 629, 789 N.E.2d 696, 646-47 (2003)(defendant failed to prove actual conflict where prosecutor filed criminal charges against him two weeks after appearing to defend county employees in civil suit arising from criminal offense); Application of In re Seneca County Bar Ass’n In re Koch, 276 A.D. 36, 37, 93 N.Y.S.2d 141, 143 (App. Div. 1949)(prosecutor not reprimanded where he disclosed dual representation to grand jury); People ex rel. Hutchinson v. Hickman, 294 Ill. 471, 128 N.E. 484, 488 (Ill. 1920)(district attorney did not violate prohibition against representing victim in both civil and criminal actions where prosecutor did not accept civil case until after defendant had been convicted and had waived his appeal).

142 Wright v. United States, 732 S.W.2d 1048, 1056 (2d Cir. 1984), cert. denied, 469 U.S. 1106 (1985).

guilt is the domain of the judge and jury – not the prosecutor.143

Prosecutors “need not be empty vessels, completely devoid of any non-case-related contact with, or information about, criminal defendants.” As the Court of Criminal Appeals observed in Ex parte Reposa: “[A] prosecutor who zealously seeks a conviction is not inherently biased or partial . . . . It is true that prosecutors may on occasion be over zealous and become overly committed to obtaining a conviction. That problem, however, is personal, not structural . . . . [S]uch overzealousness ‘does not have its roots in a conflict of interest. When it manifests itself the courts deal with it on a case-to-case basis as an aberration.’”145

On the other hand, a prosecutor may not harbor extreme personal animosity against a defendant. A prosecutor is not disinterested “if he has, or is under the influence of others who have, an axe to grind against the defendant, as distinguished from the appropriate interest that members of society have in bringing a defendant to justice with respect to the crime with which he was charged.”147

143 Id.

144 United States v. Lilly, 983 F.2d at 310; see also State of New Jersey v. Imperiale, 773 F.Supp. 747, 750 (D. N.J. 1991) (“A prosecutor is not ‘partial’ simply because she zealously seeks conviction”).


146 See Wright, 732 F.2d at 1056 (finding bias where prosecutor’s wife had had numerous political and legal confrontations with defendant, because a prosecutor is not disinterested “if he has, or is under the influence of others who have, an axe to grind against the defendant”); United States v. Terry, 806 F.Supp. 490, 497 (S.D.N.Y. 1992), att’d, 17 F.3d 575 (2d Cir.), cert. denied, 513 U.S. 946 (1994)(neither prosecutor’s personal comment to the defendant nor his later use of the prosecution in political ads established that the prosecutor had a personal “axe to grind”).

147 Terry, 806 F.Supp. at 497 (quoting Wright, 732 F.2d at 1056); see also Ex parte Reposa, No. AP-75,965, slip op. at 10, 2009 WL 3478455, at *12 (Tex. Crim. App. October 28, 2009)(not designated for publication) (“It is a bit easier to say what a disinterested prosecutor is not than what he is. He is not disinterested if he has, or is under the influence of others who have, an axe to grind against the defendant, as distinguished from the appropriate interest that members of society have in bringing a defendant to justice with respect to the crime with which he is charged” quoting Wright): see
The issue of determining whether a prosecutor is sufficiently “disinterested” in case thus comes down to discerning whether a prosecutor as an unacceptable “axe to grind” against a defendant. A mere potential or perceived conflict of interest is not sufficient to warrant disqualification. In Offermann v. State, for example, the defendant asserted that the district attorney harbored a “personal grudge” against him because years before he had been involved, through his former wife, in embezzling funds from a company in which the district attorney had been part owner. The court of appeals noted that Appellant had failed to establish any harm as a result of the alleged “grudge,” and upheld the conviction.  

also Imperiale, 773 F.Supp. at 750 (“‘partiality’ refers not to ‘personal’ zeal but to ‘structural’ problems where personal interests (including non-pecuniary interests) generate a structural conflict of interest”).

148 See Wright, 732 F.2d at 1056 n.8 (finding bias where prosecutor’s wife had had numerous political and legal confrontations with defendant, because a prosecutor is not disinterested “if he has, or is under the influence of others who have, an axe to grind against the defendant”); United States v. Terry, 806 F.Supp. 490, 497 (S.D.N.Y. 1992), aff’d, 17 F.3d 575 (2d Cir.), cert. denied, 513 U.S. 946 (1994)(neither prosecutor’s personal comment to the defendant nor his later use of the prosecution in political ads established that the prosecutor had a personal “axe to grind”); see also Gallego v. McDaniel, 124 F.2d 1065, 1079 (9th Cir. 1997), cert. denied, 524 U.S. 917 (1998)(defendant failed to establish prejudice where prosecutor entered into book deal after the case was tried); see also United States v. Terry, 17 F.3d 575, 579 (2d Cir. 1994), cert. denied, 513 U.S. 946 (1994); United States v. Wallach, 935 F.2d 445, 460 (2d Cir. 1991), cert. denied, 508 U.S. 939 (1993); see also United States v. Lilly, 983 F.2d 300, 310 (1st Cir. 1992)(though prosecutor assisting on the case had an “axe to grind” against the defendant because of previous personal litigation between the two, her conduct in supplying the prosecutor conducting the case with public information did not rise to the level of a due process violation); Dick v. Scroggy, 882 F.2d 192, 199 (6th Cir. 1989)(Celebrezze, J., concurring)(mere representation of victim of auto accident while prosecuting driver of the vehicle which caused the accident for assault rather than DWI, without showing of some specific instance of misbehavior, insufficient to establish due process violation); but see Clearwater-Thompson v. Grassmueck, Inc., 160 F.3d 1236, 1237 (9th Cir. 1998)(where a prosecutor was not disinterested in the prosecution, the “judgment of conviction is to be reversed without the need of showing prejudice”).

