IN THE SUPREME COURT OF TEXAS

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NO. 96-1131

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IN RE EPIC HOLDINGS, INC., EPIC HEALTHCARE GROUP, INC., AND EPIC HEALTHCARE MANAGEMENT CO., RELATORS

- consolidated with -

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NO. 96-1133

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IN RE KENNETH GEORGE, RELATOR

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ON PETITIONS FOR WRIT OF MANDAMUS

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Argued on October 9, 1997

JUSTICE BAKER, joined by Justice Gonzalez and Justice Spector, dissenting.

This litigation is almost five years old. Today, in a case of first impression construing Rule 1.09(a)(1)of the Texas Disciplinary Rules of Professional Conduct,[1] the Court disqualifies plaintiff's counsel. Here, the Court clearly conducts a factual sufficiency review and judges the credibility of the evidence to conclude that the trial court erred in refusing to disqualify Anderson's attorneys. Reviewed under the proper mandamus standard, the record shows that Epic waived its complaint about disqualifying Anderson's attorneys and the trial court did not abuse its discretion in denying George's motion to disqualify. Because the Court applies improper standards in granting mandamus

[1] Unless otherwise indicated, all rule references are to the Texas Disciplinary Rules of Professional Conduct.

relief, I dissent.

I. BACKGROUND

In 1988, American Medical International, Inc. (AMI), a hospital holding company, decided to spin off thirty-seven of its lower revenue hospitals to the employees of those hospitals. AMI used a stock option plan for the hospitals' employees to effectuate the spin-off. AMI selected Kenneth George, AMI's regional vice president, to head Epic Holdings, Inc., the new corporation for the spin off and to assemble a management team to operate Epic. George remained AMI's employee from the plan's origination through Epic's formation when he became an officer and director of Epic.

George selected the law firm of Johnson & Gibbs to perform the necessary legal services to form Epic. Johnson & Gibbs assisted in securing the financing necessary to fund the transaction, prepared the necessary documents for the employee stock option plan, prepared the officers' and executives' employment compensation agreements, and prepared the necessary documents for the Securities and Exchange Commission. Epic was formed, and the initial closing occurred in September 1988. The SEC filings and the final financing arrangements were completed in early 1989. Johnson & Gibbs continued to provide legal services to Epic from Epic's formation in 1988 until Epic merged with HealthTrust, Inc.-The Hospital Company in 1994.

Jakes Jordaan, a former Johnson & Gibbs associate, worked directly on securities matters for Epic in 1988 and 1989. Jordaan left Johnson & Gibbs in 1990 and ultimately formed Jordaan, Howard & Pennington. Three other lawyers who worked for Johnson & Gibbs while it represented Epic, Mike McKool, Jr., Charles Cunningham, and Gary Cruciani, left Johnson & Gibbs in 1991 and formed McKool Smith. In 1993 and 1994, Epic negotiated with HealthTrust to sell its hospitals to HealthTrust and to merge with HealthTrust.

In April 1994, Anderson, a mid-level Epic manager, and the real party in interest here, brought a stockholder derivative suit against Epic, HealthTrust, and Epic's directors, including George. Anderson's suit alleged that the proposed merger between Epic and HealthTrust was unfair to the stockholders participating in the employee stock ownership plan. James E. Pennington of the Jordaan firm filed the Anderson suit. Anderson secured a temporary restraining order in state court preventing Epic and HealthTrust from closing their merger. Epic then removed Anderson's state court suit to federal court. In May 1994, in lieu of a preliminary injunction hearing, Anderson agreed to allow the merger to proceed and in exchange, Epic agreed to assign to Anderson, for the benefit of Epic's stockholders, its claims against HealthTrust and the Epic directors arising out of the merger. Nevertheless, Epic remained a defendant.

