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No. 12-23-00236-CV

In the Twelfth Court of Appeals
Tyler, Texas

In re Trent Brookshire

Response to Petition for Writ of Mandamus

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ATTORNEYS FOR REAL PARTY IN INTEREST
CAROLINE BROOKSHIRE

Oral Argument Requested

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Statement of Facts

After Trent Brookshire was fired from his job at Brookshire Grocery Company, Trent and his wife Caroline hired lawyer Rogge Dunn and his firm to advise them of their rights and to potentially negotiate a severance agreement or pursue claims against the company. Record 155. Dunn's firm's engagement letter, which Trent, Caroline, and Dunn all signed, provided that the Texas Disciplinary Rules of Professional Conduct "shall control" over any other ethics codes and shall govern the law firm's obligations. Record 155 ¶2 ("The Firm's obligations shall be governed by the TDR …").

To further the legal representation, as Trent admits, Trent and Caroline communicated with Dunn, both collectively and separately. Record 513.

Trent and Caroline separated, in June of 2022. Record 106.

Trent then sued Brookshire Grocery, in late August of 2022, for disability discrimination and retaliation. Record 7, 14-16.

To protect her community-property rights in any recovery, Caroline intervened in the suit. Record 36, 38-39. Trent answered, generally denying Caroline's allegations and pleading that she "take nothing." Record 165-66. Trent then moved to strike Caroline's intervention. Record 341.

At Caroline's deposition in the Brookshire Grocery suit, Dunn aggressively sought to discredit her, often on matters irrelevant to the lawsuit.

E.g., Record 101 (examination on divorce and custody matters). During the deposition, Dunn reminded Caroline that she had signed an engagement letter with him in the very matter in which he was deposing her. Record 115. The deposition was adjourned, Record 115, and Caroline moved to disqualify Dunn, on grounds that he had violated the conflict-of-interest rules found in the Texas Disciplinary Rules of Professional Conduct, Record 45—the very same rules the parties at the outset agreed would govern Dunn's obligations and that Trent in this proceeding agrees were violated.

Judge Clay White, after extensive briefing and an evidentiary hearing at which Dunn testified, disqualified Dunn. Record 409. Trent then sought mandamus relief.

Summary of Argument

The Texas Supreme Court has "repeatedly said that lawyers who violate conflict-of-interest rules must be disqualified because there is an irrebuttable presumption that a lawyer obtains a client's confidential information during representation." *In re Thetford*, 574 S.W.3d 362, 373 (Tex. 2019) (orig. proceeding). Consequently, "[o]nce the movant meets her burden to show a [conflict of interest], the trial court should perform its role in the internal regulation of the legal profession and grant the motion to disqualify." *In re Houston Cnty. ex rel. Session*, 515 S.W.3d 334, 342 (Tex. App.—Tyler 2015, orig. proceeding). Only in this way can a movant like Caroline avoid being "forced to reveal the very confidences she wishes to protect to demonstrate that such confidences exist." *Id*.

Uncomfortable with this authority, Trent implies that the supreme court's opinion in *In re Murrin Brothers 1885 Ltd.*, silently overruled *Thetford*, mere months after it was issued. But that is incorrect. To be sure, *Murrin* talks of prejudice. But so did earlier cases that have peaceably co-existed with *Thetford's* forebears for decades.

In once again referencing prejudice, *Murrin* made no material change in the law governing this proceeding. And, it certainly did not mandate that a former client—in the very same matter, no less—must reveal her confidences

to protect them. But that is what Trent seems to demand. A closer reading of *Murrin* shows that it comports with the case law that came before it, which recognizes that prejudice invariably is present in a conflict-of-interest case such as this one, where the representation is adverse to the former client and it is the same matter.

Here, moreover, the prejudice to Caroline is palpable. She has detailed the known communications she had with Dunn, and he agrees there was at least one such communication minus Trent. Dunn has deposed Caroline adversely and aggressively; he has opposed her plea in intervention; he has filed an answer asking that she take nothing; and the lawyer representing him successfully has had Caroline's intervention struck—all in the same case where Dunn started out representing Caroline.

Because prejudice exists here as a matter of both law and fact, and because Trent has not proved any substantial countervailing prejudice, Judge White's decision to disqualify Dunn is a proper application of the guiding rules and principles and harmonizes *Thetford*, this Court's prior cases, and *Murrin*.

