

**DISQUALIFICATION OF COUNSEL IN CRIMINAL CASES ON THE
GROUNDS OF CONFLICT OF INTEREST**

EDWARD L. WILKINSON
Tarrant County District Attorney's Office

State Bar of Texas
36th ANNUAL
ADVANCED CRIMINAL LAW COURSE
July 26-29, 2010
San Antonio

CHAPTER 40

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:

Books: *BRADY DUTIES AND THE PRE-TRAIL DISCLOSURE OF EVIDENCE* (Texas District and County Attorney's Association 2009); "Communication with Judges, Jurors, and Witnesses Outside the Courtroom," in *DOING JUSTICE: A PROSECUTOR'S GUIDE TO ETHICS AND CIVIL LIABILITY* (National Center for Prosecution Ethics 2007); *LEGAL ETHICS AND CRIMINAL LAW: PROSECUTION AND DEFENSE* (Texas District and County Attorney's Association 2006); *TEXAS PROSECUTORIAL ETHICS* (Texas District and County Attorney's Association 2001); **Law Reviews:** *If One is Good, Two Must Be Better: A Comparison of the Texas Standards for Appellate Conduct and the Texas Disciplinary Rules of Professional Conduct*, St. Mary's Law Journal (2010); *Ethical Plea Bargaining Under the Texas Disciplinary Rules of Professional Conduct*, St. Mary's Law Journal (2008); *Communicating With Judges, Jurors, and Witness Outside the Courtroom*, *DOING JUSTICE.*, National College of District Attorneys (2007); *Punishment Evidence: Grunsfeld Ten Years Later*, St. Mary's Law Journal (2004); *Conflicts of Interest in Texas Criminal Cases*, *Baylor Law Review* (2002); *That's a Damn Lie! Ethical Obligations of Counsel When a Witness Offers False Testimony in a Criminal Trial*, St. Mary's Law Journal (2002); **Other publications:** Texas Bar Journal; Texas Criminal Appellate Law Manual, The Texas Prosecutor, American Bar Association Litigation Newsletter, State Bar of Texas Criminal Justice Section Newsletter

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 TEXAS SCHOOL OF LAW
Austin, Texas, J.D., 1988.
The UNIVERSITY OF NORTH CAROLINA at CHAPEL HILL
Chapel Hill, North Carolina, M.A., English Literature, 1983
GEORGETOWN UNIVERSITY
Washington, D.C., A.B., cum laude, 1981

TABLE OF CONTENTS

SECTION ONE: DISTRICT ATTORNEYS 1

I. THE STANDARDS FOR DISQUALIFICATION AND RECUSAL 1

 A. The standard for disqualification 2

 B. The standard for recusal 3

II. DISQUALIFICATION ON THE GROUNDS OF CONFLICT OF INTEREST WITH A FORMER CLIENT 4

 A. The district attorney and former clients 4

 1. Former client in the same case 4

 2. Client in a previous case 5

 3. Former client is a witness in the case 7

 B. Assistant prosecutors and former clients 8

III. DISQUALIFICATION AND THE DISINTERESTED PROSECUTOR 9

 A. A defendant’s right to a disinterested prosecutor at common law 9

 B. The right to a disinterested prosecutor and disqualification of the prosecutor 12

SECTION TWO: DEFENSE ATTORNEYS 16

I. TYPES OF REPRESENTATIONAL CONFLICTS UNDER BOTH THE CONSTITUTION AND THE STATE BAR RULES 17

II. CONSTITUTIONAL CONFLICTS 17

 A. “Multiple Representation” Conflicts – The *Cuyler Test* 17

 B. Alternative Tests for Conflicts Between Counsel and the Defendant 18

 1. Conflicts Between the Defendant and Counsel’s Personal Interests 18

 2. Counsel Conflicts Between a Defendant and a Third Party 21

 3. Court of Criminal Appeals’ Rejection of Beets and Embrace of Cuyler 22

III. WAIVER OF A CONFLICT OF INTEREST AND THE COURT’S DUTY TO INQUIRE 23

 A. Waiver of Conflict 23

 B. The Court’s Duty to Inquire About a Conflict 23

IV. THE RULES OF PROFESSIONAL CONDUCT AND DISQUALIFICATION OF COUNSEL 24

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.¹ 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.² Depending on the degree of conflict, a prosecutor may be disqualified from representing the State in a case.³ 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.⁴ This section will examine the standards for disqualification and recusal of a prosecutor in a case.

¹ TEX. CONST. art. V, § 21; TEX. CODE CRIM. PROC. ANN. art. 2.01 (Vernon 2005); Landers v. State, 256 S.W.3d 295, 303-04 (Tex. Crim. App. 2008); State ex rel. Hill v. Pirtle, 887 S.W.2d 921, 925 n.1 (Tex. Crim. App. 1994)(orig. proceeding); Canady v. State, 100 S.W.3d 28, 31 (Tex. App. – Waco 2003, no pet.).

² See Pirtle, 887 S.W.2d at 925; In re Reed, 137 S.W.3d 676, 679 (Tex. App. – San Antonio 2004, orig. proceeding); see also Susan W. Brenner & James Geoffrey Durham, *Resolving Prosecutor Conflicts of Interest*, 6 GEO. J. LEGAL ETHICS 415, 471-73 (1993)(suggesting that because prosecutors must also take into consideration public will, they may face a “conflict of interest” between their independent analysis of a case and political necessity).

³ See Landers, 256 S.W.3d at 304; Pirtle, 887 S.W.2d at 925.

⁴ See Coleman v. State, 246 S.W.3d 76, 81 (Tex. Crim. App. 2008); State v. Rosenbaum, 852 S.W.2d 525, 528 (Tex. Crim. App. 1993), rev'd on other grounds, 910 S.W.2d 934 (Tex. Crim. App. 1994).

I. THE STANDARDS FOR DISQUALIFICATION AND RECUSAL

The difference between “disqualification” and “recusal,” at least for the purposes of this analysis, is simple.⁵ 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.⁶ 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*⁷ is appointed to prosecute the cause.⁸ A prosecutor may voluntarily recuse himself, but that responsibility lies with him;⁹ a trial court has no authority to force a recusal.¹⁰

⁵ 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.