On September 2, 1994, the former Johnson & Gibbs lawyers at the McKool firm appeared on Anderson's behalf. Counsel for Epic and George then wrote to the McKool firm suggesting that the McKool and Jordaan firms had a conflict of interest. Anderson's counsel responded that they saw no conflict, but were willing to examine the defendants' evidence of a conflict. Over the next several months, the lawyers exchanged a number of letters arguing the conflict issue. Epic and George alleged that because the McKool and Jordaan firms were representing Anderson, whose interests were adverse to Epic, there was a conflict. Epic and George also alleged that Anderson's liability theory was to disparage Johnson & Gibbs's work product generated when Johnson & Gibbs represented Epic in 1988 and 1989. The McKool firm denied that they were challenging any work product prepared before they left Johnson & Gibbs in 1991. Instead, the McKool firm asserted that it would challenge only the unfairness of the merger plan, which allegedly provided a less than fair market value sale price and unfairly benefitted Epic's officers and directors. Epic and George replied

that their defense would put the 1988 and 1989 work product at issue.

Epic moved to disqualify Anderson's counsel in federal court on March 31, 1995. George and four other directors moved to disqualify Anderson's counsel in federal court on April 3, 1995. In that same month, the federal court remanded the case to state court without acting on the motions to disqualify. After remand to state court, Epic, George, and two other directors filed a joint motion to disqualify Anderson's counsel. In June 1995, the directors, including George, filed an amended motion to disqualify Anderson's counsel. Epic did not join in this motion.

On June 16 and 19, 1995, Judge Candace Tyson held an evidentiary hearing on the directors' motion to disqualify Anderson's counsel. After the hearing, Judge Tyson denied the directors' motion.

When the case against the directors went to trial in June 1996, the directors renewed their motion to disqualify Anderson's counsel on the grounds that Anderson's attorneys were attacking Johnson & Gibbs's work product. On June 20, 1996, without ruling on the directors' motion, Judge Tyson declared a mistrial. Shortly thereafter, Judge Tyson recused herself on her own motion.

The case was then transferred to another state district court. The directors' renewed motion remained pending. On July 12, 1996, Epic intervened in the underlying lawsuit and filed another motion to disqualify Anderson's counsel. Judge Hugh Snodgrass held a hearing that resulted in setting both disqualification motions for hearing on October 29, 1996. The day before the disqualification hearing, Epic filed an objection to Judge Snodgrass as a visiting judge under section 74.053 of the Texas Government Code.

At the beginning of the October 29 hearing, Judge Snodgrass overruled Epic's objection to him as a visiting judge and proceeded to hear the disqualification motions. After the parties' opening

statements on the disqualification motions, Judge Snodgrass indicated he would deny the motions without hearing testimony. Judge Snodgrass stated he believed that both Epic and the directors had waived their right to disqualify Anderson's counsel. Judge Snodgrass initially refused to allow Epic and the directors to offer any testimony. However, after Epic and the directors made bills of exception, Judge Snodgrass changed his ruling and admitted into evidence the testimony and exhibits offered in the bills of exception. After hearing further argument from the parties, he denied both motions to disqualify. After the court of appeals denied mandamus, Epic and George filed for mandamus in this Court for relief from Judge Snodgrass's order.

II. MANDAMUS

Mandamus is an extraordinary remedy available only in limited circumstances. *See Canadian Helicopters, Ltd. v. Wittig*, 876 S.W.2d 304, 305 (Tex. 1992); *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992). A court should issue mandamus only to correct a clear abuse of discretion or the violation of a legal duty when there is no other adequate remedy at law. *See Canadian Helicopters*, 876 S.W.2d at 305; *Johnson v. Fourth Court of Appeals*, 700 S.W.2d 916, 917 (Tex. 1985). The relator has the burden of showing an abuse of discretion as well as the inadequacy of appellate remedy. This burden is a heavy one. *See Canadian Helicopters*, 876 S.W.2d at 305; *Lutheran Soc. Serv., Inc. v. Meyers*, 460 S.W.2d 887, 889 (Tex. 1970).

The test for abuse of discretion is not whether, in the reviewing court's opinion, the facts present a proper case for the trial court's action. Rather, the question is whether the trial court acted without reference to any guiding rules or principles. *See Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241-42 (Tex. 1985). To determine whether there is an abuse of discretion, we review the entire record. *See Mercedes-Benz Credit Corp. v. Rhyne,* 925 S.W.2d 664, 666 (Tex.

