EXHIBIT 41

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

NATIONAL RIFLE ASSOCIATION OF AMERICA,	§	
Plaintiff and Counter-Defendant,	§	
and	§	
WAYNE LAPIERRE,	§	
Third-Party Defendant,	§	
v.	§	**Civil Action No. 3:19-cv-02074-G**
ACKERMAN MCQUEEN, INC.,	§	
Defendant and Counter-Plaintiff,	§	
and	§	
MERCURY GROUP, INC., HENRY MARTIN, WILLIAM WINKLER, MELANIE MONTGOMERY, and JESSE GREENBERG,	§	
Defendants.	§	

DECLARATION OF MICHAEL ERSTLING

I, My name is Michael Erstling, and I declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that the following declaration is true and correct.

1. I am over twenty-one years old and am fully competent to make this declaration. Unless otherwise noted, I have personal knowledge of all matters stated herein. I submit this declaration in support of the NRA's Opposition to Defendants' Motion to Disqualify Plaintiff's Counsel (William A. Brewer III and Brewer Attorneys & Counselors).

2. I am the current Director of Budget and Financial Analysis at the National Rifle Association of America ("NRA"). During the times relevant to the issues herein, I was employed by the NRA as Director of Budget and Financial Analysis.

3. I oversee the annual budgets of the NRA across department functions and third-party vendors. I am also responsible for measuring the actual financial performance during the year to the annual NRA budget.

4. In my capacity as Director of Budget and Financial Analysis, I participated in the annual budget process for the Public Relations Department including Ackerman McQueen ("AMc") and reviewed billing related to this department during the year. During my entire tenure at the NRA (until very recently), Ackerman was one of the NRA's largest vendors – in many years, it was the NRA's single largest vendor.

5. In addition, preparing the annual budget was made difficult because Ackerman regularly deviated from the budget parameters set by the NRA. I was provided no insight into the basis for its budgets or whether it would adhere to them.

6. Long before I met Bill Brewer, I developed serious concerns about Ackerman's budgeting and billing practices and the trust the NRA had placed in the agency. Ackerman regularly issued six-figure invoices to the NRA with little detail or support, and systemically obfuscated and blocked the NRA's efforts to understand what services were covered by any particular invoice. When staffing projects, Ackerman regularly employed, without written approvals, expensive outside contractors for functions, that in my opinion could have been adequately served by NRA staff. It was my suspicion that Ackerman did this because it could collect a markup from the NRA on contractors it hired.

7. I also noted that Ackerman's bills regularly violated contract stipulations. For example, I became concerned that Ackerman was billing the NRA for work, such as future issues of Carry Guard magazine, that had not been undertaken; indeed, in May 2018 the NRA was billed $269,000 for an issue of Carry Guard magazine that was not slated to be released until later that summer. In August 2018 NRA received another invoice for a fifth issue even though the Association was already in possession of a backlog of issues of the Carry Guard magazine that had yet to be issued to the public.

8. During early 2018, I began to compare notes with other NRA accounting staff, and it became clear that several of us shared the same or similar concerns. Although there were other vendors (and transactions) we also believed should be examined, Ackerman was clearly the most significant offender in light of the amount of NRA funds it received and the degree of autonomy it enjoyed. My colleagues and I raised our concerns with the Audit Committee of the NRA Board of Directors in July 2018. The Audit Committee appeared to take our presentation seriously and promised it would act to get to the bottom of the situation.

9. Without commenting on the contents of my communications with counsel or any legal advice received, I am generally aware that Brewer, Attorneys & Counselors (the "Brewer Firm") represents the NRA in multiple disputes with Ackerman. I am also aware that Ackerman accused the Brewer Firm of contriving concerns about Ackerman's billing practices, perhaps as a pretext for prosecuting a family feud. In my view, these allegations are ridiculous and offensive—they imply that if Brewer had not come along, the NRA's accountants would not have acted to cause the NRA to investigate Ackerman's billing practices. Although it is difficult to speculate about counterfactuals, I would hope that even if the NRA had never retained the Brewer Firm, it would nonetheless have fired Ackerman by 2019 for its refusal to cooperate with requests for files,

books, and records as pursuant to the Services Agreement. Over my entire career as a Certified Public Accountant, I cannot recall interacting with any other vendor that afforded its client so little transparency or treated client staff with so much contempt. The agency deserved to be fired.

10. I declare under penalty of perjury that the foregoing is true and correct.

Executed this 29th day of April 2020.

Michael J. Erstling

4835-0665-1066, v. 1

EXHIBIT 42

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

NATIONAL RIFLE ASSOCIATION OF AMERICA,	§	
	§	
Plaintiff and Counter-Defendant,	§	
	§	
and	§	
	§	
WAYNE LAPIERRE,	§	
	§	
Third-Party Defendant,	§	
	§	
v.	§	**Civil Action No. 3:19-cv-02074-G**
	§	
ACKERMAN MCQUEEN, INC.,	§	
	§	
Defendant and Counter-Plaintiff,	§	
	§	
and	§	
	§	
MERCURY GROUP, INC., HENRY MARTIN, WILLIAM WINKLER, MELANIE MONTGOMERY, and JESSE GREENBERG,	§	
	§	
Defendants.	§	

DECLARATION OF CHARLES COTTON

My name is Charles Cotton, and I declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that the following statements are true and correct.

1. I am over twenty-one years old and am fully competent to make this declaration. Unless otherwise noted, I have personal knowledge of all matters stated herein. I submit this declaration in support of the NRA's Opposition to Defendants' Motion to Disqualify Plaintiff's

Counsel (William A. Brewer III ("Brewer") and Brewer Attorneys & Counselors ("BAC")) (such motion, the "Disqualification Motion").

2. I am a member of the Board of Directors of the National Rifle Association of America ("NRA"), am the First Vice President of the Board and Chairman of the Board's Audit Committee. During the times relevant to the issues herein, I was a member of the NRA's Board of Directors and Chairman of the NRA's Audit Committee. I never been paid any compensation for my work for the NRA.

3. I am retired from the full-time practice of Cotton Farrell PC. Prior to becoming an attorney, I was employed as a Certified Public Accountant.

4. As Chairman of the Audit Committee, I participate in oversight of the NRA's financial reporting process, audit process, the NRA's system of internal controls, including related-party transactions, and compliance with other laws and regulations.

5. The allegation by Ackerman McQueen, Inc. ("AMc") that Brewer or BAC somehow "manufactured" the disputes between the NRA and AMc is false. I am aware that Brewer and BAC were retained to represent the NRA in a variety of actual and potential disputes in Spring 2018. Coincidentally, during July 2018, several NRA employees approached the Audit Committee and raised serious concerns about AMc's business and billing practices. Although the Audit Committee received legal advice on relevant topics, based on the those reports, it was the Audit Committee that ordered deeper scrutiny of AMc to determine whether its activities for the NRA were in compliance with NRA procedures and whether AMc had taken advantage of the NRA.

6. Since that time, facts have surfaced over the ensuing year which made clear that the NRA was correct to investigate this concern expressed by NRA employees in 2018. Based on

documents and events about which I was later made aware, it appears that AMC likely took advantage of the trust placed in them by the NRA. As only one example, I became aware of an email dated April 15, 2019, authored by an executive of another AMc client and former Congressman, Dan Boren, which predicted that AMc "can't produce the backup to the invoices" it submitted to the NRA because AMc has likely been billing the NRA for personnel assigned to other clients – to wit, his employer. In sum, Mr. Boren stated: "Ackerman is in trouble on this one."

7. I later became aware that a contract between AMc and Lt. Col. Oliver North ("North") – a related party transaction which required Audit Committee approval because North was a member of the NRA Board – contained material provisions far different from those originally disclosed to the Audit Committee when our committee approval was sought in September 2018.

8. Separately, the Disqualification Motion attempts to paint the NRA's engagement of BAC, and BAC's fee structure, as extraordinary or improper. The Audit Committee gave careful consideration to the criticisms of BAC's engagement advanced by North and determined that the controls and processes already in place for review of legal invoices were adequate.

9. I declare under penalty of perjury that the foregoing is true and correct.

Executed this 30th day of April 2020.

Charles Cotton

EXHIBIT 43

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

NATIONAL RIFLE ASSOCIATION OF AMERICA,	§	
Plaintiff and Counter-Defendant,	§	
and	§	
WAYNE LAPIERRE,	§	
Third-Party Defendant,	§	
v.	§	**Civil Action No. 3:19-cv-02074-G**
ACKERMAN MCQUEEN, INC.,	§	
Defendant and Counter-Plaintiff,	§	
and	§	
MERCURY GROUP, INC., HENRY MARTIN, WILLIAM WINKLER, MELANIE MONTGOMERY, and JESSE GREENBERG,	§	
Defendants.	§	

DECLARATION OF IAN SHAW

I, Ian Shaw, declare, pursuant to 28 U.S.C § 1746, as follows:

1. I am an Associate with the law firm Brewer, Attorneys & Counselors, counsel to the National Rifle Association ("NRA") in the above-captioned action (the "Action"). I submit this declaration in opposition to Defendants' motion to disqualify the NRA's counsel.

2. I am a member in good standing with the State Bar of Texas and am the requisite age to submit this declaration.

3. I began working for Brewer, Attorneys & Counselors in 2007 as a summer intern. Thereafter, I was offered a full-time job with the firm as a junior consultant in the Dallas office upon my graduation from college.

4. On March 10, 2008, my parents passed away—three months before my college graduation—and Bill Brewer ("Brewer"), allowed me to commence my career in the firm's New York office.

5. To help me get acclimated to a new life, the Brewer family began inviting me to visit with them on weekends, spend time with them in the Hamptons and share holidays at their house in Dallas. Over the years, I began participating in family activities, attending family outings, and helping Brewer coach his youngest son in basketball. Brewer's family accepted me as if I was kin to them. To this day, we remain close.

6. An ongoing ritual for me became spending Thanksgivings with the Brewer family. Every Thanksgiving—starting in 2008—I spent Thanksgiving with the Brewer family.

7. Typically, the Brewer Thanksgivings included one or more of Bill's siblings, their families and friends of the family. One Thanksgiving in particular, in 2012, Skye Brewer's ("Skye") mother, father ("Angus McQueen" or "Mr. McQueen"), and brother ("Revan") came to the Brewer's home in Dallas for Thanksgiving. That's where I met Revan McQueen ("Revan").

8. Early in the evening on Thanksgiving Day, as Brewer and I made our way to his backyard to play basketball, Brewer briefly introduced me to Revan. We shook hands and that was the first and last interaction I had with Revan.

9. Later that evening, there were two tables set up in the formal dining room given the number of people who there for Thanksgiving dinner. At one table sat Brewer, Skye, Skye's

family, including Revan, Brewer's sisters and their husbands. The second table, where I sat, consisted of Brewer's six children, his nephew, and nieces.

10. At no time during the entire dinner did I have any interaction with Revan or any of Skye's family, nor did I participate or hear any talk about Mr. McQueen's business. In fact, topics discussed over Thanksgiving dinners with the Brewer family that I have attended usually center on sports, current news, and family stories.

11. Revan's sworn statement that "we shared dinner together" is a bit exaggerated. I did not speak with him or interact with him in any manner beyond our brief introduction. That was also the last time I ever saw him. Furthermore, his testimony that I "surely benefited from hearing business that was discussed" is not true. I did not hear any business being discussed at the Thanksgiving gathering where I met Revan.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 30th day of April 2020.

/s/
Ian Shaw

EXHIBIT 44

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

NATIONAL RIFLE ASSOCIATION OF AMERICA,	§	
Plaintiff and Counter-Defendant,	§	
and	§	
WAYNE LAPIERRE,	§	
Third-Party Defendant,	§	
v.	§	**Civil Action No. 3:19-cv-02074-G**
ACKERMAN MCQUEEN, INC.,	§	
Defendant and Counter-Plaintiff,	§	
and	§	
MERCURY GROUP, INC., HENRY MARTIN, WILLIAM WINKLER, MELANIE MONTGOMERY, and JESSE GREENBERG,	§	
Defendants.	§	

DECLARATION OF GRANT STINCHFIELD

I, GRANT STINCHFIELD, declare under penalty of perjury pursuant to 28 U.S.C. § 1746, that the following is true and correct:

1. I respectfully submit this declaration in opposition to Defendants' Motion to Disqualify Plaintiff's Counsel William A. Brewer III ("Brewer") and Brewer, Attorneys & Counselors.

2. When I was employed at Ackerman McQueen Inc., ("AMc") as a host of NRATV, I was able to report on a topic I feel strongly about: The Second Amendment. However, while I

HS.

was employed there, I become concerned that the leadership at AMc may not be reporting to the NRA "live" real time views of my show. It appeared to me AMc only focused on social media views in its reports to the NRA. By leaving these "live" numbers out of reports to the NRA, a reasonable person would likely construe the reports as misleading. When the NRA shut NRATV down, I felt compelled to speak out.

3. I voluntarily went to Brewer and his law firm when I read about AMc's claims in legal proceedings against the NRA – claims which seem intended to damage the NRA's mission from both a financial perspective and from a public relations perspective. I felt the court needed to hear my unbiased account of my experience while working at AMc.

4. Everything in my affidavit – dated December 10, 2019 – was factual, and I stand firmly by every word. I look forward to the opportunity to defend myself against AMc for its baseless attacks, including the false narrative that I am somehow a pawn of Brewer.

5. When I submitted my affidavit on behalf of the NRA, I assumed that AMc would come after me for relaying the uncomfortable truth. I predicted they would sue me for what I was going to say. And in December of 2019, AMc sued me for Defamation and Business Disparagement. I predicted they would, because that is how they act against anyone who dares to defy them.

6. I read Revan McQueen's ("Revan") declaration, dated March 30, 2020. I am offended that Revan would accuse me of being coerced when he knows I have never been coerced into anything in my adult life. I have built and run a million-dollar business; I have run for Congress; and I have four Emmy Awards to my name. Coercion is not something I am susceptible to. Revan's statements about me being coerced by Brewer are utterly false.

7. After spending nearly 20 years in mainstream television working as a reporter for NBC stations across the country, I had never once been sued. For many of those years, I was an investigative reporter who often reported on stories fraught with legal peril. I was and continue to be fair, truthful, and careful.

8. I have never knowingly put anything false on TV and I would never knowingly put anything false in a sworn affidavit. The AMc suit against me calls into question my credibility and character. The suit is shameful, and it appears AMc is using that same tactic against Brewer.

9. Revan is correct when he stated that I called AMc's attorney after the suit was filed. However, he is incorrect in stating that I cancelled that meeting with AMc's attorney at the urging of Brewer. In fact, I never discussed the phone call I had with AMc's attorney or the cancellation of our meeting with Brewer before doing so.

10. Because I had never been sued before, I wanted the suit to go away and I thought maybe AMc would drop it if I explained my affidavit in more detail. When I spoke with AMc's attorney over the phone, an attorney named Brian Vanderwoude, I realized this was not going to happen. It was obvious that the goal was to scare me and anyone else who dares to file another affidavit on behalf of the NRA.

11. Before cancelling the meeting, I spoke with my fiancée about it. We agreed that for the sake of the NRA and its members, and for any former AMc employee who dared to come forward for the truth to be heard, I should not allow AMc and its attorneys to bully me into submission.

12. It would be nice to have the lawsuit behind me, but my ultimate allegiance has always been to the NRA and its members. I will not allow foes of the NRA, like AMc, to silence me just because they do not like what I have to say.

13. To be clear, I am not a disgruntled employee, and I was proud of the work I did at NRATV. I was always grateful for the opportunity to be a voice for NRA members. That responsibility to the NRA members – for the awesome responsibility of speaking for them – is why I came forward. "Disgruntled" is certainly not a term I would use to describe my emotions. "Sad" is a much better description.

14. My goal has always been to protect the NRA from any actions that could be harmful to membership and the NRA's ultimate goal of protecting the Second Amendment.

15. I never had a sense that AMc – under Revan's leadership – wanted to work with the NRA or even cooperate with them on important issues like budgeting or messaging.

16. I certify that the foregoing statements are true and correct under penalty of perjury.

Executed this 30th day of April 2020.

Grant Stinchfield

EXHIBIT 45

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

NATIONAL RIFLE ASSOCIATION OF AMERICA,	§	
Plaintiff and Counter-Defendant,	§	
and	§	
WAYNE LAPIERRE,	§	
Third-Party Defendant,	§	
v.	§	**Civil Action No. 3:19-cv-02074-G**
ACKERMAN MCQUEEN, INC.,	§	
Defendant and Counter-Plaintiff,	§	
and	§	
MERCURY GROUP, INC., HENRY MARTIN, WILLIAM WINKLER, MELANIE MONTGOMERY, and JESSE GREENBERG,	§	
Defendants.	§	

DECLARATION OF JOHN FRAZER

Pursuant to 28 U.S.C. § 1746, I, John Frazer, declare under penalty of perjury that the following is true and correct:

1. I am over twenty-one years old and am fully competent to make this declaration. Unless otherwise noted, I have personal knowledge of all matters stated herein. I submit this declaration in support of Plaintiff National Rifle Association of America's Opposition to

Defendants' Motion to Disqualify Plaintiff's Counsel (William A. Brewer III ("Brewer") and Brewer, Attorneys & Counselors ("BAC")) (such motion, the "Disqualification Motion").

2. I have served as Secretary and General Counsel of the National Rifle Association of America since 2015, including at all times relevant to the Disqualification Motion. In this capacity, I negotiate engagement letters with outside counsel, review and approve legal invoices submitted by outside counsel, and oversee major litigation involving the NRA. I also provide legal advice to the NRA where appropriate regarding contractual relationships and contractual disputes with vendors, including Ackerman McQueen, Inc. and Mercury Group, Inc. (collectively, "AMc").

3. I have reviewed the allegations contained in the Disqualification Motion and believe them to be totally without merit.

4. The NRA first retained BAC in early 2018 at the recommendation of our former outside counsel, Steve Hart.[1] Well before BAC began to address any issues involving AMc, I was fully aware, and understood that other members of the NRA leadership were fully aware, of Brewer's relationship by marriage to the McQueen family. I am also aware of the animus which AMc alleges has characterized that relationship over the past two years. The NRA has consented, and consents now, to be represented by Brewer and BAC notwithstanding the supposed conflicts which AMc alleges to arise from the Brewer-McQueen family relationship.

5. Since the outset of this litigation, the NRA has understood that AMc might attempt to call Brewer as a fact witness. Indeed, many of the same "lawyer-witness" arguments that appear in the Disqualification Motion were asserted unsuccessfully by AMc before a Virginia state court in a similar lawsuit in June 2019. The NRA consented then, and consents now, to be represented

[1] The NRA suspended Mr. Hart's engagement on April 22, 2019, and no longer has an attorney-client relationship with Mr. Hart. Certain functions formerly performed by Mr. Hart are performed by BAC.

by Brewer and BAC notwithstanding AMc's insistence that Brewer is a necessary or adverse witness. As discussed below, the NRA would be considerably prejudiced if Brewer were individually disqualified from representing it in any capacity. Nonetheless, the NRA would consent to be represented by BAC in that situation, including in the event of a lawyer-witness disqualification as contemplated by Texas Rule of Professional Conduct 3.08(c).

6. The Disqualification Motion alleges that BAC's engagement letters fail to comply with the NRA Bylaws,[2] and that BAC's "exorbitant legal fees"[3] create a conflict of interest which ought to disqualify BAC from this case.[4] In my view, these allegations are false and meritless. The NRA has had the opportunity to obtain—and did obtain—independent legal advice from other outside counsel regarding BAC's engagement, and the engagement has also been reviewed by the NRA's Audit Committee. The NRA is satisfied that its engagement of BAC complies with its bylaws and internal controls. In addition, I personally review detailed monthly invoices submitted by BAC and raise questions where appropriate regarding the substance of the work performed, the hours expended, charges incurred for third-party vendors and experts, and similar items. These questions have always been addressed to my satisfaction. Except for certain work handled *pro bono*, BAC is compensated by the NRA on an hourly-fee basis. Taking into account regional market variations, the hourly rates charged by BAC attorneys are comparable to the hourly rates paid by the NRA for outside counsel in other high-profile cases.

7. The Disqualification Motion accuses BAC of "faking the AMc audits and document demands"[5] during 2018 and 2019 which preceded the NRA's lawsuit for specific

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[2] *See* ECF 105 at ¶ 12.

[3] *Id.* at ¶ 6.

[4] *Id.* at ¶ 41.

[5] *Id.* at ¶ 43.

performance of a books-and-records inspection clause filed April 12, 2019. This allegation is false. Based on legitimate concerns about AMc's compliance with contractual requirements, I personally sent several of the letters requesting documents from AMc that went unanswered, and retained and supervised the third-party forensic accounting firm, Forensic Risk Alliance (FRA),[6] which attempted to examine AMc's records on-site during February 2019. The NRA's efforts to obtain documents from AMc were not "faked," by Brewer or otherwise.

8. The Disqualification Motion also cites then-AMc employee, Lt. Col. Oliver North, as raising concerns about whether "Brewer's prior record of sanctions" was "properly vetted" by the NRA.[7] Although the NRA is not in the habit of taking advice from adverse litigants regarding its choice of counsel, I note that I was fully informed, long before this action commenced, regarding the sanctions imposed on Brewer discussed in *Brewer v. Lennox Hearth Prods., LLC*, 546 S.W.3d 866, 871 (Tex. App.—Amarillo 2018). I am also aware these sanctions were reversed in their entirety by the Texas Supreme Court.

9. The NRA has chosen Brewer and BAC to lead some of its most significant litigation and regulatory advocacy, and it is my assessment that the firm has developed significant institutional knowledge regarding the documents, issues, and witnesses relevant to this work. If Brewer—or worse, BAC as a whole—were disqualified in this case, it is highly unlikely that the NRA could timely bring aboard substitute counsel with comparable mastery of the case. Therefore, the NRA would be severely prejudiced. Moreover, because the subject matter of this

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[6] The Disqualification Motion also suggests that FRA's accountants were "anything but [independent]" because a former BAC employee, Susan Dillon, worked at FRA. *Id.* at ¶ 26. FRA was retained by the NRA because its bid showed it was likely to provide better value for money than a competing firm. Moreover, Ms. Dillon was not part of the audit team that conducted the on-site record examination.

[7] *See* ECF 105 at ¶ 10.

case overlaps with other ongoing legal matters, the NRA would be forced to incur additional unnecessary legal fees, sacrificing the efficiency of having the same firm handle overlapping cases.

Executed this 1st day of May, 2020.

John Frazer

EXHIBIT 46

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

NATIONAL RIFLE ASSOCIATION OF AMERICA,	§	
	§	
Plaintiff and Counter-Defendant	§	
	§	
and	§	
	§	
WAYNE LAPIERRE,	§	
	§	
Third-Party Defendant,	§	
	§	
v.	§	**Civil Action No. 3:19-cv-02074-G**
	§	
ACKERMAN MCQUEEN, INC.,	§	
	§	
Defendant and Counter-Plaintiff,	§	
	§	
and	§	
	§	
MERCURY GROUP, INC., HENRY MARTIN, WILLIAM WINKLER, MELANIE MONTGOMERY, and JESSE GREENBERG,	§	
	§	
Defendants.	§	

DECLARATION OF ANDREW ARULANANDAM

1. My name is Andrew Arulanandam, and I declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that the following statements are true and correct.

2. I am over twenty-one years old and am fully competent to make this declaration. Unless otherwise noted, I have personal knowledge of all matters stated herein. I submit this declaration in support of the NRA's Opposition to Defendants' Motion to Disqualify Plaintiff's Counsel (William A. Brewer III ("Brewer") and Brewer Attorneys & Counselors ("BAC").

3. I serve as the Managing Director of Public Affairs of the National Rifle Association (the "NRA"). I have worked for the NRA for more than 19 years. As part of my job responsibilities, I interface with in-house communications professionals; outside advertising and public relations firms, such as Ackerman McQueen (AMc); and law firms, such as Brewer, Attorneys & Counselors ("BAC").

4. I understand that AMc claims BAC is a "competitor" of the agency based on the communications services provided by BAC and its Public Affairs Group to the NRA. I am familiar with the communications services provided by BAC to our organization, and I am also familiar with the suite of communications, political consultation, web creation and advertising services previously provided by AMc to the NRA.

5. I have worked closely with BAC Managing Director of Public Affairs Travis J. Carter and his small team of communications professionals. They have primarily assisted with communications relating to legal and regulatory matters being handled by BAC. In that regard, they have assisted in formulating media advisories, drafting public statements, and coordinating media relations activities. Given the size and strategic focus of the BAC Public Affairs Department (a total of less than five people, to my knowledge), its work for the NRA has been specialized.

6. By comparison, and as is reflected in the Services Agreement, dated April 30, 2017, (amended May 6, 2018), which existed between the NRA and AMc, AMc was to provide the NRA a broad range of communications, branding, digital, print media and video production services. Those included, but were not limited to, generating earned media at NRA events; coordinating and scheduling appearances for NRA officials and celebrities; overseeing brand management; directing media planning and placement services; managing advertising and photography;

directing audio/visual and event management; providing videotaping, editing and production services; directing music composition and arrangement; directing infomercials; managing full-time webcasting; providing support services for "live" website offerings; creating graphic and flash animation; providing ongoing technical support for NRA headquarters; overseeing search engine placement; and assisting in the production and coordination of an NRA Radio Show. AMc also directed, produced, facilitated, and managed professional talent relating to the broadcasting of NRATV – an online "TV" experience managed exclusively by AMc. None of these services are provided by BAC.

7. So expansive were the communications and advertising functions provided by AMc, the agency represented that it had, over the years, more than 100 staff members servicing the NRA account.

8. As I stated in my declaration, dated April 14, 2020, "…the NRA has never viewed the two entities [BAC and AMc] as competitors for the expansive suite of services provided by AMc."[1]

9. In fact, there has been no effort on behalf of the NRA to "replace" AMc with BAC – even as the NRA ended its affiliation with the agency. The bulk of the services once provided by AMc to the NRA are now being performed in-house by our organization. These functions include, but are not limited to, preparing for media appearances, drafting key messaging, directing social media campaigns, event management, maintaining our digital assets and publishing certain magazines and other NRA publications.

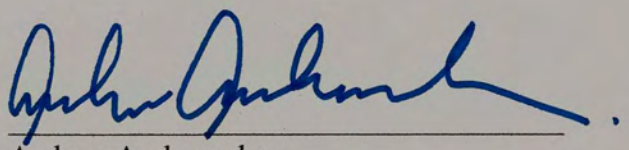
[1] See declaration from A. Arulanandam, dated April 14, 2020.

10. To fill the remaining void left by the departure of AMc, the NRA has worked on a case-by-case basis with some outside PR and advertising firms, and video production companies – all of which have no affiliation with BAC.

11. I do not believe BAC has the expertise or staffing to position itself as a "competitor" to AMc, and it seems disingenuous AMc would promote such a narrative.

12. I declare under penalty of perjury that the foregoing is true and correct.

Executed this 1st day of May 2020.



Andrew Arulanandam

4810-5328-4283.1
2277-08

EXHIBIT 47

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

NATIONAL RIFLE ASSOCIATION OF AMERICA,	§	
	§	
Plaintiff and Counter-Defendant	§	
	§	
and	§	
	§	
WAYNE LAPIERRE,	§	
	§	
Third-Party Defendant,	§	
	§	
v.	§	**Civil Action No. 3:19-cv-02074-G**
	§	
ACKERMAN MCQUEEN, INC.,	§	
	§	
Defendant and Counter-Plaintiff,	§	
	§	
and	§	
	§	
MERCURY GROUP, INC., HENRY MARTIN, WILLIAM WINKLER, MELANIE MONTGOMERY, and JESSE GREENBERG,	§	
	§	
Defendants.	§	

DECLARATION OF JAMES M. McCORMACK

1. My name is James M. McCormack. My date of birth is September 26, 1958. My law office address is 1715 Capital of Texas Highway South, Austin, Texas 78746. I am over 18 years of age, of sound mind, and competent to make this Declaration. I submit this Declaration in support of the NRA's Opposition to Defendants' Motion to Disqualify Plaintiff's Counsel (William A. Brewer III and Brewer, Attorneys & Counselors). I declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that the following declaration is true and correct.

2. Where indicated, the facts stated in this Declaration are within my personal knowledge and are true and correct; however, to be clear, I do not have personal knowledge of the facts underlying this lawsuit or the present controversy. For those underlying facts, I have relied on sources such as the pleadings, motions (and their attachments), correspondence, and other documents identified herein.

3. I have based my opinions set forth below on facts or data of a type reasonably relied upon by experts in my field in forming opinions regarding the ethical and legal duties and obligations of Texas lawyers.

4. I am and have been a licensed attorney in Texas for 35 years (since 1984).

5. I am a former **General Counsel and Chief Disciplinary Counsel of the State Bar of Texas** (1991-1996) and an **adjunct professor of law at the University of Texas School of Law** in Austin where I taught legal ethics and the law governing lawyers. More recently, I taught a non-legal ethics related course titled "Expert Witnesses" and am presently teaching a course during the Spring 2020 semester titled "Handling Depositions and Expert Witnesses." I am also a former member of the **Texas Disciplinary Rules of Professional Conduct Committee** of the State Bar of Texas; a past Chairman of the Texas Center for Legal Ethics and Professionalism (now called the Texas Center for Legal Ethics); and presently serve as the **Editor-in-Chief of the EthicsExchange** (which provides online legal ethics articles and related resources for lawyers) of the Texas Center for Legal Ethics.

6. In 2015, the Supreme Court of Texas appointed me to the **Texas Professional Ethics Committee**, which prepares and publishes formal ethics opinions for the guidance of Texas lawyers in the *Texas Bar Journal*. In 2018, the Court reappointed me to an additional three-year term.

7. My legal practice primarily involves legal ethics and legal malpractice. Within that legal practice category, I serve as ethics and malpractice counsel to Texas lawyers, law firms, and others, represent complainants and respondent attorneys in the Texas attorney disciplinary and disability system, represent clients with respect to unauthorized practice of law issues and Texas bar admissions, and serve as a consulting and/or testifying expert in legal ethics and legal malpractice-related matters, including on numerous occasions attorney disqualification issues. Further, I have practiced on both sides of the civil law docket for many years, have served as a general counsel and outside counsel to entities, taught law school courses, served as a legal ethics advisor to lawyers and law firms, have been an author or presenter of numerous articles and programs on legal ethics and legal malpractice issues for lawyers and other audiences.

8. For further information about my education, training, and experience, my *curriculum vita* is attached hereto as Exhibit A.

SCOPE OF ENGAGEMENT

9. I have been retained to review information, including various documents from this case, and provide expert opinions within the scope of my education, training, and experience as a Texas lawyer who practices extensively in the legal ethics and legal malpractice area (as described herein) and particularized expertise in the legal authorities discussed. For the purposes of this Declaration, I have been asked to offer expert opinions regarding *Defendants' Motion to Disqualify Plaintiff's Counsel (William A. Brewer III and Brewer Attorneys and Counselors)* in Civil Action No. 3:19-cv-02074-G; *National Rifle Association of America, et al. v. Ackerman McQueen, Inc.., et al.* now pending in the United States District Court for the Northern District of Texas, Dallas Division, before the Honorable Judge A. Joe Fish. I have also reviewed the "*Brief in Support of*

Defendants' Motion to Disqualify Plaintiff's Counsel (William A. Brewer III and Brewer Attorneys & Counsellors) and the exhibits attached thereto.

SUMMARY OF RELEVANT FACTS

10. In brief summary only, I have the following understanding of the facts:

11. Plaintiff in the above-referenced lawsuit is the National Rifle Association of America ("**NRA**"), in addition to Third-Party Defendant, Wayne LaPierre ("**LaPierre")**, the Executive Vice President and CEO of the NRA. The Brewer, Attorneys & Counsellors law firm ("**Brewer Firm**") represents the NRA and Mr. LaPierre in this suit.