The mandamus writ should be denied.

Argument

I. Judge White's decision merits great deference.

> When the "trial court's decision regarding disqualification [is] based on a careful, thorough consideration of all the evidence, [that decision] is entitled to great deference by an appellate court."
>
> *In re Thetford*, 574 S.W.3d 362, 365 (Tex. 2019) (orig. proceeding).

If anything is certain, it is that Judge White thoughtfully and carefully considered the disqualification record. Before the disqualification hearing, he already had reviewed all of the submitted materials. Record 423, 557. His interactions at the hearing further confirmed his firm knowledge of the record and of the parties' arguments. *E.g.*, Record 525 ("I've read the deposition."); Record 527 (referencing Caroline's deposition: "I've read it. I've heard it.") And his ruling comports with the evidence. So it is owed great deference.

II. The Texas Disciplinary Rules of Professional Conduct preclude a lawyer from representing a client adverse to a former client in the same or a similar matter.

The Texas Disciplinary Rules of Professional Conduct are controlling in disciplinary matters and are important guidelines for any disqualification proceeding in court. *See National Medical Enters, Inc. v. Godbey*, 924 S.W.2d 123, 132 (Tex. 1996). They are especially important here because, as Judge White was told, Trent, Caroline, and counsel signed a fee agreement specifying

not only that the Texas Disciplinary Rules of Professional Conduct "shall control" to the exclusion of other ethical codes but that they would likewise "govern[]" "[t]he Firm's obligations" to Trent and Caroline. Record 155 ¶ 2 & 161. So, Dunn in his testimony agreed that the disciplinary rules were not just guidelines but governed the representation. Record 471.

The governing rule for present purposes is disciplinary rule 1.09, titled *Conflict of Interest: Former Client*, which provides:

> (a) Without prior consent, a lawyer who personally has formerly represented a client in a matter shall not thereafter represent another person in a matter adverse to the former client:
> …
> (3) if it is the same or a substantially related matter. TEX. DISCIPLINARY RULES OF PROF'L CONDUCT R 1.09(a).

Trent in this proceeding concedes that counsel has violated rule 1.09, by continuing to represent Trent when the representation was adverse to his former client, Caroline, in the same matter. Mandamus Petition at 9 n. 18; *see also* Record 461-62, 469-72, 479 (Dunn, conceding that Caroline was his client, conceding the substantially-related matter element of Rule 1.09, and agreeing that counsel "cannot act adversely to a former client on a substantially-related matter).

III. Dunn has Caroline's confidential information.

A former client seeking counsel's disqualification need not prove that counsel has her confidential information[1]—it is settled in law that he does, under an irrebuttable presumption. *In re Thetford*, 574 S.W.3d at 374 ("We must presume, as a matter of law, that Verna shared confidences with Allen related to her estate planning and possible future incapacity when he prepared her will and power of attorney."); *see* Douglas Alexander, *Attorney Disqualification: Texas Supreme Court Jurisprudence*, State Bar of Texas, 36th Annual Advanced Civil Appellate Practice Conference, (2022) (In conflicts cases, "[t]he obtaining of confidential information is conclusively presumed in all instances, without qualification."). This principle was well established at least as early as *NCNB Texas National Bank v. Coker,* and the supreme court has never waivered from it. *See NCNB Texas National Bank v. Coker*, 765 S.W.2d 398, 400 (Tex. 1989).

Trent would peer behind this categorical and conclusive presumption. This is the nub of his petition. But it is not possible here, because conclusive presumptions, by definition, are impervious to attack or counterproof. *See* BLACK'S LAW DICTIONARY (8th ed.) (defining "conclusive presumption" as "[a]

[1] "Confidential information" is construed broadly in this situation such that it covers a wide range of matters, both privileged and unprivileged. *In re Liebbe*, 2019 Tex. App. LEXIS 2534, *11 (Tex. App.—Tyler, Mar. 29, 2019, orig. proceeding); *accord* TEX. DISCIPLINARY RULES PROF'L CONDUCT R 1.05(a).

presumption that cannot be overcome by any additional evidence or argument"); *accord Greco v. Commonwealth*, 2014 Va. App. LEXIS 125 *11, n.5 (Va. App. April 1, 2014); *United States v. Chase*, 18 F.3d 1166, 1172 n.7 (4th Cir. 1994) (a conclusive presumption is a rule of substantive law). It must be this way, "to prevent the moving party from being forced to reveal the very confidences sought to be protected." *In re Columbia Valley Healthcare Sys., L.P.*, 320 S.W.3d 819, 824 (Tex. 2010) (orig. proceeding), quoting *In re Am. Home*, 985 S.W.2d 68, 74 (Tex. 1998) (orig. proceeding).