1996). Our focus remains on the trial court's order regardless of the court of appeals' decision. *See Johnson*, 700 S.W.2d at 918. The party challenging the trial court's decision must establish that the facts and law permit the trial court to make but one decision. *See Johnson*, 700 S.W.2d at 917.

With respect to resolving factual issues or matters committed to the trial court's discretion, the reviewing court may not substitute its judgment for the trial court's. *See Walker*, 827 S.W.2d at 839. The reviewing court must defer to the trial court's resolution of factual issues, and may not set aside the trial court's finding unless the record makes it clear that the trial court could reach only one decision. *See Walker*, 827 S.W.2d at 839-40. The reviewing court may not issue mandamus for an abuse of discretion merely because it disagrees with the trial court's decision if that decision was within the trial court's discretionary authority. *See Beaumont Bank N.A. v. Buller*, 806 S.W.2d 223, 226 (Tex. 1991).

Moreover, an appellate court may not reconcile disputed factual matters in a mandamus proceeding. *See Hooks v. Fourth Court of Appeals*, 808 S.W.2d 56, 60 (Tex. 1991); *Dikeman v. Snell*, 490 S.W.2d 183, 186-87 (Tex. 1973). An abuse of discretion does not exist if the trial court bases its decision on conflicting evidence and some evidence reasonably supports the trial court's decision. *See Davis v. Huey*, 571 S.W.2d 859, 862 (Tex. 1978). An abuse of discretion does not exist if some evidence in the record shows the trial court followed guiding rules and principles. *See Morrow* v. *H.E.B., Inc.,* 714 S.W.2d 297, 298 (Tex. 1986).

However, we accord much less deference to a trial court's determination of the legal principles controlling its ruling. A trial court has no discretion in determining what the law is or applying the law to the facts. *See Walker*, 827 S.W.2d at 840. Thus, the trial court's failure to analyze or apply the law correctly is an abuse of discretion and may result in mandamus relief. *See*

Walker, 827 S.W.2d at 840; *NCNB Tex. Nat'l Bank v. Coker*, 765 S.W.2d 398, 400 (Tex. 1989).

III. WAIVER

Anderson asserts that Epic and George waived their right to seek her attorneys' disqualification. Anderson contends that the record shows that Epic abandoned its disqualification motion, and therefore, waived its right to complain about Anderson's attorneys. Anderson also contends that the record shows that George and the directors waited almost eleven months after they first knew or should have known of the alleged conflict of interest between Jordaan and Epic and the directors to file the disqualification motion. She contends that George and the directors knew of the alleged conflict in May 1994 when Jordaan's firm filed Anderson's suit against Epic and the directors and that this knowledge controls the waiver issue.

On the other hand, Epic and George maintain they have not waived their right to disqualify Anderson's counsel. They assert that the disqualification grounds that Judge Snodgrass heard were different from the disqualification grounds that Judge Tyson denied. George asserts that the motion Judge Tyson heard focused on whether the directors' employment agreements were sufficiently related to Anderson's lawsuit under Rule 1.09(a)(3)[2], not on whether Anderson would attack the Epic

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[2] Rule 1.09 provides in part:

> (a) Without prior consent, a lawyer who personally had formerly represented a client in a matter shall not thereafter represent another person in a matter adverse to the former client:
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> (1) in which such other person questions the validity of the lawyer's services or work product for the former client;
> (2) if the representation in reasonable probability will involve a violation of Rule 1.05; or
> (3) if it is the same or a substantially related matter.
>
> (b) Except to the extent authorized by rule 1.10 [successive government and private employment],when lawyers are or have become members of or are associated with a firm, none of them shall knowingly represent a client if any one of them practicing alone would be prohibited from doing so by paragraph (a).

formation documents. Specifically, Epic and George assert that they did not pursue a claim that Anderson and her attorneys would attack the formation documents under Rule 1.09(a)(1) because Anderson and her attorneys represented that they intended to challenge only the 1994 payments made to the directors and not Epic's creation in 1988. Epic and George assert that, nevertheless, when trial began in June 1996, Anderson challenged the formation documents. Epic and George contend that after Anderson's new attacks against the formation documents they promptly reasserted their motions to disqualify.