12. Defendants are Ackerman McQueen, Inc. ("**AMc**"), a public relations and marketing firm, AMc's subsidiary Mercury Group, Inc., and individual defendants Henry Martin, William Winkler, Melanie Montgomery, and Jesse Greenberg (collectively, "**AMc**"). The law firm of Dorsey & Whitney, LLP ("**Dorsey Firm**") represents AMc.

13. The NRA filed its Original Complaint against Defendants in August 2019. That Original Complaint involved claims based on the Copyright Act and the Lanham Act and alleged that AMc engaged in the unauthorized use of the NRA's trademarks and copyrights, including a false association claim under the Lanham Act and an alternative claim for conversion of the NRA's intellectual property. Subsequently, in October 2019, the NRA amended its Complaint and made additional claims against AMc and persons affiliated with AMc for fraud and breaches of fiduciary duty.

14. Defendant AMc was a long-time agent of the NRA and provided public relations-related services. As part of its defenses to the NRA's claims, AMc has accused the William A. Brewer III ("Brewer") and the Brewer, Attorneys & Counsellors law firm ("Brewer Firm" or the

"Firm") of competing with AMc for public relations-related services in addition to the Firm practicing law.

15. Defendants, including AMc, filed "*Defendants' Motion to Disqualify Plaintiff's Counsel (William A. Brewer III and Brewer Attorneys & Counselors)*" with this Court on March 30, 2020. Defendants' Motion alleges several grounds in support of its assertion that the Brewer Firm should be disqualified from continuing to represent the NRA in this suit. As grounds for disqualification, Defendants cite six of the Texas Disciplinary Rules of Professional Conduct (and their companion ABA Model Rules), namely :

A. Texas Rule 1.06(b) and ABA Model Rule 1.7 (Conflicts of Interest).

B. Texas Rule 3.08(a)-(c) and ABA Model Rule 3.7 (Lawyer as Witness).

C. Texas Rule 3.07 and ABA Model Rule 3.6 (Trial Publicity).

D. Texas Rule 4.01 and ABA Model Rule 4.1 (Truthfulness in Statements to Others).

E. Texas Rule 4.02 and ABA Model Rule 4.2 (Communication with Represented Persons).

F. Texas Rule 4.04 and ABA Model Rule 4.4 (Respect for the Rights of Third Persons)

16. As a purported basis for invoking these rules, Defendants make the following factual allegations:

A. Brewer has a strained relationship with the McQueen family—of which some family members have or had managerial and/or ownership roles in AMc.

B. The Brewer Firm is competing with AMc for public relations business and is now providing services to the NRA that AMc previously provided to the organization for nearly 40 years.

C. Brewer and the Brewer Firm have "taken over the NRA" with respect to "all legal and PR [public relations] decisions" and has made "exorbitant legal fees along the way."

D. The NRA initially hired the Brewer Firm for a single case and now has "taken over" an unbounded scope of representation for the organization.

E. That former NRA President Oliver North tried and failed to have the organization "investigate" the Brewer Firm's "duties and invoices."

F. That the Brewer Firm "retaliated" against former NRA President Oliver North "and others" by assisting some within the NRA to oust North as its President and by suing AMc.

G. That Brewer escalated "attacks" against AMC after he learned that his father-in-law (A. McQueen) had cancer, including making various threats to have certain persons prosecuted and instigating audits of AMc's work for the NRA.

H. That Brewer used McQueen family members to communicate with A. McQueen and R. McQueen as part of an improper effort to communicate with AMc.

I. That Brewer has had "prior ethical conflicts and court sanctions" in other cases during his legal career.

That Brewer is a "material fact witness" in this case because he allegedly knows how and why AMc and the NRA parted ways after nearly 40 years and may have "manufactured" this falling-out between the two organizations.

17. Finally, Defendants summarize their disqualification arguments with the following statements:

I. "*Brewer's continued representation of the NRA or LaPierre against AMc in this matter improperly and unfairly prejudices AMc's ability to fully and fairly litigate its claims and defenses and will further perpetuate public suspicion of the integrity of the judicial system and this lawsuit. Brewer, and by extension, the Brewer Firm, must be disqualified and prohibited from further representing the NRA and LaPierre in this case, or any other party against Defendant relating to this NRA dispute, and from participating beyond providing witness evidence in the form of documents and testimony.*"

II. "*Brewer and his firm are violating several Texas Disciplinary Rule of Professional Conduct and Model Rules of Professional Conduct by directly competing with AMc, leaking false and disparaging information about AMc to the press, side-stepping the attorney-client privilege, and communicating with a represented party.*"

18. To establish the facts they allege in support of disqualification, Defendants cite deposition testimony, documents of various provenance, and a declaration by Revan McQueen. I have reviewed these materials, along with the declarations of Skye McQueen Brewer, Wayne LaPierre, John Frazer, Craig Spray, Charles Cotton, Michael Erstling, Travis Carter, Andrew Aurulanandam and Michael Collins submitted in opposition to the Motion.

OPINIONS

19. Based on the above information and applying my education, training and experience (as well as applying relevant authorities, including the various Texas disciplinary rules and ABA Model Rules that Defendants assert are applicable here), I have the following opinions:

I. Defendants' claims concerning Brewer's alleged conflicts of interest under Texas Rule 1.06 and ABA Model Rule 1.7 intrude into matters properly resolved between the Brewer Firm and its client, the NRA. Defendants have no legitimate standing to assert these conflicts.

20. **First,** most conflicts of interest arise, and are properly addressed, solely among a lawyer or (or law firm) and the client. Comment 17 to Rule 1.06, Texas Disciplinary Rules of Professional Conduct states, in part, that "[*r*]*aising conflicts of interests is primarily the responsibility of the lawyer undertaking the representation.*" A litigant very rarely, if ever, has standing to assert that opposing counsel is conflicted. Comment 17 acknowledges such standing only "*where the conflict is such as clearly to call into question the fair or efficient administration of justice*….". Therefore, any alleged conflicts of interest (or potential conflicts) are for Brewer and the Brewer Firm to address with its client, the NRA; likewise, it is for the NRA to decide whether it wishes to accommodate the alleged conflict or not. Nothing in the record comes close to establishing the type of exceptional circumstance, contemplated by Comment 17, which would taint the administration of justice in the eyes of the public and confer standing on Defendants to

assert a conflict. For example, Defendants do not claim that Brewer previously represented them, or switched sides during the course of this litigation. Nor do Defendants identify particular information or confidences that Brewer gained by virtue of his relation by marriage to the sister of an AMc executive. Instead, Defendants' primary argument appears to be that they would be much more comfortable if the NRA was represented by more amiable counsel—which is what roughly 100% of litigants would prefer.

21. For example, Defendants attempt to make much of Brewer's supposed *animus* toward the McQueen family, which, in turn, allegedly makes his firm and him somehow unfit to represent an opponent against AMc. This is a weak reed (at best) upon which to base a disqualification claim. Lawyers and law firms are ***not*** required to ***like*** opposing parties or even feel neutrally about them. In fact, lawyers and their firms often develop an extreme dislike for—or have a pre-existing dislike regarding—opposing parties. This situation is ***not*** disqualifying ***unless*** a lawyer reasonably concludes that his or her extreme animus toward an opposing party is materially prejudicing the representation of his or her ***own*** client or the lawyer is unable to meet his or her professional obligations of civility toward opponents under the Texas Lawyers Creed or other professional standard. It is Brewer's prerogative to raise this issue with the NRA if he objectively concludes that his legal representation of the NRA is somehow compromised by his familial relationships. The NRA may be perfectly fine with the fact that Brewer allegedly dislikes his wife's family. But it is the NRA's right to determine whether it wishes to accommodate Brewer's feelings—whatever they may be—toward the NRA's opponent or related parties.

22. **Second**, it is not an impermissible conflict of interest for a law firm to "compete" with an opposing party in litigation for services that the opposing party provides to others. For example, law firms certainly compete against other law firms all the time with respects to clients,

cases, and transactions. Under Defendants' apparent theory, a law firm that handles a patent litigation and legal malpractice cases could not, on behalf of a client, sue another patent litigation law firm for legal malpractice because it is in the first law firm's interest to disadvantage a competing firm in the patent litigation space. That, however, is ***not*** the law governing conflicts of interest anywhere. Additionally, the mere fact that a law firm provides public relations-related services as an adjunct to its legal services is hardly novel. Some law firms, particularly in the corporate counsel world, provide crisis-management and public relations-related services to their entity and individual clients, whether those law firms refer to those services that way or not. In any event, whether the Brewer Firm provides public relations-related services is irrelevant. It is neither unlawful nor inappropriate to do so—nor does that fact, if true, have any bearing on the NRA's claims against AMc. Those affirmative NRA claims will presumably be decided on their own merits—and the Court will make its own decisions about whether AMc's defensive theories concerning this alleged competition are relevant to this proceeding. At most, this is another issue for discussion between the Brewer Firm and its client, the NRA.

23. **Third**, AMc's claim that Brewer and/or the Brewer Firm are disqualified because they have a financial interest in pursuing this and other litigation is laughable. Virtually all lawyers and law firms have a financial incentive in representing clients. That financial motive is tempered by the lawyers' and law firms' legal, ethical, and professional obligations to their clients, including the obligation not to charge unreasonable or unconscionable legal fees; however, the Brewer Firm's client, the NRA, is apparently not complaining about the legal fees that it has paid or may pay in the future. Unsurprisingly, an adverse party typically lacks standing to complain that its opponent in litigation is spending too much money on legal fees. If this was a family law case in which one spouse's expenditures on legal services in the divorce were significantly draining the

marital estate, the other spouse might well question those expenditures. But despite Defendants' apparent efforts to transform it into one, this is not a family-law dispute. AMc has no legitimate interest in how much or how little the NRA spends on legal services in this case or any other.

24. **Fourth**, AMc's claim that it is disadvantaged because one of its principals, R. McQueen, must defend the company against claims brought by his sister's husband (Brewer) provides no legal basis for disqualification. A party, such as AMc here, might have numerous reasons why it would prefer that another law firm represent its opponent in litigation; however, a party in litigation does not get to select (or veto) counsel for its opponent.

25. **Fifth**, AMc appears to claim that Brewer and the Brewer Firm have filed "unauthorized" lawsuits on behalf of the NRA when the NRA "was seeking to keep the peace with AMc, concocting and carrying out the false and defamatory 'extortion' narrative, and for terminating AMc's Services Agreement." If the NRA has not "authorized" any lawsuits in its name, including this one, then that is an issue for the NRA to resolve; otherwise, AMc can file a motion for the Brewer Firm to show authority to appear as the NRA's counsel in this matter, if it genuinely believes that the Brewer Firm lacks that authority. A motion to disqualify is not the proper vehicle for challenging an opposing counsel's authority to act for an adverse party. It is also my understanding that a Virginia court previously rejected the exact same argument by AMc.

II. Defendants' "lawyer-witness" arguments are misguided and defective.

26. There is no indication of which I am aware that the NRA plans to use Brewer as both an advocate and fact witness in the trial of this case. Nor is there any indication that Brewer is a "*witness necessary to establish an essential fact on behalf of the [NRA].*" If Brewer becomes a "*witness necessary to establish an essential fact on behalf of his client,*" then he certainly cannot act as an advocate before the tribunal at trial; however, that scenario, if it occurs, is not disqualifying as to the Brewer Firm as a whole—and does not completely exclude Brewer from

representing the NRA in this case. *See, e.g., Anderson Producing, Inc. v. Koch Oil Co.*, 929 S.W.2d 416, 422 (Tex. 1996)("*Rule 3.08 only prohibits a testifying attorney from acting as an advocate before a tribunal, not from engaging in pretrial, out-of-court matters such as preparing and signing pleadings, planning trial strategy and pursuing settlement negotiations*"). *But see, Crossroads Systs (Texas), Inc. v. Dot Hill Systs. Corp.*, 2006 WL 1544621 (W.D. Tex. 2006) at *10 (holding that other members of the testifying lawyer's firm should also be disqualified from serving as trial counsel under the circumstances of the case). Under *Anderson Producing*, Brewer could continue to assist with the Brewer Firm's handling of this case and participate in roles other than as an advocate before the trier of fact. *Anderson*, 929 S.W.2d at 422. Further, a party ***cannot*** disqualify an opposing counsel ***simply*** by claiming that that opposing counsel will be compelled to provide testimony adverse to his or her own client or where another witness could provide the same allegedly "essential" testimony. *United States v. Beauchamp*, 2017 WL 1684406, at *2 (N.D. Tex. 2017)(criminal case in which the government claimed that defense counsel was a necessary witness under Rule 3.08 due to work that he allegedly did on certain agreements; in denying the motion, the Court found the government's argument in this regard to be speculative and insufficient). If Brewer is compelled to testify adversely to the NRA—which ***cannot*** occur simply because AMc wills it—then Brewer could, in theory, make appropriate disclosures to his client, the NRA, about the consequent conflict and obtain a waiver. See Rule 3.08(c), Texas Disciplinary Rules of Professional Conduct. Whether Brewer must seek a conflicts waiver from his client depends on: **(a)** whether he will be compelled to give adverse testimony; and **(b)** the nature of that adverse testimony and its materiality. The Court will ultimately decide whether Brewer will be compelled to testify by AMc and the scope of that testimony, if any—while presumably ruling on the likely attorney-client privilege and work product objections to AMc's demand that opposing

counsel testify. If the Court compels Brewer's testimony, only then would Brewer need to make appropriate disclosures regarding the conflict to his client, the NRA, and receive (or not) the NRA's consent to the conflict. There may be circumstances where Brewer might not be able to seek the NRA's consent to a conflict of this nature (*i.e.*, where the conflict is so prejudicial to the NRA that it should not agree to accommodate the conflict); however, disqualification is not warranted by AMc's mere claim that it will force Brewer to be a witness adverse to the NRA, nor by its claim that Brewer is absolutely necessary to provide essential testimony in support of the NRA's claims. I note that Defendants failed, in their briefing, to alert the Court to the high legal hurdles that exist for disqualification under the Texas and ABA "lawyer as witness" rules.

III. Defendants' Motion offers a scattershot of vague and irrelevant allegations that do not implicate the Texas disciplinary rules or ABA Model Rules upon which Defendants claim to rely.

27. Neither Defendants' Motion nor the supporting papers coherently substantiate each alleged rule violation, let alone by marshaling relevant, admissible evidence. Defendants' brief is especially difficult to follow in that its alleged proof and arguments do not mirror the claims set out in the Motion and brief at the outset. This is not just a disagreement with writing style or competence in organizing arguments coherently. After covering its general conflicts of interest and "lawyer as witness" arguments, Defendants' brief trails off without developing its four other disqualification arguments or corresponding proof in sufficient detail. For example, Defendants claim that Brewer "used" McQueen family members to "communicate" with certain principals at AMc in an alleged violation of Texas Rule 4.02 (and the companion ABA Model Rule), but made no effort to identify who those McQueen family members were, how AMc principals knew that Brewer was intentionally trying to communicate with them through these unnamed family members, what those alleged "communications" concerned or when they occurred, or how these alleged indirect communications violated either Rule. With respect to this allegation, Defendants

offer the March 30, 2020, Declaration of Revan McQueen in which he claims, in §31 and §36 (on pp. 9-10) that Brewer used McQueen family members to "communicate" with him, allegedly to circumvent AMc's counsel. The declaration asserts that Brewer threatened to have "me and Angus [McQueen] indicted," but does not explain how R. McQueen knows that Brewer was trying to communicate this information to him improperly through other family members. Presumably, one of these alleged family members could have testified by affidavit to these claims, but Defendants offered no direct evidence of that sort.

28. Even more oddly, Defendants appear to claim that statements and events totally unrelated to this case, some occurring decades ago, provide grounds for disqualification. Among other things, Defendants cite: an article written by Brewer and two co-authors for the *Pepperdine Law Review* regarding the 1998 *Dondi* decision; and, alleged sanctionable conduct by Brewer in other cases, including sanctions that were reversed for abuse of discretion by the Texas Supreme Court.[1]

29. Overall, Defendants' disqualification motion is a mishmash of undeveloped or shoddily developed theories and claims, coupled with reputational smears. Defendants make no real effort to support their allegations with admissible evidence, and even less explain how the same allegations, if proven, would provide grounds for disqualification under any theory recognized in the Fifth Circuit. Perhaps Defendants' overall objective is to create an "appearance of impropriety"—which has not been recognized for ethical purposes in the Texas Disciplinary Rules of Professional Conduct for more than 30 years. Indeed, an "appearance of impropriety" is

[1] Specifically, Defendants' brief spends considerable time highlighting a trial court's 2015 highly-publicized sanction against Brewer in *Brewer v. Lennox Hearth Prods, LLC,* 546 S.W.3d 866, 871 (Tex. App.- Amarillo 2018, pet. granted). The Texas Supreme Court struck down those sanctions in their entirety, determining that imposing them was an abuse of discretion. *See* Brewer *v. Lennox Health Products, LLC, et. al.*, No. 18-0426, Supreme Court of Texas.

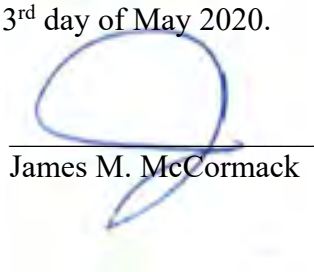
a largely discredited ABA ethical standard due to its inherent subjectivity (e.g., an "appearance" is clearly different than the "reality of impropriety"). Wolfram, *Modern Legal Ethics*, §7.1.4, West Publishing, 1986. Nonetheless, the Fifth Circuit has occasionally considered "appearances of impropriety" in the past; however, the U.S. District Court for the Northern District of Texas noted that this standard, in the attorney disqualification context, should be applied "**with caution**." *Grosser-Samuels v. Jacquelin Designs Enters., Inc*., 448 F. Supp.2d 772, 780 (N.D. Tex. 2006). And for good reason: An "appearance" is susceptible to arbitrary determinations about what lawyers, courts, and the public may find "distasteful" or "unseemly."

30. Presumably, Defendants' counsel are familiar with Rule 3.01, Texas Disciplinary Rules of Professional Conduct. That Rule states: "*A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless the lawyer reasonably believes that there is a basis for doing so that is not frivolous.*" Given the inapplicability of the Rules cited and the alleged proof offered, it is difficult to see how Defendants' counsel have acquitted themselves well in observance of this basic ethical obligation.

31. I may supplement or amend this Declaration as further information or issues are presented for my consideration.

I declare under penalty of perjury that the foregoing is true and correct.

Executed in Gonzales County, Texas on the 3rd day of May 2020.



James M. McCormack

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Mr. McCormack is the former **General Counsel and Chief Disciplinary Counsel of the State Bar of Texas (1991-1996)** and a former **Managing Attorney** of the Civil Litigation Section of the Travis County Attorney's Office in Austin, Texas. As the **State Bar's Chief Disciplinary Counsel**, he served as the chief legal ethics enforcement officer for the attorney discipline system in Texas. He is a graduate of the **University of Texas at Austin**: **BBA with Honors, l981; Doctor of Jurisprudence, 1984.**

Mr. McCormack also served as an **adjunct professor of law at the University of Texas School of Law** in Austin where he taught professional responsibility. Mr. McCormack also received the **2016 Professionalism Award** from the Austin Bar Association and the Texas Center for Legal Ethics.

From 1998 to 2004, Mr. McCormack served as a member of the State Bar's **Texas Disciplinary Rules of Professional Conduct Committee**, which is charged with recommending amendments to the Texas ethics rules. In 2015, the Texas Supreme Court appointed Mr. McCormack to the **State Bar of Texas' Professional Ethics Committee**, which prepares formal ethics opinions that are published in the Texas Bar Journal. He was reappointed by the Court in 2018.

He served as the **Chairman of the Board of Trustees of the Texas Center for Legal Ethics and Professionalism (Chair-Elect, 2006-2007; Chairman 20072008; Immediate Past Chairman 2008-2009). Mr. McCormack presently serves as the Editor-in-Chief of the EthicsExchange of the Texas Center for Legal Ethics.**

Mr. McCormack's Austin-based practice emphasizes legal ethics-related consultations and representations. Past consultations include conflicts of interest analysis, mass tort settlements, disqualification motions, lawyer advertising and solicitation questions, organizational ethics reviews, legal malpractice-related expert testimony, representation before the Texas Board of Law Examiners, and other professional responsibility and malpractice-related counsel. He is a regular lecturer on legal ethics and malpractice issues.

Martindale-Hubbell national legal directory peer-based rating: "AV" since 1994.

JAMES (JIM) M. McCORMACK
Attorney at Law

- Current practice emphasizes legal ethics and legal malpractice consultation and representation; expert consultation and testimony; prior service as an adjunct professor of law, The University of Texas School of Law; Partner, Tomblin Carnes McCormack, L.L.P., Austin, Texas (1999-present); Law Offices of James M. McCormack (1996-1999; 2008-present); also Of Counsel, Law Offices of Anthony W. Tomblin (1997-1999).

General Counsel and Chief Disciplinary Counsel
State Bar of Texas
1991-1996

- Served as the **General Counsel** and the **Chief Disciplinary Counsel** of the State Bar of Texas; as **General Counsel**, provided corporate and litigation services to the Board of Directors, Executive Departments, and other Barrelated entities, such as the Unauthorized Practice of Law Committee and the Client Security Fund; as **Chief Disciplinary Counsel,** served as the chief legal ethics enforcement officer and chief prosecutor for the statewide attorney disciplinary system; supervised ten offices and 118 employees across Texas; oversaw all litigation conducted on behalf of the State Bar and the Texas Commission for Lawyer Discipline; served as *ex-officio* member of the State Bar Board of Directors and Executive Committee. *The State of Texas is a public corporation and the administrative arm of the Judicial Department of the State of Texas.*

Managing Attorney, Litigation Section
Travis County Attorney's Office
May 1988 to 1991

- Managed public litigation section. Supervised trial attorneys and support staff while handling a regular litigation caseload.

Assistant County Attorney
Travis County Attorney's Office

- Handled wide variety of lawsuits in virtually all areas of public practice, including personal injury defense, civil rights defense, eminent domain, ad valorem tax collection, employment law, environmental enforcement, contract and real property disputes and miscellaneous litigation.

Staff Counsel
Texas State Senate
1984 to 1985

- Served as **Staff Counsel** to a Texas State Senator; provided legal opinions and advice drafted legislation and amendments; monitored and analyzed proposed legislation.

EDUCATION

- *The University of Texas Law School*. Doctor of Jurisprudence, 1984.

- *The University of Texas at Austin*. Bachelors in Business Administration with Honors, 1981 (Management).

EXECUTIVE AND CONTINUING EDUCATION

- The Wharton School, The University of Pennsylvania, Executive Education in Managing People, 1995.

- Covey Leadership Center, Seven Habits Program, 1995.

- *The University of Texas at Austin*, Coursework in counseling psychology, 1990.

- 40 hour Mediation Training Program, Travis County Dispute Resolution Center, 1991.

- *The University of Texas at Austin*, Executive Education in Finance and Accounting for Non-Financial Managers, 1995.

HONORS, ACTIVITIES, AND MEMBERSHIPS

- **Past President**, Board of Directors, **AUSTIN WOMEN'S CENTER**; Board Member (1987-1992), for twenty year old non-profit organization providing job training and counseling for men and women; staffed by professional staff and volunteers; recipient of federal, state, and local funds.

- **State Bar Presidential Citations** in 1993 and 1996 for leadership in implementing the new grievance system and balancing multiple responsibilities as General Counsel/Chief Disciplinary Counsel of the State Bar of Texas.

- **Member**, State Bar of Texas, since 1984.

- **Member of the Bar**, U.S. District Court, Western and Eastern Districts of Texas; U.S. Court of Appeals, Fifth Circuit; and the United States Supreme Court.

- **Member**, National Mock Trial Team, University of Texas Law School, 1984; Member, Board of Advocates, University of Texas Law School, 1983-1984.

- **Member**, Friar Society (since 1982); Cactus Yearbook Outstanding Student (1984); University of Texas Cactus Yearbook Goodfellow (1983).

- **Life Fellow**, Texas Bar Foundation.

- **Member, Texas Disciplinary Rules of Professional Conduct Committee**, State Bar of Texas, 1998-2004.

- **Member and Past Chairman, Board of Trustees, Texas Center for Legal Ethics and Professionalism**, 2003-2009 (Chair-Elect, 2006-2007; Chairman, 2007-2008; Immediate Past Chairman 2008-2009).

- **Member, The State Bar of Texas' Professional Ethics Committee,** appointed by the Texas Supreme Court (2015-). Reappointed 2018 to a new three year term. The Professional Ethics Committee prepares formal ethics opinions for the guidance of Texas lawyers and for publication in the Texas Bar Journal.

- **Recipient of the Professionalism Award** by the Austin Bar Association and the Texas Center for Legal Ethics, 2016 (**"**The recipient of the Award will be that lawyer selected at the local level who best exemplifies, by conduct and character, truly professional traits, who others in the bar seek to emulate, and who all in the bar admire. Those selected for the award will truly be 'role models for the bar, particularly younger or less experienced lawyers. Those selected will be lawyers who are respected by their peers and make all their peers proud of the profession'").

TEACHING, WRITING AND ETHICS-RELATED PRESENTATIONS

- **Adjunct Professor of Law**, *The University of Texas School of Law*, "Professional Responsibility" (1995-1997); Trial Advocacy: "Expert Witnesses" (2017-present); Trial Advocacy: "Handling Depositions and Expert Witnesses" (2020).

- **Editor-in-Chief, The EthicsExchange,** The Texas Center for Legal Ethics, 2014-present (online legal ethics articles and resources).

- **Contributing Co-Author,** *A Guide to the Basics of Law Practice*, 1995 and 1996 editions, Texas Center for Legal Ethics and Professionalism.

- **Author, "The Client Connection,"** ***The Texas Lawyer,*** (legal newspaper column appeared each month from September 2001 through August 2003)

- **Author**, "Good Ethics, Smart Tactics", *Law Practice Management Magazine*, American Bar Association, September 1995, (similar article at 57 TEX. B.J. 178, 1994). Named by the publication as one of its five best articles of 1995.
- **Co-author** (with Arthur Piacenti) **and Presenter**, "Dual Role Conflicts of Interest," "Reporting Misconduct," and "Entering into and Withdrawing from Representation"; *National Academy of Law, Ethics, and Management Program, 1994.*

- **Author and Presenter**, "How to Guarantee a Grievance," *Evidence: Current Strategies For The Trial Lawyer In A New Environment Program, South Texas College of Law, 1995.*

- **Author and Presenter**, "Ethical Considerations for the Personal Injury Lawyer," *The Annual Page Keeton Products Liability and Personal Injury Law Conference*, The University of Texas School of Law, 1996.

- **Author and Presenter**, "Conflicts of Interest in Complex Litigation," *Recognizing and Resolving Conflicts of Interest Program,* The State Bar of Texas, 1997.

- **Speaker**, "Most Common Ethical Lapses at Trial," 3rd Annual Evidence and Procedure Symposium, The University of Texas School of Law, San Antonio, Texas, 1998 (similar presentation at "Masters of Litigation" Program for Travis County Bar Association, 1997).

- **Speaker**, "Ethics and Negotiations," Travis County Bar Association, Austin, Texas, 1998.

- **Panel Member and Speaker**, "Class Action and Mass Tort Panel; Discussion of Special Ethics Issues, 3rd Annual Evidence and Procedure Symposium, The University of Texas School of Law, San Antonio, Texas, 1998.

- **Speaker**, "Legal Malpractice," 21st Annual Page Keeton Products Liability & Personal Injury Law Conference, The University of Texas School of Law, 1997.

- **Instructor**, "Ethical Considerations for Multi-party and Complex Litigation," Continuing Legal Education Online Course, 1998-present.

- **Co-presenter** (with Tracy McCormack) "So You Want To Be A Millionaire Lawyer, Ethically?" 5th Annual Advanced Evidence and Procedure Symposium, The University of Texas School of Law, May 2000 (similar legal ethics programs presented for the Texas Association of Bank Counsel, October 2000; and University of Texas School of Law CLE Program, April 2001).

- **Panel Member**, "Ethics and the Litigator", Live Statewide Satellite Presentation, Ethics and Malpractice Avoidance for Business/Corporate Lawyers and Litigators, State Bar of Texas, Dallas (and 25 Texas sites), November 2000.
- **Co-Presenter** (with Tracy McCormack) "The Weakest Link: Pitfalls in Legal Ethics," Texas Association of Bank Counsel Annual Meeting, Austin, Texas, October 2001.

- **Co-Presenter** (with Tracy McCormack) "The Weakest Link: Pitfalls in Legal Ethics," 25th Annual Page Keeton Products Liability and Personal Injury Law Conference, The University of Texas School of Law, Austin, Texas, November 2001 (similar legal ethics program presented at University of Texas Law School Reunion CLE Program, April 2002).

- **Co-Presenter** (with Tracy McCormack) "Ethics Jeopardy" Continuing Legal Education Program, 26th Annual Page Keeton Products Liability and Personal Injury Law Conference, The University of Texas School of Law, Austin, Texas, October 2002.

- **Speaker**, "Settling Cases Ethically," Silica Litigation Conference (HarrisMartin Publishing Company), New Orleans, Louisiana, June 2003

- **Panel Member**, "Ethics, Ethics, Ethics" 3 hour ethics program, Travis County Bar Association, December 2003.

- **Speaker**, "Ethical Pitfalls," Andrews Asbestos Conference, New Orleans, Louisiana, May 2004.

- **Speaker**, "Ethical Issues for Administrative Lawyers," Advanced Administrative Law Conference, Travis County Bar Association, June 2004.

- **Author and Presenter**, "Ethical Pitfalls Leading to Disqualification in the Texas and Federal Courts," Page Keeton Litigation Conference, The University of Texas School of Law Continuing Legal Education Program, Austin, Texas, October 2004.

- **Speaker**, "Six Ethics Rules I Thought I Knew Until I Read Them Again," Austin LSA Association Program, Austin, Texas, April 2005.

- **Author and Presenter**, "The Verdict from Kerrville: Resolving Conflicts of Interests Under Rule 1.06," Fiduciary Litigation Course, The State Bar of Texas, Houston, May 2006.

- **Speaker**, "Some Ethics Rules I Thought I Understood Until I Read Them Again," Texas Attorney General's Office, Distinguished Speaker's Program, Third Court of Appeals, Austin, August 2007.

- **Speaker**, "Attorneys and Paralegals," The Corpus Christi Bar Association, Corpus Christi, November 2007.
- **Speaker**, Legal Ethics Program for Clinical Programs at the University of Texas School of Law, Austin, January 2008.

- **Speaker**, "Ethical Insomnia: Construction Law Ethical Situations That Keep You Awake At Night," 21st Annual Construction Law Conference, The Construction Law Section of the State Bar of Texas and the Texas Institute of Continuing Legal Education, San Antonio, February 2008.
- Panelist, "The Ethics of Lawyer-Judge Interactions," The Ethics Course, The Texas Center for Legal Ethics and Professionalism, Austin, May 2008.

- **Panelist**, "The Ethics of Lawyer-Judge Interactions," The State Bar of Texas, TexasBarCLE, March 2008 (video program).

- **Panelist**, "Ethical Courtroom Behavior," The State Bar of Texas, TexasBarCLE Live Webcast program, June 2008.

- **Speaker**, "Ethics in Forming, Operating, and Amending Partnerships," The University of Texas CLE Program: Partnerships and Limited Liability Companies, Austin, July 2008.

- **Panelist**, "How to Avoid Ethical Improprieties When Dealing with Governmental Personnel," The 22nd Annual Legal Seminar on Ad Valorem Taxation, San Antonio, August 2008.

- **Panelist**, "Ethical Courtroom Behavior - Part II: Enforcement," The State Bar of Texas, TexasBar CLE Live Webcast program, October 2008.

- **Panelist/Chair**, "Lawyer-Judge Interactions," The Ethics Course, The Texas Center for Legal Ethics and Professionalism, Austin, December 2008.