149 See 742 S.W.2d 875, 876 (Tex. App. – San Antonio 1987, no pet.).

150 See id; see also Donald v. State, 453 S.W.2d 825, 827 (Tex. Crim. App. 1969)(mere presence of a district attorney on bank board of directors did not create conflict of interest where bank was not “in any way connected with the transactions involved” in the fraud prosecution); Gonzalez v. State, 115 S.W.3d 278, 286 (Tex. App. – Corpus Christi 2004, no pet.)(trial court properly refused to disqualify district attorney where defendant had physically assaulted an assistant prosecutor and the district attorney announced that any attack on personnel of his office would be considered “a personal attack on me” and that he would prosecute the case himself, as defendant failed to establish a due process violation); Fluellen v. State, 104 S.W.3d 152, 161 (Tex. App. – Texarkana 2003, no pet.)(fact that the defendant had been involved in a shouting match with the prosecutor over a minor traffic incident did not require the prosecutor’s disqualification); Hanley v. State, 921 S.W.2d 904, 909 (Tex. App – San Antonio 1994, orig. proceeding) (the trial judge had abused his discretion in disqualifying the prosecutor “not because he had found that the district attorney’s office had, in fact, committed any misconduct, but simply because allegations of misconduct had been made”); see also Ex parte Reposa, No. AP-75,965, slip op. at 10, 2009 WL 3478455, at *11 (Tex. Crim. App. October 28, 2009)(rejecting a claim of personal bias premised on the prosecutor’s failure to offer a plea bargain agreement. “It is part and parcel of a prosecutor’s discretion to make decisions about agreements in lieu of trial and/or conviction with regard to individual defendant’s,” the court observed, so that the mere failure to offer a deal, without more, does not demonstrate improper personal bias); United States v. Terry, 17 F.3d at 579 (verbal exchange between defendant and prosecutor insufficient to establish improper bias).

151 Gallego, 124 F.2d at 1079 (defendant failed to establish prejudice where prosecutor entered into book deal after the case was tried); see also Terry, 17 F.3d at 579; Wallach, 935 F.2d at 460; Wright, 732 S.W.2d at 1056 n.8; see also Lilly, 983 F.2d at 310 (though prosecutor assisting on the case had an “axe to grind” against the defendant because of previous personal litigation between the two, her conduct in supplying the prosecutor conducting the case with public information did not rise to the level of a due process violation); Scroggy, 882 F.2d at 199 (Celebrezze, J., concurring)(mere representation of victim of auto accident while prosecuting driver of the vehicle which caused the accident for assault rather than DWI, without showing of some specific instance of misbehavior, insufficient to establish due process violation); but see Clearwater-Thompson, 160 F.3d at 1237 (where a prosecutor was not disinterested in the prosecution, the “judgment of conviction is to be reversed without the need of showing prejudice”).

Just as mere personal dislike is not sufficient to disqualify a prosecutor, a prosecutor’s personal relationship with a victim or a relative of the victim, standing alone, is generally insufficient to disqualify
him under due process. In rare cases in which the relationship between the prosecutor and the victim have been so highly emotional that it is “highly unlikely” that the defendant would receive a fair trial, however, the prosecutor has been required to step aside.

The political concerns or aspirations of a prosecutor are generally not enough to warrant disqualification, either. “Politically ambitious and aggressive prosecutors are by no means uncommon,” as the courts have observed, and “the zeal of the prosecutor who covets higher office or who has a personal political axe to grind may well exceed the zeal of” a prosecutor who has more limited ambitions. Nevertheless, a prosecutor’s political ambitions alone are not enough to support a finding that a prosecutor is not sufficiently disinterested as to violate due process.

What if the “client” the State’s attorney represents in the civil action is the State itself? The Supreme Court has held that release-dismissal agreements which involve a defendant’s waiver of civil causes of action are valid, and thus has implied that the prosecutor’s representation of the State in a dual capacity as prosecutor and State’s attorney does not create a prima facia conflict of interest.

Similarly, **Vuitton** does not create a *per se* bar to the appointment of an attorney from a civil enforcement agency as special prosecutor in a criminal action. As several lower courts have suggested, however, such appointments must be assessed in light of the degree of control over the prosecution that the prosecutor retains and the magnitude of the special prosecutor’s involvement in the related civil action.

Finally, a special exception to the general rule against prosecutors having a direct interest in the criminal litigation is the participation of special

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152 See *Newman v. Frey*, 873 F.2d 1092, 1094 (8th Cir. 1989) (prosecutor friend of murder victim and had performed legal work for other family members); *United States v. Hibbard*, 493 F.Supp. 206, 208 (D.C. 1979) (entire U.S. Attorney’s Office for District of Columbia not disqualified from prosecuting defendant for burglary of an office of an Assistant U.S. Attorney for the District of Columbia where assistant was not a prosecutor in the case); *People v. Arrington*, 696 N.E.2d 1229, 1231 (Ill. 2d Dist. 1998) (prosecutor cousin of owners of store which defendant attempted to rob); *Davis v. State*, 340 S.E.2d 869, 879-80 (Ga. 1986), cert. denied, 479 U.S. 871 (1987) (prosecutor’s slight acquaintance with victim’s father insufficient to require recusal); *May v. Commonwealth*, 285 S.W.2d 160, 162 (Ky 1955) (prosecutor need not be recused even where he was complainant in the case); see also *United States v. Harrelson*, 754 F.2d 1153, 1166 (5th Cir. 1985) (judge who was friend of the victim need not recuse himself from case: “whatever the relationship between the two [friends] was, it can at most have served to create a degree of hostility toward the actual killers. As such, it is entirely consistent both with a desire that those not guilty be acquitted and with one that the guilty be convicted”).

153 See *People v. Vasquez*, 137 P.3d 199, 214 (Cal. 2006) (prosecutor’s refusal to plea bargain, based on fear that the office might appear to be favoring the defendant, the child of a former employee, could constitute sufficient prejudice to violate due process); *People v. Connor*, 666 P.2d 5, 9 (Cal. 1983) (disqualifying entire district attorney’s office after one of the attorneys had been shot at by the defendant and the victim had spoken to his colleagues about his “harrowing experience”); *People v. Gentile*, 511 N.Y.S. 901, 904 (1987) (prosecutor’s admittedly close personal relationship to victim and “deep emotional involvement in case” deprived defendant of fair trial); *People v. Superior Court*, 561 P.2d 1164, 1174 (Cal. 1977) (prosecutor properly disqualified where mother of the homicide victim employed in district attorney’s office and involved in custody dispute with defendant, the victim’s ex-wife, over victim’s child); *State v. Jones*, 268 S.W. 83, 85 (Mo. 1924) (prosecutor disqualified where he was the victim of defendant’s alleged DWI); *People v. Cline*, 44 Mich. 290, 296, 6 N.W. 671, 672-73 (1880) (victim was prosecutor’s brother).