⁶ See State ex rel. Hill v. Pirtle, 887 S.W.2d 921, 927 (Tex. Crim. App. 1994); 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).

⁷ 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

“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.

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 tem* 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.

⁸ See TEX. CODE CRIM. PROC. ANN. art. 2.07(b-1)(Vernon 2005); Rosenbaum, 852 S.W.2d at 527.

⁹ See State ex rel. Eidson v. Edwards, 793 S.W.2d 1, 6 (Tex. Crim. App. 1990)(plurality opinion); see also Ex parte Reposa, No. AP-75,965, slip op. at 9 n.28, 2009 WL 3478455, at *8 n.28 (Tex. Crim. App. October 28, 2009)(not designated for publication).

¹⁰ See Johnson v. State, 169 S.W.3d 223, 229 (Tex. Crim. App. 2008).

¹¹ See Landers v. State, 256 S.W.3d 295, 304 (Tex. Crim. App. 2008)(quoting Pirtle, 887 S.W.2d at 927); Gonzalez v. State, 115 S.W.3d 278, 286 (Tex. App. – Corpus Christi 2004, pet. ref’d); see also Ex parte Reposa, No. AP-75,965, slip op. at 9, 2009 WL 3478455, at *10.

¹² See Pirtle, 887 S.W.2d at 921.

¹³ See id.

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

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. Edwards²² that “the responsibility for acknowledging a need for

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.

²¹ See House v. State, 947 S.W.2d 251, 253 (Tex. Crim. App. 1997); Brown v. State, 921 S.W.2d 227, 232 (Tex. Crim. App. 1996).

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 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

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 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”); Marbut, 76 S.W.3d 742, 748 (Tex. Pp. – Waco 2002, pet. ref’d); see also 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 off interests on the part of the district attorney or his assistants . . . the responsibility of recusal lies with them – not the trial court”); see also 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 Canady v. State, 100 S.W.3d 28, 31 (Tex. App. –Waco 2003, no pet.) (“The law in this area is less than settled”); 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 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 Landers v. State, 256 S.W.3d 295, 310 (Tex. Crim. App. 2008); see also 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”).

²⁵ See Scarborough v. State, 54 S.W.3d 419, 424-25 (Tex. App. – Waco 2001, pet. ref’d); Canady v. State, 100 S.W.3d 28, 31 (Tex. App. – Waco 2003, no pet.); Marbut v. State, 76 S.W.3d 742, 748-49 (Tex. App. – Waco 2002, pet. ref’d); State v. May, 270 S.W.2d 682, 684 (Tex. Civ. App. -- San Antonio 1954, no writ).

²⁶ May, 270 S.W.2d at 684.

²⁷ TEX. CODE CRIM. PROC. ANN. art. 2.07(a)(Vernon 2005).

²⁸ See State v. Rosenbaum, 852 S.W.2d 525, 528 (Tex. Crim. App. 1993); Marbut v. State, 76 S.W.3d at 748.

²⁹ Rosenbaum, 852 S.W.2d at 528 (emphasis in original).

³⁰ See In re Guerra, 235 S.W.3d 392, 427 (Tex. App. – Corpus Christi 2007, orig. proceeding).

³¹ Coleman v. State, 246 S.W.3d 76, 80 (Tex. Crim. App. 2008).

³² Id.

³³ See id.; see also 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*.³⁵ 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.³⁶ Prosecutors have elected to recuse themselves because they might be called upon to testify,³⁷ because the defendant had filed complaints against them with state investigative agencies,³⁸ because members of their staff might be called upon to testify,³⁹ 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.⁴⁰

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.⁴¹ 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.*⁴²

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.⁴³ If the elected district attorney is disqualified from

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.

³⁸ See Rogers v. State, 956 S.W.2d 624, 625 (Tex. App. – Texarkana 1997, pet. ref’d).

³⁹ See State ex rel. Hilbig v. McDonald, 877 S.W.2d 469, 472 (Tex. App.--San Antonio 1994, orig. proceeding).

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. 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)(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.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.⁴⁵ Similarly, an imputed disqualification will not carry over to a subordinate who may later work for a disqualified assistant.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 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.⁴⁷ When the prosecutor raised the conflict of interest issue, the defendant assured the court that he was "comfortable" with the proceeding.⁴⁸ The defendant was again granted probation, which was later revoked.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.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.⁵¹

The opinion in 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 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. 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 *per se* disqualified from prosecuting the case.⁵² In

⁵² 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

⁴⁴ 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; Scarborough 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).

⁴⁵ See Kizzee 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).

⁴⁶ See Scarborough, 54 S.W.3d at 425 ("Texas courts have rejected [the] theory of 'double imputation'").

⁴⁷ See Simons v. State, 234 S.W.3d 652, 652-53 (Tex. App. – Amarillo 2007, no pet.).

⁴⁸ See id. at 653.

⁴⁹ See id.

⁵⁰ See id.

⁵¹ See id. at 655.

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

on charges of possession of counterfeit bills, where defendant failed to establish any connection between the two cases).

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.

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

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").

⁶² See Landers v. State, 256 S.W.3d 295, 304-05 (Tex. Crim. App. 2008).

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;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.”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.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.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.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.⁷¹ Before trial she moved to disqualify the district attorney on the basis of a conflict of interest.⁷² After a hearing, the motion was overruled.⁷³ Landers was convicted and appealed.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 Lander’s due process rights.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:

*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.*⁷⁶

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.⁷⁷ A defendant presumably would otherwise lack standing to complain

⁶⁶ See Landers, 256 S.W.3d at 307.

⁶⁷ Id.

⁶⁸ See id. at 307-08.

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).

⁷⁰ See Landers, 256 S.W.3d at 298, 300-01

⁷¹ See id. at 298.

⁷² See id.

⁷³ See id. at 298, 300-01.

⁷⁴ See id. at 300. The defendant was sentenced to 99 years imprisonment and a \$10,000 fine. See id.

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”)

⁷⁶ Id. at 310.