- **Speaker**, "What Social Science Teaches About Rules, Procedures, and Ethical Behavior" ("Advising Businesses and Government in a Troubled Economy: Ethical Policies, Procedures, and Behavior"), UTCLE (The University of Texas School of Law), 13th Annual Law Use Conference, Austin, March 2009.

- **Moderator**, "Imposing Sanctions" and "Most Common Rule Violations" Grievance Committee Training Videos, Office of the Chief Disciplinary Counsel, The State Bar of Texas, Austin, April 2009.

- **Panelist**, "Ethics and High Profile Cases: Free Press v. Fair Trial", Cosponsored by the Litigation Section of the State Bar of Texas and the Texas Center for Legal Ethics and Professionalism, The State Bar of Texas Annual Meeting, Dallas, June 2009.

- **Panelist**, "Tuning Up Your Law Practice: Conflicts, Contracts, and Costs of Doing Business," Live Webcast by the State Bar of Texas Continuing Legal Education, Austin, July 2009.

- **Speaker** (with Tracy McCormack), "What Happens If We Are Honest About Our Jury Trial Experience?," The Car Crash Seminar, UTCLE (The University of Texas School of Law), Austin, August 2009.

- **Speaker**, "Navigating the Ethics Rules," The Ethics Course, The Texas Center for Legal Ethics and Professionalism, Austin, Texas, September 2009.

- **Speaker**, "What Social Science Teaches About Rules, Procedures, and Ethical Behavior," The Academy of Hospitality Industry Attorneys Conference, Austin, Texas, October 2009.

- **Panelist**, "Presenting the Case in Chief—Defense," Trial of a Fiduciary Litigation Case, TexasBarCLE (The State Bar of Texas), Fredericksburg, Texas, December 2009.

- **Speaker**, "Navigating the Ethics Rules," The Ethics Course, The Texas Center for Legal Ethics and Professionalism, Houston, Texas, January 2010.

- **Speaker**, "Beyond the MPRE," Spring Symposium, *Pursuing Justice Through Legal Innovation*, Sponsored by the Thurgood Marshall Legal Society, The Chicano/Hispanic Law Students Association, and the National Black Law Journal, The University of Texas At Austin, Austin, Texas, February 2010.

- **Speaker**, "Practical Legal Ethics for Immigration Lawyers," Austin Chapter of the American Immigration Lawyers Association, Austin, Texas, March 2010.

- **Speaker**, "Attorney Retainer Agreements: Getting In and Getting Out," The Austin Bar Association, Litigation Section Program, Austin, Texas, April 2010.

- **Presenter**, "Ethical Tips and Traps for the Marketing Lawyer," Superlawyers Continuing Legal Education Webinar, Austin, Texas, June 2010.

- **Speaker**, "How to Terminate a Client Engagement," Advanced Tax Law Course, TexasBarCLE, Dallas, Texas, August 2010.

- **Panelist**, "New Disciplinary Rules: Point and Counterpoint," 34th Annual Page Keeton Civil Litigation Conference, The University of Texas School of Law (UTCLE), Austin, Texas, October 2010.

- **Speaker**, "Social Science and Ethics," *Strategic Management* Classes (Professor Mark Poulos), The School of Management and Business, St. Edward's University, Austin, Texas, November 2010, April 2011, November 2011, May 2012, and November 2012.

- **Co-Presenter** (with Jess Irwin), "Representation of Multiple Parties & Conflicts of Interest," The Advanced Administrative Law Course, TexasBarCLE, Austin, Texas, July 2011.

- **Author**, "The Elephant in the Room: The Referendum Defeat Is A Symptom of a Larger Problem," *The Advocate*, The State Bar Litigation Section Report, Vol. 55, Summer 2011.

- **Co-Author** (with Tracy McCormack and Susan Schultz), "Probing the Legitimacy of Mandatory Mediation: New Roles of Judges, Mediators, and Lawyers," *St. Mary's Journal on Legal Malpractice & Ethics*, St. Mary's University School of Law, Vol. 1, Number 1, 2011.

- **Speaker**, "Ethics & Pro Bono Service," Central Texas Wildfire Response Team Volunteer Attorney Training, *The Austin Bar Association*, Austin, Texas, September 2011.

- **Speaker**, "Navigating the Ethics Rules," The Holiday Ethics Program, The Austin Bar Association, Austin, Texas, December 2011.

- **Moderator**, Panel Discussion (with Buck Files and Charles Herring, Jr.), "The Ethics of the Legal Profession and the Public Perception of the Profession," *The Dr. Richard Street Legal Symposium*, Austin College, Sherman, Texas, March 2012.

- **Panelist**, "Appellate Ethics Roundtable," ("Fee Agreements: 5 Easy Pieces"), The University of Texas Conference on State and Federal Appeals, Austin, Texas, May 2012.

- **Speaker**, "Navigating the Ethics Rules and Conflicts," 12th Annual Legal Conference, The Office of General Counsel, The University of Texas System, Austin, Texas, October 2012.

- **Speaker**, "Navigating the Ethics Rules and Conflicts," 8th Annual Texas Energy Law Conference, The University of Texas School of Law, Austin, Texas, January 2013.

- **Speaker**, "Ethics in Negotiations," The Environmental Impacts of Oil and Gas Production Course, The State Bar of Texas, San Antonio, Texas, January 2014.

- **Speaker**, "Organizational and Personal Ethics," Principles of Management Courses, St. Edward's University, Austin, Texas, February 2013-Fall 2018; also, similar presentations for various "Strategic Management" Courses, Fall and Spring semesters, 2012-2018.

- **Speaker**, "Due Diligence Dilemmas: Contacting Coworkers and "Purloined" Documents" Program, Austin and Capital Area Plaintiff Employment Lawyers Association, Austin, Texas, April 2014.

- **Speaker**, "Contacts with Persons Represented and Not Represented by Opposing Counsel," Austin Bar Employment Law Section, November 2014.

- **Speaker**, "An Introduction to Attorney Disqualification," The Texas Center for Legal Ethics, Filmed April 2015.

- **Speaker**, "Attorney Fees and Fee Contracts," The Texas Center for Legal Ethics, Filmed April 2015.

- **Speaker**, "Contingent Fees and Fee Contracts," Capital Area Trial Lawyers Association, Austin, Texas, May 2015

- **Speaker**, "Managing a Grievance and How to Avoid a Grievance," Government Law Boot Camp, TexasBarCLE, Austin, Texas, July 2015

- **Speaker**, "Attorney's Fees and Fee Contracts in Family Law," Austin Family Law Advocates, Austin, Texas, September, 2015

- **Author**, various *EthicsExchange* Articles, Texas Center for Legal Ethics, 20142015, including:

    - Filing Law Firm Advertisements with the State Bar
    - Ethics in Negotiation and Mediation
    - Improper Client Solicitations
    - Confidentiality in Attorney-Client Relationship
    - Disputes Over Legal Fees and Claims by Third Parties
    - Overview of the Texas Grievance System: Ten Questions
    - Inappropriate Relationships with Clients
    - Lawyer Contacts with Adverse Parties and Experts
    - Reporting the Misconduct of Other Lawyers (and Judges)
    - Representing Organizations and Reporting Client Problems
    - The Texas Lawyer Creed: Purpose and Enforcement
    - Training Law Office Staff Regarding Ethical Obligations
    - The Basics of Lawyer Trust and IOLTA Accounts
    - Legal Fees: Types, Their Causes and Cures
    - Introduction to Attorney Disqualification
    - Navigating the Ethics Rules: What Matters in Answering Questions About Texas Legal Ethics and Why
    - The Binding Arbitration Disclosure
    - The Fee Agreement
    - Joint Representations: “More Than Just One Client” Ethics
    - The Conflicts of Interest Disclosure

- **Speaker**, “Ethics and Dilemmas in Representing Multiple Client: Conflicts and Other Implications,” The Texas Wetlands Conference, Houston, Texas, January 2016.

- **Speaker**, “Ethical Issues Regarding Trial,” Advanced Civil Trial Law Seminar, Corpus Christi Bar Association, Corpus Christi, Texas, April 2016.

- **Co-Presenter** (with Tracy McCormack), “Disclosure is the New Ethics,” The University of Texas School of Law (Reunion Weekend Continuing Legal Education), Austin, Texas, April 2016.

- **Speaker**, “Conflicts of Interest in Labor and Employment Law,” The Austin Bar Association (Labor & Employment Law Section), Austin, Texas, November 2016.

- **Speaker**, "Ethical Traps for New (and Experienced) Lawyers," *Justice James A. Baker - Guide to Ethics and Professionalism in Texas* Course, The Texas Center for Legal Ethics, Dallas, Texas November 2016.

- **Co-Presenter** (with Tracy McCormack), "Ethical Jeopardy," Holiday Ethics Program, The Austin Bar Association, Austin, Texas, December 2016.

- **Speaker,** "Legal Ethics for the Seasoned Lawyer," Austin Bar Association (*Still Loving It* Bar Section), April 2017.

- **Panel Member**, Disruptive Technology and Ethics, University of Texas Law School Technology Conference, UTCLE program, Austin, Texas, May 2017.

- **Speaker**, "Ethics in Business Litigation," Business Disputes Conference, TexasBarCLE, Austin, Texas, September 2017.

- **Speaker** (with Tracy McCormack), "The Ethical Perils of Cocktail Party Talk," Cocktail Party Law: Answering Questions in Social Situations, UTCLE Program, Austin, Texas, November 2017.

- **Speaker**, "Legal Ethics and Professionalism for the Civil Trial Lawyer," The Advanced Civil Trial Law Course, The Corpus Christi Bar Association, Corpus Christi, Texas, March 2018.

- **Speaker**, "They Say What? A Few Ethics Rules and Opinions That Surprise Experienced Lawyers," The Capital Area Trial Lawyers Association, Austin, Texas, December 2018.

- **Co-Presenter** (with Tracy McCormack), *Ethics Jeopardy: Fee Agreements Through Appeal*, The American Board of Trial Advocates, Austin, Texas, November 2019.

EXHIBIT 48

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

NATIONAL RIFLE ASSOCIATION OF AMERICA,	§	
	§	
Plaintiff and Counter-Defendant,	§	
	§	
and	§	
	§	
WAYNE LAPIERRE,	§	
	§	
Third-Party Defendant,	§	
	§	
v.	§	**Civil Action No. 3:19-cv-02074-G**
	§	
ACKERMAN MCQUEEN, INC.,	§	
	§	
Defendant and Counter-Plaintiff,	§	
	§	
and	§	
	§	
MERCURY GROUP, INC., HENRY MARTIN, WILLIAM WINKLER, MELANIE MONTGOMERY, and JESSE GREENBERG,	§	
	§	
Defendants.	§	

DECLARATION OF WAYNE LAPIERRE

My name is Wayne LaPierre, and I declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that the following statements are true and correct.

1. I am over twenty-one years old and am fully competent to make this declaration. Unless otherwise noted, I have personal knowledge of all matters stated herein. I submit this declaration in support of the NRA's Opposition to Defendants' Motion to Disqualify

Plaintiff's Counsel (William A. Brewer III ("Brewer") and Brewer Attorneys & Counselors ("BAC")) (the "Motion" or the "Disqualification Motion").

2. I am the Executive Vice President ("EVP") and Chief Executive Officer ("CEO") of the National Rifle Association of America ("NRA" or the "Association"). During the times relevant to the Motion, I was EVP and CEO of the NRA.

3. In this role, I am responsible for making major corporate decisions, as well as directing the NRA's programs and business activities in accordance with policies set by the Board. I am also one of the public faces of the NRA.

4. The NRA had a longstanding relationship with Ackerman McQueen, Inc. ("AMc"), prior to 2019. During the course of that relationship, I understood that AMc had a large number of employees working on the NRA account, managing advertising campaigns, public relations, branding strategies, publications and more. AMc managed many of the NRA's most significant public-facing communications, directed key elements of our online presence, and operated many of our digital assets. Notably, AMc concepted, managed and created all of the content for the NRA's live-streaming digital platform, known as NRATV.

5. Although I valued AMc for the creativity of its longtime CEO, Angus McQueen, AMc was not easy to work with and alienated many NRA staff, Board members and significant donors. Long before I met Bill Brewer, NRA executives, directors and others were increasingly strident in their complaints about AMc. For years, I regarded many of these as mere personality conflicts engendered by the abrasiveness of Angus McQueen. As such, I looked past the complaints because I believed the agency's work benefitted the NRA.

6. By 2018, AMc was the NRA's largest vendor, billing approximately $40 million per year. Because their work covered key communications and public relations, I often turned to

them for highly sensitive matters. Consistent with the significance of this work and the level of trust placed in AMc, the NRA allowed them considerable latitude in managing their work for the Association, subject to their agreement that we could access AMc's files, books and records under the parties' Services Agreement, dated April 30, 2017 (as amended May 6, 2018, the "Services Agreement").

7. Nonetheless, I became concerned and received numerous complaints that the public messaging AMc was crafting for the Association often struck the wrong tone. AMc was placing increasing emphasis on material that was unrelated to Second Amendment issues and often inflammatory. My concern became acute in connection with the messages coming across NRATV, which had been created with the intention of reaching a younger and more diverse audience. The NRA is a civil rights organization focused on individual freedoms, especially the Second Amendment, and in my view should provide a home for all lovers of our Second Amendment freedoms. These misgivings arose long before BAC came aboard, and long before I learned of specific staff complaints about AMc's billing practices.

8. In early 2018, as the NRA faced regulatory scrutiny over a membership program known as Carry Guard, I began to question the adequacy of our oversight of two key vendors: the insurance partner that administered that program (Lockton), and AMc, which directed portions of the program that incurred significant cost overruns.

9. Therefore, greater transparency from the Association's vendors became a high priority for the NRA. It was especially important to get the AMc relationship right given the size of their budget. Moreover, several NRA employees voiced pointed concerns that AMc was abusing the NRA's trust. For all of these reasons, it became important to gain greater insight into how the agency was spending the NRA's money. Areas of interests included the number of AMc

employees working on the NRA account, project approvals, project investments, completed services, and the projected returns on our investment in connection with NRATV. The allegation by AMc that Brewer or BAC somehow "manufactured" the disputes between the NRA and AMc, or "faked" the NRA's document requests is not only patently false but inconsistent with the historical facts.

10. In fact, when the Association initially sought information regarding AMc's billing practices in the summer of 2018, AMc tried to convince me that the NRA should not want to review the files, books and records AMC maintained related to its work for the NRA. Specifically, Angus McQueen warned me that any documents transmitted to the NRA might later be accessed by New York State regulators, but those same records would be beyond the reach of those same regulators if left in AMc's hands since AMc was headquartered in Oklahoma and would be impervious to a New York subpoena. This was not only unpersuasive, it was disconcerting: if AMc was engaged in the type of activity that triggered concerns about subpoenas, I wanted to know about it.

11. For reasons completely unrelated to AMc, the NRA had engaged BAC in March 2018, to represent it on a number of legal fronts. At or about that time, I informed Angus McQueen that the NRA was retaining BAC in connection with the various litigation and regulatory matters. He did not express any concerns. In fact, we discussed the familial relationship. I am unaware of any objections by Angus McQueen regarding BAC's representation of the NRA until after the Association began asking questions about AMc's billing.

12. In June 2018, I was informed that our new Chief Financial Officer, Craig Spray ("Craig"), was going to travel to AMc's headquarters in Oklahoma City to be introduced to AMc's leadership by our outgoing chief financial officer. Before Craig returned to work, I received an

irate phone call from Angus McQueen who demanded that I fire Craig immediately. I tried to get to the bottom of AMc's complaint. I came to understand that Craig had merely asked questions that AMc executives did not want to answer about AMc's services, the metrics related to NRATV, and AMc's accounting practices. Assured by Wilson Phillips that the questions asked by Craig were appropriate, I informed Angus that the NRA would not fire Craig.

13. On October 11, 2018, Craig and I met with Angus McQueen, Revan McQueen, and other members of AMC's leadership at their office in Dallas, Texas. The purpose of the meeting was to discuss ways to reduce AMc's fourth-quarter budget for 2018 and the budget for 2019. The meeting was explosive. Angus and Revan were enraged at the prospect of cutting AMc's $40 million budget and seemed to have lost all sight of their role as a vendor in a vendor-client relationship. In abusive, vulgar tirades, the McQueens told me I was "dead to [them]" and they had already written NRA off and had moved on. BAC was not the focus of the meeting. I have read Revan McQueen's declaration filed in support of AMc's Disqualification Motion. His testimony regarding the events that took place at this meeting, as well as a number of claims about my relationship with Brewer, is entirely incorrect.

14. During 2018 and early 2019, Andrew Aurulanandam and I occasionally asked BAC to assist with specialized media outreach—almost always in response to press inquiries about legal issues the NRA was facing. Similarly, I asked BAC to assist with my remarks for the February 2019 Conservative Political Action Conference ("CPAC"). I wanted the speech to focus on First Amendment litigation BAC spearheaded, and felt it was important to get the legal nuances right. AMc also provided input on the speech. I never viewed BAC and AMc as business competitors, nor do I believe that AMc held this view until it became convenient for purposes of litigation.

15. Against this backdrop, the NRA's efforts to obtain documents and information from AMc continued throughout the remainder of 2018 and the first quarter of 2019. At times, AMc went through the motions of complying with some of our requests, but our most important requests were ignored or rebuffed. By early April 2019, it was clear to me the agency would not comply with the most important of the Association's information requests. Therefore, on April 12, 2019, I authorized the filing of a lawsuit in Virginia against AMc to force them to produce all of the documents to which the NRA was entitled.

16. The decision to sue one of our longtime vendors was a difficult but necessary one. Of course, I did not imagine AMc would retaliate in the outrageous fashion that followed.

17. Lt. Col. Oliver North ("North") came aboard as President of the NRA during the fall of 2018. This role, at one time occupied by Charlton Heston, was largely ceremonial and unpaid. I understood and agreed that during at least part of his presidency, North would host a show on NRATV, for which he would be paid by AMc as an independent contractor. Unbeknownst to me at the time (May 2018), North was actually hired by AMc as a full-time employee and turned out to be more loyal to AMc than the NRA. Although he appeared to support the NRA's engagement of BAC, North later aligned himself with the agency as his business relationship with the agency was scrutinized. By April 2019, as the NRA prepared for its Annual Meeting of Members, I regarded North as having a conflict of interest as he attempted to interfere with the Association's efforts to gain access to AMc's files, books and records. In fact, in early 2019, even before the NRA prepared for its Annual Meeting of Members, I regarded North as having a conflict of interest. I repeatedly informed him of this conflict multiple times and that he should cease trying to derail BAC's compliance work and its efforts to scrutinize AMc's books and records.

18. On April 24, 2019, I was in Indianapolis, Indiana, at the NRA Annual Meeting. I was meeting with a number of Board members and staff in the living room area of a hotel suite when one of my aides, Millie Hallow, received a telephone call from North. Millie ducked into the bedroom of the suite to take the call, and NRA President Carolyn Meadows (then 2nd Vice President) accompanied her. Several minutes later, Millie and Carolyn emerged from the bedroom, both visibly upset. Millie recounted the conversation she just had with North. In sum, North wanted to convey a message from Angus McQueen and AMc: unless I dropped the lawsuit against AMc and immediately resigned, AMc would circulate allegedly damaging information about me, members of my leadership team, and the NRA. On the other hand, if I agreed to their demands and supported North for another term as NRA President, North stated he would speak to Angus McQueen in order to negotiate an "excellent retirement" for me.

19. Sandy Froman and Scott Bach, both of whom are attorneys and were present when Millie and Carolyn relayed the contents of the call, remarked that this sounded like extortion. Although I was shocked by the explicitness and audacity of AMc's ultimatum, I was not surprised by the agency's openly adverse posture. Earlier that day, Millie had reported receiving a less-detailed version of the same corrupt proposal from former NRA Board member (and senior executive of an AMc client) Dan Boren, likewise relayed on behalf of AMc. I had already determined that I would not accept "the deal". In fact, I was determined to expose AMc's conduct to the Board of Directors so they would know what Angus McQueen, North and AMc were doing.

20. On April 25, I circulated a letter to the Board to this effect, a true and correct copy of which is attached as Exhibit A to this declaration.

21. Bill Brewer was not in Indianapolis on April 24, 2019. The suggestion that he was in or near Indianapolis is false.

22. Since then, significant documents and other information have come to my attention that confirm my grim intuition that day: the demand by AMc that I resign on April 24, 2019, was a premeditated, corrupt scheme by AMc and others to take control of the NRA in order to derail inquiries into their own conduct. These revelations have deepened the NRA's resolve to root out any and all abuses by AMc and others and to make the Association whole.

23. I declare under penalty of perjury that the foregoing is true and correct.

Executed this 3 day of May 2020.

Wayne LaPierre

Wayne LaPierre

EXHIBIT 49

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

NATIONAL RIFLE ASSOCIATION OF AMERICA, Plaintiff and Counter-Defendant and WAYNE LAPIERRE, Third-Party Defendant, v. ACKERMAN MCQUEEN, INC., Defendant and Counter-Plaintiff, and MERCURY GROUP, INC., HENRY MARTIN, WILLIAM WINKLER, MELANIE MONTGOMERY, and JESSE GREENBERG, Defendants.	§ §	Civil Action No. 3:19-cv-02074-G

DECLARATION OF TRAVIS J. CARTER

1. My name is TRAVIS J. CARTER. I am over the age of twenty-one years and am fully competent and able to testify herein and to state that all of the facts and statements herein contained are true and correct and that, except as expressly noted otherwise, I have personal knowledge of the same.

2. I am the Managing Director of Public Affairs at Brewer, Attorneys & Counselors ("BAC" or "the Brewer firm"), outside counsel for the National Rifle Association of America ("NRA" or "the Association").

3. I have more than 25 years of experience in news reporting, media and public relations, strategic communications, and issues & crisis management. My experience includes working in the print news media, and working in communications for the Federal Reserve Bank of Dallas, Allstate Insurance Company, BAC (formerly Bickel & Brewer), and my own public relations agency, Carter PR. I have a bachelor's degree in Journalism & Mass Communications from The University of Oklahoma and hold an MBA from The University of Dallas.

A Working Relationship with AMc

4. Since I first became employed with BAC in 2001, I have worked closely with various representatives of Ackerman McQueen ("AMc"). BAC relied upon AMc to provide many professional services for the firm, including, but not limited to, design and management of multiple websites, creative development for advertisements, video production, brand and logo development, and design and implementation of marketing materials.[1]

5. With my input and direction, these services were utilized by BAC, as well as the firm's charitable foundation and a suite of educational programs it offers to the community. For example, AMc directed logo development, branding campaigns, and some video services for the Brewer Foundation / NYU International Public Policy Forum ("IPPF"), a high school debate contest that serves students around the globe. AMc also assisted with logo development and branding for the Brewer Foundation Future Leaders Program ("FLP"), an academic and leadership development program that serves disadvantaged students from urban communities in Dallas, Texas.

[1] *See* Declaration of Travis Carter at ¶ 5, dated March 4, 2020, attached as Ex. 36 to the Declaration of Michael Collins ("Collins Decl.).

6. When it was suggested that the Brewer Foundation "live stream" high school student debates promoted and sponsored by the IPPF and BAC, I enthusiastically supported the idea, directing the hiring of AMc, arranging payment of the agency's travel costs, and working with AMc principals on this project.

7. BAC staff members actually collaborated with a team of AMc professionals in New York City for many years to conduct the IPPF live video proceedings from the Harold Pratt House – home of the Council on Foreign Relations. In addition, AMc professionals helped direct a social media campaign to drive awareness of the IPPF and its unique global platform.

8. In sum, Bill Brewer, BAC, and I engaged AMc for an assortment of important projects for almost *20 years* – until December 2019. I understand that, during this time, the Brewer firm paid AMc more than $1 million. Further, I have been personally involved in recommending the professional services of AMc to other clients of the Brewer firm. On one occasion, this resulted in the agency submitting a proposal for a lucrative website project for a Fortune 500 company.

BAC and AMc Not Competitors

9. Given the nature of the professional relationship between BAC and AMc, I am surprised to learn that AMc alleges BAC is a competitor to the agency. BAC is not a competitor to the agency. It has never viewed itself as such.[2] There is no legitimate basis upon which AMc claims that the Brewer firm seeks to "compete" with AMc or replace it as the advertising or communications firm of record for the NRA.

10. BAC employs a small number of professionals in its Dallas office who primarily work in the field of legal communications and issues & crisis management – the Public Affairs

[2] *Id.* at ¶ 12.

Group.[3] This group primarily works on communications strategy in helping clients navigate media issues, regulatory challenges, and reputational exposure associated with legal matters being handled by the firm.

11. The group is comprised of professionals with backgrounds in news reporting, media relations, and corporate communications. None of the communications professionals employed by BAC specialize in advertising, website development, or marketing.

12. Over the years, BAC's team of communications professionals has worked cooperatively with a wide range of clients, ranging from 3M Company to New York University, and the *outside* public relations agencies those clients employ in connection with legal services provided by the firm. This work has been viewed positively by BAC clients, their in-house communications professionals, and outside PR and communications firms enlisted as part of a "multi-pronged strategy" to manage legal communications and confront reputational challenges.

Many Law Firms Offer Strategic Communications Services

13. I understand that AMc claims that the Brewer firm is unique in its efforts to promote its ability to offer crisis management and PR services to clients.[4] That claim is false.

14. Many senior lawyers and the firms they lead (of all shapes and sizes) routinely offer crisis management and communications services to their clients. Many law firms in BAC's competitive set – and firms it opposes – employ practice groups that engage in legal

[3] *See* Brewer, Attorneys & Counselors Public Affairs Group electronic biographies: Travis Carter, Andrea Sadberry, and Katherine Leal Unmuth, available at: https://www.brewerattorneys.com/team-1, attached as Ex. 54 to the Collins Decl.

[4] *See* ECF 105, Brief in Support of AMc's Motion to Disqualify Plaintiff's Counsel.

communications and PR. These practice groups are often touted as being more efficient and cost-effective than PR firms in the arena of legal communications.[5]

15. It has been widely reported in legal trade publications that this is especially true for firms like BAC that specialize in high-stakes advocacy that generates public attention.[6] In fact, it was national reporting on this subject that spawned a Texas practice commentary from Bill Brewer about the benefits derived from having lawyers involved in legal communications and PR.[7]

16. At the request of the NRA, BAC has assigned professionals to provide media relations and public relations services to the Association in connection with the legal and regulatory matters being handled by the firm. However, the work performed by the firm's communications professionals is fairly specialized. As evidence of how limited these services are in aggregate, none of these individuals work solely for the NRA.[8]

AMc: A Suite of Services

17. By comparison, I understand that AMc provided a *broad range* of communications and upscale video production services for the NRA. The relationship between the advertising agency and the NRA, which spanned several decades, had culminated in billings for AMc that exceeded tens of millions of dollars annually – apparently involving AMc

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[5] *See* promotional materials from Quinn Emanuel, attached as Ex. 55 to the Collins Decl.; *see also* promotional materials from Akin Gump, attached as Ex. 56 to the Collins Decl.

[6] *See* American Lawyer article, "Meet the Lawyers Who Clean Up Clients' Worst Messes," dated March 28, 2019, attached as Ex. 11 to the Collins Decl.

[7] *See* Texas Lawyer commentary, "Advocacy as Art: Lawyers Must Engage in Issues and Crisis Management," dated May 6, 2019, attached as Ex. 15 to the Collins Decl.

[8] *See* Ex. 36 at ¶ 9.

employees spread across four offices in Oklahoma City, Oklahoma; Dallas, Texas; Colorado Springs, Colorado; and Alexandria, Virginia.

18. AMc reported that many of these employees were exclusively dedicated to serving the NRA. That said, I understand that at least one other AMc client believes the agency assigned professionals to its account who were supposed to be dedicated full-time to the NRA.[9]

19. Unlike any services offered by BAC, I understand that a flagship deliverable for AMc was a multimedia platform that featured daily "live television" – complete with news anchors, writers, producers, and production assistants. The agency utilized a dedicated production studio in the office of its Alexandria, Virginia-based subsidiary, Mercury Group, and often deployed video crews, TV hosts, and technicians to locations around the United States and world in connection with its services.

20. As part of its self-described "brand influence strategy," AMc reportedly specializes in the building, management and leveraging of "media properties" for clients. Indeed, the biography of AMc CEO Revan McQueen says that the agency leads communications efforts to "support the successful scaling of premium video products." Under the direction of Mr. McQueen, Ackerman [AMc] is proudly transitioning the advertising agency "to become a media company in and of itself."[10]

21. For all these reasons, it strains credibility for AMc to argue that the small public affairs team of BAC ever sought to replace the core services provided by the agency to the NRA.

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[9] *See* email communication from Dan Boren, dated May 30, 2019, attached as Ex. 18 to the Collins Decl.

[10] *See* electronic biography of AMc CEO, Revan McQueen, attached as Ex. 16 to the Collins Decl.

Indeed, the firm "does not have the professional resources, expertise, or inclination" to occupy such space for the NRA or any other clients.[11]

22. Further, the NRA's own managing director of Public Affairs finds the claim that BAC sought to replace AMc "disingenuous and without factual basis" and notes that the "NRA has never viewed the two entities as competitors for the expansive suite of services provided by AMc."[12]

Upon Closer Review: BAC's Role for the NRA

23. Purportedly to illustrate that AMc was being "replaced" by BAC, the agency cites work in which I was involved. This includes the drafting of certain press releases soon after BAC was retained in March 2018.

24. Any press releases drafted by BAC related to legal and regulatory issues being handled by lawyers with BAC. As an example, the firm drafted a press release relating to the NRA's lawsuit against New York Governor Andrew Cuomo and the New York State Department of Financial Services, dated May 11, 2018.[13]

25. This was a communications tool that relates specifically to legal services being provided by BAC. It was clearly more practical for BAC, versus AMc, to draft such public-facing communications that summarized the legal and regulatory positions being advanced by the NRA.

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[11] *See* Ex. 36 at ¶ 13.

[12] *See* Declaration of Andrew Arulanandam, dated April 14, 2020, attached as Ex. 38 to the Collins Decl.

[13] *See* press release, "The NRA Sues New York Governor Andrew Cuomo, New York State Department of Financial Services Over Alleged Attack on First Amendment Rights," dated May 11, 2018, attached as Ex. 4 to the Collins Decl.

26. On April 5, 2018, BAC drafted media statements responding to anticipated legal and PR-related issues arising from the actions of Citigroup to restrict its retail clients' access to firearms sales. The firm *copied* AMc senior directors on proposed communications – working in collaboration to confront a potentially negative situation for the NRA.[14]

27. Shortly thereafter, on April 13, 2018, BAC drafted communications for board members, NRA members, and the news media in connection with another *legal concern*: the cancellation of insurance policies affiliated with Lockton Affinity, LLC ("Lockton") maintained by NRA members and gun owners in New York. The AMc Motion to Disqualify argues this was done to "supplant" AMc. In fact, these communications were sent *to* Angus McQueen – again in cooperation to support the defense of the NRA and the members it serves.[15]

28. Many NRA principals, including Secretary and General Counsel John Frazer and former outside counsel J. Steven Hart, were copied on these communications.

29. I am unaware of <u>any</u> press releases drafted or disseminated by AMc on the topics in question during this time period – even though I understand the agency had a retainer for which it was paid significant sums of money to render such services and professional advice.

30. AMc also argues that BAC, in an effort to take over its function, directed speechwriting services once performed solely by the agency, including a March 2019 speech for Wayne LaPierre in connection with the Conservative Political Action Conference ("CPAC"). The CPAC speech in question is focused, in significant measure, on the NRA's First Amendment

[14] *See* ECF 80, Ex. A-8.

[15] *See* ECF 80, Ex. A-9

(free speech) lawsuit against New York Governor Andrew Cuomo and promised investigatory proceedings by the New York Attorney General.[16]

31. The remarks bore the working title, "This is Our Moment of Truth: Wayne LaPierre Calls for Protection of **Free Speech** in Debate Over Second Amendment." They were drafted for Mr. LaPierre at his specific direction.