158 See *Nat. Cellular*, 868 F.2d at 320; *United States ex rel. Sec. and Exch. Comm’n v. Carter*, 907 F.2d 484, 487 (5th Cir. 1990); *United States v. Eisenberg*, 773 F.Supp. 662, 705-06 (D.N.Y. 1991); cf. *Person v. Miller*, 854 F.2d 656, 663 (4th Cir. 1988) (appointment of private counsel for interested party permissible under *Vuitton* “so long as that participation (1) has been approved by government counsel; (2) consists solely of rendering assistance in a subordinate role to government counsel; and (3) does not rise to the level of effective control of the prosecution”).
prosecutors in a criminal case. A “special prosecutor” is an attorney who “is permitted by the elected district attorney to participate in a particular case to the extent allowed by the prosecuting attorney, without being required to take the constitutional oath of office.”

He need not be appointed by the trial court, as his utilization is not predicated upon the absence or disqualification of the elected district attorney. A special prosecutor assists the district attorney in the investigation and prosecution of particular case, but the district attorney is responsible for the prosecution, control and management of the case. The use of special prosecutors has been sanctioned by Texas courts for well over a century.

Generally, an attorney who represents the victim in a civil case is not barred by a conflict of interest in assisting the prosecutor in the criminal action as a special prosecutor, so long as the lead prosecutor retains control over the case and has no interest himself in the civil action. There is no per se constitutional prohibition against the use of special prosecutors, even where the special prosecutor represents the victim in a civil suit arising from the same transaction at issue in the criminal case.

Since the use of special prosecutors raises concerns that the prosecutor’s loyalty to the person who pays the special prosecutor may override the interests of society in justice and a fair trial for the accused, however, the courts require that the district attorney retain control of the prosecution. Where a private prosecutor controls the “crucial prosecutorial decisions” such as whether to prosecute, what targets of prosecution to select, what investigative powers to utilize, what sanctions to seek, plea bargains to strike, or immunities to grant, the arrangement violates due process. Operational conduct of the trial is of subordinate concern, except as it may have an impact upon determining the more fundamental prosecutorial decisions. Thus, a quantitative analysis or a determination of who was lead counsel will not necessarily reveal whether the district attorney retained “control” for purposes of due process. Given the level of control, or rather, lack of control, required of a special prosecutor, a special prosecutor is considered a “state employee,” and not a “state officer” for purposes of Article 16, section 14 of the Texas Constitution.

SECTION TWO: DEFENSE ATTORNEYS

Just as there are constitutional restraints upon a prosecutor’s conflict of interests, so, too, are defense attorneys constitutionally prohibited from representation which will create mutually exclusive demands upon counsel’s duty of loyalty. The Sixth, not the Fourteenth, Amendment, governs a defense attorney’s conflict of interest, however. The Sixth Amendment guarantees not just the right to counsel, but the right to the reasonably effective assistance of

furthermore, appearance of impropriety caused by financial arrangement necessitated disqualification of entire district attorney’s office).

Compare Faulder, 81 F.3d at 517 with Tecczar v. State, No. 11-07-00075-CR, 2008 WL 4602547, at *3 (Tex. App. – Eastland October 16, 2008, no pet.)(not designated for publication)(appointment of plaintiff’s attorney as special prosecutor did not violate due process where civil case had settled before criminal trial and attorney did not participate in direct or cross-examination of witnesses); see also Erikson v. Pawnee County Bd. of Cty. Comm’rs, 263 F.3d 1151, 1154 (10th Cir. 2001), cert. denied, 535 U.S. 971 (2002); East v. Scott, 55 F.3d 996, 1001 (5th Cir. 1995); Person v. Miller, 854 F.2d 656, 664 (4th Cir. 1988), cert. denied, 489 U.S. 1011 (1989).

See East, 55 F.3d at 1001

See Faulder, 81 F.3d at 517.

See Powell v. State, 898 S.W.2d 821, 824-25 (Tex. Crim. App. 1994)(orig. proceeding); State ex rel. Hill v. Pirtle, 887 S.W.2d 921, 931 (Tex. Crim. App. 1994)(orig. proceeding); see also TEX. CONST. art. XVI § 14 (“all district or county officers [shall reside] within their districts or counties”), and § 40 (“[n]o person shall hold or exercise at the same time, more than one civil office of emolument”).

161 See id.
166 See Faulder, 81 F.3d at 517; see also State v. Culbreath, 30 S.W.3d 309, 316 (Tenn. 2000) (fact that special prosecutor was paid by a special interest group created a conflict of interest disqualifying prosecutor from case;
counsel. Ineffective assistance of counsel may result when an attorney labors under a conflict of interest. Faced with a conflict of interest, counsel may breach not only the duty of loyalty, “perhaps the most basic of counsel’s duties,” but violate the defendant’s constitutional right to competent representation. Under such circumstances counsel must either withdraw or be disqualified by the court.

I. TYPES OF REPRESENTATIONAL CONFLICTS UNDER BOTH THE CONSTITUTION AND THE STATE BAR RULES

Defense counsel may face a “representational” conflict of interest in one of three ways: (1) he may represent a defendant and represent or have formerly represented a co-defendant in the case; (2) he may have conflicting duties of loyalty between his client and his own interests; or (3) he may represent a defendant and may either represent or have formerly represented a third party. As in other ethical issues in criminal law, these types of conflicts of interest may implicate both the constitution and the Rules of Professional Conduct, or may violate the latter without violating to the level of the former.