Because everyone agrees that Dunn was formerly Caroline's lawyer, representing her upon claims against Brookshire Grocery Company, it is conclusively established that Dunn has her confidences.

IV. Dunn's adverse representation is disqualifying.

A. When counsel becomes adverse to his former client, in the same matter, shared confidences are presumed and prejudice exists as a matter of law.

The Texas courts may not view the Texas Disciplinary Rules of Professional Conduct as *always* controlling of disqualification. But where the requirements of disciplinary rule 1.09(a)(3) exist, the courts do seem to require that counsel be disqualified, largely because of the irrebuttable presumption of shared client confidences. *See In re Thetford*, 574 S.W.3d at 373-74 ("lawyers

who violate the conflict-of-interest rules [*e.g.*, Disciplinary Rules 1.06 and 1.09] must be disqualified because there is an irrebuttable presumption that a lawyer obtains a client's confidential information during representation"); *In re Houston Cnty. ex rel. Session*, 515 S.W.3d at 342 ("Once the movant meets her burden to show a substantial relationship between the two representations, the trial court should perform its role in the internal regulation of the legal profession and grant the motion to disqualify.").

This is not surprising: the practical effect of proving the Rule 1.09(a)(3) elements is to establish clear legal prejudice based upon the "genuine threat of disclosure" of client confidences. In such circumstances—when an attorney acts adversely to a former client in the same matter where he once represented her—prejudice is implied in law. *See In re Fenenbock*, 621 S.W.3d 724, 737-39 (Tex. App.-El Paso 2020, orig. proceeding) (movant, by proving a "direct overlap" between disputes, "had established she would be presumptively prejudiced" absent counsel's disqualification). The former client need not prove yet a second species of "actual" prejudice that could require her to divulge what is hers to protect. This is not supposition, but Texas Supreme Court jurisprudence, consistently applied for decades.

In *Henderson v. Floyd*, a 1995 disqualification case applying disciplinary rule 1.09, counsel argued, as Trent and Dunn do, that he should not be

disqualified because the relator had "shown no actual harm." *Henderson v. Floyd*, 891 S.W.2d 252, 254 (Tex. 1995). The supreme court's answer then was—and the correct answer today remains—that "[i]t would be virtually impossible for relator to show that Thomas revealed his confidences to his harm, and he should not be required to do so." *Henderson*, 891 S.W.2d at 254.

Other courts, both state and federal, agree:

- *In re Tex. Windstorm Ins. Ass'n*, 417 S.W.3d 199, 132 (Tex. App.-Houston [1st Dist.] 2013, orig. proceeding) ("former clients generally are not required to disclose confidential communications with their former counsel in order to make the showing of actual prejudice ….");

- *In re Houston Cnty. ex rel. Session*, 515 S.W.3d at 342 ("Once the movant meets her burden to show a substantial relationship between the two representations, the trial court should perform its role in the internal regulation of the legal profession and grant the motion to disqualify.");

- *In re TMD Def. & Space, LLC*, 649 S.W.3d 764, 774 (Tex. App.-El Paso 2022, orig. proceeding) (upholding disqualification) ("the reasonable probability that [the former client's] confidential information could be used to its detriment outweigh[s] the prejudice [that the current client] would experience in having to employ new counsel"); and

- *Dean Witter Reynolds, Inc. v. Clements, O'Neill, Pierce & Nickens, LLP*, 2000 U.S. Dist. LEXIS 22852 *31-32 (S.D. Tex. 2000) (it is unnecessary for the former client to present any detail about the disclosure made to his attorney because that would require him to reveal the very confidences he seeks to protect).

Texas commentators likewise recognize this as the law. *See* Dan S. Boyd, *Current Trends in Conflict of Interest Law*, 53 BAYLOR L. REV. 1, 3-4 (Winter

2001) ("[T]he aggrieved former client … has no burden to identify the particular confidences revealed or to prove whether the lawyer subject to disqualification has an advantage against that former client that another lawyer would not have").