32. AMc has made repeated reference to a presentation from me as evidence that BAC provides counsel on matters involving "the court of public opinion." I did present to the NRA Public Affairs Committee a presentation, dated January 4, 2019, at the request of the NRA.[17] AMc officials (as representatives of the NRA's agency of record) were present during the meeting.

33. The presentation primarily related to reputational concerns stemming from legal and regulatory issues – media pursuits relating to board contracts, governance issues, and the like. There was discussion of the "court of public opinion" and how it intersects with "The Courtroom" and "The Regulatory Arena." Specifically, this briefing "covered public-facing communications efforts concerning legal and regulatory matters" being handled by BAC.[18]

34. This was <u>not</u> a presentation about how to advance generalized PR or advertising services. Indeed, the reference to the "Court of Public Opinion" is a point that follows mention of Lockton (a legal matter) and Gov. Andrew Cuomo (a legal and regulatory concern, and defendant).

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[16] *See* W. LaPierre CPAC speech, dated March 2, 2019, attached as Ex. 8 to the Collins Decl.

[17] *See* ECF 81-2 [APP001130-APP001162].

[18] *See* declaration from Andrew Arulanandam, dated April 14, 2020, attached as Ex. 38 to the Collins Decl.

35. I was told that AMc never presented to the Public Affairs Committee in connection with these types of issues.

False Allegations of "Leaking" Information

36. I understand that AMc accuses BAC of "leaking" documents and lawsuits to inflict reputational damage on the agency. As an example, AMc implies the Brewer firm may have "leaked" to the news media a communication to the NRA Board of Directors, dated April 25, 2019, from NRA CEO & EVP Wayne LaPierre. AMc says the "leaked" document was cited by *The Wall Street Journal* ("*WSJ*"). I am not aware who provided this document to the *WSJ*.

37. I am the person who most often directly interacts with the news media on behalf of BAC. I did not provide the April 25, 2019, communication to the media before reports emerged about it. Rather, I was confronted with questions from several reporters, including those from the *WSJ*, about the contents of the communication. On the afternoon of April 25, 2019, the communication had become "public" due to its dissemination to an estimated 76 NRA board members and employees of the Association.

38. I also did not "leak" copies of legal filings against AMc. There have been several *publicly filed* legal actions between the parties. During the course of the disputes between AMc and the NRA, I have not distributed draft copies of any legal filings (*i.e.*, "leaked") to members of the news media.

39. There has been public interest in these legal proceedings, likely due to the parties involved and the unraveling of long-term partnerships. Accordingly, BAC, on occasion, has publicly commented on behalf of its client about these legal proceedings and confronted false claims and allegations made by AMc and its principals.

The PR Tactics of AMc

40. After April 24, 2019, AMc, as reportedly promised, has been involved in an aggressive campaign to disparage the NRA and distort the public record. For example, on July 3, 2019, AMc made public accusations that the NRA was threatening AMc employees "with the loss of their unemployment and benefits" and accused the NRA of embarking upon a "destructive plan" to "hurt as many people as they can."[19]

41. I became aware of these claims (and an AMc-sponsored media advisory to give them maximum effect) based on phone calls I received from news reporters while I was with my family in Colorado.

42. The media advisory was sprung just hours before the Fourth of July. It generated multiple media inquiries to which the NRA had to hurriedly respond – in an attempt to correct the record and confront unfounded allegations. Predictably, AMc's premeditated attack on an unsuspecting NRA spawned numerous negative articles full of disinformation contained in the media advisory.[20] [21]

43. I understand that AMc's *Brief in Support of Defendants' Motion to Disqualify Plaintiff's Counsel* includes an appendix that purports to chronicle all media statements from BAC on behalf of the NRA. However, the appendix omits the media record from July 3-4, 2019, likely to avoid drawing attention to AMc's unprovoked reputational attacks on the NRA.

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[19] *See* statement from AMc, dated July 3, 2019, attached as Ex. 22 to the Collins Decl.

[20] *See* Oklahoman article, "Ackerman McQueen Accuses NRA of Threatening Employees," dated July 4, 2019, attached as Ex. 24 to the Collins Decl.

[21] *See* Talking Points Memo article, "Jilted NRATV Firm Accuses Gun Group of 'Hurting as Many People as Possible," dated July 3, 2019, attached as Ex. 23 to the Collins Decl.

44. AMc has widely distributed a barrage of negative media advisories, blistering quotes, and other communications meant to harm BAC and the NRA.[22] Following the filing of AMc's *Brief in Support of Defendant's Motion to Disqualify Plaintiff's Counsel*, I received a media call about information in the filing that supposedly had been redacted – but was *still viewable* and accessible to the public. This resulted in negative media reports about the "redacted" information.[23]

45. I believe AMc's actions and inflammatory campaign messaging have contributed to the intense public scrutiny of the agency. I am aware of many national media reports that question the value and sensibility of AMc's public messaging strategy on behalf of the NRA and, in particular, NRATV.[24] [25] [26] [27] [28]

46. For example, the *New York Times* ("*NYT*") article, "Incendiary N.R.A. Videos Find New Critics: N.R.A. Leaders," dated March 11, 2019, was spawned by controversial and

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[22] *See* public statement by AMc, dated April 15, 2019, attached as Ex. 12 to the Collins Decl.; public statement from AMc contained in Bloomberg article, "Ad Firm Cuts Ties With NRA, Says 'Chaos Led Us To Lose Faith' After 38 Years," dated May 29, 2019, attached as Ex. 17 to the Collins Decl.; public statement by AMc, dated June 26, attached as Ex. 20 to the Collins Decl.; public statement by AMc, dated August 30, 2019, attached as Ex. 25 to the Collins Decl.; public statement by AMc, dated September 13, 2019, attached as Ex. 26 to the Collins Decl.; Stephen Gutowski, Twitter page containing AMc statements, dated October 28, 2019, attached as Ex. 29 to the Collins Decl.; *see* Newsweek article, "NRATV Creator Threatens 'Legal Action' Against Former Host Over 'Fabrications,'' dated December 18, 2019, attached as Ex. 30 to the Collins Decl.; *see* Wall Street Journal Article, "NRA Fails to Stop Former Ad Agency From Cooperating With New York Probe," dated February 24, 2020, attached as Ex. 35 to the Collins Decl.

[23] *See* Newsweek article, "Longtime NRA Attorney Says Group's Own Lawyer Embarked on 'Highly Destructive' Path; Court Documents Show," dated April 17, 2020, attached as Ex. 39 to the Collins Decl.

[24] *See* Vanity Fair, "What the F--k is NRATV? Let John Oliver Explain," dated March 5, 2018, attached as Ex. 2 to the Collins Decl.

[25] *See* TIME, "At the NRA's TV Network, Guns Are a Weapon in the Culture Wars," dated November 16, 2017, attached as Ex. 1 to the Collins Decl.

[26] *See* CNN, "NRA TV depicts 'Thomas & Friends' characters in KKK hoods," dated September 14, 2018, attached as Ex. 7 to the Collins Decl.

[27] *See* NPR, "NRATV Strays Seemingly Far Afield From Gun Ownership," dated May 7, 2018, attached as Ex. 3 to the Collins Decl.

[28] *See* The Atlantic, "Live-Streaming the Apocalypse With NRATV," dated June 2018, attached as Ex. 5 to the Collins Decl.

hate-filled messaging that came to be associated with NRATV.[29] The Brewer firm did not cause the editorial pursuit of the subject matter.

47. The NYT proactively contacted the NRA and its representatives to advise it was pursuing the investigative article, upon reportedly learning that certain NRA board members, like the general public, were increasingly uncomfortable with the "site's [NRATV] inflammatory rhetoric, and whether it has strayed too far from the N.R.A.'s core gun-rights mission…"

48. In fact, AMc has admitted that it recognizes the "offensive imagery" that served as a catalyst for the *NYT's* reporting.[30]

In Sum: No Attempt to "Replace" AMc

49. I do not believe there is any legitimate argument that BAC sought to "replace" AMc as the NRA's communications or advertising agency of record. BAC, with its small team of communications professionals, lacks the resources, expertise or inclination for such an undertaking. The work performed by BAC for the NRA is not unusual in the field of high-stakes advocacy, and often offered by law firms to the clients they represent.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 4th day of May 2020.

Travis J. Carter

[29] *See* New York Times article, "Incendiary N.R.A. Videos Find New Critics: N.R.A. Leaders," dated March 11, 2019, attached as Ex. 9 to the Collins Decl.

[30] *See* Ex. 36 at ¶ 4.

EXHIBIT 50

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

NATIONAL RIFLE ASSOCIATION OF AMERICA,	§	
	§	
Plaintiff and Counter-Defendant	§	
	§	
and	§	
	§	
WAYNE LAPIERRE,	§	
	§	
Third-Party Defendant,	§	
	§	
v.	§	**Civil Action No. 3:19-cv-02074-G**
	§	
ACKERMAN MCQUEEN, INC.,	§	
	§	
Defendant and Counter-Plaintiff,	§	
	§	
and	§	
	§	
MERCURY GROUP, INC., HENRY MARTIN, WILLIAM WINKLER, MELANIE MONTGOMERY, and JESSE GREENBERG,	§	
	§	
Defendants.	§	

DECLARATION OF NANCY J. MOORE

Introduction

1. My name is Nancy J. Moore. My date of birth is June 30, 1949. My office address is 765 Commonwealth Ave., Boston, MA 02215. I am over 18 years of age, of sound mind, and competent to make this Declaration in support of the NRA's Opposition to Defendants' Motion

to Disqualify Plaintiff's Counsel. I declare under penalty of perjury pursuant to 28 U.S.C. §1746 that the following declaration is true and correct.[1]

2. I have been asked by Brewer Attorneys & Counselors ("the Brewer Law Firm") to consider whether the allegations of unethical conduct contained in Defendants' Motion to Disqualify Plaintiff's Counsel warrant disqualification of either William A. Brewer III ("Brewer") or the Brewer Law Firm from representing the plaintiff National Rifle Association of America ("NRA") in this lawsuit.

3. In formulating my opinions I have relied on the materials cited in Defendants' Brief in Support of Defendants' Motion to Disqualify Plaintiff's Counsel ("Defendants' Brief") in support of their allegations, as well as the materials contained in Exhibit 1 to this Declaration.

4. I am being compensated at my regularly hourly rate of $800.

My Qualifications

5. I am Professor of Law and Nancy Barton Scholar at Boston University School of Law ("BU"). I have been a tenured full professor at BU since January 1999. From 1976 through December 1998, I was employed at Rutgers School of Law-Camden ("Rutgers") as an assistant professor, tenured associate professor, associate dean for academic affairs, and tenured full professor. I am a Member and former Chair of the Multistate Professional Responsibility Test Drafting Committee. In addition, I was Chief Reporter to the American Bar Association's Commission on Evaluation of Professional Rules of Conduct ("Ethics 2000 Commission"). I also served as an adviser to the American Law Institute's Restatement of the Law (Third) Governing Lawyers and as a member of the ALI's Members Consultative Group for its Principles of Aggregate

[1] I do not have personal knowledge of the facts underlying this lawsuit or the present controversy. For those underlying facts, I have relied on sources such as the pleadings, motions (and their attachments), correspondence, and other documents identified herein.

Litigation. I served twice as Chair of the Professional Responsibility Section of the Association of American Law Schools. I have authored numerous articles on legal ethics, including articles on lawyers' conflicts of interest.

6. I have testified as an expert on legal ethics via deposition, declaration and in various state and federal tribunals, including testimony in courts in Connecticut, Florida, Maine, Maryland, Massachusetts, New Jersey, New York, and Pennsylvania. I am currently licensed to practice law in the Commonwealth of Massachusetts. I have spoken on topics in legal ethics numerous times in the last forty years at continuing legal education seminars and professional conferences, including national bar conferences. In addition to regularly teaching the basic course in Professional Responsibility (formerly at Rutgers and now at BU), I teach a seminar on Professional Responsibility for Business Lawyers. A current copy of my Curriculum Vitae is attached as Exhibit 2.

Disqualification Standards

7. Disqualification decisions in this court are guided by state and national standards for lawyers adopted by the Fifth Circuit. *Centerboard Securities, LLC v. Benefuel, Inc*., 2016 WL 3126238 (June 3, 2016). These standards include the American Bar Association's Model Rules of Professional Conduct ("Model Rules"), as well as the Texas Disciplinary Rules of Professional Conduct ("Texas Rules"). *Id.* The court also considers any applicable local rules of this court, *id.;* however, except for the local rule adopting the Texas Rules as governing the ethical behavior of lawyers appearing before the court, *see* LR. 83.8(e)--ND Texas, I do not find any local rule relevant to my opinions. As a result, I base my opinions on both the Model Rules and the Texas Rules, which I find to be significantly similar with respect to the issues raised in Defendants' Brief.

My Opinions

I. The allegations that Brewer's personal interests violate the conflict of interest rules are insufficient to warrant disqualification of either Brewer or the Brewer Law Firm

8. Defendants, including Ackerman McQueen, Inc., ("AMc"), allege that Brewer has personal and professional interests that create personal conflicts of interest under both the Texas Rules and Model Rules, citing what they characterize as six separate bases for these conflicts: (1) "Brewer manufactured conflicts and tension between the NRA and AMc," contrary to the NRA's goals and without the knowledge or consent of some of the NRA's officers and directors, thereby making Brewer a "principal actor in the underlying dispute;"[2] (2) "Brewer and his firm are direct business competitors of AMc;"[3] (3) Brewer has "personal and well-known animosity" towards AMc, suggesting that his actions on the NRA's behalf may be "for his own personal vendetta;"[4] (4) "Brewer's financial motives are a key issues in this litigation," including his alleged "exorbitant fees" and his alleged incentive "to maintain the NRA lawsuits against AMc to generate more revenue;"[5] (5) "Brewer is suing his family;"[6] and (6) "Brewer is a principal actor and tortfeasor in this litigation."[7] Defendants allege that these personal interests violate Texas Rule 1.06(b) and Model Rule 1.7.

9. Conflict of interest rules are for the protection of the affected client or former client. Texas Rule 1.06 and Model Rule 1.7 address conflicts of interest affecting current clients of a lawyer. The only person or entity arguably affected by any of these alleged conflicts is the NRA.

[2] *See* ECF 105 (Defendants' Brief) at ¶ 38.
[3] *Id*. at ¶39.
[4] *Id.* at ¶40.
[5] *Id*. at ¶41.
[6] *Id*. at ¶42.
[7] *Id*. at ¶43.

10. As a general rule, courts do not disqualify an attorney on grounds of conflict of interest unless it is the client itself (or former client, where applicable) that is moving for disqualification. *See, e.g.*, *In re Yarn Processing Patent Validity Litigation*, 530 F.2d 83, 88 (5th Cir. 1975) (refusing to disqualify an attorney for a former-client conflict arguably affecting a former co-defendant, who had been dismissed from the case and was not pressing a conflict it had previously raised); *Centerboard Securities v. Benefuel, Inc.*, 2016 WL 3126238 (N.D. Tex. June 3, 2016) (holding that plaintiff had no standing to seek the disqualification of the defendant's law firm from simultaneously representing non-party witnesses); *Coates v. Brazoria County Texas*, 2012 WL 2568129 (S.D. Tex. 2012) (holding that plaintiffs did not have standing to challenge the defendant law firm's representation adverse to a former co-plaintiff who had previously consulted with the firm); *Clemens v. McNamee*, 2008 U.S. Dist. LEXIS 36916 (S.D. Tex. May 6, 2008) (holding that the defendant did not have standing to raise an alleged former client conflict of a non-party). Courts have recognized narrow exceptions to this rule where the movant was a company that the former client controlled, where the former client appeared by counsel to argue for disqualification even though he was not the formal moving party, and where the conflicts were "manifest and glaring," confronting the court with a plain duty to act. *See In re Yarn Processing Patent Validity Litigation*, 530 F.2d at 89. *See also Centerboard Securities v. Benefuel, Inc.*, *supra*; *Coates v. Brazoria County Texas*, *supra*; *Clemens v. McNamee*, *supra*. None of these narrow exceptions applies to the allegations made by Defendants in their efforts to disqualify the Brewer Law Firm on grounds of a personal conflict of interest. The NRA, which is the party sought to be protected under current client conflict of interest rules, is a party to this lawsuit and is strenuously resisting the disqualification of its

attorneys[8]. Moreover, for the reasons set forth below, it is my opinion that not only is there no "manifest and glaring conflict," there is no conflict at all. Further, even if there were a conflict, the NRA has given its fully informed consent; therefore, there is no violation of the applicable conflict of interest rules.

11. Under Texas Rule 1.06(b), a conflict exists if the lawyer's representation of a person "reasonably appears to be or become adversely limited by the lawyer's or law firm's responsibilities to another client or to a third person or by the lawyer's or law firm's own interests." Texas Rule 1.06(b)(2). Model Rule 1.7 is similar, providing that a conflict exists if "there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer." Model Rule 1.7(a)(2).

12. Revisiting the numbered allegations summarized in Paragraph 8 above, in my opinion, allegations (1), (4) and (6) are essentially the same, single allegation that Brewer's conduct will be the subject of some aspects of the litigation, at least with respect to Defendants' counterclaims. As a result, AMc maintains, Brewer may be a necessary witness who is disqualified from personally appearing as an advocate in the lawsuit under the advocate-witness rule. *See infra* at ¶ 18. This does not mean, however, that his alleged role in the underlying events creates a conflict of interest under either the Texas Rules or the Model Rules.

13. The facts alleged in allegations (1), (4), and (6) are disputed by both Brewer and the NRA.[9] Indeed, according to Defendants, these are facts that are at issue and will be determined in the trial of this lawsuit. As such, they should not serve as the basis for disqualification. More

[8] *See* Declaration of John Frazer ("Frazer Decl.") at ¶¶ 4-9; Declaration of Wayne LaPierre ("LaPierre Decl.") at ¶ 1; Declaration of Charles Cotton ("Cotton Decl.") at ¶ 1.
[9] *See* LaPierre Decl. at ¶¶ 9-20; Frazer Decl. at ¶¶ 6-7; Cotton Decl. at ¶¶ 5, 8.

important, there is no indication that the positions of the NRA and Brewer with respect to these allegations are or are likely to become inconsistent. It may be in Defendants' interest to prove that Brewer "manufactured conflicts and tension between the NRA and AMc," that his "exorbitant fees" contributed to that tension, and that "Brewer is a principal actor and tortfeasor in this litigation," but it is in the interest of both Brewer and the NRA to disprove these allegations. *See F.D.I.C. v. U.S. Fire Ins. Co*., 50 F.3d 1304 (5th Cir. 1995) ("[j]ust as it is in the interest of [the defendant] to show comparative bad faith, it is in the interest of both [the plaintiff's lawyer] and [the plaintiff] to disprove it;" a "remote possibility that [the plaintiff and its lawyer] may eventually find themselves at odds is much too tenuous a thread to support the burdensome sanction of law firm disqualification"). In the absence of evidence establishing a likelihood that the NRA has taken or should seriously consider taking positions that are inconsistent with Brewer's interest in denying these allegations, it is my opinion that the allegations do not create a conflict of interest under either the Texas Rules or the Model Rules.

14. Further, with respect to allegation (4), Defendants claim that "Brewer is incentivized to maintain the NRA lawsuits against AMc to generate more revenue."[10] All litigators charging hourly fees have some incentive to maintain and prolong lawsuits to generate more fees. Indeed, there are conflicts of interest in all fee arrangements, and this would be the case regardless of which law firm represents the NRA. These general fee-based conflicts are inherent in principal-agency relationships and are not the type of conflicts specific to particular lawyers that underlie the legal profession's conflict of interest rules. *See* Nancy J. Moore, "Who Should Regulate Class Action Lawyers?" 2003 U. Ill. L. Rev. 1477, 1489-1492 (2003) (distinguishing "between 'conflicts of interest' in the broad sense, which economists characterize as a form of agency

[10] *See* ECF 105 at ¶41.

problem, and the far narrower 'conflict-of-interest doctrine,' which is found in Rule 1.7 and other conflicts rules").

15. Defendants' second allegation is that Brewer and his firm are "direct business competitors." Once again, this is a fact disputed by both Brewer and the NRA.[11] Moreover, given that AMc was a public relations firm with approximately 100 employees, whereas Brewer's law firm has only four employees in its Public Relations unit,[12] it is difficult to see how Brewer and his law firm could possibly perform the work that was previously performed by AMc on the NRA's behalf.[13] In any event, Defendants do not explain, nor is it apparent, how this fact, even if true, establishes a likelihood that this competitor relationship would adversely affect (or even "reasonably appear" to adversely affect) the Brewer Law Firm's representation of the NRA *in this lawsuit.* Given the current state of the relationship between AMc and the NRA, as evidenced by the pleadings in this lawsuit, AMc cannot reasonably believe either that it and the law firm are currently competing for AMc's former business with the NRA or that the Brewer Law Firm's supposed desire to further develop its public relations work at AMc's expense will cause it to conduct this lawsuit in a manner that is not in the best interest of the NRA. As a result, it is also my opinion that, in the absence of evidence establishing a likelihood that the Brewer Law Firm's alleged interest in performing public relations work will cause it to take positions inconsistent with the NRA's interests, this allegation does not create a conflict of interest under either the Texas Rules or the Model Rules.

[11] *See* Affidavit of Andrew Arulanandam, Managing Directofr of Public Affairs of the NRA, dated April 14, 2020; Declaration of Travis J. Carter, Managing Director of Public Affairs at the Brewer Law Firm, dated Mar. 4, 2020.
[12] See ECF 61 (NRA's Memorandum of Law in Opposition to Defendant's Motion for Protective Order).
[13] Defendants claim that the Virginia court acknowledged the fact that Brewer and his firm are direct business competitors of AMc, *see* Defendants' Brief at ¶39; however, the hearing transcript cited by Defendants in support of this contention establishes that the Brewer Law Firm vigorously disputed that it was a business competitor of AMc and that the judge made no finding of fact concerning this allegation. *See Id.* at n. 110, citing Ex. A-58 at 42:4-19.

16. AMc's third and fifth allegations are essentially the same, single allegation that Brewer's relationships with members of his wife's family, who were and are principals in AMc, somehow create a conflict of interest with the NRA. The only support offered for the allegation that Brewer has a "personal and well-known animosity" towards AMc and its former and current principals is a single citation to a deposition of a former NRA outside counsel that provides no evidence of such animosity.[14] Moreover, the only consequence Defendants can ascribe to the allegation that "Brewer is suing his family" is an adverse effect not on the NRA, Brewer's client, but on R. McQueen, the current CEO of AMc, who allegedly may be less zealous on behalf of AMc because of *his* concerns for his family.[15] In the absence of evidence that Brewer has an actual and severe "animosity" toward AMc *and* that any such animosity has a realistic likelihood of adversely affecting the Brewer firm's representation of the NRA in this lawsuit, it is my opinion that these allegations do not create a conflict of interest under either the Texas Rules or the Model Rules.

17. Even if there were a conflict of interest, both the Texas Rules and the Model Rules permit the client to consent to the continued representation after full disclosure of the nature of the conflict and its implications. *See* Texas Rule 1.06(c)(2); Model Rule 1.7(b)(4). Such fully informed consent is effective when the lawyer reasonably believes "that the representation of each client will not be materially affected" (Texas Rule 1.06(c)(1)) or "that the lawyer will be able to provide competent and diligent representation to each affected client" (Model Rule 1.7(b)(1).[16] In my opinion, Defendants have offered no evidence or explanation that any personal conflict

[14] *See* ECF 105 at n. 111.
[15] *See Id*. at ¶42.
[16] Model Rule 1.7(b) also requires that "the representation is not prohibited by law" and that "the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal." Both of those conditions are satisfied here.

of Brewer will materially and adversely affect the interests of the NRA or that the Brewer Law Firm's representation of the NRA in this lawsuit will not be diligent and competent. Nor is it reasonably apparent that such is the case. Moreover, the NRA has provided an affidavit from its General Counsel attesting that the NRA has been fully informed concerning the alleged conflicts of interest and their possible implications and that the NRA nevertheless wants to continue to retain Brewer and the Brewer Law Firm as its legal representatives in this lawsuit.[17] Therefore, it is further my opinion that, to the extent there may be a conflict of interest under the relevant rules, the NRA has effectively consented to that conflict of interest, and the Brewer Law Firm's continued representation of the NRA does not violate either the Texas Rules or the Model Rules.

II. The allegation that Brewer may be a necessary witness does not warrant disqualification of either Brewer or the Brewer Law Firm

18. Defendants argue that both Brewer and the Brewer Law Firm must be disqualified because Brewer may be a necessary witness in this lawsuit.[18] Defendants further argue that Brewer's testimony will be adverse to the NRA,[19] although they cite no evidence to support that allegation.[20]

19. Texas Rule 3.08 provides that "[a] lawyer shall not accept or continue employment as an advocate before a tribunal in a contemplated or pending adjudicatory proceeding if the lawyer knows or believes that the lawyer is or may be a witness necessary to establish an essential fact on behalf of the lawyer's client," except under certain circumstance. Texas Rule 3.08(a). The

[17] *See* Frazer Decl. at ¶ 4.
[18] *See* ECF 105 at ¶¶45-51.
[19] *Id*. at ¶ 46.
[20] *See Id.* at n. 188, citing transcripts in which the Brewer Law Firm stated that Brewer may be a witness and agreed that *if* Brewer's testimony would be adverse to the NRA, that would constitute a conflict of interest, but denied that any such testimony would be adverse.

rule further provides that "[w]ithout the client's informed consent, a lawyer may not act as advocate in an adjudicatory proceeding in which another lawyer in the lawyer's firm is prohibited by paragraphs (a) or (b) from serving as an advocate. If the lawyer to be called as a witness could not also serve as an advocate under this Rule, that lawyer shall not take an active role before the tribunal in the presentation of the matter." Texas Rule 3.08(c). Model Rule 3.7 similarly provides that "[a] lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness," except under certain circumstances. Model Rule 3.7(a). The rule further provides that "[a] lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9." Model Rule 3.7(b).

20. The Brewer Law Firm has confirmed that Brewer will not appear as an advocate at the jury trial of this lawsuit.[21] However, under both the Texas Rule and the Model Rule, other lawyers in the Brewer Firm may appear as advocates in the lawsuit in which Brewer may testify. Under Texas Rule 3.08(c), they may do so with the client's informed consent, *see, e.g.*, Tex. Ctr. Legal Ethics, Op. 682 (2018),[22] and the NRA has provided such consent.[23] Under Model Rule 3.7(b), no such client consent is necessary unless the testimony will create a conflict of interest under Rule 1.7 or Rule 1.9, which might be the case if the lawyer's testimony will be substantially adverse to the client. *See F.D.I.C. v. U.S. Fire Ins. Co.*, 50 F.3d at 1313 (absent an impermissible conflict between testifying lawyer and client, Model Rule 3.7 does not mandate disqualification of lawyer's law firm). For reasons set forth in paragraphs 22-24 below, that is not the case here.

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[21] *See* Declaration of Michael Collins, at ¶ 4.
[22] *See also Anderson Producing Inc. v. Koch Oil Co.*, 929 S.W.2d 416, 422 (Tex. 1996) (with company's informed consent, testifying attorney's law firm partner was not prohibited from representing company at trial).
[23] *See* Frazer Decl. at ¶ 5.

21. Neither the Texas Rules nor the Model Rules prohibit a lawyer-witness from participating in the preparation of the matter for trial, so long as the lawyer does not appear as an advocate at trial. A comment to the Texas Rule expressly permits such participation. *See* Texas Rule 3.08, cmt. [8] ("This rule does not prohibit the lawyer who may or will be a witness from participating in the preparation of a matter for presentation to a tribunal."). Although neither the text nor the comment to Model Rule 3.7 expressly addresses whether a lawyer-witness may participate other than as an advocate, courts in most jurisdictions have held that a lawyer disqualified as a necessary witness may still represent the client other than as an advocate at trial. *See Droste v. Julien*, 477 F.2d 1030 (8th Cir. 2007); *Anderson Producing Inc. v. Koch Oil Co.*, 929 S.W.2d 416, 422 (Tex. 1999). Thus it is my opinion that there is no basis to disqualify Brewer himself from participating in the lawsuit other than as an advocate at trial.

22. As noted above, Defendants have alleged not only that Brewer is a necessary witness, but that his testimony will be adverse to his client, the NRA.[24] If so, there might be a personal interest conflict under Texas Rule 1.06(b) and Model Rule 1.7(a)(2). However, Defendants do not have standing to attempt to disqualify either Brewer or the Brewer Law Firm on this ground.[25] This is because Defendants are not and have never been clients of Brewer or the Brewer Firm, and any conflict of interest that arises from the testimony of a lawyer-witness is for the benefit of the client, not the client's adversary.[26] In any event, as explained below, it is my opinion that

[24] *See* ¶ 18 *supra*.
[25] *See* ¶ 10 *supra*.
[26] In addition to the authorities earlier cited on the question of standing, *see* Texas Rule 3.08 at cmt. [10] ("a lawyer should not seek to disqualify an opposing lawyer under this Rule merely because the opposing lawyer's dual roles may involve an improper conflict of interest with respect to the opposing lawyer's client, for that is a matter to be resolved between lawyer and client or in a subsequent disciplinary proceeding"). Under Model Rule 3.7, conflicts arising from adverse testimony are expressly identified as conflicts under Model Rules 1.7 or 1.9, rules that federal courts in the Fifth Circuit and in Texas have repeatedly held are only rarely appropriate as a basis for disqualification urged by the client's opponent. *See* ¶ 10 *supra*.

the continued representation of the NRA by Brewer and the Brewer Law Firm does not violate either the advocate-witness or the conflicts rules of the Texas Rules or the Model Rules.

23. As noted above, the Brewer Law Firm denies that any testimony Brewer might give will be adverse to the NRA, and Defendants have provided no evidence establishing any likelihood that any such testimony will be adverse to the Brewer Law firm's client.[27]

24. Under the Texas advocate-witness rule, even if a lawyer's testimony will be adverse to the client, lawyers in a firm other than the lawyer-witness are permitted to continue the representation with the client's informed consent. *See* Texas Rule 3.07(b), (c); *see also Ayrus v. Total Renal Care, Inc*., 48 F. Supp. 714, 718 (S.D. Tex. 1999). The NRA has provided such consent to continued representation by the Brewer Law Firm.[28] Under the Model Rules, substantially adverse testimony will likely create a conflict of interest under Rule 1.7; however, as with other personal interest conflicts, the representation is consentable unless the lawyer could not reasonably believe that the representation will be competent and diligent. *See* Model Rule 1.7(b)(1); *see also F.D.I.C. v. U.S. Fire Ins. Co*., 50 F.3d at 1314 (Model Rule 1.7, in conjunction with Model Rule 1.10, provides "that disqualification is unnecessary if the client consents after consultation"). There is no evidence suggesting that the Brewer Firm lawyers could not reasonably believe that their continued representation of the NRA will not be competent and diligent, even if Brewer's testimony is adverse to the NRA, and the NRA has given its informed consent to any conflict that might arise as a result of Brewer's testimony, including testimony adverse to the NRA.[29]

III. Brewer's alleged ex parte contact with a represented person does not warrant disqualification of either Brewer or the Brewer Law Firm

[27] *See* ¶ 18 *supra*.
[28] *See* Frazer Decl. at ¶ 5.
[29] *See Id.*

25. Although Defendants have not alleged an improper ex parte contact as a separate basis for disqualification, they did insert an allegation of such an improper contact in the midst of their Brief's discussion of the advocate witness rule.[30] According to Defendants, Brewer "us[ed] family members to communicate with R. McQueen about this very lawsuit."[31]

26. Both Texas Rule 4.02 and Model Rule 4.2 prohibit a lawyer from contacting a represented party concerning the subject matter of the lawsuit without the permission of that party's lawyer; however, the sole evidence that Defendants cite in support of their allegation is a declaration submitted by R. McQueen, in which he states that he has "personal knowledge that Brewer, using family members as channels, has attempted to communicate with me to influence AMC's litigation positions and strategy," including trying to direct him to "'break privilege'" with his own attorneys.[32] McQueen does not explain what his "personal knowledge" is based on, but it would appear that, if true, it can only be based on some form of inadmissible hearsay statement, since Brewer's alleged attempts were apparently unsuccessful.