Although they share the same constitutional basis for the right to conflict-free counsel, three tests have emerged for gauging whether a defendant’s right to reasonably effective assistance of counsel has been violated. The first test applies to situations in which an alleged conflict resulted from “serial representation of criminal defendants as well as simultaneous multiple representations.” The second test, a more specific variation of the test for multiple representations, may be applied to conflicts of interest which may arise when an attorney represents a defendant and a witness in the case being tried. The third test, which consists simply of the application of the Strickland test for ineffective assistance of counsel, is to be used in any other situation in which a defendant claims ineffective assistance of counsel based upon his attorney’s conflict of interest.

II. CONSTITUTIONAL CONFLICTS

A. “Multiple Representation” Conflicts – The Cuyler Test

Multiple representation of co-defendants – either the serial representation of co-defendants, or the simultaneous representation of co-defendants – does not per se violate the Sixth Amendment. Indeed, as the Supreme Court has observed, in many cases a “common defense . . . gives strength against common attack.” Thus, though a possible conflict of interest “inheres in almost every instance of multiple representation,” the courts have rejected an inflexible rule that would presume prejudice in all cases.

Under the Supreme Court case of Cuyler v. Sullivan, a conflict of interest arising from multiple representation of co-defendants – often referred to as “multiple representation” – will be held to violate the Sixth Amendment only after a defendant demonstrates (1) that his counsel was burdened with an actual conflict of interest, and (2) that the conflict had an

172 See Strickland, 466 U.S. at 692; Acosta v. State, 233 S.W.3d 349, 356 (Tex. Crim. App. 2007); Monreal, 947 S.W.2d at 564.
173 Monreal, 947 S.W.2d at 564.
174 See id.
175 See id.
176 See United States v. Thomas, 474 F.2d 110, 112 (10th Cir. 1973), cert. denied, 412 U.S. 932 (1973) (counsel’s actions violated rules of ethics but did not rise to the level of a constitutional violation).
adverse effect on specific instances of counsel’s performance.  

The possibility of a conflict of interest is not sufficient to reverse a criminal conviction or warrant disqualification of counsel; a defendant must show that his counsel “actively” represented conflicting interests in order to establish the constitutional predicate for a claim of ineffective assistance of counsel based upon a conflict of interest.  

To establish an actual conflict of interest, a defendant must show that “one defendant stands to gain significantly by counsel adducing probative evidence or advancing plausible arguments that are damaging to the cause of a co-defendant whom counsel is also representing.” Examples of an actual conflict include when inculpating or exculpating testimony exists to the detriment of one defendant, and when a defense strategy “goes sour” or was thwarted by the strategy of the State.

The mere showing of an actual conflict of interest is not enough to establish a constitutional violation. A defendant must also demonstrate that the actual conflict of interest “adversely affected his lawyer’s performance.” This standard requires a showing of a “choice by counsel, caused by the conflict of interest,” and not a showing that the choice was prejudicial in any other way. In addition to direct evidence, a defendant may prove causation circumstantially, through evidence that the lawyer did something detrimental or failed to do something advantageous to one client that protected another client’s interests. The requirement of “adverse effect” constitutes a burden higher than a per se rule of prejudice, but lower than the prejudice prong of the Strickland test for ineffective assistance of counsel, under which a defendant must prove that but for counsel’s error, the result of the proceeding would have been different.

B. Alternative Tests for Conflicts Between Counsel and the Defendant

1. Conflicts Between the Defendant and Counsel’s Personal Interests

As some courts have observed, a conflict of interest between a lawyer’s own interests and those of his client differs in both type and degree from a conflict of interest “adversely affected his lawyer’s performance.”

186 See Cuyler, 446 U.S. at 348; James v. State, 763 S.W.2d at 779 (Tex. Crim. App. 1989); Castillo, 186 S.W.3d at 28; Ex parte Meltzer, 180 S.W.3d 252, 256 (Tex. App. – Fort Worth 2005, no pet.); Gaston v. State, 136 S.W.3d 315, 318 (Tex. App. – Houston [14th Dist.] 2004, pet. stricken)(en banc); Kegler v. State, 16 S.W.3d 908, 912-13 (Tex. App. – Houston [14th dist.] 2000, pet ref’d); see also Monreal, 947 S.W.2d at 564 (citing Cuyler test but declining to hold whether it is applicable to a conflict between defense counsel and her client).

187 Cuyler, 446 U.S. at 350, 100 S.Ct. at 1719; see also Monreal, 947 S.W.2d at 564; Castillo, 186 S.W.3d at 29; Dickerson v. State, 87 S.W.3d 632, 639 (Tex. App. – San Antonio 2002, no pet.).

188 James v. State, 763 S.W.2d 776, 779 (Tex. Crim. App. 1989); Gaston, 136 S.W.3d at 318; Dickerson, 87 S.W.3d at 639; Kegler, 16 S.W.3d at 912-13 (quoting James, 763 S.W.2d at 779); Howard v. State, 966 S.W.2d 821, 826 (Tex. App. – Austin 1998, pet ref’d).

189 Kegler, 16 S.W.3d at 913; see also Ex parte McCormick, 645 S.W.2d 801, 805-06 (Tex. Crim. App. 1983)(proposed defense strategy of claiming first confession coerced and second confession later induced using earlier false confession backfired when prosecution introduced only one of the two confessions); Ex parte Parham, 611 S.W.2d 103, 105 (Tex. Crim. App. 1981)(one co-defendant could have provided exculpatory testimony for the other); Amaya v. State, 677 S.W.2d 159, 161-62 (Tex. App. – Houston [1st Dist.] 194, pet ref’d)(counsel unable to emphasize discrepancies between witnesses’ testimony because it would have hurt co-defendants).

conflict in which a lawyer is ethically compelled to advance two separate and divergent interests on behalf of two different clients. Since the Supreme Court has yet to provide any clear guidance as to how such conflicts should be addressed, lower courts have devised several different tests to evaluate whether such a conflict has violated a defendant’s constitutional right to counsel.

a. The Beets test

A number of courts that have recently addressed the issue have concluded that the test in Cuyler for determining whether a Sixth Amendment violation has occurred due to a conflict of interest between an attorney and two defendants is not appropriate for analyzing whether a conflict between a defendant and his own attorney might rise to the level of a deprivation of the constitutional right to counsel.