B. *Murrin* did not materially change the law governing former-client cases.

To argue that something more is now required, Trent isolates a sentence from *Murrin*, stating that "the party requesting disqualification must also show it will suffer prejudice if disqualification is not granted." *In re Murrin Bros. 1885, Ltd.*, 603 S.W.3d 53, 57 (Tex. 2019) (orig. proceeding). This did not overrule *Thetford* or alter the fact that in cases falling under disciplinary rule 1.09 prejudice generally will exist as a matter of law. It most certainly did not say that former clients seeking disqualification under Rule 1.09(a)(3) must separately prove some unique, actual prejudice.[2] *Cf.* Petition at 10. Rather, *Murrin* makes no material change in the law governing this proceeding.

[2] By "actual prejudice," we presume Trent means prejudice in fact. *See In re Reeder*, 515 S.W.3d 344, 354 (Tex. App.—Tyler 2016, orig. proceeding) (citing Black's Law Dictionary definition of "actual" as meaning "existing in fact; real").

1. *Murrin* is consistent with prior law.

For decades, there have been cases discussing prejudice, just as there have been cases mandating disqualification when, as here, counsel is adverse to his former client in the same or a similar matter. These cases are not at cross purposes. And *Murrin* does not say otherwise.

Trent's demand to interpret *Murrin* as overruling *Thetford* seems particularly unconvincing given that *Murrin* was not a former-client case but was a garden-variety "control fight[] between LLC members couched as [a] derivative action[]," 603 S.W.3d at 60.[3] What is more, prejudice was not even "an issue raised or addressed in [*Murrin*]. The *In re Murrin Brothers* case turned entirely on the question of whether a group of minority shareholder[s] and the company … were adverse for purposes of the Rules." *Fenenbock*, 621 S.W.3d at 736 n.7. And *Murrin* never once mentions the term "actual prejudice" that Trent is so keen to focus on.

To use *Murrin* as Trent proposes—as a device to bludgeon the conclusive presumption of shared confidences—would work true mischief. It could award counsel an unmerited win-by-default in many instances, owing to the

[3] The law firm involved in *Murrin*, Kelly Hart Hallman, always had represented only one of the warring shareholder factions, and so "the trial court could have treated the derivative claims as claims 'brought by the member for the member's own benefit.'" *In re Murrin*, 603 S.W.3d at 60.

judicially-recognized "difficulty in proving a misuse of confidences." *Godbey*, 924 S.W.2d at 131-32. It further would imperil the very confidences that the disqualification rules intend to protect, with the bonus effect of eroding client trust and the integrity of the legal practice. *See id.* (discussing the need to "help[] clients feel more secure" and "help[] guard the integrity of the legal practice by removing undue suspicions that the clients' interests are not being fully protected"). At the very least, Trent's actual-prejudice requirement would be redundant of the clear legal prejudice already present in Rule 1.09 cases like ours.

So, it should be no surprise that the intermediate appellate courts since *Murrin*, while giving due regard to *Murrin*'s language, have continued to cite *Thetford* and to uphold disqualification orders under disciplinary rule 1.09(a)(3) when the rule's elements are met.

2. The intermediate appellate courts, in former-client cases both before and after *Murrin*, have authorized disqualification without requiring explicit proof of "actual" prejudice.

The El Paso Court's decision in *Fenenbock*. *Fenenbock*, a former-client case decided after *Murrin*, supports Judge White's discretion to order counsel disqualified. There, the court discussed prejudice in detail, because the relator, like Trent, had complained that there was no actual exchange of

confidential information and, thus, no "actual" prejudice. *Fenenbock*, 621 S.W.3d at 737. This was an invalid argument, the court explained, precisely because "[t]he movant need not divulge confidences in a disqualification proceeding so long as she delineates with specificity the overlap between the current and former representation." *Id.*, quoting *In re Drake*, 195 S.W.3d 232, 326 (Tex. App.-San Antonio 2006, orig. proceeding).

The "direct overlap between the [disputes]" in that case, *id*. at 737, created "a genuine threat that confidences revealed to the client's former counsel will be divulged to his present adversary." *Id*. at 734. And so there was an appearance of impropriety, *id*., such that the client "would be presumptively prejudiced" by counsel's representation of her adversary. *Id*. at 737. This presumptive prejudice was sufficient to require counsel's disqualification. And it existed even though the former client's representation had lasted a mere two weeks, *id*. at 730, in which counsel had only given advice on a business merger and attended a board meeting, and most of his communications were not with the former client but her father. *Id*. at 735-37.