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.⁷⁸ 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.⁷⁹ 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.⁸⁰

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.⁸¹ In State ex rel. Eidson,

⁷⁸ See Briggs 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 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 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).

⁷⁹ See State ex rel. Hill v. Pirtle, 887 S.W.2d 921, 927-28 (Tex. Crim. App. 1994)(orig. proceeding) (prosecutor may be disqualified only on basis of due process violation); 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").

⁸⁰ See Powers 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).

⁸¹ See Marbut 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 v. State, 54 S.W.3d 419, 424 (Tex. App. – Waco 2001, no pet.)(same); Hernandez 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 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

for example, the Court of Criminal Appeals rejected the contention that the mere presence in the district attorney's office of an assistant who had formerly represented the defendant is sufficient to warrant disqualification of the district attorney or other members of his staff.⁸²

Contrary to the general rule, the Amarillo Court of Appeals in 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.⁸³ 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.⁸⁴ 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."⁸⁵

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."⁸⁶ 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

father's office at the time father was representing defendant, where ADA never discussed case with anyone); see also Carson 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 *elected* district attorney to those staff members who 'serve at his [or her] will and pleasure"); Susan W. Brenner & James Geoffery Durham, *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").

⁸² See State ex rel. Eidson v. Edwards, 793 S.W.2d 1, 7 (Tex. Crim. App. 1990)(orig. proceeding).

⁸³ See 790 S.W.2d 705, 709 (Tex. App. – Amarillo 1990, orig. proceeding).

⁸⁴ See id. at 707.

⁸⁵ Id.

⁸⁶ Id.

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

⁸⁷ See id.

⁸⁸ State ex rel. Eidson v. Edwards, 793 S.W.2d 1, 5 n.5 (Tex. Crim. App. 1990)(orig. proceeding).

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 id.

⁹¹ See State ex rel. Hill v. Pirtle, 887 S.W.2d 921, 925 n.1 (Tex. Crim. App. 1994)(orig. proceeding).

⁹² See TEX. CODE CRIM. PROC. ANN. art. 2.01 (Vernon 2005); TEX. DISCIPLINARY R. PROF’L CONDUCT 1.06(a); TEX. DISCIPLINARY R. PROF’L CONDUCT 3.08(b); see also Edward L. Wilkinson, 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).

⁹³ See Worthington v. State, 714 S.W.2d 461, 465 (Tex. App. – Houston [1st Dist.] 1986, pet. ref’d); Stephens v. State, 978 S.W.2d 728, 730 (Tex. App. – Austin 1998, pet. ref’d); Smith v. Whatcott, 757 F.2d 1098, 100 (10th Cir. 1985); see also Marbut v. State, 76 S.W.3d 742, 749 (Tex. App. – Waco 2002, pet. ref’d)(error unauthorized appointment of attorney *pro tem* waived when defendant failed to object to the appointment).

⁹⁴ See Worthington, 714 S.W.2d at 465.

⁹⁵ See id.

⁹⁶ See id.

⁹⁷ Young v. United States ex rel. Vuitton Et. Fils, S.A., 48 U.S. 787, 810 (1987); Marshall v. Jerrico, Inc., 446 U.S. 238, 249-50 (1980). Several commentators have suggested that prosecutors must be “neutral” rather than simply “disinterested.” See Bruce A Green & Fred C. Zacharias, *Prosecutorial Neutrality*, 2004 WIS. L. REV. 837-904 (Winter 2004)(calling for creation of “well-established normative standards governing prosecutors’ discretionary decision making”); H. Richard Uviller, *The Neutral Prosecutor: The Obligation of Dispassion in a Passionate Pursuit*, 68 *Fordham L. Rev.* 1695, 1718 (2000)(advocating the creation of bifurcated prosecution process, requiring that the lawyers who take in a case and negotiate a plea be screened from those who actually try cases).

⁹⁸ See In re April 1977 Grand Jury Subpoenas: General Mortors Corp. v. United States, 573 F.2d 936, 944 (6th Cir.), appeal dismissed en banc, 584 F.2d 1366 (1978), cert. denied, 440 U.S. 934 (1979); Granger v. Peyton, 379 F.2d 709, 711 (4th Cir. 1967); People v. Zimmer, 414 N.E.2d 705, 707 (N.Y. 1980); People v. Superior Court of Contra Costa County, 561 P.2d 1164, 1173 (Cal. 1977).

⁹⁹ See 379 F.2d at 711.

would make a favorable property settlement in the parallel divorce action.¹⁰⁰

The Fourth Circuit concluded that the dual representation “clearly denied [the defendant] the possibility of fair minded exercise of the prosecutor’s discretion.”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.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.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.*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.”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.¹⁰⁶

Finally, in Young v. United States ex rel. Vuitton et Fils, S.A., the Court appeared poised to directly address the issue.¹⁰⁷ Louis Vuitton, S.A., a French leather goods manufacturer, sued Sol Klayminc and others, alleging trademark infringement.¹⁰⁸ Klayminc and the others settled with Vuitton.¹⁰⁹ As part of the settlement, Klayminc consented to the entry of a permanent injunction prohibiting him from manufacturing or selling fake Vuitton goods.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.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.¹¹² The court granted the motion.¹¹³ Klayminc was eventually convicted by a jury of criminal contempt of court.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.¹¹⁵ Both the district court and the Second Circuit Court of Appeals rejected the contention.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.”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

¹⁰⁰ See id.

¹⁰¹ Id. at 712.

¹⁰² Id.

¹⁰³ See id.

¹⁰⁴ Bordenkircher v. Hayes, 434 U.S. 357, 365 (1978).

¹⁰⁵ Marshall v. Jerico, Inc., 446 U.S. 238, 250-51 (1980).

¹⁰⁶ Id. at 249.

¹⁰⁷ See 481 U.S. 787 (1987).

¹⁰⁸ See id. at 790.

¹⁰⁹ See id.

¹¹⁰ See id.

¹¹¹ See id.

¹¹² See id.

¹¹³ See Vuitton, 481 U.S. at 791.

¹¹⁴ See id. at 792.

¹¹⁵ See id. at 793.