A. Applicable Law

Waiver is an affirmative defense and applies to a motion to disqualify opposing counsel. *See Turner v. Turner*, 385 S.W.2d 230, 236 (Tex. 1964). Waiver occurs when a party either intentionally relinquishes a known right or engages in intentional conduct inconsistent with claiming that right. *See Tenneco, Inc. v. Enterprise Prod. Co*., 925 S.W.2d 640, 643 (Tex. 1996); *Sun Exploration & Prod. Co. v. Benton*, 728 S.W.2d 35, 37 (Tex. 1987). A party may expressly renounce a known right and thereby waive that right. *See Tenneco, Inc.*, 925 S.W.2d at 643. A party's silence or inaction, for so long a period that it shows an intention to yield the known right, is also enough to prove waiver. *See Tenneco, Inc*., 925 S.W.2d at 643. Waiver is ordinarily a question of fact. *See Tenneco*, Inc., 925 S.W.2d at 643. But when the facts and circumstances are admitted or clearly established, the question becomes one of law. *See Tenneco, Inc*. 925 S.W.2d at 643.

A party who does not file a motion to disqualify opposing counsel in a timely manner waives the complaint. *See Grant v. Thirteenth Court of Appeals*, 888 S.W.2d 466, 468 (Tex. 1994); *Vaughan v. Walther*, 875 S.W.2d 690, 690 (Tex. 1994). In determining whether the party has waived the complaint, the reviewing court should consider the time period between when the conflict

becomes apparent to the aggrieved party and when the aggrieved party moves to disqualify. *See Spears*, 797 S.W.2d at 656; *Wasserman v. Black*, 910 S.W.2d 564, 568 (Tex. App.--Waco 1995)(orig. proceeding). The reviewing court should also consider any evidence that indicates the aggrieved party filed the disqualification motion as a tactical weapon for dilatory or other purposes. *See Grant*, 888 S.W.2d at 468; *Spears*, 797 S.W.2d at 658. Importantly, in making these determinations, a reviewing court cannot resolve the parties' conflicting factual assertions concerning waiver. *See Grant*, 888 S.W.2d at 468; *Brady v. Fourteenth Court of Appeals*, 795 S.W.2d 712, 714 (Tex. 1990).

B. Analysis

1. Epic

Anderson's waiver arguments against Epic center on her claim that Epic waited too long, after learning of the alleged conflict of interest, to assert its motion to disqualify Anderson's counsel. Anderson points out that although Epic first knew of Jordaan's involvement when it was served in April 1994, Epic did not hint of any alleged conflict until it removed the case to federal court and the McKool firm entered its appearance. Epic then delayed another seven months before moving to disqualify Anderson's counsel.

Anderson further argues that Epic abandoned its motion to disqualify by not joining and urging disqualification in the directors' second amended motion to disqualify Anderson's attorneys heard by Judge Tyson in June 1995. The record clearly reflects, and Epic does not dispute, that only George and the directors[3] pursued disqualification in June 1995. Epic counters that it temporarily

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[3] As previously noted, earlier Epic had joined George and the directors in a joint amended motion to disqualify Anderson's attorneys. However, Epic was not a movant in the directors' amended motion that Judge Tyson heard in June

abandoned its disqualification efforts only because Anderson and her attorneys represented that Anderson would not challenge any aspect of Epic's 1988 formation. However, the representations Epic cites (two letters from the McKool firm, a response to a request for admission, and a statement in a trial brief) either occurred well before Epic filed its initial motion for disqualification or after it had abandoned its disqualification efforts in Judge Tyson's court. These undisputed facts undercut Epic's arguments that it abandoned its initial motions in reliance on these representation and show that Epic abandoned its initial disqualification efforts in June 1995. Epic thereby waived its right to complain about Anderson's lawyers by waiting over a year--until its July 1996 intervention--to renew its disqualification efforts. *See Tenneco, Inc.*, 925 S.W.2d at 643; *Grant*, 888 S.W.2d at 468.