As the Fifth Circuit in Beets v. Scott first observed, the demands and reasoning of legal ethics militate against treating multiple representation cases like those in which a lawyer’s self-interest is pitted against the duty of loyalty to his client. Because multiple defendant representation poses a unique, straightforward danger of conflict due to competing duties of loyalty imposed by the ethics of the profession itself, a danger that is most often “plain,” the Cuyler rule of “not quite per se” prejudice “makes eminent sense.” But “in stark contrast” to multiple representation situations, there is little meaningful distinction between lawyer who inadvertently fails to act or who acts erroneously (and thereby renders ineffective assistance of counsel) and one who, for selfish reasons, decides not to act or determines to act against his client’s best interests (and thereby renders ineffective assistance of counsel).

The courts have expressed a number of considerations in weighing whether the Strickland test is more appropriate for determining constitutional error where an attorney’s self-interest may have compromised his duty of loyalty to his client: (1) the scope of the duty of loyalty with respect to self-interest is “inherently vague” and overlaps with the duty of professional effectiveness; (2) the range of possible breaches of the duty of loyalty due to a lawyer’s self-interest is almost limitless, and their consequences may stretch from “wholly benign to devastating”; (3) misconduct as a result of self-interest will almost always involve questions of lawyer’s competence as well as a question of divided loyalty; (4) the Strickland test constitutes the more “flexible” and less intrusive test for determining whether a lawyer’s conduct has violated a defendant’s Sixth Amendment rights; and (5) self-interest/duty of loyalty problems are not ordinarily amenable to prophylactic treatment or court oversight. After weighing these concerns, courts that have directly confronted the issue have concluded that Strickland and not Cuyler should control claims.
that an attorney’s representation was affected by own self-interest.  

A number of Texas courts, including the Court of Criminal Appeals, have not closely examined the question of whether Strickland is the proper test to employ even after the Fifth Circuit’s decision in Beets, either because they have reflexively applied the Cuyler test or because they have side-stepped the issue by concluding that an actual conflict of interest did not exist, and hence, a defendant would not prevail under even the Cuyler standard. 

Under Beets, of course, the test for determining ineffective assistance of counsel due to a conflict of interest between an attorney and her client under Strickland requires that a defendant show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. The test “is the benchmark for judging . . . whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” 

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202 Id. at 1270-72; see also Monreal, 923 S.W.2d at 65-66; Moreland v. Scott, 175 F.3d 347, 349 (5th Cir. 1999), cert. denied, 528 U.S. 937 (1999).


207 See Winkler, 7 F.3d at 307.

208 Id. (quoting Cuyler v. Sullivan, 446 U.S. 335, 356 n.3 (1980)(Marshall, J., dissenting)).

209 See Winkler, 7 F.3d at 309.

210 Id. at 309; see also Triana v. United States, 205 F.3d 36, 41 (2d Cir. 2000), cert. denied, 531 U.S. 956 (2000).

211 See Moree, 220 F.3d at 69 (quoting Winkler, 7 F.3d at 309 (quoting Gambino, 864 F.2d at 1070)); see also United States v. Schwarz, 283 F.3d 76, 92 (2d Cir. 2002) (“A defendant is not required to show that the lapse in representation affected the outcome of the trial or that, but for the conflict, counsel’s conduct of the trial would have been different . . . . The foregone strategy or tactic is not even subject to a requirement of reasonableness”); United States v. Malpedi, 62 F.3d 465, 469 (2d Cir. 1995)(same).
conflict with or not undertaken due to the attorney’s other loyalties or interests.\footnote{212}

Though the possibilities of conflict between counsel and his client are almost endless, Texas courts have already addressed claims of a conflict due to counsel’s financial interest in the sale of the defendant’s publication rights\footnote{213}; counsel’s alleged interest in setting up and later pursuing a civil rights case that he would handle on a contingent fee\footnote{214}; counsel’s refusal to raise an ineffective assistance of counsel claim against himself\footnote{215}; the defendant’s filing of a grievance against his attorney\footnote{216}; the defendant’s having filed a lawsuit against his attorney;\footnote{217} and counsel’s attempting to force payment of fees by removing himself as surety of defendant’s bond.\footnote{218}

2. Counsel Conflicts Between a Defendant and a Third Party

A lawyer may also face a conflict of interest when he represents a defendant in one case and has represented a witness or another person involved in the case in separate, unrelated action.\footnote{219} The courts have

\footnote{212} Moree, 220 F.3d at 69 (quoting Winkler, 7 F.3d at 309)(emphasis added). For a full discussion of the difference between the Beets and Winkler tests, see Wilkinson, supra note 194, at 210-13.

\footnote{213} See Beets, 65 F.3d at 1270-72.

\footnote{214} See Pina v. State, 127 S.W.3d 68, 73 (Tex. App. – Houston [14th Dist.] 2003, no pet.).


\footnote{216} See McKinny v. State, 76 S.W.3d 463, 478 (Tex. App. – Houston [14th Dist.] 2002, no pet.)