27. Even if true, a violation of the ex parte contact rule does not typically result in disqualification of the attorney, given the alternative remedies available, such as barring use of any testimony or evidence gained from the improper contact. *See, e.g.*, *Parker v. Pepsi-Cola Gen. Bottlers*, Inc., 249 F. Supp. 2d 1006 (N.D. Ill. 2003). In my opinion, disqualification based solely on the evidence contained in McQueen's declaration is inappropriate here for several reasons. First, it is uncertain either that a violation took place or that any such violation rises to a level requiring the severity of the sanction of attorney disqualification. *See Cramer v. Sabine Transp*.

[30] *See* ECF 105 at ¶55.
[31] *Id.*
[32] *Id.* at n. 139.

Co., 141 F.Supp.2d 727, 731 (S.D.Texas. 2001). Second, although McQueen does not say precisely when the attempted contact occurred, it appears that he is referring to a period beginning in April 2019, and yet to my knowledge, Defendants never raised this allegation until the filing of their motion to disqualify in March 2020. Such a lengthy delay suggests that, even if he believed that Brewer was attempting to contact him, McQueen did not view this attempt as raising such serious concerns that either Brewer or the Brewer Law Firm should be disqualified from representing the NRA in either the Virginia or the Dallas lawsuit. *See Cramer v. Sabine Transp. Co*., 141 F. Supp. at 732 (plaintiff's initial nonconcern over communication with plaintiff's expert suggests that the contact did not result in the expert revealing any information of import, which "significantly undermines plaintiff's request for disqualification"). Finally, courts have held that even if an ethical violation occurred, disqualification is inappropriate if the moving party suffered no actual prejudice from the alleged violation. *See Id.* at 732 (harm to plaintiff was "seemingly minimal"); *Orchestrather, Inc. v. Trombetta*, 2016 WL 4563348 at *14 (N.D. Tex. Sept. 1, 2016) (even if ethical violation had occurred, plaintiffs did not show that they "suffered actual prejudice from any alleged violation," citing *In re* Meador, 968 S.W.2d 346, 350 (Tex. 1998)("[A] court should not disqualify a lawyer for disciplinary violation that has not resulted in actual prejudice to the party seeking disqualification")).

IV. Brewer's media statements do not warrant disqualification of either Brewer or the Brewer Law Firm

28. Defendants allege that Brewer and the Brewer Law Firm are violating rules regarding improper trial publicity by "leaking confidential information and defaming AMc,"[33] but they have provided no evidence of these violations. The only media publications they cite in support of

[33] *See* ECF 105 at ¶58.

their allegation are: an article from March, 1998 describing how Brewer arranged for reporters to receive certain pleadings immediately after they were filed in court;[34] a recent article referencing a Brewer statement to the media about the effect of Covid-19 on the NRA,[35] and a March 2019 New York Times article, which contained adverse comments about AMc from two NRA Board members, allegedly supplied to the newspaper by Brewer.[36]

29. Texas Rule 3.07 provides that "[i]n the course of representing a client, a lawyer shall not make an extrajudicial statement that a reasonable person would be expected to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicatory proceeding. A lawyer shall not counsel or assist another person to make such a statement." Texas Rule 3.07(a). Model Rule 3.7 is substantially similar, providing that "[a] lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicate proceeding in the matter."

30. The meager evidence cited by Defendants in support of their allegation is clearly insufficient to establish that Brewer or any member of the Brewer Law Firm has made extrajudicial

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[34] *Id.* at n. 146. In the absence of a gag order prohibiting all comments to the media, statements that do no more than disclose what is already a matter of public record are ordinarily permissible. *See* Texas Rule 3.07(c)(2); Model Rule 3.6(b)(2).

[35] *Id.* at n. 147.

[36] *Id.* at n. 148 & accompanying text. Defendants claim that it is "undisputed" that Brewer "leaked" the comments from the NRA Board members, *see id.* at ¶58; however the only evidence cited is an email from an AMc attorney to the NRA's in-house counsel claiming only that the New York Times reporter stated that Brewer supplied the quotes. *See id.* In any event, as I explain below, *see* ¶31 *infra*, there is nothing about this article that suggests that if indeed Brewer supplied the quotes, he violated either the Texas Rule or the Model Rule prohibiting prejudicial trial publicity.

The only other evidence cited in this section of AMc's Brief, is deposition testimony from two witnesses claiming that Brewer was the source of the March 2019 New York Times article and speculating that Brewer was responsible for "leaks" to the press in unspecified articles discussing "NRA's issues". *Id.* at n. 149. In the absence of evidence demonstrating substantial likelihood of material prejudice, whether Brewer was the source of this information is irrelevant.

statements to the media that they "knew or reasonably should know" would have a "substantial likelihood of materially prejudicing an adjudicatory proceeding." The only recent article cited concerns the effect Covid-19 is having on the NRA, a subject that has absolutely nothing to do with the dispute between the NRA and AMc. An earlier March 1998 article describes Brewer providing immediate access to the press of pleadings that had been filed in court; this article is both too old to be prejudicial and relates conduct that is expressly permitted under both the Texas Rule and the Model Rule, which provide that a lawyer may provide "information contained in a public record." *See* Texas Rule 3.08(c)(2) (a lawyer providing such information "ordinarily will not violate paragraph (a)); Model Rule 3.7(b)(2) (notwithstanding paragraph (a), lawyer may provide such information).

31. Further, with respect to the March 2019 New York Times article containing adverse comments about AMc's work from two NRA Board members, Defendants make no effort to explain how these brief comments have a "substantial likelihood of material prejudicing an adjudicatory proceeding." The quoted comments do not appear to say anything beyond what is already alleged in the pleadings in the current lawsuits,[37] and courts have held that lawyers may permissibly make "general statements about the nature of the allegations or defense." *E.g.*, *United States v. Brown*, 218 F.3d 415, 429-30 (5th Cir. 2000). Movants seeking relief on the basis of excessive trial publicity must "describe how the publicity would affect [the movant's]

[37] The statements in question appear to be the following two quotes from "two prominent board members": (1) "'Since the founding of NRATV, some, including myself and other board members, have questioned the value of it,' Marion Hammer the group's most formidable lobbyist and a key adviser to its chief executive, Wayne LaPierre, said in a statement. 'Wayne has told me and others that NRATV is being constantly evaluated---to make sure it works in the best interest of the organization and provides an appropriate return on investment.'"; (2) "'It is clear to me that NRATV is an experiment and Wayne is evaluating the future of the enterprise,' Willes K. Lee, a board member who leads the N.R.A. Outreach Committee, said in a statement to The Times. After the Thomas the Tank Engine video, he said, Mr. LaPierre appeared 'livid and embarrassed' in a meeting with the outreach group. 'He apologized to the entire committee and spent hours listening to our concerns.'" *See* https://www.nytimes.com/2019/03/11/us/nra-video-streaming-nratv.html The quoted statements are not the focus of the article and do not even mention AMc by name.

right to a fair trial." *Clifford v. Trump*, 2018 WL 5273913 (C.D. Cal. July 31, 2018). Further, even when the content itself could be prejudicial, the movant must explain how any publicity would be prejudicial when trial of the matter is not imminent. *Id.* ("[N]o trial date has been set, and this action has been stayed for a number of months. It is far from clear that the publicity in this case would affect the outcome of a trial that may happen, if at all, months down the road.").

32. Finally, Defendants have cited no cases supporting disqualification as an appropriate remedy for any violation of the trial publicity rules. On the contrary, courts have suggested that appropriate remedies include "change of venue, jury sequestration, 'searching' voir dire, and 'emphatic' jury instructions," as well as the more serious remedy of a "gag order" for courts concerned that trial publicity will undermine the participants' right to a fair trial. *See United States v. Brown*, 218 F.3d at 431; *see also Levine v. U.S. Dist. Court for C. Dist. of Cal.*, 764 F.2d 590 (9th Cir. 1985) (upholding restraining order, explaining why other alternative remedies were insufficient); Restatement (Third) of the Law Governing Lawyers §109, cmt f (2000) (no mention of disqualification among remedies for violation of trial publicity rules).

V. Any alleged appearance of impropriety or "public suspicion" is insufficient to warrant disqualification of either Brewer or the Brewer Law Firm

33. Defendants conclude by arguing that "the likelihood of public suspicion" in this matter outweighs the NRA's right to counsel of choice.[38] They do not explain, however, precisely how or why there would be an appearance of impropriety if Brewer and the Brewer Law Firm are permitted to continue to represent the NRA. Most of the allegations concern personal conflicts of interest in which the affected client is the NRA, a sophisticated user of legal

[38] *See* ECF 105 at ¶¶ 60-61.

services represented by in-house counsel.[39] Given the NRA's emphatic and insistent desire to continue being represented by Brewer and the Brewer Law Firm, it is difficult to see how the Defendants' allegations of personal conflicts "would cause the public to question the loyalty a lawyer owes to a client and 'invite skepticism of the justice system.'"[40] As for the allegations concerning the advocate-witness rule, the Fifth Circuit has held the appearance of impropriety is not even a partial rationale for this rule, because loyalty to a former client is just as likely to cause the public to suspect the testimony of a lawyer witness regardless of whether that lawyer is currently serving as counsel for the party on whose behalf the lawyer is testifying. *See F.D.I.C. v. U.S. Fire Ins. Co.*, 50 F.3d at 1315-1316. With respect to the remaining allegations, because disqualification is generally not an appropriate remedy for actual violations of either the ex parte contact rule[41] or excessive trial publicity;[42] disqualification would be even more inappropriate as a remedy for any mere "suspicion" that such a violation has occurred.

34. Finally, any likelihood of public suspicion must be weighed against a party's right to counsel of choice. *Id.* at 1316. "[R]ather than indiscriminately gutting the right to counsel of one's choice, [the Fifth Circuit] has held that disqualification is unjustified without at least a reasonable possibility that some identifiable impropriety actually occurred." *Id.* And "when instigated by an opponent, [disqualification] presents a palpable risk of unfairly denying a party the counsel of his own choosing." *Id.* For the reasons set forth above, it is my opinion that Defendants have not established either that any actual ethical violation has occurred or that there is a "reasonable possibility" that an actual violation has occurred. As a result, it is my

[39] *See* Frazer Decl. at ¶ 2.
[40] *See* ECF 105 at ¶ 61.
[41] *See supra* ¶ 27.
[42] *See supra* ¶ 32.

opinion that the likelihood of any public suspicion is low and does not warrant disqualification on the basis of Defendants' unsupported allegations.

Conclusion

35. For the reasons set forth above, it is my professional opinion that the evidence cited in support of the Defendants' Motion to Disqualify the Plaintiff's Lawyer is insufficient to establish that either Brewer or other members of the Brewer Law Firm are violating their ethical obligations. It is further my professional opinion that disqualification of either Brewer or the Brewer Law Firm from representing the NRA in this lawsuit is not warranted.

36. I may supplement or amend this Declaration as further information or issues are presented for my consideration.

I declare under penalty of perjury that the foregoing is true and correct.

Executed in Suffolk County, Massachusetts, on the 4th day of May 2020.

Nancy J. Moore

Exhibit 1

1. Motion to Disqualify Brewer and the Brewer Firm
2. Motion for Leave to temporarily File Under Seal Brief in Support of Motion to Disqualify
3. Brief in Support of Motion to Disqualify
4. Appendix in Support of Motion to Disqualify
5. Motion for Leave to File Under Deal Certain Exhibits to Motion to Disqualify
6. Exhibits A-1 through A-67
7. Declaration of Revan McQueen
8. Affidavit of Andrew Arulanandam, Managing Director of Public Affairs of the NRA, dated April 14, 2020
9. Declaration of Travis J. Carter, Managing Director of Public Affairs at the Brewer Law Firm, dated Mar. 4, 2020;
10. The NRA's Memorandum of Law in Opposition to Defendant's Motion for Protective Order;
11. Declaration of Michael J. Collins, dated May 4, 2020;
12. Declaration of Charles Cotton, dated April 30, 2020.
13. Declaration of John Frazer, dated May 1, 2020.
14. Declaration of Wayne LaPierre, dated May 3, 2020.

EXHIBIT 51

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

NATIONAL RIFLE ASSOCIATION OF AMERICA,	§	
	§	
Plaintiff and Counter-Defendant	§	
	§	
and	§	
	§	
WAYNE LAPIERRE,	§	
	§	
Third-Party Defendant,	§	
	§	
v.	§	**Civil Action No. 3:19-cv-02074-G**
	§	
ACKERMAN MCQUEEN, INC.,	§	
	§	
Defendant and Counter-Plaintiff,	§	
	§	
and	§	
	§	
MERCURY GROUP, INC., HENRY MARTIN, WILLIAM WINKLER, MELANIE MONTGOMERY, and JESSE GREENBERG,	§	
	§	
Defendants.	§	

DECLARATION OF RICHARD E. FLAMM

Introduction

1. My name is Richard E. Flamm. My date of birth is August 7, 1953. My office address is 2840 College Avenue, Berkeley, CA 94705. I am over 18 years of age, of sound mind, and competent to make this Declaration in support of the NRA's Opposition to Defendants' Motion to Disqualify Plaintiff's Counsel. I declare under penalty of perjury pursuant to 28 U.S.C. §1746 that the following statements are true and correct.

2. I have been a practicing attorney for nearly four decades. Since 1995 I have had my own practice, in which I concentrate exclusively on matters of legal and judicial ethics.

3. I have often been asked to testify as an expert witness regarding such matters. This testimony has typically been by affidavit, but I have also been qualified to testify as an expert at court hearings and trials. In addition, in December of 2009 I was invited to and did testify before a subcommittee of the House Judiciary Committee on judicial disqualification.

4. I have taught courses on "Professional Responsibility" as an Adjunct Professor at the University of California at Berkeley and at Golden Gate University in San Francisco. I have also lectured on the subjects of conflicts of interest in the practice of law and attorney and law firm disqualification at many seminars and other educational events.

5. I have written and annually prepare updates for four national treatises. The first of these, *Judicial Disqualification: Recusal and Disqualification of Judges,* was originally published by Little, Brown & Company of Boston in 1996, and is now in its Third Edition. This book has been relied on by a host of federal courts. *See Williams v. Pennsylvania*, 136 S. Ct. 1899, 1918 (Thomas, J., dissenting). The book has also been cited by the highest courts of many states. *See Whitacre Inv. Co. v. State*, 113 Nev. 1101, 1116 at n.6 (Nev. 1997), Springer, J. (referring to the undersigned as the nation's "leading authority on judicial disqualification").

6. In addition to writing treatises on judicial ethics I have written books on legal ethics, including Lawyer Disqualification*: Disqualification of Attorneys and Law Firms* (Banks & Jordan Law Publishing Co. 2d. Ed., 2014), and Conflicts of Interest in the Practice of Law: *Causes and Cures* (2015). I am currently working on the Third Edition of Lawyer Disqualification, which is due out later this year. I have also authored a number of articles on conflicts, disqualification and related topics which have appeared in law reviews and periodicals.

7. From 2000 until 2002 I served as Chair of the San Francisco Bar Association's Legal Ethics Committee. I also served as a member of the Advisory Council for the American Bar Association's Commission on Evaluation of Rules of Professional Conduct ("Ethics 2000"), and as Chair of Alameda County Bar Association's Ethics Committee.

A. Summary of Opinions

8. An attorney for Plaintiff National Rifle Association of America ("NRA") recently informed me that the defendants had moved to disqualify plaintiff's counsel, William A. Brewer III ("Brewer") and the law firm of Brewer Attorneys & Counsels (collectively "the Brewer firm"). Counsel asked whether I would be willing to review certain documents relating to this matter and provide the Court with my opinion regarding the relevant ethical standards governing disqualification of attorneys and their firms. After reviewing those documents, I agreed to do so.

9. In order to be able to opine about this subject in a way that might be of most assistance to the Court I have undertaken to review a number of documents, including the Brief in Support of the Motion to Disqualify ("D.B.").

10. Upon completing my review of these documents, as well as the legal precedents, I formed four opinions. The first is that defendants have not shown that they filed their motion in a timely fashion; and, because this is so, the Court would be warranted in denying it on that basis, without considering it on its merits. The second opinion I formed is that, while defendants have accused Mr. Brewer in conclusory fashion of having violated thirteen rules of professional conduct, they have not carried their burden of proving that he violated any of them. The third opinion I formed is that, even if defendants had been able to show that Mr. Brewer ran afoul of one or more ethical rules, they have not shown that disqualification would be an appropriate remedy for that violation; and, in my opinion, it would not. Finally, I have formed

the opinion that even if defendants had shown that Mr. Brewer should be disqualified from participating in this case, they have not shown that his firm is subject to "imputed" disqualification, and it is not.

B. The Right to Seek Disqualification May have been Waived

11. Before evaluating the merits of a disqualification motion courts often consider whether the right to bring it has been "waived." Waiver can take two forms: whereas some courts discuss a "client's waiver of a conflict as occurring only through 'informed consent' after 'full disclosure' of the facts creating the conflict, others recognize waiver based on delay." *Vinewood Capital, LLC v. Dar Al-Maal Al-Islami Trust*, 2010 U.S. Dist. LEXIS 30358, at *24-25 (N.D. Tex. 2010). In this case I have seen no indication that defendants expressly waived their right to move to disqualify the Brewer firm; I have focused on whether it impliedly did so.

12. It is "well established that a party can waive its motion to disqualify opposing counsel by failing to timely file" it. *Buck v. Palmer*, 2010 Tex. App. LEXIS 10082, at *18 (2010). *See also In re Nat'l Lloyds Ins. Co.*, 2016 Tex. App. LEXIS 1353, at *16 (Tex. App.–Corpus Christi-Edinburg 2016) ("A party who fails to file its motion to disqualify opposing counsel in a timely manner generally waives the complaint"); *Diggs v. Diggs*, 2013 Tex. App. LEXIS 8500, at *22 (Tex. App.–Hou. [14th Dist.] July 11, 2013) ("Complaints based on violations of the [TDRPC] are waived if not timely raised"). Because no statute or court rule specifies what constitutes a "timely" motion this requirement has not resulted in any express bright line rule, but certain parameters can be gleaned from the existing case law.

13. In the same vein, while some courts have held that a party must file its motion to disqualify promptly upon learning of the facts on which it is based, just as the word "timely" is not unambiguous, the available jurisprudence does not say precisely what it means for such a

motion to be "prompt." *J.K. & Susie L. Wadley Research v. Morris*, 776 S.W.2d 271, 283 (Tex. App. 1989) (noting that, like the word "timely," the word "promptly" is amenable to a number of very different interpretations). A common formulation of the requirement is that, to obviate the possibility that disqualification is being sought for tactical reasons, the objecting party must file its motion at the "earliest practical opportunity" after learning the facts upon which its challenge is based.

14. No hard and fast rule can be discerned from the case law, and there have been cases in which courts have found that a party's delay of only a few weeks or even days before filing its motion to disqualify was fatal to its challenge. It is probably fair to say, however, that in a situation where a party places its motion on file within a month or two of discovering the relevant facts, an implied waiver defense is unlikely to carry the day. *See, e.g., U.S. ex rel. Southern Rock, Inc. v. Precision Impact Recovery, LLC*, 2011 U.S. Dist. LEXIS 15517, at *10 (N.D. Tex. 2011) (the moving party "did not file this motion immediately…[but waiting seven weeks] does not rise to the level of waiver"); *In re Am. Home Prods. Corp.*, 42 Tex. Sup. Ct. J. 252, 895 S.W.2d 68, 76-79 (1999) (holding that a delay of 2 months did not constitute a waiver).

15. Even a delay of a period of three months or so may not be deemed to give rise to an implied waiver – particularly where the moving party is able to show good cause for not moving sooner. *In Re Hoar Construction, L.L.C.*, 256 S.W.3d 790, 798 (Tex. App. 2008) ("we cannot conclude the trial court abused its discretion by impliedly finding that [the client did not waive] its right to seek disqualification…three months after the Hoar Parties asserted counterclaims"). But where the moving party procrastinates for an extended period after learning the relevant facts the court is likely to seriously entertain a waiver defense. *Vinewood Capital, LLC,*

supra, 2010 U.S. Dist. LEXIS 30358, at *22 (a conflict based on substantial relationship "can be waived by the former client's delay for an extended amount of time" in asserting that conflict).

16. Texas state courts "have found waiver where a party waited as little as four to eight months to file the motion to disqualify." *In re Trujillo*, 2015 Tex. App. LEXIS 11394, at *4 (Tex. App.–El Paso [8th Dist.] Nov. 4, 2015). *Cf. Buck v. Palmer*, 381 S.W.3d 525, 528 (Tex. 2012) (concluding that an unexplained delay of seven months amounted to waiver); *Petroleum Co. v. Mancias*, 773 S.W.2d 662, 664 (Tex. App.–San Antonio 1989) (finding a waiver where the movant waited four months to file a motion to disqualify). This is particularly likely to happen when the delay has been inadequately explained. *Buck*, supra, 381 S.W.3d at 528 (the "court of appeals held that Buck's unexplained seven-month delay in seeking…disqualification was sufficient…We have held that a delay of even less time waives a motion to disqualify"). It follows that an implied waiver is likely to be found in a situation where the delay in seeking disqualification is even longer. *Compare Vaughan v. Walther*, 875 S.W.2d 690, 691 (Tex. 1994) (denying a motion to disqualify as untimely where it was not filed until 6½ months after the moving party learned of the grounds for disqualification) *with Buck*, supra, 2010 Tex. App. LEXIS 10082, at *24 (2010) ("The delay in this case was even longer").

17. Federal courts in Texas have also found that a delay of only a few months in bringing a disqualification motion may render the motion untimely. *See Microsoft Corp. v. Cmwlth. Sci. & Indus. Research Org.*, 2007 U.S. Dist. LEXIS 91550, 2007 WL 4376104, at *9 (E.D. Tex. 2007) (concluding that a nearly six-month delay in seeking disqualification waived the claim). This is so, a fortiori, in a situation where the court finds the reasons the moving party has given to explain its delay to be unpersuasive. *One World Foods, Inc. v. Stubb's Austin Rest.*

Co. LC, Case No. A-15-CA-1071-SS, 2016 U.S. Dist. LEXIS 147312, at *23 n.5 (W.D. Tex. Oct. 25, 2016) ("Plaintiff claims it only became aware of the alleged prior representation on September 1, 2016…The Court finds this reason for the delay unpersuasive")

18. The length of the moving party's delay in moving for disqualification is typically the first factor a court will consider in deciding whether the right to challenge counsel has been impliedly waived. *See, e.g., Am. Prod. Co. v. Zaffirini*, 419 S.W.3d 485, 514 (Tex. App.–San Antonio [4th Dist.] 2013) ("In considering the timeliness of the motion, the court considers, inter alia, the length of time between when the conflict was apparent and when the motion was filed"); *In re Gunn*, 2013 Tex. App. LEXIS 12727, at *16 (Tex. App.–Hou. [1st Dist.] Oct. 15, 2013) ("courts consider the length of time between when the conflict became apparent and the filing of the motion"); *In re Trujillo*, 2015 Tex. App. LEXIS 11394, at *4 (Tex. App.–El Paso [8th Dist.] Nov. 4, 2015) ("the reviewing court should consider the time period between when the conflict became apparent to the aggrieved party and when he moved to disqualify").

19. In some cases, however, this is not the only thing that will go into a court's waiver calculus. Judges have, in fact, identified a number of factors that may be considered, including whether the motion may have been employed as a litigation tactic. *In re Nat'l Lloyds Ins. Co.*, 2016 Tex. App. LEXIS 1353, at *16-17 (Tex. App.–Corpus Christi-Edinburg 2016) ("In determining waiver, we consider the length of time between when the conflict became apparent to the aggrieved party and when [it] filed a motion for disqualification…We also consider any evidence that indicates the motion is being filed as a dilatory trial tactic...We further look to whether the moving party has a satisfactory explanation for the delay"). *Cf. Am. Sterilizer Co. v. Surgikos*, 1992 U.S. Dist. Lexis 21542, at *16 (N.D. Tex. 1992) ("[w]aiver is particularly relevant when a motion to disqualify is used in an abusive manner as a part of litigation tactic").

20. Yet another factor that has sometimes been considered is whether the moving party was represented by counsel during the period of delay. *Compare In re Epic Holdings*, 985 S.W.2d 41, 52 (Tex. 1998) (noting that the party's attorney who had knowledge of the conflict was not representing the party in the litigation in which disqualification was asserted) *with Buck v. Palmer*, 2010 Tex. App. LEXIS 10082, at *23-25 (2010) ("That is not the case here"). It has sometimes been suggested, finally, that a party who did not object to the same conduct of a lawyer in a different case cannot be seriously concerned about being prejudiced by that conduct; and, therefore, that a party who moves to disqualify counsel in one case, after failing to seek this remedy in another, should be deemed to have impliedly waived its right to complain. *Cf. In re Corr'd Container Antit. Litig.*, 659 F.2d 1341, 1348 (5th Cir. 1981).

21. In this case, despite the fact that defendants have neither briefed the need to file a timely motion, nor attempted to specify when they learned the relevant facts – and even though the facts which defendants claim to warrant disqualification are not laid out sequentially, but instead are scattered throughout many pages of text and more than 150 footnotes –I believe that all of the major building blocks of defendants' disqualification motion were known to them even before the Complaint in this case was placed on file.

22. Defendants drew attention to the timeliness problem they face on page one of their brief when they said: "[s]ince his engagement by the [NRA] **in March 2018**, William A. Brewer III [and his law firm]…have skirted the edge of disqualifying conflicts and conduct." D.B. 1 (emphasis added). To be sure, defendants attempted to nip the inevitable timeliness inquiry in the bud by adding that "[r]ecently revealed facts and developments" have "now ripened" the issue to "the point where disqualification is required;" but this action "was filed on August 30, 2019" [D.B. 23, ¶ 56], and defendants have not specified which of their facts were

"recently revealed" and which have been known to them even before this action was placed on file.

23. It is certain that the first of defendants' "background facts," and the one they most stridently claim to warrant the firm's disqualification, that "Brewer has a multi-decade, animus-filled family relationship with" AMc's owners [D.B. 2], is not something that AMc learned about "recently." *See* D.B. 2 ("For over 20 years, Brewer has had a strained relationship [with] A. McQueen and other McQueen family members"). The same goes for defendants' professed concern about the "insight" Mr. Brewer supposedly acquired as a result of his relationship with AMc's owners. D.B. 3 ("Brewer has had 20 years, as a family member and AMc client, gaining key insight into AMc's business strategy and the personal lives of the McQueen family").

24. Likewise, while defendants cite to a recent article in saying that unlike "typical law firms, the Brewer Firm actively promotes its ability to offer crisis-management and PR services to clients," defendants did not discover this fact last week or last month. Defendants say that "Brewer positioned his law firm as a direct competitor of AMc, **supplanting it shortly after his retention by the NRA**." D.B. 3 ¶ 5 (emphasis added). The first piece of evidence they submitted on this point was an email dated April 5, 2018, from Travis Carter of the Brewer Firm. D.B. 3, ¶ 12. The recipient of that email was the AMc CEO, Angus McQueen. APP 362. *See also* APP363 (April 13, 2018 email from Mr. Brewer to Angus McQueen.).

25. Several claims defendants make against Mr. Brewer stem from his firm's supposed "takeover of the NRA;" but, again, the evidence on which defendants based this claim was not learned by them "recently." Defendants allege that after "being retained by the NRA in 2018, Brewer and his firm appear to have overtaken all legal and PR decisions within the NRA, allowing the firm to extract exorbitant legal fees along the way." D.B. 4. The first item of

evidence they submitted to support this claim was a letter from Oliver North – then an AMc employee – in which, according to defendants, North advised the NRA "to obtain a full accounting of the Brewer firm's time charges to date." D.B. 4 n.14. The letter was dated March 31, 2019 – five months before the Complaint in this action was placed on file.

26. The fact is, too, that some of the same claims defendants say warrant disqualifying the Brewer firm in this case were made in the Opposition they filed on June 24, 2019 to the NRA's motion to have Brewer firm partner Michael Collins admitted pro hac vice in the Virginia consolidated action. In paragraph one of that Opposition defendants warned that the "attorneys seeking admission pro hac vice are very likely to become witnesses" in violation of [Va. R.P.C.] Rule 3.–7; that none "of the exceptions to Rule 3.7 apply;" and that "the testimony of these two attorneys will be adverse to the position of their client," and "therefore will create a disqualifying conflict for the attorneys." In paragraph two defendants previewed the "economic competitor conflict" claim they made in the pending motion when they urged that the Brewer firm had "poached substantial portions of the NRA business that Defendant AMc has handled for over 38 years." Defendants do not explain why, if they knew of these "conflicts" two months before the Complaint in this case was filed, it took them until a few weeks ago to register their concerns.

27. I realize that some of the allegations the defendants made in their motion were supported by references to recent deposition testimony. But if a party could delay in making a motion for disqualification for months after learning the relevant facts, then conduct discovery to corroborate "facts" it was already aware of – and then claim that the need for disqualification only recently "ripened" – no disqualification motion would ever be impliedly waived.

C. <u>The Burden of Proof on Disqualification</u>

28. Courts sometimes consider the question of whether a motion to disqualify was made in a timely manner to be a threshold matter for a court to decide: when the court concludes that it was not, it may see no need to proceed to a discussion of the motion's merits. But even those that have found a disqualification motion to be untimely, and that the right to challenge counsel has been waived, have often gone on to consider the motion on its merits in order to decide whether a different conclusion would have been reached if the moving party had acted more expeditiously. In making such a determination it is, in my view, helpful to bear in mind who bears the burden of proof on disqualification, and what that burden entails.

29. Courts have made it clear that the party who moves for disqualification bears the burden of proof on its motion. *See Vinewood Capital, LLC v. Dar Al-Maal Al-Islami Trust*, 2010 U.S. Dist. LEXIS 30358, at *18-19 (N.D. Tex. 2010) ("the party seeking disqualification bears the burden of proof"); *In re Whitcomb*, 575 B.R. 169, 174 (Bankr. S.D. Tex. Sept. 18, 2017) ("As the party seeking disqualification, Whitcomb bears the initial burden to prove [that counsel] should be disqualified"). What that burden entails may not be always be as clear. It has been suggested, however, that a party who seeks to disqualify an attorney must establish the factual predicate upon which its motion depends by showing that counsel's continued participation in a particular matter would be impermissible; and, therefore, that the court should exercise its discretion to grant the motion. *Abney v. Wal-Mart*, 984 F. Supp. 526, 528 (E.D. Tex. 1997).

30. To clear this hurdle the moving party is typically assigned the task of demonstrating that challenged counsel's continued representation would cause it to run afoul of the conflict of interest rules or some other rule of professional conduct. *Spears v. Fourth Court of Appeals*, 797 S.W.2d 654, 656 (Tex. 1990). But some courts have assigned the moving party

the additional burden of proving that, if disqualification is not ordered, prejudice will inure to the moving party or to counsel's own client; or that, for some other reason, no remedy less drastic than disqualification exists. *In re Hilliard*, 2006 Tex. App. LEXIS 3514, at *7 (2006) ("The mere allegation of potential prejudice is insufficient").