¹¹⁶ See id.

¹¹⁷ Id. at 803 (quoting Berger v. United States, 295 U.S. 78, 88 (1935)).

escape nor innocence suffer.”¹¹⁸ The Court also noted numerous disciplinary and ethical rules outlining a prosecutor’s “unique responsibility” and prohibiting potential conflicts of interest.¹¹⁹

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.”¹²⁰ 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.”¹²¹ 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.*¹²²

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.¹²³ 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.”¹²⁴

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.”¹²⁵ “Given this inherent conflict of roles,” the Court concluded, “there is no need to speculate whether the prosecutor will be subject to extraneous influence.”¹²⁶

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,”¹²⁷ the Court specifically declined to hold that the prosecutorial conflict of interest at issue was unconstitutional.¹²⁸ Instead, it relied upon its “supervisory authority” over the procedures to be employed by federal courts to enforce their orders.¹²⁹ Only one justice, in fact, voted to hold that the appointment at issue violated due process.¹³⁰

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.¹³¹ 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.”¹³² It is therefore error that is “so fundamental and pervasive

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.

¹²⁷ See State of N. J. v. Imperiale, 773 F. Supp. 747, 752 (D.N.J. 1991).

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.”¹³³

But an equal number of justices – four¹³⁴ – 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.¹³⁵

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.”¹³⁶

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).

¹³⁶ See Sassower v. Sheriff of Westchester County, 824 F.2d 184, 191 (2d Cir. 1987)(noting that the Young court did not hold that the arrangement at issue violated due process); see also Person v. Miller, 854 F.2d 656, 663 (4th Cir. 1988), cert. denied, 489 U.S. 1011(1989)(holding that appointment of private counsel to prosecute contempt proceeding did not violate Young or due process where disinterested government counsel retained “effective control” of the case); see also See Clearwater-Thompson v. Grassmueck, Inc., 160 F.3d 1236, 1237 (9th Cir. 1998); State of New Jersey v. Imperiale, 773 F.Supp. 747, 754 (D.N.J. 1991); United States ex rel. S.E.C. v. Carter, 907 F.2d 484, 486 (5th Cir. 1990); United States v. Eisenberg, 773 F.Supp. 662, 703-06 (D.N.J. 1991); Dick v. Scroggy, 882 F.2d 192, 198-99 (6th Cir. 1989)(Celebrezze, S.J., concurring); State v. Terrazas, 962 S.W.2d 38, 43 (Tex. Crim. App. 1998)(Mansfield, J., dissenting); see also 20 John D. Bessler, *The Public Interest and the Unconstitutionality of Private Prosecutors*, 47 ARK. L. REV. 511-602 (1994)(arguing that the use of special prosecutors unconstitutional in the wake of Vuitton).

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.¹³⁷ The Court of Criminal Appeals concluded that a prosecutor may be disqualified on the basis of lack of disinterest 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.”¹³⁸

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.¹³⁹ 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.”¹⁴⁰ “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.”¹⁴¹

¹³⁷ See Ex parte Reposa, No. AP-75,965, slip op. at 9-10, 2009 WL 3478455, at *10-11 (Tex. Crim. App. October 28, 2009)(not designated for publication).

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 Geoffrey 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.”¹⁴² 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 Williams, 50 P.2d 729, 732 (Okla. 1935)(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. 1910)(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. Hutchison 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.”¹⁴⁴ 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.¹⁴⁶ 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”).

¹⁴⁵ 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)(quoting Young v. United States ex rel. Vuitton et Fils S.A., 481 U.S. 787, 807 n.18 (1987)).

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), 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”).

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.¹⁴⁸ 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.¹⁴⁹ The court of appeals noted that Appellant had failed to establish any harm as a result of the alleged “grudge,” and upheld the conviction.¹⁵⁰

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 “ax 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

Just as mere personal dislike is not sufficient to disqualify a prosecutor,¹⁵¹ a prosecutor’s personal relationship with a victim or a relative of the victim, standing alone, is generally insufficient to disqualify

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–Waco 1996, pet. ref’d)(defendant failed to prove that prosecutor’s purported “prejudice” and “predisposition” against him rose to the level of a due process violation); State ex rel Hilbig v. McDonald, 877 S.W.2d 469, 470 (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 Reposo, 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 “ax 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”).

him under due process.¹⁵² 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.¹⁵³

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

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).

of” a prosecutor who has more limited ambitions.¹⁵⁴ 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.¹⁵⁵

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 facie* conflict of interest.¹⁵⁶

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.¹⁵⁷ 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.¹⁵⁸

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

¹⁵⁴ Dick v. Scroggy, 882 F.2d 192, 196 (6th Cir. 1989).

¹⁵⁵ See In re Guerra, 235 S.W.3d 392, 430 (Tex. App. – Corpus Christi 2007, orig. proceeding)(“a prosecutor’s political ambitions alone are not enough to support a finding that the prosecutor is not sufficiently disinterested”); Scroggy, 882 F.2d at 196; United States v. Wallach, 935 F.2d 445, 460 (2d Cir. 1991); Wright v. United States, 732 S.W.2d 1048, 1055 (2d Cir. 1984), cert. denied, 469 U.S. 1106 (1985); Azzone v. United States, 341 F.2d 417, 419 (8th Cir. 1965), cert. denied, 381 U.S. 943 (1965); United States v. Terry, 806 F.Supp. 490, 497 (S.D.N.Y. 1992), aff’d, 17 F.3d 575 (2d Cir. 1994), cert. denied, 513 U.S. 946 (1994).

¹⁵⁶ See Town of Newton v. Rumery, 480 U.S. 386, 397-98 (1987).

¹⁵⁷ See United States v. Terry, 17 F.3d 575, 578 (2d Cir. 1994), cert. denied, 513 U.S. 946 (1994); Fed. Trade Comm’n v. Am. Nat. Cellular, 868 F.2d 315, 319 (9th Cir. 1989); United States v. Eisenberg, 773 F. Supp. 662, 704 (N.J. 1991).