\footnote{219} See Grantham v. State, 116 S.W.3d 136, 146-47 (Tex. App. – Tyler 2003, pet. ref’d)(alleged conflict of interest where defense counsel admitted to defense witness that it might not be in her best interest to testify for the defense); Barbaro v. State, 115 S.W.3d 799, 801 (Tex. App. – Amarillo 2003, pet ref’d)(alleged conflict because defense attorney had represented a prosecution witness in an unrelated DWI and in a divorce action more than ten years before defendant’s trial); Brink v. State, 78 S.W.3d 478, ostensibly applied Cuyler in such situations, though oddly, they sometimes fail to cite it.\footnote{220} A closer

485-86 (Tex. App. – [14th Dist.] 2002, pet. ref’d)(trial court did not err in disqualifying counsel where attorney was under a conflict of interest between defendant and former client, who was a State’s witness); Charleston v. State, 33 S.W.3d 96, 101-02 (Tex. App. – Texarkana 2000, pet ref’d)(alleged conflict because counsel had represented a prosecution witness in some business dealings years before trial); Ramirez v. State, 13 S.W.3d 482, 485-86 (Tex. App. – Corpus Christi 2000, pet. denied’s, improvidently granted, 67 S.W.3d 177 (Tex. Crim. App. 2001)(alleged conflict because attorney was presently representing prosecution witness in a separate criminal matter); Fulgizm v. State, 4 S.W.2d 107, 114 (Tex. App. – Waco 1999, pet. ref’d)(alleged conflict because attorney had represented a witness in an unrelated criminal case years before); see also Williams v. State, 154 S.W.3d 800, 803 (Tex. App. – Houston [14th Dist.] 2004, pet. ref’d)(alleged conflict because attorney was a personal friend of a State’s punishment witness); Thompson v. State, 94 S.W.3d 11, 14-15 (Tex. App. – Houston [14th Dist.] 2002, pet. ref’d)(alleged conflict between counsel and prior client who defendant claimed was the true perpetrator of the crime); Talbott v. State, 93 S.W.3d 521, 525-26 (Tex. App. – Houston [14th Dist.] 2002, no pet.)(alleged conflict because counsel represented defendant in his criminal trial and the defendant’s father in a civil action against CPS for visitation rights to the victim); Pina v. State, 29 S.W.3d 315, 318 (Tex. App. – El Paso 2000, pet. ref’d)(alleged conflict because attorney had represented defendant’s twin brother in an unrelated matter and for whom defendant claimed witnesses mistook him); Wolf v. State, 674 S.W.2d 831, 844 (Tex. App. – Corpus Christi 1984, pet. ref’d)(defendant’s counsel had previously represented defendant’s husband in divorce proceedings which were allegedly part of the motive for murder); see also Arnett v. State, No. 05-07-00514-CR, 2009 WL 311445, at *4 Tex. App. – Dallas February 10, 2009, no pet.)(not designated for publication)(claimed conflict where defense attorney had once represented testifying officer in unrelated employment case); Boyd v. State, No. 03-07-00084-CR, 2007 WL 2330689, at *3 (Tex. App. – Austin August 15, 2007, pet. ref’d)(not designated for publication)(alleged conflict of interest where counsel had represented witness); Thieleman v. State, No 13-03-0570-CR, 2006 WL 3095666, at *10-11 (Tex. App. – Corpus Christi October 26, 2006, pet. ref’d)(not designated for publication)(alleged conflict of interest where counsel purportedly once represented testifying officer in unrelated case).

\footnote{220} See Routier v. State, 112 S.W.3d 554, 585-86 (Tex. Crim. App. 2003), cert. denied, 541 U.S. 1040 (2004); Pina, 29 S.W.2d at 317; Fulgizm, 4 S.W.2d at 114; Ramirez, 13 S.W.3d at 486; Arnett, No. 05-07-00514-CR, 2009 WL 311445, at *4; Boyd, No. 03-07-00084 CR, 2007 WL 2330692, at *3. The Fourteenth Court of Appeals has twice announced that they will apply Strickland to alleged conflicts of interests between an attorney and a third party, but then cited and quoted Cuyler’s requirement that the
defendant show that the conflict had an adverse effect on specific instances of counsel’s performance. See Williams v. State, 154 S.W.3d at 803 (alleged conflict because attorney was a personal friend of a State’s punishment witness); Thompson v. State, 94 S.W.3d 11, 21 (Tex. App. – Houston [14th Dist] 2002, pet. ref’d)(alleged conflict because attorney had once represented individual whom the defendant accused of actually committing the crime). The distinction proved unimportant in both cases, as the court concluded each time that the defendant had failed to show an actual conflict of interest. See Williams, 2004 WL 2933579, at *3; Thompson, 94 S.W.3d at 21-22. The court’s ambiguity may reflect simple confusion, but more probably signals a recognition that Cuyler is inadequate for dealing with conflicts of interest that do not involve representation of co-defendants.

221 See Fulgium, 4 S.W.2d at 114; see also Ramirez, 13 S.W.3d at 491-92 (Seerden, C.J., dissenting).


3. Court of Criminal Appeals’ Rejection of Beets and Embrace of Cuyler

Though acknowledging that the Supreme Court has yet to resolve the issue, the Court of Criminal Appeals has rejected Beets, ignored Winkler, and announced that it will follow Cuyler when addressing conflicts of interest that do not involve multiple representations.

In Acosta v. State, the defendant was charged with aggravated sexual assault of a child. While the criminal case was pending, the defendant’s wife, and mother of the victim, asked counsel to help her in a custody battle with CPS. The defendant’s attorney concluded that the best way to aid her was to discredit the CPS investigator on the case. To that end, he introduced an otherwise inadmissible audiotape during Appellant’s trial to impeach the investigator, but did not inform the defendant of the purpose for the tactic. Counsel later testified that during closing argument he realized “that he had made a mistake by playing the audiotaped interview for the jury.”

On appeal, the defendant contended that counsel had rendered ineffective assistance due to his attorney’s conflict of interest. The San Antonio Court of Appeals, following Beets, applied the Strickland test and rejected the defendant’s complaint on the grounds that he had failed to prove that counsel’s action had prejudiced his defense.