31. The specifics of the showing the moving party will be required to make will depend, in part, on which rule has purportedly been violated. For example, in a case where a motion to disqualify has been predicated upon a putative violation of the "advocate-witness rule," the movant typically bears the burden of demonstrating that counsel's testimony is needed and not readily obtainable elsewhere. *In re Sanders*, 153 S.W.3d 54, 2004 Tex. LEXIS 1365, at *6 (2004) ("Because she has sought disqualification, Joyce bears the burden of showing that McKnight's testimony is necessary"). Conversely, where disqualification is sought on the basis of a claimed conflict of interest violation the movant is ordinarily expected to show, first, that an attorney-client relationship either currently exists or once existed between her and challenged counsel [*Johnston v. Harris County Flood Control Dist.*, 869 F.2d 1565, 1569 (5th Cir. 1989)]; and, therefore, that she has standing to raise the conflict issue. Once this showing has been made, the moving party is usually expected to establish – by the weight of the evidence, a preponderance of the evidence, or at least some evidence – that challenged counsel, if unrestrained by the court, will violate the conflict of interest rules that are in effect in the jurisdiction in which the motion to disqualify has been made. *See, e.g., OneBeacon Ins. Co. v. T. Wade Welch & Assocs.*, 2012 U.S. Dist. LEXIS 14663, at *19-20 (S.D. Tex. 2012) ("the severity of this remedy 'requires the movant to establish by a preponderance of the facts indicating a substantial relation between the two representations'"); *Tierra Tech de Mex. SA de CV v. Purvis Equip. Corp.*, CIVIL ACTION NO. 3:15-CV-4044-G, 2016 U.S. Dist. LEXIS 99229, at *11

(N.D. Tex. July 29, 2016) ("Manley has not carried his burden of delineating with specificity the existence of a substantial relationship between the prior and present CSA representations")

32. Many federal courts have characterized the movant's burden on disqualification as being a "heavy" one. *United States v. Aleman*, 2004 WL 1834602, at *1 (W.D. Tex. 2004); *Am. Sterilizer Co. v. Surgikos, Inc.*, 1992 U.S. Dist. LEXIS 21542 (N.D. Tex. 1992). This is true, a fortiori, in a situation where, as here, even though disqualification has been sought on the basis of a purported "conflict," the moving party is neither a current nor former client of the challenged firm. *Robertson v. AstraZeneca Pharms.*, LP, 2015 U.S. Dist. LEXIS 132859, at *8 (E.D. La. Sept. 30, 2015) ("Plaintiff bears the burden of demonstrating a conflict…that warrants disqualification. [Her] burden is heightened here because she is not a former [firm] client").

33. The precise nature of the moving party's burden is not always clear, but it is well-settled that to satisfy that burden it must do more than make assertions that are vague, tenuous or conclusory in nature; and which, therefore, are unsubstantiated by the record. *In re Cerberus*, 164 S.W.3d 379 (Tex. 2005) (allegations of unethical conduct will not suffice); *In re Sanders*, 153 S.W.3d 54, 2004 Tex. LEXIS 1365, at *5 (2004) ("mere allegations of unethical conduct or evidence showing a remote possibility of [an RPC] violation will not merit disqualification"). Courts have also made it plain that a party who moves to disqualify a law firm is expected to concretely establish the particular facts and grounds that support its attempt to exclude counsel from further participating in the matter, and that mere "generalities" will not suffice. *See Microsoft Corp. v. Cmwlth. Sci. & Indus. Research Org.*, 2007 U.S. Dist. LEXIS 91550, at *27-28 (E.D. Tex. 2007) ("disqualification cannot be granted on generalities"). *Cf.* FDIC v. U.S. Fire Ins. Co., 50 F.3d 1304, 1314 (5th Cir. 1995) (the remote possibility that counsel and plaintiff might eventually find themselves at odds was "much too tenuous a thread").

34. In the same vein, while disqualification motions have sometimes been based on claims as to what might have transpired in the past, or could conceivably occur in the future, courts have made it clear that conjecture and speculation do not suffice. *United States v. Beauchamp*, 2017 U.S. Dist. LEXIS 66393, at *8 (N.D. Tex. Apr. 4, 2017) ("speculation is insufficient to satisfy the government's burden to prove conflict of interests"); *Painter v. Suire*, 2014 U.S. Dist. LEXIS 108151, at *8 (M.D. La. Aug. 5, 2014) ("Painter's argument rests on nothing more than mere speculation of improper activity, and would not justify disqualification"); *In re Sanders*, 153 S.W.3d 54, 56 (Tex. 2004) ("[courts] have condemned disqualifications based upon 'speculative and contingent allegations'").

35. The rule that speculative claims do not satisfy the moving party's proof burden applies without regard to the nature of the rule violation that has been alleged. Therefore, just as a well-founded motion to disqualify cannot be based on the moving party's speculation that challenged counsel will serve as both an advocate and a witness at trial, it is not enough for a party to allege the mere possibility that a conflict of interest may arise, or that some other ethical rule will be impinged. *See, e.g., In re A.M.*, 974 S.W.2d 857, 864 (Tex. App. 1998).

36. Courts have likewise observed that, to warrant the drastic remedy of disqualifying a party's chosen counsel, the basis for disqualification cannot be "potential" or "hypothetical." *United States v. Hernandez*, 690 F.3d 613, 619 (5th Cir. 2012). *Cf. Tierra Tech de Mex. SA de CV v. Purvis Equip. Corp.*, CIVIL ACTION NO. 3:15-CV-4044-G, 2016 U.S. Dist. LEXIS 99229, at *10-11 (N.D. Tex. July 29, 2016) ("'A potential conflict based on potential issues is simply not the standard'"), quoting *Hydril Company v. Multiflex, Inc.*, 553 F. Supp. 552, 556 (S.D. Tex. 1982). It follows that a motion that is based on surmise, suspicion, or imagined scenarios of conflict will not carry the day. *Hughes v. Pogo Producing Co.*, 2009 U.S. Dist. LEXIS 59454, at

*6 (W.D. La. 2009) ("the Fifth Circuit has 'provided clear guidance as to the need to ensure that any disqualification is linked to an actual, real conflict rather than an imaginary one'").

37. As I will discuss, many of the claims defendants have made in support of their motion to disqualify appear to have their source not in competent evidence, but in conclusory claims and speculative assertions about things that may or may not occurred. In particular, it would appear that most if not all of the claims the defendants have made about ethical rules Mr. Brewer and his firm have supposedly infringed in this case are unsupported by record evidence; and, for that reason alone, defendants have not carried their burden of proof on disqualification.

D. Defendants have not Demonstrated a Conflict Rule Violation

38. Defendants say that Mr. Brewer and his firm violated the ethical rule that generally precludes lawyers from undertaking or continuing with representation if they have a "conflict of interest." However, defendants have not established – or, in fact, even alleged – that they have standing to move to disqualify the Brewer firm on conflicts of interest grounds.

39. "Standing" is a jurisdictional matter that goes to the power of a court to decide an issue; the question is whether a party who has invoked the court's jurisdiction has done so properly. *Warth v. Seldin*, 422 U.S. 490, 498 (1975). As one court has put it, standing is a party's "ticket to ride." *Booth v. Cont'l Ins. Co.*, 167 Misc.2d 429, 433, 634 N.Y.S.2d 650 (1995). Because standing implicates the court's power to decide a motion, standing is sometimes the threshold issue the Court must decide. *See, e.g., U.S. ex rel. Friddle v. Taylor, Bean & Whitaker Mortgage Corp.*, 2012 U.S. Dist. LEXIS 42473, at *23 (N.D. Ga. 2012) ("As an initial matter, the relators must [show] that they have standing to seek Mr. Parker's disqualification").

40. Prior to 1983, when the Model Code of Professional Responsibility ("Model Code") was in effect, DR 1-103(A) placed an affirmative obligation upon an attorney to disclose

to an appropriate tribunal any ethical violation that she had unprivileged knowledge of. In part for this reason, during the 1970's some courts held that a court that had an issue of ethical misconduct brought to its attention was obliged to examine the charge. *See In re Gopman*, 531 F.2d 262, 265 (5th Cir. 1976). But the same year that *Gopman* was handed down a different Fifth Circuit panel pointed out that courts generally do not disqualify attorneys on conflict of interest grounds unless a former client has sought that relief. *In re Yarn Processing Patent Validity Litigation* 530 F.2d 83, 88 (5th Cir. 1976). The court went on to explain, in words that have been oft quoted since, that to allow "an unauthorized surrogate to champion the rights of the former client" would allow that surrogate to "use the conflict rules for his own purposes." Id. at 90.

41. In 1983 DR 1-103(A) was effectively replaced by Rule 8.3(a) of the Model Rules of Professional Conduct ("Model Rules"). The new rule materially differs from its Model Code predecessor in that, whereas the Code obliged lawyers to report all suspected ethics violations, the Model Rule only requires them to report infractions that raise substantial questions about a lawyer's "honesty, trustworthiness or fitness to practice law." Lawyers are, moreover, to report their concerns to "the appropriate professional authority" – not to a court. Since the applicable conflict of interest rules exist for the benefit of an attorneys' clients and former clients – and because, in most jurisdictions, _no ethical rule currently compels attorneys to report unethical conduct – in recent years many courts have held or implied that, when a motion to disqualify has been predicated upon a claimed conflict, the movant must ordinarily satisfy a threshold burden of showing, as a matter of fact, that it is – or at least once was – represented by challenged counsel.

42. In recent years many federal courts have held or implied that in a case where a motion for disqualification has been predicated upon a putative conflict of interest, but the moving party has not shown that it has standing to raise that conflict, the motion may properly be

denied. *See, e.g., Coates v. Brazoria County Tex.*, 2012 U.S. Dist. LEXIS 90748, at *5-6 (S.D. Tex. 2012) ("the general rule is that 'courts do not disqualify an attorney on [conflict grounds] unless the former client moves for disqualification'"); *U.S. v. Aleman*, 2004 WL 1834602, at *2 (W.D. Tex. 2004). In fact, one of the cases defendants rely on in attempting to show that the Brewer firm has a disqualifying conflict of interest undercuts the defendants' claimed right to seek disqualification on that basis. *Hill v. Hunt*, 2008 U.S. Dist. LEXIS 68925, at *9 (N.D. Tex. 2008) (a "party seeking to disqualify opposing counsel on the grounds of current and/or former representation must first establish that an actual attorney-client relationship existed between the party and the attorney he or she seeks to disqualify") (citation omitted).

43. In this case defendants point to various "relationships" Mr. Brewer supposedly had, including his "animus-filled family relationship" with AMc's owners [D.B 2], his "strained relationship" with "A. McQueen" [D.B. 2], and his "relationship with Danny Hakim" [D.B. 13 n.84]. But even a cursory review of defendants' brief reveals that they have not alleged – much less established – that they have or ever had an attorney-client relationship with Mr. Brewer. Defendants have not shown, in short, that they have standing to raise the conflict issue.

44. Assuming arguendo that defendants do have standing to raise a "conflict" between the interests of Mr. Brewer and his client, the NRA, defendants have not, in my opinion, shown that any such conflict exists. In order to understand why this is so it is necessary, first, to know what the applicable ethical rule says. Relevant to the instant motion, Model Rule 1.7(a)(2) provides that a concurrent conflict of interest exists if "there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer." In this case, I have seen nothing to suggest that there is a "significant risk" – or, indeed, any risk – that

the Brewer firm's representation" of the NRA "will be materially limited" by any "personal interest" Mr. Brewer or his firm may arguably have in this matter. To understand why there is not, it is important to examine what defendants are claiming that counsels' "conflict" is.

45. Some of the 42 references to "conflicts" in the brief defendants filed in support of their motion were nothing more than conclusory claims regarding unspecified "conflicts." *See, e.g.,* D.B. 12 ("high-ranking NRA officials testified that Brewer's actions were improper given his clear conflict of interest with A. McQueen and AMc"); D.B. 20 ("Brewer's testimony is necessary on his conflict of interest with AMc"); D.B. 25 ("Allowing his firm to continue would signal to the public that the protection of one's rights extends only to the lawyer himself, but not to the abusive litigation tactics and conflicts of interests that pervade the law firm").

46. Defendants have also used the word "conflicts" to refer to different things, such as the "prior conflicts" Mr. Brewer purportedly had in other cases [D.B. 15] or "conflicts" the firm supposedly "manufactured." D.B. 17. But when Defendants have spoken in terms of the "conflict of interest" that supposedly exists in this case, what they have contended is not so much that there is a conflict between the interests of Mr. Brewer and his client, the NRA, as between Mr. Brewer and principals of AMc to whom he is related by marriage. D.B. 9 (referring to the "multi-decade, animus-filled family relationship with the owners of AMc"); D.B. 9 ("Brewer's prior record of…conflict of interest with the McQueen family had been properly vetted"); D.B. 17-18 ("numerous individuals both within the NRA and AMc knew that Brewer's involvement with AMc was a conflict of interest given his relationship with the McQueens").

47. Defendants never say exactly why it is that they think that Mr. Brewer's "animus" towards his wife's family members, or fractious relationship with them, constitutes a "conflict of interest" within the meaning of Model Rule 1.7; and, in my opinion, it does not. For one thing,

any "animus" Mr. Brewer might possibly bear towards AMc's principals would not cause him to "pull his punches" in dealing with AMc – if anything, it would cause him to punch harder. The "personal interests" defendants allege, in other words, would not cause Brewer's representation to be "limited;" if anything, they would cause him to become even more zealous than he is already accused of being in advancing NRA claims. As defendants own moving papers reflect, moreover, if anybody would be "limited" in their ability to "zealously advocate" in this case it would not be Mr. Brewer, but Mr. McQueen: "R. McQueen, the current CEO of AMc, must battle his sister's husband, which *could hamper R. McQueen's ability to zealously advocate for his own company* because of his concerns for family." D.B. 18. ¶ 42 (italics added).

48. In addition to making conclusory claims about generic "conflicts," and supposed interpersonal "conflicts" between the interests of Mr. Brewer and those of the defendants, they have adverted to certain circumstances which could be taken to implicate a professed concern about Mr. Brewer's ability to zealously represent the NRA. In my opinion, however, none of the "evidence" that was proffered in support of these other "conflict" claims demonstrates or even suggests that the Brewer firm would be "materially limited" in representing its client.

49. Defendants allege, for example, that because of "AMc's concerns about Brewer and his firm's conflicts, LaPierre promised Brewer would not be involved anymore." D.B. 12. ¶ 26. Insofar as proof that Mr. LaPierre promised that Mr. Brewer "would not be involved anymore" in response to "AMc's concerns" about "conflicts" would be tantamount to proof that Mr. Brewer and his firm was, in fact conflicted, one would expect that such an allegation would be supported by evidence that Mr. LaPierre did, in fact, think that the firm's ability to represent the NRA had been materially limited in some way. But the only "evidence" that was submitted in support of this prong of defendants' "conflict" claim was not from Mr. LaPierre – it was

testimony from defendants' CEO, and a letter from defendants' attorney, which seem to establish nothing more than what the Court already knows: that defendants *claim* the firm has a conflict.

50. In the cited passage Revan McQueen contended that after he and Mr. LaPierre "extensively discussed Brewer's connection to the McQueen family," how "inappropriate and aggressive Brewer's conduct had become," and that "we felt it was inappropriate for him to continue to represent the NRA in any manner related to AMc," LaPierre promised "that AMc would not have to deal with Powell, Brewer or his firm anymore, and that any future review of AMc's documents would be conducted by independent parties." APP176. Even a cursory review of this "evidence" reflects that it does not establish that the Brewer firm's representation of the NRA would be limited in any way, or even that LaPierre thought that it might be. What it shows, and all it shows, is that to keep the NRA's long-time P.R. firm happy Mr. LaPierre acquiesced in its request to have someone other than the Brewer firm conduct an AMc audit.

51. The same is true of the other "evidence" defendants submit to bolster this claim – a letter from AMc attorney, Jay Madrid. It is true that Mr. Madrid opined, in that letter, that one of the reasons why Mr. LaPierre agreed that the Brewer firm would have no further contacts with AMc or its representatives was that the firm had an "irreconcilable conflict of interest." But that assertion was nothing but "lawyer speak" – defendants have not established that AMc's counsel had any reason to know what motivated Mr. LaPierre to agree to what he did. Regardless of what Mr. LaPierre may have thought, moreover, nothing in the cited letter suggests – much less establishes – that the Brewer firm's ability to represent the NRA had been "limited" by the conflict Mr. Madrid claimed it had. In fact, the only time the defendants used the word "limited" anywhere in their brief was in their citation to ~~the~~ Texas Rule 1.06(b). The fact is that if a party could manufacture a conflict on the part of an adverse firm, and thereby engineer grounds for its

disqualification, merely by citing proof that the moving party or its counsel had *claimed* that its adversary had a conflict, few disqualification motions would ever be denied.

52. Defendants also purported to provide evidence to support their claim that "Brewer and LaPierre chased former NRA President North and numerous others out of the NRA to cover up Brewer's conflicts." D.B. 22. The "evidence" cited in support of this claim consists of three passages from attorney J. Stephen Hart's February 20, 2020 deposition transcript. In the first of these Mr. Hart described the termination of certain NRA personnel on account of their supposed participation in a "conspiracy," but no "conflict" on the part of Mr. Brewer was even mentioned. In fact, the only thing the witness said about the firm in the cited passage was that it "was only doing document production at that time." APP 87. This nondescript excerpt was followed by one in which Mr. Hart opined, in conclusory fashion, that NRA's counsel and another person had been terminated for "challenging Bill Brewer's billings" [APP143], and another in which the only things Mr. Hart said about Mr. Brewer was that "there was kind of a limited crowd that was trying to figure out what to do about Brewer," and that he did not think Chris Cox had been involved in the effort to "complain about Bill Brewer's bills." APP 156-157.

53. If I understand what defendants are contending, it would seem to be that when an employee of an entity questions a law firm's bills to that entity, or hears about others who have, the firm *ipso facto*, has a "conflict" that materially limits its ability to represent its client; and, should that person subsequently be terminated from his or her job, for whatever reason, his or her rank speculation that the termination was effected for the purpose of "covering up" the firm's "conflict" is sufficient grounds on which to disqualify the firm from representing its client.

54. If this is what defendants are contending three points should be mentioned. First, it is not at all unusual for employees of an entity that employs law firms to question bills that have

been submitted by those firms. If the fact that billing questions have been raised by someone who works or worked for an entity client meant that the firm had a "conflict" in representing that client it is probably fair to say that every major law firm in this country, and most of the smaller ones, has been afflicted by many a "disqualifying conflict" they never knew they had.

55. The fact is, moreover, that just as defendants only allege that the Brewer firm has a "conflict" that was manifested by Mr. LaPierre's decision to have somebody other than that firm conduct an AMc audit – without establishing how the firm's representation of the NRA was, in any way, limited as a result – defendants have not even suggested how its unsupported claim that Mr. LaPierre "chased the NRA President and others out" of the NRA to cover up "Brewer's conflicts" shows that the firm's ability to represent the NRA in this litigation against defendants was limited in any way. The third point is that a ruling that "unauthorized surrogates" like defendants could have a firm "conflicted out" of a case merely because somebody raised questions about the firm's billing practices, or because somebody was rumored to have been terminated for doing so, would be an open invitation to those who have never been represented by a firm to do precisely as the Fifth Circuit worried they might, by using "the conflict rules for [their] own purposes." It is precisely to avoid this eventuality that the "standing" rule exists.

56. One final point about defendants' "conflict" charge that bears mentioning is that, pursuant to Model Rule 1.7(b), notwithstanding the existence of a concurrent conflict under 1.7 (a), a lawyer may represent a client if: "(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; (2) the representation is not prohibited by law; (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and (4) each affected client gives informed consent,

confirmed in writing." In this case, no claim has been made that Mr. Brewer's representation is prohibited by law, and his representation of the NRA does not involve the assertion of a claim by one client against another client he represents. In addition, I am informed and believe that counsel has averred that it will be able to provide competent and diligent representation to the NRA, despite defendants' claims to the contrary; and that the only "affected client," the NRA, has given informed consent, confirmed in writing," to the Brewer Firm's continuing to represent it in this case. Since this is so, in my opinion, even if the firm would have been subject to being disqualified pursuant to Rule 1.7(a), they are permitted by Rule 1.7(b) to stay on the case.

57. I recognize that while defendants mentioned Model Rule 1.7 without saying what it says, they cited Rule 1.06(b) of the Texas Disciplinary Rules of Professional Conduct ("TDRPC") for the proposition that a lawyer shall not undertake representation that "even appears" to be "adversely limited" by the lawyer or law firm's own interests. To the extent that the defendants may be contending that the court should apply the Texas conflict rule, rather than Model Rule 1.7(a), and that the Texas rule is less stringent than its ABA counterpart – either because the Texas rule only seems to require a showing that counsel's representation of a client will be "adversely limited," rather than it will be "materially" so, or because the moving party does not have to show that there actually is a significant risk that the representation will be so limited, only that it might "appear to be" – I must respectfully disagree.

58. In the absence of a uniform code of ethics for attorneys who practice before federal courts it is not always obvious whether a motion to disqualify should be decided in accordance with the Model Rules or those that have been adopted in the state in which the federal court sits. In many instances this is a distinction without a difference because application of either rule would yield the same result. *Finalrod IP, LLC v. John Crane, Inc.*, 2016 U.S. Dist. LEXIS

26870, at *8 (W.D. Tex. Mar. 3, 2016) ("The relevant ABA Model Rule, Rule 1.9(b), has some 'linguistic differences' from Texas Rule 1.09, but 'the two codes produce the same result application'"); *Hutton v. Parker-Hannifin Corp.*, CIVIL ACTION H-15-3759, 2016 U.S. Dist. LEXIS 102176, at *6-7 (S.D. Tex. Aug. 4, 2016) ("The Fifth Circuit has noted that the ABA Model Rules and the Texas Disciplinary [R.P.C.] are essentially identical regarding conflicts of interest due to an attorney's prior representation of the opposing party…Accordingly, the court may properly focus its analysis on the Texas Disciplinary [R.P.C.]") (citation omitted).

59. There are times, however, when the Model Rules and the state rules are not uniform in all respects. By way of example, in a 1995 case the Fifth Circuit pointed out that the Rules for the Northern District of Texas, the TDRPC, the ABA Model Rules, and the Model Code all delineated dissimilar rules for determining whether an attorney could serve as both an advocate and witness in the same case. *FDIC v. United States Fire Insur. Co.*, 50 F.3d 1304, 1312 (5th Cir. 1995). More recently, a federal district judge in the Eastern District of Texas pointed out that the Model and Texas Rules propound different tests for deciding disqualification motions based on putative conflicts of interest, and that "the Fifth Circuit has shown a preference for the more stringent ABA Model Rule." *JuxtaComm-Texas Software, LLC v. Axway, Inc.*, 2010 U.S. Dist. LEXIS 125352, at *9-10 (E.D. Tex. 2010) ("Thus, the Court will apply the Model Rule"). Like the Eastern District of Texas, I am of the view that when there is any tension between the applicable Model Rule and the applicable Texas rule, it is the former that should be applied.

E. <u>Defendants have not Shown a "Lawyer-Witness" Rule Violation.</u>

60. The second rule defendants claim that Mr. "Brewer is violating" is "the Lawyer-Witness Rule." D.B. 19. Defendants say that "Brewer must be disqualified because his witness testimony is necessary," and "because no exception applies." D.B. ¶ 46. Since I have not been

involved in the underlying case I am in no position to opine about whether Mr. Brewer's testimony will truly be "necessary" within the meaning of the applicable professional conduct rules; or, if it would, whether any of the exceptions to that rule would apply. But to the extent that defendants are claiming that if Mr. Brewer will be a necessary witness at trial he must "withdraw" from participating in pre-trial proceedings I do have an opinion – he need not.

61. Defendants begin their "lawyer-witness" argument by selectively citing Texas Rule 3.08(a) for the proposition that a "lawyer shall not accept or continue *representation* 'if the lawyer knows or believes that the lawyer is or may be a witness necessary to establish an essential fact on behalf of the lawyer's client'" [D.B. 19 ¶ 45, italics added, emphasis omitted]. What the rule actually says is that a "lawyer shall not accept or continue *employment as an advocate before a tribunal in a contemplated or pending adjudicatory proceeding* if the lawyer knows or believes that the lawyer is or may be a witness necessary to establish an essential fact on behalf of the lawyer's client." T.D.R.P.C. Rule 3.08(a) (italics added). Perhaps the quote was trimmed merely to save space, but the apparent effect of "ellipsing" the rule – coupled with defendants' invocation of Texas Rule 1.15(a)(1) for the proposition that "a lawyer 'shall' decline or withdraw from representation if it would 'result in violation of Rule 3.08" [D.B. ¶45] – is to leave the reader with the impression that, under the relevant Texas rules, a lawyer who thinks he may be a witness must not only not "advocate before a tribunal," but must immediately withdraw.

62. In their moving papers defendants do not discuss Model Rule 3.7, except to say it is "substantially similar to Texas Rule 3.08;" which, in my opinion, it is not. For one thing, Model Rule 3.7(a) is categorical in stating that, unless certain exceptions apply, a lawyer who is "likely to be a necessary witness" shall not "act as advocate *at a trial*" (italics added); thereby making it

clear beyond peradventure that a lawyer who knows he will be a witness at trial may nevertheless continue to be involved in pre-trial proceedings. The relevant federal case law is to like effect.

63. During the period when the Model Code was in force some courts stated that when an attorney knew that he was likely to be a testifying witness at trial the proper course was for him to withdraw. It has long been recognized, however, that many of the policy reasons that underlie the advocate-witness rule – such as concerns about "jury confusion," and the possibility that counsel's testimony might be given undue weight by the fact-finder – do not usually apply to pre-trial proceedings in which no jury is present. During the Model Code era, too, some were of the view that the Code's advocate-witness provisions were ambiguous; and that, as a result, parties had essentially been invited to file disqualification motions in an attempt to deprive opposing parties of their chosen counsel, or disrupt that counsels' trial preparation. In 1983 the drafters of the Model Rules responded to these perceived abuses by creating Rule 3.7 – a rule that was designed to eliminate the ambiguity of prior Code provisions [*FDIC v. U.S. Fire Ins. Co.*, 50 F.3d 1304, 1317 (5th Cir. 1995)], as well as to minimize the use of the rule as a tactical weapon, and ensure that a litigant's choice of trial counsel would not be lightly disturbed.

64. Since then many federal district courts have acknowledged that Rule 3.7, unlike its predecessor, does not require a lawyer who is likely to be a witness at trial to cease representing a client in all phases of a case; he can, rather, remain involved in most pre-trial proceedings. *Landmark Graphics Corp. v. Seismic Micro Tech., Inc.*, 2007 U.S. Dist. LEXIS 6897, at *16 (S.D. Tex. 2007) ("Courts have distinguished between a lawyer's role at trial and in pretrial matters"); *P & J Daiquiri Cafe, Inc. v. Andrew K. Knox & Co.*, 2008 U.S. Dist. LEXIS 20775, at *7 (E.D. La. 2008) ("There is no prohibition against [representing a] client in pre-trial matters"). It has been suggested that a testifying advocate can only participate in certain types of pre-trial

proceedings with the consent of his client. *See Ayus v. Total Renal Care*, 48 F. Supp. 2d 714, 718 (S.D. Tex. 1999) (a "lawyer should not represent the client at his own pre-trial deposition, nor should he argue pre-trial motions involving his pre-trial testimony as to a contested matter unless the client consents"). I am informed, however, that Mr. Brewer has received consent here.

65. Although a cursory review of defendants' brief might lead the reader to conclude that the rule is different in Texas, courts in that state have also recognized that a lawyer who will be an advocate at trial can nevertheless participate in pre-trial proceedings. *See, e.g., In re Guidry*, 316 S.W.3d 729, 738 (Tex. App. 2010) ("Even if a lawyer is disqualified…[he] can still represent the client in that case by performing out-of-court functions…, such as drafting pleadings, assisting with pretrial strategy, engaging in settlement negotiations, and assisting with trial strategy"). Even if the Texas rule was more stringent, moreover, for reasons I have already stated I am of the opinion that Model Rule 3.7, rather than Rule 3.08, would apply.

66. In any event D.R. 3.08, as its name suggests, was promulgated as a disciplinary standard – not as a barometer for when an attorney who has been accused of running afoul of that rule should be disqualified from representing her client. In a 2007 decision a federal district judge in Western Texas said that, while the trial court has the "duty to disqualify counsel when representation of the client is prohibited" by the Rules of Professional Conduct, Rule 3.08 is "not well-suited as a procedural rule of disqualification." *Mendoza v. U.S.*, 2007 U.S. Dist. LEXIS 26955, at *16-17 (W.D. Tex. 2007). Several state courts have suggested that the rule should rarely be the basis for a disqualification order. *See, e.g., In re Reeder*, No. 12-15-00206-CV, 2016 Tex. App. LEXIS 1084, 2016 WL 402536, at *7, *18 (Tex. App.–Tyler Feb. 3, 2016).

F. Defendants have not Shown a "Unauthorized Contact" Rule Violation

67. Two of the ethics rules defendants claim that Mr. Brewer ran afoul of, and should be disqualified for violating – Model Rule 4.2 and TDRPC Rule 4.02 – seek to prevent a lawyer from driving a wedge between a represented client and its counsel by engaging in unauthorized communications with a represented party. Rule 4.2 provides that in representing a client a lawyer shall not "communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so…" Rule 4.02(a) would appear to be substantially similar.

68. The charge that a lawyer has violated the "unauthorized communications" rule is a serious one; and one that should be supported not only by competent evidence, but by a detailed discussion of the relevant case law. That did not happen here. The entirety of defendants' claim in this regard would appear to be contained in the phrase "by using family members to communicate with" his brother-in-law, Revan McQueen, "about this very lawsuit, Brewer is violating the ethical rule against communicating with represented parties." D.B. 23, ¶ 55.

69. According to defendants, the evidentiary basis for this claim can be found in three paragraphs of the affidavit that was filed by Mr. McQueen in support of this motion, Exh. B, ¶¶ 36-38. But even a cursory review of two of those paragraphs, ¶¶ 37 and 38, reveal that they have nothing to do with any supposedly "unauthorized" contact with Mr. McQueen. In ¶ 37 Mr. McQueen talked about Mr. Brewer's representation of Grant Stinchfield, and purported "false statements regarding AMc" that were purportedly contained in an affidavit Mr. Stinchfield filed; in ¶ 38 Mr. McQueen described Mr. Brewer's supposed "manipulation of Stinchfield" as "a way to continue his personal attack on Angus." It would appear to follow that, if defendants did provide evidentiary support for their Rules 4.2 and 4.02 claim, it must be in ¶ 36.

70. In that paragraph Mr. McQueen did say that since "the date the NRA's first lawsuit was filed against AMc on April 12, 2019, I have personal knowledge that Brewer, using family members as channels, has attempted to communicate with me to influence AMc's litigation positions and strategy." But he did so without explaining why, if he had such knowledge, it is only now, a full year later, that counsel moved to disqualify Mr. Brewer for having made these "attempts." Perhaps more fundamentally, McQueen made no attempt to substantiate this claim.

71. McQueen hinted that there may be other "examples" of how Mr. Brewer attempted to communicate with him through family members, but the only contact he specifically referred to was one, "in April 2019," in which Mr. McQueen purportedly learned of a "threat of indictment" through "these channels." According to Mr. McQueen, even though Mr. Brewer "knew that AMc was represented by counsel," he "tried to direct me to 'break privilege' with my own attorneys" so he could tell me "how to get out of this." McQueen Aff. ¶ 36.

72. As I have indicated, a party cannot base a motion to disqualify on speculation, conclusions or subjective beliefs; it is, rather, incumbent upon the party to substantiate its claims. In this case, while Mr. McQueen alleges, in conclusory fashion, that he learned of a "threat of indictment" from family members, he did not say which "members" communicated that "threat" to him; what he was threatened with being indicted for; or anything to indicate that the "indictment" was related to any matter on which AMc was being represented ~~on~~ by counsel.

73. After providing the "factual basis" for its Rule 4.2 claim in footnote 139, the legal basis for disqualifying Mr. Brewer was purportedly set forth in footnote 140. However, in that footnote all defendants did was "string cite" two cases – no attempt was made to show that the applicable precedent warrants disqualifying Mr. Brewer; and, in my opinion, it does not.