The presumed prejudice recognized in *Fenenbock* comports with *Murrin*, with previous cases, and with Judge White's disqualification ruling.

The Corpus Christi Court's decisions. This past year, the Corpus Christi Court of Appeals refused to disturb a disqualification order that was

based on Rule 1.09. *In re Bracewell*, 2022 Tex. App. LEXIS 3845, *1 (Tex. App.-Corpus Christi June 8, 2022, orig. proceeding). The court did not need a separate prejudice analysis in order to do so, because the irrebuttable presumption of shared confidences, together with the rule 1.09 elements, combined to imply prejudice.

> "Given the irrebuttable presumption that a lawyer obtains a client's confidential information during representation, the substantially related nature of the cases, the appearance of impropriety, and the great deference we owe to the trial court's determination, we conclude that extraordinary relief must be denied." *Bracewell*, 2022 Tex. App. LEXIS 3845 at *5, citing *Thetford*, 574 S.W.3d at 373.

Just within the last two months, the Corpus Christi Court granted mandamus to require counsel's disqualification. *In re Ruiz*, 2023 Tex. App. LEXIS 5920 *17 (Tex. App.-Corpus Christi Aug. 8, 2023, orig. proceeding). In this decision, which Trent has cited, the court acknowledged *Murrin* then based the disqualification holding upon settled conflict-of-interest principles, without attempting any add-on analysis of actual prejudice as an extra element. *Id.* Instead, the *Ruiz* court quoted from *Thetford* and other pre-*Murrin* decisions then concluded that the irrebuttable presumption of shared confidences made disqualification "mandatory." *Id*. at *20 ("Because De Luna moved to disqualify the law firm representing the real parties, the opposing parties in ongoing litigation, we employ the second irrebuttable presumption, which

requires the mandatory disqualification of her firm.").[4] *Ruiz* thus cannot support Trent's argument.

The Houston First Court's decision in *Texas Windstorm Insurance Association*. Despite what Trent says, the pre-*Murrin* decision in *Texas Windstorm Insurance Association* did not impose any requirement that a former client must show actual prejudice in a Rule 1.09(a)(3) situation or otherwise conflict with this Court's decisions. Just the opposite.

The *Texas Windstorm* court distinguished between two groups of movants—a group of counsel's former clients and another group comprising non-clients. *In re Tex. Windstorm Ins. Ass'n*, 417 S.W.3d 119, 132-33 (Tex. App.-Houston [1st Dist.] 2014, orig. proceeding). The court *excused* the former clients from showing explicit prejudice, *id*., and denied disqualification as to them only because they had failed to prove what Trent here concedes: the adversity and the similar-matter requirements under Rule 1.09(a)(3). *Id*. at 133.

In respect of prejudice, the court said, correctly, that clients "generally are *not* required to disclose confidential communications with their former counsel in order to make the showing of actual prejudice that is usually

[4] *Ruiz* involved a combination of two presumptions, both irrebuttable: the presumption that a client shares confidences with her lawyer and the further presumption that a lawyer, when switching firms, shares those confidences with other lawyers at the new firm. 2023 Tex. App. LEXIS 5920 at *18.

necessary to support the severe remedy of attorney disqualification." *Id*. at 132-33 (emphasis added). It was only the second set of movants—the ones "who [could not] claim to have been former clients"—that the Court held were "not excused" from showing actual prejudice. *Id*. at 132 (those "movants who cannot claim to have been former clients of Martin … are not excused from this burden"). Trent's quotation from *Texas Windstorm*, Mandamus Pet. at 10, references the non-clients.

The relevant legal commentary. As referenced earlier, this past year Doug Alexander made a deep dive into the supreme court's disqualification jurisprudence. His paper, presented at the State Bar of Texas's 2022 Advanced Appellate Practice Seminar, agrees with our analysis by focusing on the *Thetford* line of cases and whether the movant can prove the Rule 1.09 elements. Douglas Alexander, *Attorney Disqualification: Texas Supreme Court Jurisprudence*, State Bar of Texas, 36th Annual Advanced Civil Appellate Practice Conference, at §III(A)(1)(c). Of course, the paper also discusses prejudice—in connection with those non-conflict-of-interest cases situations where a separate showing of prejudice is in fact necessary, such as when the lawyer obtains an opponent's confidential information or when the lawyer would become a witness. *Id*. at §§ III (B)(2) & III(C)(1).