The Court of Criminal Appeals rejected the lower court’s application of Beets, without resolving whether Beets actually presents the better test. Instead, the court merely observed that the test should not be adopted because “the Supreme Court has never expressly limited Cuyler,” and “it does not seem difficult to glean a workable standard out of Cuyler without limiting it to the multiple representation context held.” The court therefore held: “In short,
the proper standard by which to analyze claims of ineffective assistance of counsel due to a conflict of interest is the rule set out in Cuyler v. Sullivan, that is, the appellant must show that his trial counsel had an actual conflict of interest, and that the conflict actually colored counsel’s actions during trial.\textsuperscript{233} Lower Texas courts have since followed Acosta.\textsuperscript{234}

\section*{III. WAIVER OF A CONFLICT OF INTEREST AND THE COURT’S DUTY TO INQUIRE}

\subsection*{A. Waiver of Conflict}

Absent an express, voluntary, and knowing waiver, an actual conflict of interest that rises to the level of a Sixth Amendment violation will mandate a new trial.\textsuperscript{235} The right to conflict-free counsel may be waived, but the record must show the waiver was done knowingly, intelligently, and voluntarily.\textsuperscript{236} To be effective, the record must reflect that the defendant was aware of the conflict of interest, realized the consequences of continuing with counsel who faced a conflict, and knew that he had a right to obtain other counsel.\textsuperscript{237}

Even if a court concludes that a defendant has knowingly, intelligently, and voluntarily waived a conflict of interest, it may in its discretion decline to accept the waiver and order new counsel to represent the defendant.\textsuperscript{238} The accused does not have an absolute right under the Sixth Amendment to have counsel of her own choosing.\textsuperscript{239} A court therefore will be accorded “substantial latitude” in refusing waivers of a conflict of interest, since it has an “independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them.”\textsuperscript{240}

\subsection*{B. The Court’s Duty to Inquire About a Conflict}

A trial court has no duty to inquire into the possibility of a conflict of interest, and absent special circumstances trial courts may assume either that the defendant’s representation entails no conflict or that the lawyer and his client’s knowingly accept such risk.

\textsuperscript{233} Id. at 356. Curiously, earlier in the opinion the court words the test slightly differently: “In other words, the appellant must show that an actual conflict of interest existed and that trial counsel actually acted on behalf of those other interests during the trial.” Id. at 355.

\textsuperscript{234} See Berry v. State, 278 S.W.3d 492, 497 (Tex. App. – Austin 2009, pet. ref’d)(no conflict of interest where video of defendant’s assault of defense attorney introduced at punishment, following Acosta); Stewart v. State, 293 S.W.3d 853, 864 (Tex. App. – Texarkana 2009, pet. ref’d)(rejecting reputed conflict where defense counsel served as part-time “mentor” to ADA trying the case, on the basis of Acosta); see also Jester v. State, No. 12-08-00072-CR, 2010 WL 177792, at *1-2 (Tex. App. – Tyler January 20, 2010, no pet.)(no conflict where counsel had originally signed several motions as prosecutor in case, but represented defendant on subsequent probation revocation hearing, citing Acosta); Pickett v. State, No. 02-08-00439-CR, 2009 WL 3246755, at *7 (Tex. App. – Fort Worth October 8, 2009, no pet.)(no conflict where defense counsel had prosecuted defendant in unrelated case ten years earlier, citing Acosta); Wiggins v. State, No. 01-07-00672-CR, 2009 WL 2231806, at *11-12 (Tex. App. – Houston [1st Dist.] July 23, 2009, no pet.)(not designated for publication)(relying on ain Acosta, no conflict of interest between defendant and expert witness, who was counsel’s wife, where her testimony was “duplicative of other witnesses and uncontradicted”); Kirksey v. State, No. 01-07-00156-CR, 2008 WL 4837424, at *5 (Tex App. – Houston [1st Dist.] November 6, 2008, no pet.)(not designated for publication)(following Acosta, no conflict where counsel was cousin of testifying deputy); Hole v. State, No. 12-06-00207-CR, 2008 WL 726185, at *2 (Tex. App. – March 19, 2008, pet. ref’d)(not designated for publication)(no conflict of interest where counsel had represented key State’s witness in unconnected proceeding to modify probation, relying on Acosta).

\textsuperscript{235} See United States v. Greig, 967 S.W.2d 1018, 1026 (5th Cir. 1992); Maya v. State, 932 S.W.2d 633, 636 (Tex. App. – Houston [14th Dist.] 1996, no pet.).


\textsuperscript{237} See Ex parte Prejean, 625 S.W.2d at 733; Brink, 78 S.W.3d at 485; Maya, 932 S.W.2d at 636; United States v. Greig, 967 F.2d 1018, 1022 (5th Cir. 1992); United States v. Garcia, 517 F.2d 272, 277-78 (5th Cir. 1975). In Federal court, judges are required by Rule 44(c) to admonish the defendant and obtain answers from the court’s inquires directly from him. See United States v. Newell, 315 F.3d 510, 519-20 (5th Cir. 2002); Garcia, 517 S.W.2d at 278. Texas has no corresponding procedural requirement, though it might perhaps be the better course for a trial judge to take.

\textsuperscript{238} See Wheat, 486 U.S. at 162 (“where a court justifiably finds and actual conflict of interests, there can be no doubt that it may decline a proffer of waiver, and insist that defendants be separately represented”).

\textsuperscript{239} See id. at 159 (“the essential aim of the Amendment is to guarantee an effective advocate for each criminal defendant rather than ensure that a defendant will inexorably be represented by the lawyer whom he prefers”).

\textsuperscript{240} Id. at 160, 163.
of conflict as may exist. A defendant who objects to
counsel on the basis of a conflict of interest, however,
must be allowed the opportunity to show that potential
conflicts impermissibly imperial his right to a fair
trial. Similarly, once the court knows or should
know that a particular conflict of interest exists, or the
court has been alerted or otherwise becomes aware of a
conflict of interest, it has a duty to conduct a hearing
on the issue. Even where a defendant has already
waived a conflict, if a conflict emerges that was not
foreseeable at the time of the initial waiver, the trial
court should conduct a second hearing. A vague and
conclusory accusation of a conflict of interest will be
insufficient to trigger a trial court’s duty to inquire,
however.

When a timely objection is made to a conflict of
interest, a defendant need not show specific harm or
prejudice; reversal is automatic whenever a trial court
improperly requires conflicted counsel over
objection. Prejudice is presumed regardless of
whether it is independently shown. A defendant is
not entitled to automatic reversal with harm presumed
if the claim of conflict of interest is advanced without
some allegation or assertion of a logical supporting
fact. Each case must be judged on an individual
basis.