Epic asserts that it should be excused from abandoning its original efforts to disqualify Anderson's attorneys because its renewed disqualification motion in July 1996 urged a new basis for disqualification. Epic asserts that its new basis--that Anderson's attorney should be disqualified under Rule 1.09(a)(1)(challenging earlier work product)--was not available to Epic until after the 1996 mistrial. I would reject this argument. Despite the fact that Epic brought its original motions under Rule 1.09(a)(3)(regarding substantially related matters), the thrust of Epic's original argument was that the two matters were substantially related because Anderson was challenging Johnson & Gibbs's work product in forming Epic in 1988. For example, in its original motion, Epic argued that Anderson was challenging the 1988 stock incentive program and the 1988 employment agreements, including the directors' compensation package. Thus, even though Epic's original motions were not expressly based on Rule 1.09(a)(1), that ground was certainly available, and indeed Epic raised it. After abandoning its initial efforts and arguments for disqualification, Epic should not be allowed

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to raise essentially the same arguments one year later. *See Tenneco, Inc.*, 925 S.W.2d at 643; *Grant*, 888 S.W.2d at 468. Accordingly, based on this record I would hold that Epic abandoned its right to complain about disqualifying Anderson's attorneys and deny Epic any relief.

2. George

Anderson also contends that George and the directors knew, as they originally alleged in their disqualification motions, that her attorneys were going to disparage Johnson & Gibbs's work product and that they could have and should have litigated that issue before Judge Tyson at the disqualification hearing in June 1995. Anderson claims that the directors' motion to disqualify before Judge Snodgrass was merely an attempt to secure another judge's determination of the very same issues Judge Tyson decided in the June 1995 hearing.

George counters that Epic's and the directors' attempts to get Anderson's attorneys to voluntarily withdraw in accordance with the local federal district court rules caused the lapse of time between the McKool firm's appearance in September 1994 and the directors' filing their motion to disqualify in April 1995. George claims that not until Pennington's deposition in March 1995, did Anderson's attorneys directly acknowledge that they would refuse to withdraw under any circumstances. George claims that the directors filed their motion to disqualify as soon as these facts became apparent.

George points out that after the federal court remanded the action to the state court, the directors promptly moved to disqualify Anderson's counsel in state court. George also asserts that the directors did not allege and litigate the disparagement of work product claim because, in a discovery response, Anderson stated that her claims did not involve disparagement of Johnson & Gibbs's legal services in 1988 and 1989. Moreover, Anderson's discovery responses stated that her

claims were directed only at the director's compensation package and at Epic's sale price. George argues that it was not until the aborted trial in June 1996 that it became apparent to the directors, despite Anderson's assertions to the contrary, that Anderson was actually disparaging Johnson & Gibbs's 1988 work product. George asserts that there was a material difference between the issues in the June 1995 hearing and the October 1996 hearing. George claims the record supports the directors' position that they promptly and expeditiously asserted their disqualification claim on both occasions.

The record shows that both Judge Tyson and Judge Snodgrass expressed concern that, like Epic, the directors had waived the right to assert disqualification. However, both Judge Tyson and Judge Snodgrass heard evidence on the merits of the disqualification that George and the directors urged. Judge Snodgrass, whose order is the focus of this mandamus, did not indicate that he based his final decision on waiver. According to the record, the waiver issue as regards to the directors was hotly disputed, with conflicting interpretations of the factual circumstances. Moreover, unlike Epic, the directors did not abandon their disqualification efforts.

As a reviewing court, we may not resolve disputed factual matters in a mandamus proceeding. *See Hooks*, 808 S.W.2d at 60; *Dikeman*, 490 S.W.2d at 186-87. Because there is conflicting evidence in this case about the directors' alleged waiver, I would hold that we cannot conclude that George waived the right to complain about the trial court's disqualification ruling. *See Tenneco, Inc.*, 925 S.W.2d at 643; *Grant*, 888 S.W.2d at 468.