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.”¹⁵⁹ 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.¹⁶⁰ 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.¹⁶¹ The use of special prosecutors has been sanctioned by Texas courts for well over a century.¹⁶²

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.¹⁶³ There is no *per se* constitutional prohibition against the use of special prosecutors,¹⁶⁴ even where the special prosecutor represents the victim in a civil suit arising from the same transaction at issue in the criminal case.¹⁶⁵

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.¹⁶⁶ 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.¹⁶⁷ Operational conduct of the trial is of subordinate concern, except as it may have an impact upon determining the more fundamental prosecutorial decisions.¹⁶⁸ 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.¹⁶⁹ 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.¹⁷⁰

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

¹⁵⁹ State v. Rosenbaum, 852 S.W.2d 525, 529 (Tex. Crim. App. 1993)(Clinton, J., concurring); rev’d on other grounds, 910 S.W.2d 934 (Tex. Crim. App. 1994).

¹⁶⁰ See Stephens v. State, 978 S.W.2d 728, 731 (Tex. App. – Austin 1998, pet. ref’d).

¹⁶¹ See id.

¹⁶² See Burkhard v. State, 18 Tex. App. 599, 618-19 (1885).

¹⁶³ See Ballard v. State, 519 S.W.2d 426, 428 (Tex. Crim. App. 1974); Ex parte Powers, 487 S.W.2d 101, 104 (Tex. Crim. App. 1972); Jones v. Richards, 776 F.2d 1244, 1246-47 (4th Cir. 1985); but see Op. Tex. Ethics Comm’n No. 455 (1987).

¹⁶⁴ See Faulder v. Johnson, 81 F.3d 515, 517 (5th Cir. 1996), cert. denied, 519 U.S. 995 (1996); Powers v. Hauck, 339 F.2d 322, 325 (5th Cir. 1968).

¹⁶⁵ See Figueroa v. State, 375 S.W.2d 907, 907 (Tex. Crim. App. 1964).

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;

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

¹⁶⁷ Compare Faulder, 81 F.3d at 517 with Teczar 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).

¹⁶⁸ See East, 55 F.3d at 1001

¹⁶⁹ See Faulder, 81 F.3d at 517.

¹⁷⁰ 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”).

counsel.¹⁷¹ Ineffective assistance of counsel may result when an attorney labors under a conflict of interest.¹⁷² Faced with a conflict of interest, counsel may breach not only the duty of loyalty, “perhaps the most basic of counsel’s duties,”¹⁷³ but violate the defendant’s constitutional right to competent representation.¹⁷⁴ Under such circumstances counsel must either withdraw or be disqualified by the court.¹⁷⁵

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.¹⁷⁶

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.”¹⁷⁷ 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.¹⁷⁸ 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.¹⁷⁹

II. CONSTITUTIONAL CONFLICTS

A. “Multiple Representation” Conflicts – The Cuyler Test

Multiple representation of co-defendants – either the serial representation of co-defendants,¹⁸⁰ or the simultaneous representation of co-defendants¹⁸¹ – does not *per se* violate the Sixth Amendment.¹⁸² Indeed, as the Supreme Court has observed, in many cases a “common defense . . . gives strength against common attack.”¹⁸³ Thus, though a possible conflict of interest “inheres in almost every instance of multiple representation,”¹⁸⁴ the courts have rejected an inflexible rule that would presume prejudice in all cases.¹⁸⁵

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

¹⁷¹ See Strickland v. Washington, 466 U.S. 668, 686 (1984); Monreal v. State, 947 S.W.2d 559, 564 (Tex. Crim. App. 1997).

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).

¹⁷⁷ Beets v. Scott, 65 F.3d 1258, 1265 (5th Cir. 1995)(*en banc*), *cert. denied*, 517 U.S. 1157 (1996); see also Cuyler v. Sullivan, 446 U.S. 335, 348-49 (1980).

¹⁷⁸ See Pina v. State, 29 S.W.3d 315, 318 (Tex. App. – El Paso 2000, *pet. ref’d*).

¹⁷⁹ See Beets, 65 F.3d at 1265; Monreal v. State, 947 S.W.2d 559, 565 (Tex. Crim. App. 1997); see also Kegler v. State, 16 S.W.3d 908, 914 (Tex. App. – Houston [14th Dist] 2000, *pet. ref’d*); Cunningham v. State, 982 S.W.2d 513, 523 (Tex. App. – San Antonio 1998, *pet. ref’d*).

¹⁸⁰ See Cuyler, 446 U.S. at 337-38.

¹⁸¹ See Holloway v. Arkansas, 435 U.S. 475, 477-78 (1978).

¹⁸² See Cuyler, 446 U.S. at 348; James v. State, 763 S.W.2d 776, 778 (Tex. Crim. App. 1989); Castillo v. State, 186 S.W.3d 21, 28-29 (Tex. App. – Corpus Christi 2006, *pet. ref’d*).

¹⁸³ Burger v. Kemp, 483 U.S. 776, 784 (1987)(quoting Holloway, 435 U.S. at 482-83 (ellipsis in original)); see also Kegler v. State, 16 S.W.2d at 913 (holding no actual conflict in attorney representing co-defendants where both claimed a third party committed the offense); See also Teresa Stanton Collett, *The Promise of Multiple Representation*, 16 REV. LITIG. 567, 574-82 (1997)(comparing advantages and disadvantages of joint representation).

¹⁸⁴ Cuyler, 446 U.S. at 348, 100 S.Ct. at 1718.

¹⁸⁵ See Burger, 483 U.S. at 783, 107 S.Ct. at 3120.

adverse effect on specific instances of counsel's performance.¹⁸⁶

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.¹⁸⁷ 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."¹⁸⁸ Examples of an actual conflict include when inculcating 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.¹⁸⁹

The mere showing of an actual conflict of interest is not enough to establish a constitutional violation.¹⁹⁰ A defendant must also demonstrate that the actual

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).

¹⁹⁰ See Raspberry v. State, 741 S.W.2d 191, 196-97 (Tex. App. – Fort Worth, 1987, pet. ref'd).

conflict of interest "adversely affected his lawyer's performance."¹⁹¹ 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.¹⁹² 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.¹⁹³ The requirement of "adverse affect" 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.¹⁹⁴

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

¹⁹¹ Burger v. Kemp, 483 U.S. 776, 783 (1987)(quoting Strickland v. Washington, 466 U.S. 668, 692 (1984); Cuyler, 446 U.S. at 350.