Similarly, if a defendant’s counsel of choice is
erroneously disqualified on the basis of a conflict of
interest, the error is structural and not subject to
harmless error analysis. Thus, where the defendant’s Sixth Amendment right to his counsel of
choice has been violated, the case must be reversed
regardless of how well replacement counsel conducted
the defense.

IV. THE RULES OF PROFESSIONAL
CONDUCT AND DISQUALIFICATION OF
COUNSEL

The Disciplinary Rules of Professional Conduct
do not purport to provide a standard for
disqualification in litigation. Furthermore, the
disciplinary standards do not include all of the factors
which may be appropriate for a judge to consider in
deciding motions to disqualify, including any delay in
raising the issue by the opposing party, whether

duty under United States Constitution); Calloway v. State,
699 S.W.2d 824, 829-30 (Tex. Crim. App. 1985)(no duty
under the United States Constitution); Pina v. State, 127
S.W.3d 68, 73 (Tex. App. – Houston [1st Dist.] 2003, no
pet.)(no duty under the United States Constitution); Ramirez,
13 S.W.2d at 487 (no duty under United States Constitution);
Howard v. State, 966 S.W.2d 821, 825 (Tex. App. – Austin 1998, pet. ref’d)(no duty under Texas Constitution);
see also United States v. Greig, 967 F.2d 1018, 1021 (5th Cir. 1992)(no duty under United States Constitution).

See Cuyler, 446 U.S. at 348; Holloway v. Arkansas, 435

See Cuyler, 446 U.S. at 346; Stephenson v. State, 255
ref’d); Thompson v. State, 94 S.W.3d 11, 20 (Tex. App. –
Houston [14th Dist.] 2002, pet. ref’d); Brink v. State, 78
S.W.3d 478, 486 (Tex. App. – Houston [14th Dist.] 2002,
pet. ref’d); Ramirez, 13 S.W.2d at 487, see also United
States v. Brown, 217 F.3d 247, 259 (5th Cir.), cert. denied,

See United States v. Newell, 315 F.3d 510, 522 (5th Cir.
2002); United States v. Hall, 200 F.3d 962, 967 (6th Cir.
2000).

See Stephenson, 255 S.W.3d at 656 (trial court did not
er in denying motion to withdraw where “trial counsel did
deliberately on the alleged conflict of interest”); Howard,
966 S.W.2d at 826 (“A conflict of interest claim that is
advanced without some allegation of a logical supporting
fact does not obligate the trial court to conduct a hearing”);
Gottlich v. State, 822 S.W.2d 734, 727 (Tex. App. – Fort
Worth 1992, pet. ref’d)(conclusory allegation of conflict of
interest insufficient to trigger duty to inquire); Brown, 217
F.3d at 259 (allegation that counsel was trying to “railroad"
defendant was too “vague, conclusional and insufficient to
alert a trial court to an actual conflict of interest”).

See id. at 150-51.

See TEX. DISCIPLINARY R. PROF’L CONDUCT 1.06 cmt.
17 (“Raising questions of conflict of interest is primarily
the responsibility of the lawyer undertaking the representation”); TEX. DISCIPLINARY R. PROF’L CONDUCT preamble ¶ 15
(“The fact that a rule is a just basis for a lawyer’s self-
assessment, or for sanctioning a lawyer under the
administration of a disciplinary authority, does not imply
that an antagonist is a collateral proceeding or transaction
has standing to seek enforcement of the rule”).
Disqualification of counsel in criminal cases on the grounds of conflict of interest

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Disqualification is necessary to prevent tainting of the proceedings, and constitutional right to counsel issues.253 Finally, “mere” violations of the Rules of Disciplinary Procedure do not constitute a violation of Due Process, so that a party seeking disqualification or reversal on constitutional grounds will have to prove something more than simply a violation of the rules in order to be entitled to the relief he seeks.254

Nevertheless, while warning that objection may be “misused as a technique of harassment,” the comments to Rule 1.06, which address conflicts of interest, recognize that where a conflict is sufficiently severe as to “call in question the fair or efficient administration of justice,” opposing counsel may properly raise the issue.255 The courts have come to rely upon the rule in determining whether counsel should be disqualified.256

In the end, however, the primary responsibility rests with the lawyer who undertakes representation.257 Comment 1 to Rule 1.06 notes that an “impermissible conflict of interest may exist before representation is undertaken,” and cautions that if so, “representation should be declined.”258 Similarly, the comment warns, if a conflict arises after the lawyer has been engaged, counsel “must take effective action to eliminate the conflict,” which may include withdrawing from the case.259

Though comments to the rules do not rise to the level of ethical obligations, and no disciplinary action may be taken for failure to conform to the comments,260 a lawyer who does not heed this commonsense advice risks violating the State Bar Rules. Rule 1.06(e) requires that if a lawyer has accepted representation in violation of the rule, or if representation properly accepted later becomes improper under the rule, “the lawyer shall promptly withdraw from one or more representation to the extent necessary for any remaining representation not to be in violation of these rules.”261 Curiously, subsection (e) does not address a lawyer’s responsibility for declining representation which might violate Rule 1.06. Rule 1.15(a), however, fills whatever gap might be left, as it mandates that a lawyer shall decline or withdraw from representation which “will result in violation of Rule 3.08 [or] other applicable rules of professional conduct or other law.”262 Presumably, Rule 1.06(b) would constitute an “applicable rule of professional conduct” subject to the strictures of Rule 1.15(a).


255 See *House*, 947 S.W.2d at 253; *Brown*, 921 S.W.2d at 232.


257 TEX. DISCIPLINARY R. PROF’L CONDUCT cmt. 17.

258 TEX. DISCIPLINARY R. PROF’L CONDUCT 1.06 cmt. 1.

259 TEX. DISCIPLINARY R. PROF’L CONDUCT 1.06 cmt. 1

260 See TEX. DISCIPLINARY R. PROF’L CONDUCT preamble ¶ 10.

261 TEX. DISCIPLINARY R. PROF’L CONDUCT 1.06(e).

262 TEX. DISCIPLINARY R. PROF’L CONDUCT 1.15(a).