74. The standard to be applied in deciding disqualification motions that have been based upon putative violations of the "unauthorized contact" rule has received scant attention over the years, and the few courts which have considered the matter have not reached a consensus. It is probably fair to say, however, that in the vast majority of such cases disqualification has not been ordered; and, when it has, that has generally been because the contacting attorney received confidential information from an unsophisticated person that could not be protected in any other way. Conversely, courts have been reluctant to disqualify counsel in a situation where the contacted person was sophisticated; where no privileged or work product information was conveyed to the lawyer as a result of the contact; or where, as here, no prejudice to the moving party has been shown to have resulted from the communication.

75. In the same footnote in which they made their Rule 4.2 claim defendants cited TDRPC Rule 4.04(b) for the proposition that a "lawyer shall not present, participate in presenting, or threaten to present: (1) criminal or disciplinary charges solely to gain an advantage in a civil matter." But because defendants have not even alleged that Mr. Brewer presented such a charge for such a purpose, much less proved that he did so – and because they did not cite any legal authority that would support the contention that disqualification of Mr. Brewer would be an appropriate remedy if he did – it would appear to be unnecessary for me say any more about this particular claim than that defendants do not appear to have satisfied their burden of proof.

G. Defendants have not Shown that Other Rules were Violated

76. In addition to alleging – incorrectly, in my view – that the Mr. Brewer violated the three rules that have most commonly been cited by parties who move to disqualify counsel – the conflicts of interest rule, the advocate-witness rule, and the unauthorized contacts rule, as well as TDRPC Rule 4.04(b) – defendants have contended that Mr. Brewer violated three more Model

Rules (Rules 3.6(a), 4.1(a) and 4.4(a)) and their Texas counterparts (Rules 3.07, 4.01(a) and 4.03(a)). Defendants suggest that Mr. Brewer should be disqualified for having done so, despite citing no case in which any court disqualified counsel for violating any of those rules.

77. The "trial publicity" rule, Model Rule 3.6(a), provides that a "lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter." While defendants allege, in conclusory fashion, that Mr. Brewer and his firm "are violating" that rule by "using PR tactics to beat their opposition into submission" [D.B. 24, ¶ 58], it would appear that the only "extrajudicial statement" defendants claim the firm actually made to the press was one in which Mr. Brewer was quoted as saying that the COVID epidemic and its accompanying nationwide lockdown had "caused a major disruption" to the NRA's fundraising activities. D.B. 24 n.147. On its face there would appear to be nothing about this comment that is in any way objectionable – much less anything about it that would "have a substantial likelihood of materially prejudicing" this lawsuit.

78. In addition to claiming that Mr. Brewer made an unremarkable statement about the impact of the COVID epidemic on NRA revenues defendants cited a 22 year old newspaper article in support of their claim that the firm leaks "court filings before opposing counsel is even aware of them." D.B. 24 ¶ 58. Assuming for the sake of the argument that Mr. Brewer's former firm did this in the 1990's, or that the same was done in this case, it would appear to go without saying both that a "court filing" is not an "extrajudicial statement" by a lawyer, and that defendants have not shown how they were, in any way, prejudiced by such "leaking."

79. The same is true of comments "about AMc" that Mr. Brewer purportedly "leaked." Apart from the fact that a deponent's conclusory claim that "we all know it is Brewer [leaking]" is speculation about what the witness believes to be true, not proof that it is, the comments purportedly leaked were those of two "NRA board members" – not statements by Mr. Brewer – and there has been no showing of how "leaking" what NRA members actually said, if it occurred, would have a "substantial likelihood of materially prejudicing" this lawsuit.

80. As to this, the comments defendants adverted to were statements NRA board members made about concerns they had, not about AMc itself, but about a television station AMc ran, NRA-TV; and, in particular, about an episode of one show that some had deemed to be objectionable. Although defendants claim that this "impropriety is now a matter of national attention because of Brewer's own insistence on abusively leaking information to the media," and that "Brewer was not responding to negative publicity – he created it," the fact is that fully 6 months before the *New York Times* article defendants complain about, *USA Today* ran a story which the author began by noting that, using "a jarring image to blast increased diversity on a children's TV show, a National Rifle Association online show depicted characters from "Thomas & Friends" in white, Ku Klux Klan-style hoods on a burning train." *See* Melas, Chloe, *NRA TV Depicts Thomas & Friends in KKK Hoods*, CNN, available at: https://www.cnn.com/2018/09/13/entertainment/thomas-the-tank-engine-nra-kkk-trnd/index.html, dated September 14, 2018.

81. "Leaking" the reaction of an entity client's board members to such a depiction is not the type of "extrajudicial statement" the drafters of the Model Rules appear to have in mind. *Compare Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1033, 115 L. Ed. 2d 888 (1991). *Cf.* J. Fletcher, Gentile v. State Bar of Nevada: *ABA Model Rule 3.6 as the Constitutional Standard for Reviewing Defense Attorneys' Trial Publicity*, 46 SMU L. Rev. 293, 293 (1993) ("[Gentile,] a

criminal defense attorney, held a press conference on the day of his client's indictment on theft charges. Gentile hoped to rebut adverse press coverage that his client, Gary Sanders, had received over the preceding months. Gentile delivered a prepared statement that he believed conformed with ethical rules. In the statement, he maintained Sanders's innocence, claimed that a police detective was the likely culprit, and attacked the character and motives of three potential witness. Six months later, a jury acquitted Gentile's client. The State Bar of Nevada then charged Gentile with violating the Nevada Supreme Court rule on trial publicity").

82. It would appear to be no coincidence that, in addition to failing to clearly identify any "extrajudicial statement" Mr. Brewer made that would have a "substantial likelihood of materially prejudicing" this lawsuit, defendants have failed to cite a single case that would support their contention that the court should disqualify Mr. Brewer for violating that rule. Most of the reported cases in which violations of Model 3.6 or analogous rules of professional conduct have been discussed are not disqualification cases; they are, like *Gentile*, ones in which the question before the court was whether counsel should have been *disciplined*. *Gentile*, supra, 501 U.S. at 1036. *Cf. Davenport v. Garcia*, 834 S.W.2d 4, 29 (Tex. 1992) (Hecht, J., concurring) ("I do not suggest that relator should be disciplined, only that the [TDRPC] address the propriety of attorneys' extrajudicial statements during pending litigation"). In fact, offhand, the only decision I can think of in which an attorney was disqualified, in whole or in part, for violating Model Rule 3.6 or an analogous state rule was an Ohio case, and that decision was reversed on appeal. *State v. Cornick*, 2014-Ohio-2049, ¶¶ 8-19 (Ohio App. 8th Dist. 2015) (even if May publicly suggested the defendants were guilty, "that statement would not cause actual prejudice because all criminal prosecutions carry the implied understanding that the state believes that a defendant is guilty").

83. In one final claim that was also relegated to a footnote defendants suggest that the same conduct that purportedly caused Mr. Brewer to run afoul of M.R 3.6 also infringed M.R. 4.1(a) and 4.4(a), and Texas Rules 4.01(a) and 4.4(a). D.B. 24 n.150. It is certainly true, as a matter of general principle, that a lawyer should not knowingly "make a false statement of material fact or law to a third person," or use means that have no substantial purpose "other than to embarrass, delay, or burden a third person." But because defendants have not specified what "false statement of material fact or law" Mr. Brewer purportedly made, who he made it to, or what "means" he allegedly employed that has "no substantial purpose other than to embarrass, delay or burden a third person," the conclusory charge that he did one or more of those things does not, in my view, provide any basis for finding that Mr. Brewer violated these rules.

H. Even if a Rule was Violated Disqualification of Mr. Brewer is Not Automatic

84. In the Model Code era (1970-1983) some courts suggested that, once a Disciplinary Rule had been shown to have been violated, disqualification would ordinarily follow on a "per se" basis, as a matter of course; without regard to the impact such an order might have on the interests of the non-moving party or challenged counsel, or on the administrative efficiency of the court itself. This was particularly so in a situation where the violated rule was the one that forbade improper "dual" representation. *J.K. & Susie L. Wadley Research v. Morris*, 776 S.W.2d 271, 284 (Tex. App. 1989) (Howell, J., concurring) ("[t]he rule against dual representation is monolithic and rigorous; it recognizes few exceptions, if any").

85. Defendants seem to believe that this "per se" disqualification rule is still in effect. *See* D.B. 19 ¶ 44 ("Each conflict independently warrants disqualification; together, they mandate it"). But the views of courts regarding the automatic disqualification of a lawyer have changed. *See, e.g., SWS Fin. Fund A v. Salomon Bros.*, 790 F. Supp. 1392, 1403 (N.D. Ill. 1992) (many

courts automatically disqualify counsel, but "[t]he legal world is changing"). While no court condones ethical rule violations, on account of the severe consequences a disqualification order can wreak, both on the non-moving client and its counsel, a large and ever-growing number of courts have pointed out that disqualification can be a harsh, drastic and even draconian sanction for a rule violation. *NCNB Tex. Nat'l Bank v. Coker*, 765 S.W.2d 398, 399 (Tex. 1989).

86. In recent years both state and federal courts in Texas have reminded the bar that disqualification is a "severe remedy" [*Jackson v. City of Sherman*, 2018 U.S. Dist. LEXIS 14198, at *5 (E.D. Tex. Jan. 30, 2018)] which "can result in immediate and palpable harm, disrupt trial court proceedings, and deprive a party of the right to have counsel of choice." *In re Trujillo*, 2015 Tex. App. LEXIS 11394, at *4 (Tex. App.–El Paso [8th Dist.] Nov. 4, 2015) (citation omitted). *Also compare In re Solis Law Firm*, NUMBER 13-16-00350-CV, 2016 Tex. App. LEXIS 10567, at *7 (Tex. App.–Corpus Christi-Edinburg [13th Dist.] Sept. 27, 2016) (disqualification "is a severe remedy") *with In re Ace Real Prop. Invs., LP*, 2018 Tex. App. LEXIS 1258, at *6 (Tex. App.–Beaumont [9th Dist.] Feb 15, 2018) ("Because disqualifying a party's attorney results in the party losing its counsel of choice, courts generally review disqualification as a severe remedy, especially [if based on an] alleged conflict of interest").

87. Over the years it has come to be understood that the disqualification remedy – although frequently aimed at protecting one attorney-client relationship – inevitably interferes with another. *In re In re Am. Air.*, 972 F.2d 605, 619 (5th Cir. 1992) (disqualification rules "unavoidably affect relationships"), *cert. denied*, 113 U.S. 1262 (1993). It has been recognized, too, that motions to disqualify attorneys and firms are often made for tactical reasons that have nothing whatsoever to do with the moving party's professed concerns about insuring ethical conduct. For these reasons and others, disqualification of counsel – far from being the

"automatic" remedy for a rule violation that it once was – has in many jurisdictions become a "disfavored" one. *See, e.g., AMEC Constr. Mgmt. v. FFIC Risk Mgmt.*, 2017 U.S. Dist. LEXIS 133698, *8-9, 2017 WL 3602053 (M.D. La. August 21, 2017) ("Motions to disqualify attorneys are generally disfavored and require a high standard of proof so as not to deprive a party of its chosen counsel"); *Am. Sterilizer Co. v. Surgikos*, 1992 U.S. Dist. Lexis 21542, at *7 (N.D. Tex. 1992) ("Close scrutiny is necessary because disqualification is a severely disfavored remedy"), citing *Woods v. Covington Cty. Bank*, 537 F.2d 804, 810 (5th Cir. 1976).

88. In light of the extreme nature of the disqualification remedy, as well as the fact that disqualification motions are often interposed for strategic purposes, the Fifth Circuit has made it clear that an "inflexible application of a professional rule is inappropriate" [*FDIC v. U.S. Fire Ins. Co.*, 50 F.3d 1304, 1314 (5th Cir. 1995)]; and that the "rule of disqualification is not mechanically applied in this Circuit." *Johnston v. Harris County Flood Control Dist.*, 869 F.2d 1565, 1569 (5th Cir. 1989); *Church of Scientology of California v. McLean*, 615 F.2d 691, 693 (5th Cir. 1980); *Leleux-Thubron v. Iberia Parish* 2015 U.S. Dist. LEXIS 8020, at *10 (W.D. La. Jan. 23, 2015) ("The rule of disqualification is not mechanically applied in the Fifth Circuit"); *OneBeacon Ins. Co. v. T. Wade Welch & Assocs.*, 2012 U.S. Dist. LEXIS 14663, 9 (S.D. Tex. 2012) ("In [this circuit], courts 'do not mechanically apply the rules of disqualification'").

89. In keeping with this admonition courts throughout the nation have abjured a "per se" approach to disqualification in favor of a "functional" one. *UMG Recordings, Inc. v. Myspace, Inc.*, 2007 U.S. Dist. LEXIS 91179, at *45 (C.D. Cal. 2007) ("Courts have been admonished to take a 'functional' approach"), quoting R. Flamm, Judicial Disqualification: *Recusal and Disqualification of Judges* (1st Ed., at § 23.1). To courts which subscribe to this "flexible" approach, proof that an ethics rule has been violated is not, in and of itself, a sufficient

reason for disqualifying a lawyer. *Yorkshire Ins. Co. v. Seger*, 2007 Tex. App. LEXIS 4777, at *49 (2007). It must be shown that such a remedy is absolutely necessary. *All Am. Semicon., Inc. v. Hynix Semicon., Inc.*, 2008 U.S. Dist. LEXIS 106619, at *14 (N.D. Cal. 2008) ("disqualification is a drastic measure that…should only be imposed when absolutely necessary").

90. These days, in other words, a court's disqualification decision typically involves a two-step inquiry. First, the court must decide whether challenged counsel violated any ethical rule that is in force in the applicable jurisdiction. *Schlumberger Techs. v. Wiley*, 113 F.3d 1553, 1561 (11th Cir. 1997). If not, the court's inquiry will typically end. But should the court find that a rule has been infringed, disqualification of counsel does not follow as a matter of course. The court must, rather, engage in a thoughtful and careful – if not "painstaking" – weighing of all of the relevant facts and circumstances in order to assess, on a case by case basis, whether disqualification would be a necessary and appropriate remedy for that violation. *See Duncan v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 646 F.2d 1020, 1021 (5th Cir. 1981) ("we conclude that the district court misallocated the burden of proof applicable in a disqualification proceeding and failed to make the painstaking factual analysis required by our cases. We therefore remand for further proceedings"); *In re Tex. Windstorm Ins. Ass'n*, 417 S.W.3d 119, 129 (Tex. App.–Hou. [1st Dist.] Nov. 7, 2013) ("To prevent the abusive filing of such a motion for tactical reasons, the court must carefully evaluate the motion and record to determine if disqualification is warranted"). *Cf. FDIC v. U.S. Fire Ins. Co.*, 50 F.3d 1304, 1314 (5th Cir. 1995) (all the "facts particular to a case must be considered").

91. In making this assessment the court is expected to apply the legal precedent to the facts in order to strive to strike a "cautious," sensitive, and sometimes difficult balance between

several important – and often competing – considerations and interests. *Alabama v. Dean Foods Prods. Co.*, 605 F.2d 380, 383 (8th Cir. 1979) (disqualification, "like other reaches for perfection, is tempered by a need to balance a variety of competing considerations and complex concepts"); *Rosario v. City of Newark*, 2011 U.S. Dist. LEXIS 5880, at *4 (D.N.J. 2011) ("the balance requires "fact-intensive analysis and careful application of the law"); *Kelly v. CSE Safeguard Ins. Co.*, 2010 U.S. Dist. LEXIS 101118, 2010 WL 3613872, at *1 (D. Nev. 2010) ("Disqualification motions present courts with a delicate and sometimes difficult balancing task"). *Cf. One World Foods, Inc. v. Stubb's Austin Rest. Co. LC*, Case No. A-15-CA-1071-SS, 2016 U.S. Dist. LEXIS 147312, at *23-24 (W.D. Tex. Oct. 25, 2016) ("the Court finds the balance of the ethical rules, public interest, litigants' rights, and facts of this case does not favor disqualifying [the firm]").

92. The interests which weigh in favor of granting a motion to disqualify include any prejudice that may inure to the moving party if the motion is not granted. On the obverse side of the coin the primary factor militating against the precipitous grant of a disqualification motion is the fact that to do so will inevitably delay the proceedings and deprive the non-moving party of its right to enjoy the services of the counsel of its choice, thereby causing it economic hardship. But there are also other factors that may counsel against disqualifying an attorney or law firm in a particular case, including the possibility that the motion was filed for strategic reasons.

93. The first thing the court will typically balance is the relative hardships that would be expected to inure to the parties should the motion to disqualify be granted or denied. *See One World Foods, Inc.*, supra, 2016 U.S. Dist. LEXIS 147312, at *13 ("a court weighs the ethical rules with the public interest and the litigants' rights in deciding the substantive motion to disqualify under federal law"). In a situation where the court, after performing the requisite sifting and weighing, finds that the prejudice the moving party would suffer if disqualification

was not ordered outweighs the prejudice to the non-moving party if its counsel is removed, the motion is likely to be granted. Conversely, if the balance tips in favor of finding that the non-moving party would be likely to be more prejudiced by the loss of its counsel than plaintiff would be by losing its motion, the motion will ordinarily be denied. *One World Foods, Inc.*, supra, at *22-23 ("Disqualifying [the firm] would impose significant costs in time and money on the Defendants…[and] would likely cause significant delays in the case. By contrast, Plaintiff waited ten months after the start of this suit to file its motion for disqualification… Plaintiff fails to show any harm it might suffer outweighs the harm Defendants would incur if [the firm] were disqualified"); *Classic Ink, Inc. v. Tampa Bay Rowdies*, 2010 U.S. Dist. LEXIS 75220, at *13-14 (N.D. Tex. 2010) (plaintiff "could suffer a substantial hardship if the court goes forward with disqualification…Anderson has made no showing of prejudice")

94. As for the showing of prejudice the moving party is expected to make, since proof that an ethical rule was infringed does not automatically result in disqualification of counsel, a party who seeks to disqualify opposing counsel is usually expected to not merely allege that it will be prejudiced in some way if that remedy is not ordered, but to demonstrate with specificity that actual prejudice will befall it if challenged counsel is allowed to stay on the case. *See Henry v. City of Sherman*, 2017 U.S. Dist. LEXIS 202496, at *8 (E.D. Tex. Dec. 8, 2017) ("the Court 'should not disqualify a lawyer for a disciplinary violation that has not resulted in actual prejudice to the party seeking disqualification'"), quoting *In re Meador*, 968 S.W.2d 346, 351-352 (Tex. 1998); *OrchestrateHR, Inc. v. Trombetta*, CIVIL ACTION NO. 3:13-CV-2110-KS-BH, 2016 U.S. Dist. LEXIS 117986, at *43, 2016 WL 4563348 (N.D. Tex. Sept. 1, 2016) ("Plaintiffs have not shown that they suffered actual prejudice from any alleged violation").

95. Courts in Texas have been particularly insistent on this point. In a 1998 case the Supreme Court of Texas held that a court should not disqualify a lawyer for a rule violation that has not resulted in actual prejudice to the moving party. *In re Meador*, supra, 968 S.W.2d at 349. Since then Texas courts have been virtually unanimous in holding that neither a showing that challenged counsel engaged in conduct that contravenes a disciplinary rule, nor that counsel's misconduct has caused the potential for prejudice to the moving party, is enough to warrant removing counsel. On the contrary, the movant must demonstrate that counsel's conduct caused actual prejudice to it. *In re Users Sys. Servs. Inc.*, 22 S.W.3d 331, 336 (Tex. 1999); *Praise Tabernacle Outreach v. Restoration Fin. Group, Inc.*, 2008 Tex. App. LEXIS 5612, at *29 (2008) (the movant must show "that the opposing lawyer's conduct caused actual prejudice").

96. Some courts have gone even further. Due in part to the hardship that is likely to befall the non-moving client if it is forced to change counsel against its will, some courts have decreed that a showing that the movant will incur "some" prejudice if disqualification is not ordered is insufficient. The disqualification remedy will be ordered only if the movant shows that she will be prejudiced "substantially." *In Re Nitla S.A.*, 92 S.W.3d 419, 423 (Tex. 2002). Thus, should a court find that the prejudice that would inure to the moving party if its motion to disqualify were to be denied would be likely to be minimal, the court will be inclined to deny the disqualification motion. *See Hughes v. Pogo Prod. Co.*, 2009 U.S. Dist. LEXIS 59454, at *8 (W.D. La. 2009) (the lack of real "prejudice weighs heavily against" complete disqualification).

97. In this case defendants claim that their delay in moving for disqualification "will not meaningfully prejudice *the NRA*." D.B. 23 ¶ 56 (italics added). They also allege that Mr. Brewer sought to create trial publicity to "prejudice *this case*." D.B. 24. ¶ 59 (italics added). But the only prejudice to the defendants themselves that they even contend they will suffer is if

Mr. Brewer is permitted to simultaneously serve as an advocate and a witness. D.B. 22 ¶ 52 ("A witness-advocate…can "unfairly prejudice the opposing party"); D.B. 22 ¶ 53 ("Defendants will suffer actual prejudice defending against Brewer's tactics as lawyer and a witness").

98. As previously noted, I am in no position to opine about whether Mr. Brewer's testimony will be needed at trial. I have been informed and believe, however, that he has represented that he will not act as an advocate at trial; and, therefore, defendants concern about possible prejudice to them from such testimony would appear to be moot. Defendants have not even alleged that they will be prejudiced if Mr. Brewer is not disqualified for violating any of the other ethical rules they have asserted, and it would appear to be clear that they will not be.

99. By way of example, while defendants contend that Mr. Brewer violated Model Rule 4.2 in the past by indirectly communicating with his brother-in-law or father-in-law, defendants have not even alleged, much less shown, how a decision to deny the motion to disqualify Mr. Brewer for violating Rule 4.2 or its Texas counterpart would redound in prejudice to them. In the same vein, while defendants posit that Mr. Brewer's "personal interest conflict" caused him to run afoul of Rule 1.7, this claim, if true, would mean that Mr. Brewer's ability to represent his client, the NRA, might be limited by his personal interests – in such a situation the prejudice would be to the NRA, not to the moving parties.

100. On the observe side of the coin, while defendants allege, in conclusory fashion, that the NRA would not suffer any "meaningful prejudice" if the counsel who has represented it in this action from the beginning (and in three parallel Virginia actions for as long as two years) is disqualified, because this case is "not yet one year old" [D.B. 23 ¶ 56], it would appear that plaintiffs would not only be prejudiced by losing Mr. Brewer as its counsel, but materially so.

101. As a preliminary matter, it has long been understood that legal practitioners are not fungible; and that, because they are not, the right to be represented by counsel of one's choice is a significant and even fundamental one, which is entitled to great respect. *Richardson-Merrell v. Koller*, 105 S. Ct. 2757, 2767 (1985) (Stevens J., dissenting) ("Everyone must agree that the litigant's freedom to choose his own lawyer in a civil case is a fundamental right"); *In re Gunn*, 2013 Tex. App. LEXIS 12727, at *5-6 (Tex. App.–Hou. [1st Dist.] Oct. 15, 2013) (disqualification "can result in immediate harm by depriving a party of the right to have counsel of its choice"). For this reason, and because separating a client from its chosen attorney is a sanction that can have serious consequences for both client and counsel, it has often been said that a court should not separate a client from its chosen attorney "lightly," "liberally," or "cavalierly." *FDIC v. United States Fire Ins. Co.*, 50 F.3d 1304, 1316 (5th Cir. 1995); *In re ProEducation Int'l, Inc.*, 587 F.3d 296, 300 (5th Cir. 2009) ("[d]epriving a party of the right to be represented by the attorney of [its] choice is a penalty that must not be imposed without careful consideration"); *In re Brady*, 2016 Tex. App. LEXIS 2962, at *4 (Tex. App. – Tyler [12th Dist] Mar. 23, 2016) ("[for many reasons] motions to disqualify should not be granted liberally").

102. Given the importance the law places on a party's right to choose counsel, it could be argued that a disqualification order, by denying a party that choice, is prejudicial in its own right; and, indeed, some courts have denied disqualification motions out of concern about impeding the non-moving party's right to decide who its counsel should be. It has been recognized, however, that disqualification not only separate parties from their chosen counsel, but that it often does so with immediate and measurable effect. *In re Reeder*, 2016 Tex. App. LEXIS 1084, at *3 (Tex. App.–Tyler [12th Dist.] 2016) ("Disqualification of a party's attorney can cause immediate harm by depriving the party of its chosen counsel and by disrupting court

proceedings"). For one thing, while delay and increased expense are the unavoidable byproducts of almost any disqualification order, in some instances ~~a~~ disqualification ~~motion~~ may cause the non-moving party hardship of a more substantial nature. *See, e.g., Nat'l Oilwell Varco, L.P. v. Omron Oilfield & Marine*, 60 F. Supp. 3d 751, 767-768 (W.D. Tex. 2014) ("To disqualify NOV's counsel and have it hire [a new one] would almost certainly result in further delay and inefficient resolution of this lawsuit…the lawyers at [the firm] are singularly familiar with the issues of this case as they have worked this matter since they filed the complaint…To remove these lawyers as counsel would work significant prejudice against NOV"). The non-moving party may endure a particularly onerous hardship in a case where, as here, replacement counsel would have to be secured after the initial counsel has performed substantial legal services over a period of thousands of hours, spanning many months, if not years. *See, e.g., Alexander v. Primerica Holdings,* 822 F. Supp. 1118 (D.N.J. 1993) (defendant's huge economic investment "would be unfairly lost to [the non-moving party if counsel] were not allowed to continue").

103. It bears mentioning, too, that while courts that have been called upon to "balance the prejudice" in deciding motions to disqualify typically focus on the hardship that would befall the client who would lose its counsel, rather than on the attorney or law firm that would be disqualified, in recent years courts have begun to acknowledged that disqualification orders can cause severe, sometimes irreparable damage to an attorney's professional reputation and client relationships, and that these factors – together with counsel's interest in being permitted to practice her profession free of any unnecessary restrictions – are also deserving of the court's consideration. *See, e.g., FDIC v. U.S. Fire Ins. Co.*, 50 F.3d 1304, 1314 (5th Cir. 1995); *P & J Daiquiri Cafe, Inc. v. Andrew K. Knox & Co.*, 2008 U.S. Dist. LEXIS 20775, at *8-9 (E.D. La. 2008) ("[Courts] should take into account the social interests at stake including the right of a

party to its counsel of choice and an attorney's right to freely practice her profession"). *See also One World Foods, Inc. v. Stubb's Austin Rest. Co. LC*, Case No. A-15-CA-1071-SS, 2016 U.S. Dist. LEXIS 147312, at *23-24 (W.D. Tex. Oct. 25, 2016) ("Even if the Court had found an attorney-client relationship existed…, such a relationship would be minimal…Allowing such an encounter to disqualify [the firm] would be an inflexible application of the professional rules, abrogating Defendants' right to counsel of their choice and [the firm]'s right to freely practice…Thus, the Court finds the balance… does not favor disqualifying [the firm]").

104. The possible prejudice that might befall a client if its counsel were to be removed unnecessarily is a factor courts consider in deciding motions to disqualify, but it is not the only one. For one thing, while there is no question that such motions can be properly utilized to draw the court's attention to ethical rule violations, it has long been understood that disqualification motions are not always motivated by high-minded concerns about ethical derelictions on the part of challenged counsel; on the country, such motions have frequently been interposed in bad faith, for tactical reasons wholly unrelated to any legitimate concern the movant might have about the ethical purity of the legal profession. *Openwave Sys. v. Myriad France S.A.S.*, 2011 U.S. Dist. LEXIS 35526, at *15 (N.D. Cal. 2011) ("Too much money is being wasted these days on tactical motions to disqualify"). In order to inhibit the use of disqualification motions for these types of purposes many courts have held or implied that, in deciding whether to grant such a motion, one factor a court can properly consider is whether the motion was "tactical."

105. Many things could motivate a party to file a motion seeking to disqualify an opposing party's attorney, apart from a legitimate concern about counsel's conduct. First and foremost, because a successful disqualification motion, by definition, deprives a client of the counsel of its choice, parties sometimes move to disqualify counsel not so much out of a genuine

concern about how counsel has behaved, as out of a belief that eliminating the services of an adverse attorney may yield a significant litigation advantage. *See In re Am. Air.*, 972 F.2d 605, 613 (5th Cir. 1992) (noting that the alleged facts, if accepted as true, might establish that the moving party's efforts were motivated primarily by a desire to ensure that counsel could not represent its adversary), *cert. denied*, 113 S. Ct. 1262 (1993); *Quicken Loans v. Jolly*, 2008 U.S. Dist. LEXIS 48266, at *5-6 (E.D. Mich. 2008) (disqualification "can work a severe hardship and give the [movant a significant advantage. This is often the motivation for] filing such motions").

106. A concern about disqualification being sought for such a purpose is particularly likely to be voiced in a situation where, as here, the targeted attorney is a highly experienced and formidable advocate, or one who possesses extensive experience that would be difficult to duplicate by successor counsel. *FDIC v. Amundson*, 682 F. Supp. 981, 988-989 (D. Minn. 1988) (we are "in a time when ethics has ceased to be a common guide to virtuous behavior. It is now a sword in hand, to be used to slay a colleague. This kind of ethics does not reflect a heightened awareness of moral responsibility or a means to temper one's zeal for [her] client. It is instead a means to hobble the opposition by driving a spurious wedge between [client and counsel]").

107. In some cases disqualification motions have been filed, in whole or in part, for the purpose of retaliating for similar motions brought against the moving party's counsel. *See Colandrea v. Town of Orangetown*, 490 F. Supp. 2d 342, 353 (S.D.N.Y. 2007) (counsel "states, in a declaration no less, that the reason for his [motion is]…because Defendants indicated that they intended to move to disqualify him"). This is a point that bears keeping in mind because I am informed and believe that, while most of the facts that defendants claim justify filing their motion existed from the outset of the case, no motion was placed on file until after plaintiff's counsel warned defense counsel that the NRA intended to seek to move to disqualify them.

108. It has been recognized, too, that a party who moves to disqualify a lawyer or firm does not necessarily need to prevail on its motion in order to reap an advantage. For one thing, even disqualification motions that are ultimately unsuccessful inevitably stall, if not derail the proceedings, and motions to disqualify have sometimes been filed for that purpose. *In re Leyendecker*, 2012 Tex. App. LEXIS 6581, at *4 (2012) (a "court must strictly adhere to an exacting standard to discourage a party from using the motion as a dilatory tactic").

109. There is widespread agreement that leveling charges of impropriety which, if sustained, would require disqualification of an opposing attorney is not something that should be a standard part of a lawyer's offensive arsenal; to be used routinely, without a good faith belief that the charges are justified. The fact is, moreover – as more than one court has observed – that the rules of professional conduct were not drafted with the intention of providing a windfall to clients who have hired strategic-minded litigators. In fact, the drafters of the applicable ethical edicts warned that when rules that were intended to provide guidance for practitioners are brandished by their adversaries as procedural weapons, the purpose of establishing ethical rules in the first place can be subverted. *Adams v. Reagan*, 791 S.W.2d 284, 291 (Tex. App. 1990).

110. It is also the case that if disqualification motions were routinely granted, without regard to the motives of the moving party, the very rules that were designed to promote public confidence in the legal system and the legal profession may themselves threaten the integrity of the judicial process, and foster disrespect for the legal system as a whole; and, in the end, may wind up diminishing public confidence in the ability of the process to redress serious wrongs. *FDIC v. U.S. Fire Ins. Co.*, 50 F.3d 1304, 1316-1317 (5th Cir. 1995) ("When, for purely strategic purposes, opposing counsel raises the question of disqualification, and subsequently prevails, public confidence in the integrity of the legal system is proportionately diminished").