¹⁹² See Covey v. United States, 377 F.3d 903, 908 (8th Cir. 2004)(quoting McFarland v. Yukins, 356 F.3d 688, 705 (6th Cir. 2004)).

¹⁹³ McFarland, 356 F.3d at 706. The circuits are split as to what constitutes sufficient evidence to establish an adverse affect where a defendant claims that his attorney's conflict caused him to forego an available defense. See *id.* While some hold that a mere showing that a defense was "plausible" is sufficient, others require the available defense be "reasonable," while still others demand that a defendant show that the choice was not part of a legitimate strategy or that the choice worked to the defendants detriment and to the other client's benefit and there is no other explanation for employment of the strategy. See *id.* Though the Court of Criminal Appeals has discussed an actual conflict of interest as comprising the "dilemma" of having to "advancing plausible arguments that are damaging to the cause of a co-defendant," see James, 763 S.W.3d at 779, it has not yet had to address the issue of whether foregoing the advancement of a "plausible" argument constitutes an "adverse affect." Compare McFarland, 356 F.3d at 706.

¹⁹⁴ See Beets v. Scott, 65 F.3d 1258, 1265 (5th Cir. 1995)(*en banc*), *cert. denied*, 517 U.S. 1157 (1996). For a detailed examination of the differences between a *per se* rule of prejudice, the standard of "adversely affected," and the Strickland standard, see Edward L. Wilkinson, *Conflicts of Interest in Texas Criminal Cases*, 54 BAYLOR L. J. 171, 204-208 (2002).

conflict in which a lawyer is ethically compelled to advance two separate and divergent interests on behalf of two different clients.¹⁹⁵ Since the Supreme Court has yet to provide any clear guidance as to how such conflicts should be addressed,¹⁹⁶ 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.¹⁹⁷

¹⁹⁵ See *Beets v. Scott*, 65 F.3d 1258, 1270-72 (5th Cir. 1995)(*en banc*), cert. denied, 517 U.S. 1157 (1996); see also *United States v. Newell*, 315 F.3d 510, 516 (5th Cir. 2002).

¹⁹⁶ *Mickens v. Taylor*, 535 U.S. 162, 175 (2002)(observing that language of *Cuyler* does not clearly establish, or even support, expansive application of its standard to other types of conflicts of interest); *Acosta v. State*, 233 S.W.3d 349, 355 (Tex. Crim. App. 2007)(observing that the Supreme Court "has not rules on the issue of whether *Cuyler* is limited to multiple-representation conflicts"); *State v. Drisco*, 355 N.J. Super. 283, 293-94, 810 A.2d 81, 86-87 (2002), cert. denied, 178 N.J. 252, 837 A.2d 1094(2003)(observing that not all conflict of interest claims can be properly analyzed under state *per se* rule of harm or *Cuyler* standard).

¹⁹⁷ See *Beets*, 65 F.3d at 1265; *Cunningham*, 982 S.W.2d at 522-23; *Monreal v. State*, 923 S.W.2d 61, 66 (Tex. App. -- San Antonio 1996), *aff'd*, 947 S.W.2d 559 (Tex. Crim. App. 1997); *Thielman v. State*, No. 13-03-00570-CR, 2006 WL 3095366, at *10-11 (Tex. App. -- Corpus Christi October 26, 2006, pet. ref'd)(not designated for publication) (outlining test in *Cuyler*, but rejecting claim on basis of *Strickland*); see also *Mickens v. Taylor*, 535 U.S. 162 (2002)(observing that language of *Cuyler* does not clearly establish, or even support, expansive application of its standard to other types of conflicts of interest); *State v. Drisco*, 355 N.J. Super. 283, 293-94, 810 A.2d 81, 86-87 (2002)(observing that not all conflict of interest claims can be properly analyzed under state *per se* rule of harm or *Cuyler* standard); see also *United States v. O'Neil*, 118 F.3d 65, 72 (2d Cir. 1997), cert. denied, 522 U.S. 1064 (1998) (adopting *Beets* solely in situations in which a fee dispute prompts counsel to "shirk" his obligation "to dutifully represent his client"); but see *Spreitzer v. Peters*, 114 F.3d 1435, 1451 n.7 (7th Cir. 1997), cert. denied, 522 U.S. 1120 (1998)(rejecting *Beets*); *State v. Thompson*, 597 N.W.2d 779, 784 n.1 (Iowa 1999)(declining to follow *Beets* on basis that the Supreme Court has not yet adopted the standard); see also Brent Coverdale, Comment,

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.¹⁹⁸ 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."¹⁹⁹ 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).²⁰⁰

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.²⁰¹ After weighing these concerns, courts that have directly confronted the issue have concluded that *Strickland* and not *Cuyler* should control claims

Cuyler Versus Strickland: The Proper Standard for Self-Interested Conflicts of Interest, 47 U. Kan. L. Rev. 209, 233-38 (1998).

¹⁹⁸ See *Beets*, 65 F.3d at 1265; *Garcia v. Bunnell*, 33 F.3d 1193, 1198 n.4 (9th Cir. 1994), cert. denied, 514 U.S. 1024 (1995).

¹⁹⁹ *Beets*, 65 F.3d at 1270.

²⁰⁰ *Id.* at 1271.

²⁰¹ See *id.* at 1271-72.

that an attorney's representation was affected by own self-interest.²⁰²

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.²⁰³

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.²⁰⁴ 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."²⁰⁵

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).