This Court's decisions. This Court had it right all along: "a showing of actual prejudice is required *in some instances* …," such as with the non-clients in *Windstorm*, or in lawyer-as-witness situations under disciplinary rule 3.08, where the potential for disclosure of shared confidences to an adversary is not in play. *In re Innovation Res. Solution, LLC*, 2016 Tex. App. LEXIS 3303 at *12 (Tex. App.-Tyler Mar. 31, 2016, orig. proceeding) (emphasis added). But it still appears true that there is "no case" in which the requirements of Rule 1.09(a)(3) are met and yet disqualification is denied for lack of actual prejudice. *Id*.

In the lawyer-as-witness situation, it makes perfect sense to require a showing of prejudice in fact, because the lawyer's status as witness doesn't threaten any client confidences or implicate disloyalty of counsel. And yet in a conflicts case, when the issue is whether the lawyer should be disqualified from acting adverse to a former client in the same matter, it is perfectly reasonable to conclude that a disqualifying prejudice is baked into the cake.

In summary, Trent's asserted conflict between the Houston, Tyler, and El Paso courts never existed. He has not produced any case in which an attorney disqualification was denied or overturned on actual-prejudice grounds in a former-client/same-matter situation. And the courts today remain united against any requirement that could force former clients to reveal confidences in

attempting to protect them. When Trent dares Caroline to reveal her confidences, in the guise of an argument about actual prejudice, he undermines the longstanding judicial policy of preserving confidences.

C. The facts of this case establish a disqualifying prejudice.

Of course, there is prejudice here, because Trent and Dunn are adverse to Caroline *in the same matter* in which Caroline hired Dunn. Such situations are inherently prejudicial, because counsel has chosen to breach his duty of loyalty and is irrebuttably deemed to have the client's confidences. *See, e.g.*, *Fenenbock*, 621 S.W.3d at 738. That is the very reason why, in Rule 1.09(a)(3) situations, the courts invariably focus their analyses laser-like on the Rule 1.09 elements—whether (i) the representation is adverse and (ii) the matters are the same or similar. *See, e.g.*, *Thetford*, 574 S.W.3d at 374-80; *see also* D. Alexander, *Attorney Disqualification.*

In such cases, there is no need of an extra evidentiary inquiry about what or exactly how many confidences were imparted. Rather, the situation creates prejudice in law and counsel is disqualified to stanch even further prejudice,

vindicate the duty of loyalty, and avoid an appearance of impropriety. *Thetford*, 574 S.W.3d at 373.[5]

But if a showing of specific facts reflecting prejudice would have been required, the showing in this case surely would comply.

The prejudice to Caroline is front and center. After all, she intervened in the Brookshire Grocery matter, during a contentious divorce with Trent, Record 46, specifically because her interest in maximizing the community-property elements of any recovery from Brookshire Grocery had been drawn into conflict with Trent's competing interest in maximizing his separate-property damage recovery *at the expense of the community*. *E.g.*, Record 38-39, ¶¶ 9, 11-13 (Caroline's First Amended Plea in Intervention) (pleading that the parties' interests "are not aligned" but are "adverse" and the divorce proceeding is inadequate to fully protect Caroline's community-property interests). Trent and Dunn then promptly filed an answer that Dunn agrees was "against" and "in opposition to" Caroline's intervention, in which Trent denied all her allegations and asked that she "take[] nothing" even though she sought to plead the same claims as Trent. Record 165 ¶ 1 & 166; Record 475-76, 478, 480.

[5] At the disqualification hearing, counsel for Dunn conceded the duty of loyalty, stating: "Mr. Dunn does, indeed, have a duty to her as a former client that he recognizes. He's not going to be adverse to her. … That's what the ethical rule prohibits …". Record 452.