IV. DISQUALIFICATION OF ATTORNEYS

On the merits of the disqualification issue, George asserts: that Epic and the directors were

the clients that Johnson and Gibbs represented in 1988; that this litigation is adverse to them; that Anderson questions the validity of Johnson & Gibbs's services and work product; that the Jordaan and McKool firms possess confidential information they gained while representing Epic and the directors in Epic's formation in violation of Rule 1.05; and that this matter is substantially related to Epic's formation in 1988.

Anderson's counsel argue that: neither Epic nor the directors, including George, were Johnson & Gibbs's clients in 1988; that AMI was the actual client; that Anderson, as assignee of Epic's claims, is not adverse to Epic; that Anderson is not questioning the validity of Johnson & Gibbs's services or work product; and that the information Anderson's attorneys possess is not confidential.

A. Applicable Law

Disqualification is a severe remedy. *See Coker*, 765 S.W.2d at 400. Courts must adhere to an exacting standard when considering motions to disqualify to discourage their use as a dilatory trial tactic. *See Coker*, 765 S.W.2d at 399. Accordingly, the movant has the burden to establish with specificity a violation of one or more of the disciplinary rules. *See Coker*, 765 S.W.2d at 400. Mere allegations of unethical conduct or evidence showing a remote possibility of a disciplinary rule violation will not suffice under this standard. *See Spears*, 797 S.W.2d at 656; *Coker*, 765 S.W.2d at 400.

The Texas Disciplinary Rules of Professional Conduct for lawyers are not controlling as standards governing motions to disqualify. However, the rules provide guidance for determining whether a court should disqualify an attorney from representing a party in litigation. *See Henderson v. Floyd*, 891 S.W.2d 252, 253 (Tex. 1995); *Spears*, 797 S.W.2d at 656. Thus, Rule 1.09 and its

interpretive case law provide the guiding principles for our analysis.

The party moving to disqualify an attorney must prove: (1) the existence of a former attorney-client relationship; (2) that the attorney is now representing another person in a matter adverse to the former client; (3) that the attorney does not have the former client's consent[4] to represent the other person; and (4) that in the pending litigation: (a) the other person questions the validity of the lawyer's services or work product for the former client; (b) the representation in reasonable probability will involve a violation of Rule 1.05[5]; or (c) it is the same or a substantially related matter. *See* Rule 1.09*; Coker*, 765 S.W.2d at 400.

B. Analysis

Like the waiver issue, the disqualification issue was hotly contested and the factual assertions sharply conflicting. As initially noted, George asks this Court to set aside the trial court's denial of the directors' motion to disqualify Anderson's counsel. Thus, as the movant, George has the burden to specifically prove the pertinent elements for disqualification. *See Coker*, 765 S.W.2d at 400.

1. Former Attorney-Client Relationship

The record shows that the parties disputed who Johnson & Gibbs represented during Epic's formation. Anderson introduced Johnson & Gibbs's internal records that showed AMI as the client, that Johnson & Gibbs billed AMI as the client, and that AMI paid Johnson & Gibbs more than two million dollars in fees for Johnson & Gibbs's services in forming Epic. On the other hand, George

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[4] Neither party argues lack of the former client's consent. Therefore, it is not necessary to consider this element in the analysis.

[5] Rule 1.05 provides that, subject to certain exceptions not pertinent here, a lawyer shall not knowingly reveal a client's or former client's confidential information to anyone else or use such confidential information to the disadvantage of the client or former client without consent. *See* TEX. DISCIPLINARY R. OF PROF. CONDUCT 1.05, *reprinted in* TEX. GOV'T CODE Tit. 2, subtit. G app. (State Bar Rules art. X, § 9).