²⁰³ See Monreal, 947 S.W.2d at 565; Ex parte Morrow, 952 S.W.2d 530, 538 (Tex. Crim. App. 1997), cert. denied, 525 U.S. 810 (1998); McKinny v. State, 76 S.W.3d 463, 478 (Tex. App. – Houston [1st Dist.] 2002, no pet.); Akridge v. State, 13 S.W.3d 808, 810-11 (Tex. App. – Beaumont 2000, no pet); Chavez v. State, 6 S.W.3d 66, 73 (Tex. App. – San Antonio 1999, pet. ref'd); see also Banda v. State, 890 S.W.2d 42, 59-60 (Tex. Crim. App. 1994), cert. denied, 515 U.S. 1105 (1995)(applying Strickland without comment or analysis to allegation of conflict between counsel's own interests and defendant's); Pickett v. State, No. 02-08-0439-CR, 2009 WL 3246755, at *7 (Tex. App. – Fort Worth October 8, 2009, no pet)(not designated for publication) (upholding court's refusal to appoint different counsel where defendant failed to establish an actual conflict of interest in counsel having prosecuted defendant ten years earlier). One court of appeals has gone to the other extreme, however, and reflexively applied Strickland without discussing either Cuyler or Beets -- perhaps because the defendant's complaint was so patently ridiculous (defendant claimed that his counsel had a conflict of interest because he had an office in the same building as the prosecutor). See Hooks v. State, 203 S.W.3d 861, 865-66 (Tex. App. – Texarkana 2006, pet. ref'd).

²⁰⁴ See Jackson v. State, 973 S.W.2d 954, 956 (Tex. Crim. App. 1998); see also Strickland v. Washington, 466 U.S. 668, 694 (1984); Beets, 65 F.3d at 1272.

²⁰⁵ Gosch v. State, 829 S.W.2d 775, 784 (Tex. Crim. App. 1991), cert. denied, 509 U.S. 922 (1993) (quoting Strickland, 466 U.S. at 686).

b. *The Winkler test, an alternative to the Beets test*

Several other federal Circuit Courts, implicitly recognizing the limitations of Cuyler but apparently unwilling to abandon it entirely, have offered an alternative test for reviewing allegations of ineffective assistance due to an attorney's self interest which, though based upon Cuyler, is more rigorous. These courts have developed "a three stage analysis" to review cases where the asserted conflict of interest arises between the interests of the defendant and those of his attorney.²⁰⁶

First, the defendant must establish that an actual conflict of interest existed.²⁰⁷ An actual conflict arises during representation when "the attorney's and the defendant's interests 'diverge with respect to a material factual or legal issue or to a course of action.'"²⁰⁸ Next, the defendant must establish an "actual lapse in representation" that resulted from the conflict.²⁰⁹ An actual lapse in representation is demonstrated by the existence of some "plausible alternative defense strategy" not taken up by defense counsel.²¹⁰ A defendant need not show that the alternative would necessarily have been successful, but only that it "possessed sufficient substance to be a viable alternative."²¹¹ Finally, the defendant must demonstrate causation; that is, he must show that the alternative defense or strategy was "inherently in

²⁰⁶ See United States v. Moree, 220 F.3d 65, 69 (2d Cir. 2000); Winkler v. Keane, 7 F.3d 304, 307 (2d Cir. 2000), cert. denied, 511 U.S. 1022 (1994); United States v. Gambino, 864 F.2d 1064, 1071 (3d Cir. 1988), cert. denied, 492 U.S. 906 (1989); see also Beets, 65 F.3d at 1283-84 (King, J.,dissenting).

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. Malpiedi, 62 F.3d 465, 469 (2d Cir. 1995)(same).

conflict with or not undertaken *due* to the attorney's other loyalties or interests."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 rights²¹³; counsel's alleged interest in setting up and later pursuing a civil rights case that he would handle on a contingent fee²¹⁴; counsel's refusal to raise an ineffective assistance of counsel claim against himself²¹⁵; the defendant's filing of a grievance against his attorney²¹⁶; the defendant's having filed a lawsuit against his attorney;²¹⁷ and counsel's attempting to force payment of fees by removing himself as surety of defendant's bond.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.²¹⁹ The courts have

ostensibly applied Cuyler in such situations, though oddly, they sometimes fail to cite it.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 deals several years before trial); Ramirez v. State, 13 S.W.3d 482, 485-86 (Tex. App. – Corpus Christi 2000), pet. dismiss'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); Fulgium 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 2330692, at *3 (Tex. App. – Austin August 15, 2007, pet. ref'd)(not designated for publication)(purported conflict of interest where counsel had represented witness); Thieleman v. State, No. 13-03-0570-CR, 2006 WL 3095366, 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).

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.

²¹³ See Beets, 65 F.3d at 1270-72.

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

²¹⁵ See Alvarez v. State, 79 S.W.3d 679, 681-82 (Tex. App. – Houston [14th Dist.] 2002, pet. dismissed).

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

²¹⁷ See Dunn v. State, 819 S.W.2d 510, 519 (Tex. Crim. App. 1991), cert. denied, 506 U.S. 834 (1992); Perry v. State, 464 S.W.2d 660, 664 (Tex. Crim. App. 1971); see also United States v. O'Neil, 118 F.3d 65, 71-72 (2d Cir. 1997), cert. denied, 522 U.S. 1064 (1998)(no conflict where attorney and client engaged in civil litigation over fees).

²¹⁸ See Walker v. State, No. 11-06-00079, 2007 4285265, at *4 (Tex. App. – Eastland December 6, 2007, no pet.) (not designated for publication).

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,

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; Fulgium, 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

examination of several recent cases, however, suggests that several Texas courts are actually applying the test in Winkler, though again, they curiously fail to cite it.²²¹

Application of the more specific Winkler standard, rather than the “vaguer” Cuyler test or the stricter Strickland standard, to possible conflicts of interest arising from representation of the defendant and a witness in the case makes sense. Representing a defendant in one case and a witness in a wholly unrelated matter does not automatically hold the possibility of prejudice that “inheres in almost every instance of multiple representation,” as Fulgium demonstrates. Thus, the stringent rule of Cuyler is unjustified. In addition, though it is “difficult to measure the precise effect on the defense of representation corrupted” by conflicting loyalties between two defendants in the same trial,²²² the same may not be said in many, if not most, of the cases involving a conflict between a defendant and witness. Very often, the significance of the witness’s testimony, or the influence of an unrelated matter, may be readily gauged, as Pina illustrates. Finally, as the Supreme Court has recognized, a certain deference should be accorded the judgment of trial counsel, who is in the best position to judge whether or not a conflict between a defendant and a witness may affect his representation of one or both of the clients.²²³ On the other hand, when counsel is genuinely faced with competing duties of loyalty which affect his representation of either or both clients, the Strickland test is ill-suited to gauging the constitutional ramifications of the conflict.²²⁴

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).