And when Caroline was deposed in the Brookshire Grocery litigation, Dunn underscored the conflict and prejudice with red-letter clarity. There, he questioned Caroline—his own client in the matter—aggressively and extensively as an adversary. He did so for three hours (Record 480), peppering Caroline with hostile questions that badgered her, probed the couple's immaterial custody dispute, and even insinuated that Caroline might have "provid[ed] information to BGC that would be helpful to it," to wit:

> Q. You are not in a position to say that any particular individuals that Trent took hunting, fishing, or golfing who were suppliers of BGC that that [sic] was not a business reason to advance the business interest of BGC, am I right?
>
> A. I feel like I've answered this over and over.
>
> ***
>
> Q. [Y]ou can't name one vendor or supplier for BGC that Brent might have – Trent might have taken for a business development event, correct? That is correct?
>
> A. I feel like I've answered that. I'm not sure what you want me to say.
>
> ***
>
> Q. … [Y]ou weren't the hall monitor, you don't have the records, you don't' have the in/out records of the security guards, correct? Is that Correct?
>
> ***
>
> Q. … Have you flown on [the Brookshire family's] private plane along with your kids?
>
> ***
>
> Q. Fair to say you're not qualified to say that Trent is not doing his job …
>
> ***
>
> Q. Did you ever have outbursts at home?

***

Q. Do you think that there were times when you yelled at Trent?

***

Q. Were there times where you told him, hey, you're going to lose all custody of your children; I'm going to make sure of that?

***

Q. … [Y]ou didn't consult with anybody at BGC and say what can I, Caroline Brookshire, do to help my husband when he's being treated or evaluated at Carrollton Springs and Canyon Ranch, correct?

***

Q. My question is simple. Did your dad send Exhibit 7 to BGC's general counsel without your knowledge and approval?

***

Q. … After you moved out of the house, did you start providing information to BGC that would be helpful to it in its lawsuit with Trent?
A. No.
Q. None at all?
A. No.
Q. Did they ask you for information?
A. They did not.
Q. Did you provide information about Trent?
A. About Trent?
Q. Yeah, to BGC.
A. Not that I recall.

***

Q. I'm simply saying it's a fact at this time when you wrote this text on January 3rd, you did not want him to have custody, correct?
A. I've answered.
Q. No, you haven't.
A. I've answered.
Q. No, we're going to keep asking. If we have to go to the judge, we'll go to the judge and come back to Dallas again. Record 48-53; *see also id.* at 96, 98, 100-01, 105-06, 108.

Dunn, at the disqualification hearing, conceded this to have been "a cross-examination. You could characterize it as that." Record 40.

What is more, Dunn's deposition ambush occurred even before he bothered to notify Caroline that he wasn't still her lawyer. Record 162 (email notice); Record 464, 469, 478, 481-82 (Dunn, admitting he only emailed Caroline "after her deposition" to state the representation was over); *see also* Record 462, 464-65, 473-74, 512 (Dunn, contending his representation of Caroline had ended "automatically" when he failed to settle the matter pre-suit).

Dunn had counsel appear in the case on his behalf. Record 490-91, 507. And, acting through this lawyer, Dunn and Trent successfully had Caroline's intervention struck. Record 412.

Still worse, Dunn for four months after Caroline's deposition refused to even provide Caroline with her file, and did not hand it over until after the disqualification hearing. *See, e.g.*, Record 466. The delay was unexcused, as Dunn's counsel agreed at the disqualification hearing, stating: "we agree with him, we have an obligation to produce the file. And I'll even agree that that was taken a little lightly and got lost in the shuffle with these two motions." Record 556.

This antic of course violated the disciplinary rules that mandate the prompt return of a client's file materials (*i.e.*, TEX. DISC. RULE OF PROF'L

CONDUCT 1.14(b) & 1.15(d)). But more importantly, it materially prejudiced Caroline in the disqualification proceeding, by forcing her to rely upon her recollection then using this against her. Record 194-95, 484. As Trent notes, Petition at 5, Caroline has testified that she does "not know the full extent of [her] confidential information known to Mr. Dunn" and is "prejudice[d] … in that Mr. Dunn is acting against [her] interests and presumably will use that confidential information against [her]." Record 194-95.