testified that he understood that he personally was Johnson & Gibbs's client because Johnson & Gibbs prepared and negotiated his employment compensation package with AMI. There is also evidence that after Epic's incorporation Johnson & Gibbs considered Epic as its client and that Epic paid Johnson & Gibbs's legal bills. However, when the majority completes its review of the record, its conclusion is that the only evidence in the record is that the firm did represent George individually in setting up Epic. In doing so, the Court attempts to explain away the "some evidence" that AMI was in fact the client and that George as AMI's salaried employee could have been representing AMI's interest in the spin-off. The Court weighs the evidence and judges its credibility to reach its conclusion that there is no dispute in the record that the firm represented George personally. In doing so, the Court ignores its own precedent that an abuse of discretion does not exist if the trial court bases its decision on conflicting evidence and some evidence reasonably supports the trial court's decision. *See Davis*, 571 S.W.2d at 862. Thus, there are factual disputes about a former attorney-client relationship between Epic and George and Anderson's attorneys that the Court may not resolve. See *Grant*, 888 S.W.2d at 468.

2. Adverse To A Former Client

There is no dispute about the adverse parties element. Anderson and George are adverse parties. However, because George cannot meet the other pertinent elements, this fact does not affect my decision. *See Coker*, 765 S.W.2d at 400.

3. Challenge To Johnson & Gibbs's Work Product

Anderson asserts that she and her attorneys are not challenging Johnson & Gibbs's 1988 services or work product. She claims that in the aborted trial she merely asserted that the merger

agreements permitted payments to the directors that the 1988 documents did not permit. Anderson testified on direct examination that she had no complaint about the way Epic was structured in 1988. Anderson asserts that her lawyers were not breaching confidences because the documents were either in the public domain because of the SEC filings or were furnished without objection during discovery before the aborted trial in June 1996. George counters that the record clearly shows that Anderson was disparaging Johnson & Gibbs's services and the firm's work product. George also claims that Anderson's lawyers are breaching confidences learned when they were members of Johnson & Gibbs in 1988, thereby violating Rule 1.05.

The Court recognizes that there is conflicting evidence about the substantial relationship and confidentiality elements of Rule 1.09. Again, because the record shows these factual disputes, we cannot say that the trial court abused its discretion by denying the directors' disqualification motion. *See Grant*, 888 S.W.2d at 468; *Beaumont Bank, N.A.*, 806 S.W.2d at 226.

V. ON THE ROAD AGAIN[6]

Once again, the Court has ignored well established precedent governing the standards of review of a trial court's discretionary decision and improperly conducted a factual sufficiency review of this mandamus record. Additionally, the Court has improperly judged the credibility of the evidence before the trial court. The Court fails to keep in mind that the Court may not substitute its judgment for that of the trial court. *See Walker*, 827 S.W.2d at 839; *Flores*, 777 S.W.2d at 41-42. This Court may not reverse the trial court's judgment merely because it disagrees with the trial court's decision if that decision was within the trial court's discretionary authority. *See Beaumont Bank N.A.*, 806 S.W.2d at 226. The trial court does not abuse its discretion if it bases its decision

[6] *See In re Ford Motor Co.*, ____ S.W.2d ____ (Baker, J., dissenting).

on conflicting evidence and some evidence reasonably supports the trial court's decision. *See Davis*, 571 S.W.2d at 862. The Court clearly and unequivocally ignores this precedent and regrettably so. In my view, under this record and under applicable mandamus standards, the Court cannot conclude an abuse of discretion exists. This decision is yet another mile marker down the road of no return where the Court ignores its own rules and precedent. *See In re Ford Motor Co*., ___S.W.2d ___ (Baker, J., dissenting).

VI CONCLUSION

Under this record, I would hold that Epic abandoned its disqualification efforts and, thereby, waived its ability to complain about Anderson's attorneys. I agree that George did not waive his efforts to have Anderson's attorneys disqualified. Nevertheless, because of the deference this Court should give to the trial court's resolution of factual matters in a mandamus proceeding, I would hold that the trial court did not abuse its discretion in refusing to disqualify Anderson's counsel. Accordingly, I would deny both Epic and George's petitions for mandamus.

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James A. Baker
Justice

OPINION DELIVERED: December 31, 1998