²²² Strickland v. Washington, 466 U.S. 668, 692 (1984).

²²³ See Cuyler v. Sullivan, 446 U.S. 335, 346 (1980)

²²⁴ See Beets v. Scott, 65 F.3d 1256, 1265 (5th Cir. 1995)(*en banc*), cert. denied, 517 U.S. 1157 (1996).

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.²²⁵ 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.²²⁶ The defendant’s attorney concluded that the best way to aid her was to discredit the CPS investigator on the case.²²⁷ 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.²²⁸ Counsel later testified that during closing argument he realized “that he had made a mistake by playing the audiotaped interview for the jury.”²²⁹

On appeal, the defendant contended that counsel had rendered ineffective assistance due to his attorney’s conflict of interest.²³⁰ 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.²³¹

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.”²³² The court therefore held: “In short,

²²⁵ See Acosta v. State, 233 S.W.3d 349, 350 (Tex. Crim. App. 2007).

²²⁶ See id. at 350-51.

²²⁷ See id. at 350.

²²⁸ See id. at 350, 352.

²²⁹ Id. at 350-51.

²³⁰ See id. at 352.

²³¹ See id.; see also Acosta v. State, 04-03-00583-CR, 2005 WL 418224, at *3 (Tex. App. – San Antonio 2005)(not designated for publication), rev’d, 233 S.W.3d 349 (Tex. Crim. App. 2007).

²³² Acosta, 233 S.W.3d at 354-355.

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.²³³ Lower Texas courts have since followed Acosta.²³⁴

III. WAIVER OF A CONFLICT OF INTEREST AND THE COURT'S DUTY TO INQUIRE

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.²³⁵ The right to conflict-free counsel may be waived, but the record must show the waiver was done

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.

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 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).

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.).

knowingly, intelligently, and voluntarily.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.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.²³⁸ The accused does not have an absolute right under the Sixth Amendment to have counsel of her own choosing.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."²⁴⁰

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

²³⁶ See Wheat v. United States, 486 U.S. 153, 159 (1988); Ex parte Prejean, 625 S.W.2d 731, 733 (Tex. Crim. App. 1981); Brink v. State, 78 S.W.3d 478, 485 (Tex. App. – Houston [14th Dist.] 2002, pet. ref'd); Ramirez v. State, 13 S.W.3d 482, 487 (Tex. App. – Corpus Christi 2000, pet. dism'd); Maya v. State, 932 S.W.2d at 636; see also Burton v. Mottolese, 267 Conn. 1, 39-40, 835 A.2d 998, 1024-25 (2003)(attorney violated rules of professional conduct by failing to explain fully potential conflict of interest).

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.

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

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").

²⁴⁰ Id. at 160, 163.

of conflict as may exist.²⁴¹ 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 imperil his right to a fair trial.²⁴² 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.²⁴³ 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.²⁴⁴ A vague and conclusory accusation of a conflict of interest will be insufficient to trigger a trial court's duty to inquire, however.²⁴⁵

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.²⁴⁶ Prejudice is presumed regardless of whether it is independently shown.²⁴⁷ 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.²⁴⁸ Each case must be judged on an individual basis.²⁴⁹

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.²⁵⁰ 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.²⁵¹

²⁴¹ See Cuyler v. Sullivan, 446 U.S. 335, 346-47 (1980) (no 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).

²⁴² See Cuyler, 446 U.S. at 348; Holloway v. Arkansas, 435 U.S. 475, 436-37 (1978).

²⁴³ See Cuyler, 446 U.S. at 346; Stephenson v. State, 255 S.W.3d 652, 655-56 (Tex. App. – Fort Worth 2008, pet. 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, 531 U.S. 973 (2000).

²⁴⁴ 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).

²⁴⁵ See Stephenson, 255 S.W.3d at 656 (trial court did not err in denying motion to withdraw where “trial counsel did not elaborate 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, conclusory and insufficient to alert a trial court to an actual conflict of interest”).

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.²⁵² 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

²⁴⁶ See Calloway v. State, 699 S.W.2d 824, 830 (Tex. Crim. App. 1985).

²⁴⁷ See id.; see also Holloway v. Arkansas, 435 U.S. 475, 438 (1978).

²⁴⁸ See Calloway, 699 S.W.2d at 831.

²⁴⁹ See id.

²⁵⁰ See United States v. Gonzalez-Lopez, 548 U.S. 140, 150 (2006) (“We have little trouble concluding that erroneous deprivation of the right to counsel of choice, ‘with consequence that are necessarily unquantifiable and indeterminate, unquestionably qualifies as ‘structural error’”) (quoting Sullivan v. Louisiana, 508 U.S. 275, 282 (1993)).

²⁵¹ See id. at 150-51.

²⁵² 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 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).

²⁵³ See Robert P. Schuwerk and John F. Sutton, *Commentary on the Texas Disciplinary Rules of Professional Conduct*, TEXAS LAWYER’S PROFESSIONAL ETHICS at I-30-31 (3d ed. 1997).

²⁵⁴ See House v. State, 947 S.W.2d 251, 253 (Tex. Crim. App. 1997); Brown v. State, 921 S.W.2d 227, 232 (Tex. Crim. App. 1996).

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

²⁵⁶ See Henderson v. Floyd, 891 S.W.2d 252, 252 (Tex. 1995)(orig. proceeding); Spears v. Forth Court of Appeals, 797 S.W.2d 654, 656 (Tex. 1990)(orig. proceeding); Ayres v. Canales, 790 S.W.2d 554, 556 n.2 (Tex. 1990)(orig. proceeding); NCNB Nat’l Bank v. Coker, 765 S.W.2d 398, 399 (Tex. 1989)(orig. proceeding).

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).