All of this has occurred in the very matter where Dunn started out representing Caroline—a matter in which, again, Dunn and his firm agreed to be "govern[ed]" by the disciplinary rules and where even Dunn agrees there was at least one attorney-client communication that had not involved Trent. Mandamus Petition, FN 19; Record 483-84.[6]

In this Court, Trent says that none of this matters, boasting that he "will have the very same information and documents possessed by Dunn" and "will simply tell his new lawyers" the lot of it. Petition at 14. This kind of threat categorically is no reason to condone a continued representation adverse to

[6] Dunn should have seen the potential conflict from the beginning, given his testimony that Caroline from the outset did not wish to sue but, apparently, Trent had no such reservations. *E.g.*, Record 474, 480. And, as Caroline's fiduciary, he should have withdrawn from representing Trent the moment the clients' positions became adverse. *In re Romo*, 2021 Tex. App. LEXIS 2403, *4-*6 (Tex. App.-Corpus Christi 2021, orig. proceeding) (discussing the duty, under the disciplinary rules, to promptly withdraw from multiple representation if a conflict arises), citing TEX. DISCIPLINARY R. PROF. CONDUCT R. 1.06(e).

Caroline's interests and in breach of the firm's fee-agreement covenants. *See* Boyd, *Current Trends in Conflict of Interest Law*, 53 BAYLOR L. REV. at 3-4 ("[T]he aggrieved former client … has no burden … to prove whether the lawyer subject to disqualification has an advantage against that former client that another lawyer would not have"). And here, Trent's threat is not even supported in the record: Trent has not produced evidence that Caroline provided Dunn no confidential information or proved that Dunn has revealed all of what he knows to Trent.

To now burden Caroline to further prove that she gave Dunn her information would be a Catch 22, where she must either (i) impair her own confidences in attempting disqualification or (ii) just resign herself to the fact that counsel will impair them. That is never required.

Disclosing client confidences to an adverse litigant is surely prejudice. And just as surely, if a lawyer takes an adverse position *in the same matter*, confidences, and loyalties, are apt to be broken. *In re American Airlines, Inc.*, 972 F.2d 605, 617-18 (5th Cir. 1992) (An important "aspect of loyalty to a client is the lawyer's obligation to decline subsequent representations involving positions adverse to a former client arising in substantially related matters").

As for prejudice to Trent from Dunn's disqualification, he never really attempted to prove any. Other than touting Dunn's competence as a lawyer,

Record 520, Dunn's testimony on the matter is a single conclusory paragraph stating that new counsel will need to read supposedly "a lot" of documents:

> So if I'm disqualified, then Trent has to hire a new lawyer. This case, because she intervened late in the game, there's a lot that's already been exchanged discovery-wise. There are a lot of documents to look at. And so it would take a significant amount of time for somebody else to get up to speed. He would incur new attorney's fees to bring a lawyer up to speed. Record 521.

These global and conclusory statements were insufficient even to raise an issue of fact, and they certainly would not have *required* Judge White to find any substantial prejudice to Trent. *See, e.g., Schindler Elevator Corp. v. Ceasar*, 670 S.W.3d 577, 586 (Tex. 2023) ("Because the only evidence Caesar offered to support the first element of res ipsa is conclusory testimony, there is no evidence to support a finding …."). Yet Trent otherwise made no effort to quantify any cost, to suggest that any work product would be lost, or to suggest that the case could have reached a point beyond which new counsel could efficiently substitute in. This seems a waiver. And in any event, the case clearly has not proceeded that far: it is barely a year old, Caroline's deposition remains the only deposition taken, Record 522, and any time constraints could easily be cured with a continuance, Record 523, which Judge White would surely grant under the circumstances.

Judge White was entitled to take the record as establishing full-on adversity between Caroline, on the one hand, and Trent and Dunn, on the other, and as establishing that Dunn's continued presence in the suit would materially prejudice Caroline's interests. *See, e.g.*, *Wasserman v. Black*, 910 S.W.2d 564, 568 (Tex. App.-Waco 1995, orig. proceeding) (pleadings can establish adversity). He likewise was entitled to determine that the prejudice to Caroline substantially outweighed any surmised prejudice to Trent.

Conclusion and Prayer

Dunn has become the adversary of his former client, in the same matter where he once represented her. The balance of prejudice weighs in Caroline's favor. And the disqualification order otherwise comports with the guiding rules and principles laid down in the disciplinary rules and the relevant Texas cases.

Because Judge White did not abuse his discretion by ordering Dunn and his firm disqualified, the Court should deny the mandamus writ.

Respectfully submitted,

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Certificate of Service

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Dated: October 2, 2023.

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