111. Many judges – believing that strict scrutiny of disqualification motions may be an effective deterrent against improper objectives – have held that, in order to inhibit the misuse of disqualification motions as strategic weapons, as well as to avoid hardships on innocent clients and other unjust results, courts not only may but should – or even must – evaluate such motions carefully and judiciously, with skepticism and extreme caution, if not outright suspicion; considering any evidence which suggests that the motion may have been filed for a strategic aim. *See, e.g., In re Jackson*, 2012 Tex. App. LEXIS 5386, at *4 (2012) ("A trial court should be extremely judicious in considering a disqualification motion because the procedure should not be used tactically to deprive an opposing party of the right to be represented by the lawyer of his or her choosing"); *Buck v. Palmer*, 2010 Tex. App. LEXIS 10082, at *18 (2010) ("[we must] consider any evidence that indicates the motion is being filed…as a dilatory trial tactic").

112. This Court has itself recently pointed out that parties "may use disqualification motions as 'procedural weapons' to advance purely tactical purposes") [*Centerboard Secs., LLC v. Benefuel, Inc.*, CIVIL ACTION NO. 3:15-CV-2611-G, 2016 U.S. Dist. LEXIS 72476, at *3 (N.D. Tex. June 3, 2016), citation omitted], and said that the "court must give careful consideration to motions to disqualify because of the potential for abuse." *Tierra Tech de Mex. SA de CV v. Purvis Equip. Corp.*, CIVIL ACTION NO. 3:15-CV-4044-G, 2016 U.S. Dist. LEXIS 99229, at *3 (N.D. Tex. July 29, 2016). *See also In re Colony Ins. Co.*, 2014 Tex. App. LEXIS 9902, at *2 (Tex. App.–Dallas [5th Dist.] Sept. 2, 2014) ("courts must adhere to exacting standards when considering motions to disqualify so that they are not used as a tactical device.").

113. Many courts have held or implied that, when the moving party's motivation for filing a disqualification motion was not a genuine concern about the ethical issues raised in it, but rather the hope of securing some type of strategic advantage, an otherwise meritorious

motion may be properly denied. But even when a tactical motivation is suspected, establishing the moving party's reasons for seeking disqualification is seldom an uncomplicated task. After all, there are few instances in which a party who files a motion for an improper purpose will candidly attest to that fact. The motive for such a motion must, rather, ordinarily be gleaned from the circumstances under which it was made. *Spears v. Fourth Court of Appeal*, 797 S.W.2d 654, 658 (Tex. 1990) (a motion had "all the appearances of a tactical weapon").

114. A tactical motivation is most likely to be suspect in a situation where the timing of its filing suggests that a motion was made in bad faith, for reasons other than those apparent on the face of the motion; as where the moving party, although long aware of the conduct that gave rise to the disqualification challenge, unreasonably delayed in bringing its motion for a lengthy period of time. *See, e.g., Murray v. Metro. Life Ins. Co.*, 583 F.3d 173, 180 (2d. Cir. 2009) ("Plaintiffs' delay suggests opportunistic…motives"); *Redd v. Shell Oil Co.*, 518 F.2d 311, 315 (10th Cir. 1975) (the motion was "held in reserve" until the most expedient time came along to file it); *Skyy Spirits, LLC v. Rubyy, LLC*, 2009 U.S. Dist. LEXIS 109641, at *12 (N.D. Cal. 2009) ("Rubyy was aware of the conflict [from day one]…This motion is largely a tactical gimmick"); *In re Kvaerner|IHI*, 2010 Tex. App. LEXIS 7710, at *5-6 (2010) ("untimely urging of a disqualification motion lends support to any suspicion that the motion is being used as a" tactic).

115. A court may also suspect that disqualification has been sought for tactical reasons in a situation where the conduct of the moving party, or its counsel, reflects that the motion was not brought out of any sensitivity to ethical concerns. *FDIC v. U.S. Fire Ins. Co.*, 50 F.3d 1304, 1315 (5th Cir. 1995) ("[a] tortured justification for disqualification...premised on a purported possible [conflict] in the future, suggests not so much a conscientious professional concern for the profession and the client of the opposing counsel as a tactic"); *Vinewood Capital, LLC,*

supra, 2010 U.S. Dist. LEXIS 30358, at *22 (N.D. Tex. 2010) (a waiver finding is "appropriate when…the attempt at disqualification appears abusive or is being used as a delaying tactic"). For example, a court may ~~also~~ be inclined to suspect that the decision to file a disqualification motion was prompted by strategic considerations in a situation where, as here, the movant could have sought counsel's disqualification in a related proceeding, but never did. *See Simmons, Inc. v. Pinkerton's, Inc.*, 555 F. Supp. 300, 305 (N.D. Ind. 1983) (noting, "with interest," that no motion to disqualify had been filed in a similar action that was on file in another court).

116. Of course, not every motion to disqualify an attorney or law firm is motivated by the desire to delay the proceedings, eliminate a formidable advocate, or achieve some other strategic objective; and not every court that has been presented with a motion to disqualify has found that it was, in fact, tactically motivated. *Hill v. Hunt*, 2008 U.S. Dist. LEXIS 68925, at *54 (N.D. Tex. 2008) (finding insufficient evidence that defendant's motion was tactical). *Cf. Nat'l Oilwell Varco, L.P.*, supra, 60 F. Supp. 3d at 771 ("In the Court's view, this motion was primarily motivated by tactics"). A strategic motive is especially unlikely to be found in a situation where the motion was filed promptly upon learning of the grounds therefore, or where it is not apparent that the moving party would have anything to gain by counsel's disqualification.

117. But here the motion was not filed promptly upon learning of the grounds alleged in support of the motion [D.B. 23 ¶ 56]; it was supported by little, if any, relevant, admissible evidence; and defendants would have everything to gain were they to prevail on their motion. Not only would they succeed in depriving plaintiff of the counsel of the services of a tenacious litigator who has been actively representing the NRA in this litigation from the beginning, and in parallel litigation for two years; but they would deal an economic and reputational blow to an

attorney and firm with whom, by defendants' own account, they have long had a contentious relationship, and whom they view to be a direct business "competitor."

118. In my opinion, moreover, after carefully reviewing defendants' stated reasons for seeking disqualification, it is difficult to view their justification for filing their motion to be anything other than "tortured." Defendants, having failed to acknowledge that they have the burden of proof on their motion or what that burden entails, filed a motion alleging the violation of 13 different ethical rules, some cited only in footnotes, without providing any factual support for many of their claims; and, in some instances, without citing any legal authority that would warrant the court in affording the relief they request. Defendants have also urged the court to disqualify Mr. Brewer for violating ethical rules without considering any of the factors that courts have been exhorted to "sift" and "balance" before deciding whether disqualification is an appropriate remedy for a rule violation – all the while failing to explain why, if Mr. Brewer did violate 13 ethical rules, it took the defendants eight months to get their motion on file, and only then after learning that the NRA was planning to move for their law firm's disqualification.

119. One final, and to my mind not insignificant cause for concern about defendants' motives for filing their motion stems from the fact that, although the applicable conflict of interest rules exist for the benefit of an attorneys' clients and former clients, defendants never had an attorney-client relationship with the Brewer firm: the "conflict" they profess concern about, if it exists, is between the Brewer firm and defendants' litigation adversary. *See AMEC Constr. Mgmt. v. FFIC Risk Mgmt.*, 2017 U.S. Dist. LEXIS 133698, at *6-7 (M.D. La. Aug. 21, 2017) ("While originally it appeared that FFIC's motivation in requesting disqualification was genuine…its motivations are now more suspect. FFIC is not seeking disqualification based on its own interests but rather, it is seeking disqualification to protect AMEC (its adversary) even

though AMEC itself has waived any potential conflict…where one party seeks to disqualify opposing party's counsel based on a conflict between the opposing party and its own counsel, the Fifth Circuit has directed districts courts to proceed with caution").

I. Defendants Established no Basis for Disqualifying the Firm

120. Defendants punctuated the "conflict violation" section of their brief by opining that, because "Brewer can no longer represent the NRA, neither can his firm." D.B. 19 ¶ 44. In my opinion this claim is not only false but troubling, for two reasons. First, defendants did not even cite the Model Rule that governs the subject of vicarious disqualification, Rule 1.10 – much less attempt to explain why they think that if Mr. Brewer is disqualified pursuant to that rule his firm must be also. Defendants have also misstated the rule they did cite, Rule 1.06(f).

121. The "imputed" or "vicarious" disqualification rule first appeared in an ethics code when the ABA adopted the Model Code in 1970. DR 5-105 was categorical in stating that "if a lawyer is required to decline employment or withdraw from employment under a Disciplinary Rule, no partner, or associate, or any other lawyer affiliated with him or his firm may accept or continue such employment." Model Code of Prof'l Resp., DR 5-105(D). It was recognized, however that the rule – if read literally – would have mandated firm-wide disqualification not only when a lawyer at the firm labored under a conflict of interest, but whenever any of its attorneys was precluded from handling a representation for any reason; and, even while the Code was in effect, some courts found the rule to be too harsh and declined to strictly apply it.

122. In 1983 D.R. 5-105(D) was replaced by the Model Rule 1.10. The new rule did not mandate firm-wide disqualification every time a lawyer was precluded from representing a client – it applied only when an attorney would be prohibited from undertaken representation by Model Rules 1.7 and 1.9. M.R.P.C., Rule 1.10(a) (1983). In 2002 other amendments to Rule

1.10 were approved which further narrowed the circumstances in which an individual lawyer's disqualification would be imputed to her firm; and, in 2009, the rule was amended again to allow firms to avert conflict imputation in some situations. The current version of the rule provides, in pertinent part, that while "lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9." But such representation is expressly permitted in certain circumstances – including when the disqualifying conflicts was "based on a personal interest of the disqualified lawyer," and does not "present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm." M.R.C.P., Rule 1.10(a)(1) (current).

123. In this case the conflict that has been alleged to exist is based on a "personal interest" of Mr. Brewer; in fact, defendants captioned the "conflict violation" section of their brief: "Brewer's personal interests violate the conflict-of-interest rules." D.B. 17. Defendants have not shown – or even clearly alleged – how Mr. Brewer's "personal interests" present a "significant risk of materially limiting the representation of the client by the remaining lawyers in the firm." Defendants have not shown, in other words, that Mr. Brewer's "personal interest" conflict warrants disqualifying his firm in accordance with the dictates of Model Rule 1.10.

124. In asserting that the Brewer Firm should be disqualified by "imputation" defendants – instead of explaining how disqualification is warranted by M.R. 1.10 – relied on Rule 1.06(f) of the TDRPC. This rule materially differs from Rule 1.10; and, for reasons I have already explained, I am assuming that if the court is called upon to choose between inconsistent Texas and Model Rules it is the latter that it will apply. But assuming arguendo that Rule 1.06(f) applies, defendants have interpreted the rule in a rather curious way.

125. Defendants, whose only citation to this Rule was in a footnote, wrote: "TEX. R. 1.06(f) (lawyer disqualification imputed to firm)". D.B. 19 n.114. Rule 1.06(f) does not say, however, that a lawyer's "disqualification" is imputed to his firm. In fact, unlike the drafters of Model Rule 1.10, the drafters of Rule 1.06 did not use the word "disqualification" at all. What the rule actually says is that, if a lawyer "would be prohibited by this Rule from engaging in particular conduct, no other lawyer while a member or associated with that lawyer's firm may engage in that conduct." On its face, in other words, the rule does not impute "disqualification" from one lawyer to another on the basis of the first lawyer's conflict; what it does – and all it does – is say that conduct that one lawyer is not permitted to engage in is forbidden to all.

126. The fact is, moreover, that while defendants point out that in "the Northern District of Texas, a judge may discipline a lawyer for…conduct that violates the Texas Disciplinary Rules of Professional Conduct" [D.B. 16, ¶, citation omitted], if the court's goal is to "discipline" Mr. Brewer for his "personal interest" conflict, disqualification of Mr. Brewer himself performs that function. Defendants have not shown that there is any justification for "disciplining" any of his affiliated attorneys – much less for punishing the NRA – on the basis of a personal conflict they do not have. There is, moreover, an eminently practical reason for this.

127. In what is by far the most common "conflict" scenario the need for "imputed" disqualification is predicated upon a concern about the possibility that confidential information that a "personally prohibited" lawyer may possess about an adverse party could be, even inadvertently, disseminated to other members of his firm. In such a case the applicable ethical rules typically call for "imputed disqualification" – at least where no "screening" has been set up between the "tainted" attorney and the rest of the firm – for the purpose of insuring the moving party that its confidential information will not be improperly disseminated or adversely used.

128. Defendants say that any "notion that Brewer could be walled off from the NRA litigation is nonsensical given his leadership of his firm" [D.B. 19 ¶ 44], but no concern about protecting confidential information has been alleged here. While it might make sense to "wall off" an attorney from the rest of his firm to avoid the possibility that his affiliates could become "tainted" by the presumed receipt of confidences he possesses, in this case disqualification is being sought on the basis of Mr. Brewer's relationships with Mr. McQueen, not on the basis of any claim that he improperly acquired client-confidential information. While one of his affiliates could have been "tainted" if Mr. Brewer had confidential information, it is probably safe to say that, if he is not "walled off," no firm lawyer is going to become one of McQueen's relatives.

129. As far as the possibility of disqualifying the Brewer firm as a consequence of a finding that Mr. Brewer ran afoul of other ethical rules, Model Rule 1.10 only applies in certain situations where a conflict has arisen for one or more attorneys pursuant to the current client conflict rule (Model Rule 1.7), or the former client conflict rule (Model Rule 1.9). The drafters of the Model Rules did not contemplate that the violation of other rules would result in "imputed disqualification;" and, to defendants' credit, they have not alleged that, if Mr. Brewer were to be disqualified in accordance with most of the other rules they say he has violated, his firm should be removed as well. They did, however, make such a claim about one other rule – they contend that, if Mr. Brewer is disqualified in accordance with the "lawyer witness rule," "his firm must be as well." D.B. 23 ¶ 53. In my opinion, defendants are wrong about that.

130. As previously mentioned, pursuant to DR 5-105(D) of the Model Code, if a lawyer was required to decline employment or withdraw from employment under a Disciplinary Rule, no partner, or associate, or any other lawyer affiliated with him or his firm could accept or continue such employment. Because the rule was generally applied to the advocate-witness

situation, as to any other, many Code-era courts held that, if a lawyer in a firm was disqualified because of the advocate-witness rule, her entire firm would be disqualified as well. Even when the Model Code was in force some courts thought that a per se application of the vicarious disqualification rule, when applied in the advocate-witness context, swept too broadly; and, when the Model Rules were adopted in 1983 those suggestions were taken to heart.

131. Defendants, having dismissed Rule 3.7 as being "substantially similar" to Rule 3.08, and having neglected to cite Model Rule 1.10 at all, apparently failed to take heed of the fact that, under the Model Rules, even if the testimony of one of a law firm's attorneys will be needed at trial, and even if no exception to Model Rule 3.7(a) applies – and, as a result, such a lawyer will be precluded from serving as an advocate at trial – the Model Rule contains a second prong, Rule 3.7(b), which expressly provides that a "lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9." Model Rules of Prof'l Conduct, Rule 3.7(b). Unlike its Model Code counterpart, in other words, Rule 3.7 does not contemplate the automatic disqualification of a testifying advocate's firm. *See, e.g., Gilbert v. Rogina Invest. Corp.*, 991 So. 2d 681, 2008 Ala. LEXIS 63, at *22 (2008) ("DR 5-102 may have contemplated the recusal of an entire firm…no such requirement is found in Rule 3.7").

132. Since Model Rule 3.7 went into effect most of the federal courts that have had an occasion to consider the matter – mindful of the drastic nature of the disqualification remedy, as well as the rule change that expressly permits firms to remain in a case despite the need for a firm member to testify – have declined to override the nonmoving client's right to select counsel of choice by disqualifying an entire firm in this situation. *See, e.g., FDIC v. United States Fire Ins. Co.*, 50 F.3d 1304, 1316-1317 (5th Cir. 1995) (affirming an order insofar as it disqualified a

lawyer, but vacating the order disqualifying the firm); *Iguana, LLC v. Lanham*, 2008 U.S. Dist. LEXIS 102661, at *32-33 (M.D. Ga. 2008) ("Rule 3.7(b) does not recognize imputed disqualification"); *Borom v. Town of Merrillville*, 2007 U.S. Dist. LEXIS 45176, at *9-14 (N.D. Ind. 2007) ("the plaintiffs…provide no rationale to overcome Rule 3.7(b)"); *Occidental Hotels Mgmt. B.V. v. Westbrook Allegro L.L.C.*, 440 F. Supp. 2d 303, 314 (S.D.N.Y. 2006) (the rule expressly permits a firm to "'continue representation of a client even if one [firm attorney must] testify'") (citation omitted). Texas state courts have been in accord. *In re Bahn*, 13 S.W.3d 865, 873 (Tex. App. 2000) ("the testifying attorney's law firm can continue to represent the client even though the attorney will testify, as long as the client gives informed consent").

133. In this case, even if Mr. Brewer were to be disqualified from acting as the NRA's advocate at trial, nothing in the applicable ethical rules prevents the Brewer Firm from trying the case in his absence. I am informed and believe, moreover, that the NRA has been fully informed of the possibility that Mr. Brewer may be called to testify and has given its informed consent to allow the firm to proceed as its advocate. In this situation, in my opinion, the advocate-witness rule supplies no basis for imputing disqualification from Mr. Brewer to his firm.

J. No Need for Disqualification has been Shown Absent any Rule Violation

134. The gravamen of defendants' claim is that Mr. Brewer and his firm engaged in "actual impropriety," purportedly by violating certain ethical rules – not that counsel should be removed even if no rules were transgressed, and no impropriety occurred in fact. *See* D.B. 25 ("Impropriety occurred, raising public suspicion"); D.B. 25, ¶ 61 ("This brief describes the improprieties that have already occurred"). In one instance, however, defendants said "Brewer should have avoided the appearance of – rather than blatantly engage in – impropriety." D.B. 22, ¶ 55. Since this is so, and because one case they cited mentioned the "appearance of impropriety

in general" [D.B. 25, ¶ 60], it may be prudent to explain why, in my view, disqualification of Mr. Brewer – much less his firm – is not warranted on the basis of any untoward "appearance."

135. As the Court knows, federal judges are not permitted to engage in conduct that would give even an "appearance of impropriety." At one time attorneys operated under the same constraint. As a result, in a situation where a party complained about a lawyer's conduct the absence of demonstrable wrongdoing was not necessarily enough to avoid being disqualified. Prior to 1970 the "appearance" doctrine was based solely on case law but, in that year, the concept was incorporated into Canon 9 of the Model Code. *See United States v. Trafficante*, 328 F.2d 117, 120 (5th Cir. 1964). During the period in which the Code was in effect, the Fifth Circuit pointed out that Canon 9 reflected the bar's concern that some conduct that was ethical in fact might nevertheless appear to be unethical to the public, thereby eroding public confidence in the profession. *Woods v. Covington County Bank*, 537 F.2d 804, 813 (5th Cir. 1976).

136. Following the adoption of Canon 9 several courts held or implied that, where counsel's conduct was such as to give an appearance of impropriety, but she declined to step away from the case, the court had the power to disqualify her – not for acting improperly, but for failing to avoid the appearance of doing so. Even under Canon 9, however, attorneys were not required to abstain from representing clients in response to baseless charges of possibly improper appearances. *Church of Scientology v. McLean*, 615 F.2d 691, 692 (5th Cir. 1980). Almost from the moment the Code was adopted, moreover, courts began to criticize Canon 9 and caution against its overuse as an independent basis for disqualifying lawyers and firms.

137. One problem with the appearance rubric was that, while some judges professed to being able to readily discern whether counsel had engaged in conduct that gave an improper appearance – such as a federal judge in Utah who said, in a decision in a 1982 case, that "like

pornography," courts and lawyers know an appearance of impropriety "when they see it" [*Bodily v. Intermtn. Health Care Corp.*, 649 F. Supp. 468, 477 (D. Utah 1986)] – others complained that the appearance standard was imprecise, nebulous and vague; and, as a result, that it provided an exceedingly poor compass for guiding attorneys in determining whether they had traversed the boundary of proper ethical conduct. *See e.g., People v. Lopez*, 155 Cal. App. 3d 813, 824 (1984) (noting that an appearance is a "malleable factor," that has the "chameleon like quality of reflecting the subjective views of the percipient;" and that decision-making "should not turn on the psychological or philosophical perceptions of those involved").

138. The appearance standard was also subject to criticism on the ground that Canon 9, if applied literally, could "swallow up" everything else in the Code. Specifically, a concern was expressed about the possibility that a court might employ the appearance Canon as a sort of "catchall" of "failsafe" basis for ordering disqualification whenever it intuitively felt that something was amiss – even if no actual misconduct on the part of challenged counsel had been shown to exist. It was noted, too, that many members of the public simply do not understand the duties of counsel; and, because they do not, disqualification for appearances could tarnish a lawyer's professional reputation, impose hardship on the non-moving client, and increase the likelihood of public suspicion of judges and the bar. *Woods*, supra, 537 F.2d at 813. For these and other reasons courts began to caution that, while there may be times when Canon 9 might be applied, it should not be used "promiscuously" for strategic advantage, in cases where the facts did not fit within the rubric of more specific ethical rules. *Woods*, supra, 537 F.2d. at 819 (courts cannot permit Canon 9 to be "manipulated for strategic advantage on the account of an impropriety which exists only in the minds of imaginative lawyers").

139. Even when the Model Code was in effect some courts expressed misgivings about the possibility that counsel might be disqualified because of untoward appearances alone. In its 1976 case decision in *Woods*, for example, the Fifth Circuit pointed out that the more often a litigant is disadvantaged by the unnecessary disqualification of its lawyer pursuant to the appearance doctrine, the "greater the likelihood of public suspicion of both the bar and the judiciary." Id. at 809-810. To address this concern, as well the increasing use of disqualification motions for strategic purposes, the Court held that while a party who moves to disqualify an attorney or law firm need not prove that there was actual wrongdoing by challenged counsel, the movant must show at least a "reasonable possibility that some specifically identifiable impropriety had actually occurred." Even then, a lawyer was not to be disqualified unless the movant could show that the likelihood of public suspicion "outweighed whatever social interests would be served by counsel's continued participation." *Woods*, 537 F.2d at 812-813 & n.12.

140. By the early 1980's criticism of the appearance standard had become so widespread that, as many courts have noted, the drafters of the Model Rules of Professional Conduct made a conscious decision not to include a provision analogous to Canon 9. This determination left the continuing viability of the appearance standard in doubt. *See Vinewood Capital, LLC v. Dar Al-Maal Al-Islami Trust*, 2010 U.S. Dist. LEXIS 30358, at *21 (N.D. Tex. 2010). *Cf. Glover v. Libman*, 578 F. Supp. 748, 763-764 (N.D. Ga. 1983) ("the Model Rules fail to have a counterpart to [Canon 9]. Perhaps the ABA determined that the 'appearance of impropriety' standard was unworkable or too vague to serve as a guide for attorneys or as a policy consideration for judicial decisions. Within the context of vicarious disqualification, a Comment provides that: 'This rubric [appearance of impropriety] has a two-fold problem. First, the appearance of impropriety can be taken to include any new client-lawyer relationship that

might make a former client feel anxious. If that meaning were adopted, disqualification would become little more than a question of subjective judgment by the former client. Second, since 'impropriety' is undefined, the term 'appearance of impropriety' is question-begging"), citing Comment to Model Rule 1.10. *Cf. U.S. v. Aleman*, 2004 WL 1834602, at *2 (W.D. Tex. 2004) (finding the fact that the ABA had eliminated the appearance standard to be "noteworthy").

141. Even after the Model Rules were adopted some courts in this Circuit have continued to advert to the need for attorneys to avoid untoward appearances; however, courts in many jurisdictions have discerned that the "trend is now away from" disqualifying attorneys on "appearance of impropriety" grounds. In any event, the Fifth Circuit has itself pointed out that, "[while we] have held that application of the disqualification rule requires a balancing of the likelihood of public suspicion against a party's right to counsel of choice..., rather than indiscriminately gutting the right to counsel of one's choice, we have held that disqualification is unjustified without at least a reasonable possibility that *some identifiable impropriety* actually occurred." *FDIC v. United States Fire Ins. Co.*, supra, 50 F.3d at 1316 (italics added). In this case, in my opinion, defendants have not even come close to making that showing.

I declare under penalty of perjury under the laws of the United States and the State of California that the foregoing is true and correct.

Executed on this 4th day of May, 2020, in Berkeley, California

Richard E. Flamm, Esq.

4831-8295-0587, v. 4

EXHIBIT 52

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

NATIONAL RIFLE ASSOCIATION OF AMERICA,	§	
Plaintiff and Counter-Defendant,	§	
and	§	
WAYNE LAPIERRE,	§	
Third-Party Defendant,	§	
v.	§	**Civil Action No. 3:19-cv-02074-G**
ACKERMAN MCQUEEN, INC.,	§	
Defendant and Counter-Plaintiff,	§	
and	§	
MERCURY GROUP, INC., HENRY MARTIN, WILLIAM WINKLER, MELANIE MONTGOMERY, and JESSE GREENBERG,	§	
Defendants.	§	

DECLARATION OF CRAIG SPRAY

My name is Craig Spray, and I declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that the following statements are true and correct.

1. I am over twenty-one years old and am fully competent to make this declaration. Unless otherwise noted, I have personal knowledge of all matters stated herein. I submit this declaration in support of the NRA's Opposition to Defendants' Motion to Disqualify Plaintiff's Counsel (William A. Brewer III ("Brewer") and Brewer, Attorneys & Counselors ("BAC")).

2. I am the Treasurer and Chief Financial Officer of the National Rifle Association of America ("NRA"). I joined the NRA on March 15, 2018 as Chief Financial Officer, and on September 13, 2018, was also elected Treasurer. Thus, during all times relevant to the issues herein, I was employed by the NRA as the Chief Financial Officer.

3. Prior to working at the NRA, I served as Senior Vice President and Chief Financial Officer of Knoll Inc., a publicly traded home and office products company with more than $1 billion in annual sales.

4. As Treasurer and Chief Financial Officer, I oversee all financial actions of the NRA and am responsible for managing the finance and accounting departments. In this capacity, I ensure that the company's financial reports are accurate, measured against budgets for the year and completed in a timely manner.

5. Before spending any time with Bill Brewer, I personally knew that executives, accounting personnel and Board members expressed serious concerns about Ackerman McQueen ("AMc") during 2018. Among those concerns were the integrity of its billing practices, the utility of many of its services and the direction of its messaging for the NRA. With that background and given the sheer size of its billing – approximately $40 million that year – I was anxious to meet the leaders at AMc. My first in-person meeting with AMc occurred in June 2018 in Dallas, Texas at AMC's offices. The purpose of the meeting was general relationship building, and I wanted to understand what AMc did for the NRA, as AMc was the largest vendor for the NRA at the time. Unfortunately, when I attempted to learn more about plans for the 24-hour digital platform run by AMc, NRATV, I apparently touched a raw nerve in Revan McQueen. Specifically, when I asked how many unique visitors were measured on various live programs on NRATV, Revan became extremely agitated, told me I did not know what I was talking about, said that questions about

"unique visitors" are a "false narrative", and summarily walked out of the meeting for a period of time. For the balance of the day, I completed interviews with other executives of AMc.

6. When I flew back to the Northeast the next day and exited the aircraft, I was alarmed by several voicemails on my phone stating that Ackerman was demanding I be fired because I wasn't the "right guy for the job". Later, I came to understand that the NRA was attempting to ascertain and monetize the NRATV platform and among its concerns was the significant expense invoiced to the NRA and the NRA's inability to receive clarity on the platform's unique viewership.

7. A few months later on October 11, 2018, Wayne LaPierre and I visited AMc at its offices in Dallas, TX to identify ways to reduce costs in the fourth quarter of 2018 and understand how those savings might be applied to the 2019 budget.

8. I have read Revan McQueen's declaration filed in support of AMc's Motion to Disqualify NRA's Counsel. His version of the events that took place at this meeting on October 11, 2018, are grossly inaccurate.

9. What occurred on October 11, 2018 was one of the least professional meetings of my career. Wayne and I had travelled to AMc's office to understand what services were being provided, what services we required, and what the services would cost. What ensued was an epithet-filled tirade by Revan and Angus McQueen and other members of the AMc team. AMc repeatedly acted as if they were enraged by our desire to cut their approximately $40 million a year budget. AMc's short-sighted and entitled position that the NRA's need to make budget cuts was tantamount to "taking" money from them rang hollow in my ears. I remember trying to explain to them that other vendors provide support for membership, marketing and legal advice – it was only in this regard that questions about what the NRA was spending on legal fees arose.

10. Contrary to Revan's testimony, BAC legal fees and representation of the NRA were not the focus of the meeting; the focus. As mentioned earlier was on AMc-related services and costs. AMc seemed to believe that any fees paid to other vendors were an unwise expenditure if AMc received less than $40 million per year. At one point, I remember trying to explain that BAC's services were in no way at odds with AMc's services. This wasn't a competition. Our efforts to meet with Revan and Angus were to discuss a prudent budget for the NRA, and I recall telling them that "if you want to provide other services, we have no objections to your doing so; we simply need to discuss it as part of our larger 2019 budget planning for the entire business." At the end, Angus and Revan oddly demanded that Wayne and I return all paper copies (as well as all of my notes taken during the meeting) of the reduced services we discussed during the meeting.

11. Never in my entire career as a finance executive have I dealt with business partners that acted in such an unprofessional manner. Finally, Revan falsely states that Wayne and I agreed with him and Angus that Brewer's conduct towards AMc was "inappropriate and aggressive". Wayne and I made no such statements.

12. I declare under penalty of perjury that the foregoing is true and correct.

Executed this 4th day of ~~April~~ May 2020.

Craig Spray

EXHIBIT 53

Exhibit 53- AMc Waiver Chart

Allegation Made By AMc	Evidentiary Support for When AMc First Knew of Allegation	Time Period of AMc Awareness
Brewer was responsible for faking the AMc audits and document demands.[1]	In a letter dated March 12, 2019, from Jay Madrid of Dorsey, AMc's counsel, to John Frazer, Mr. Madrid writes: "Over the past few weeks, it has become clear that Brewer has been relying upon information provided by NRA persons and entities, including the FRA firm and you, to interact with and conduct reviews of AMc. As I have advised NRA in the past, AMc has encountered a growing number of disputes with demands made and positions taken by the NRA. These disputes have coincided with the emergence of the Brewer firm as the NRA's lead outside counsel and, it appears, its official spokesman."[2]	**1 year, 18 days**
Brewer carried out the false and defamatory narrative that AMc and Colonel North attempted to extort Wayne LaPierre.[3]	In a letter dated April 25, 2019, from Wayne LaPierre to the NRA Board of Directors, Mr. LaPierre writes: "Yesterday evening, I was forced to confront one of those defining choices – styled, in the parlance of extortionists, as an offer I couldn't refuse. I refused it. Delivered by a member of our Board on behalf of his employer, the exhortation was simple: resign or there will be destructive allegations made against me and the NRA. Alarmed and disgusted, I refused the offer. This letter explains why."[4] A Wall Street Journal Article, published April 26, 2019, states that: "A spokesman for Ackerman McQueen said it would have no comment" on Mr. LaPierre's letter dated April 25, 2019, to the Board.[5]	**11 months, 4 days**

[1] *See* ECF 105 at ¶ 43.
[2] *See* Ex. 10 to the Collins Decl.
[3] *See* ECF 105 at ¶ 43.
[4] *See* Ex. 13 to the Collins Decl.
[5] Mark Maremont, *NRA's Wayne LaPierre Says He Is Being Extorted, Pressured to Resign*, dated Apr. 26, 2019, attached as Exhibit 14 to the Collins Decl.

Exhibit 53- AMc Waiver Chart

Brewer had a multi-decade, animus-filled family relationship with the owners of AMc.[6]	In an AMc public statement made on April 15, 2019, AMc states that: "Months ago, legal counsel informed the NRA that "Mr. Brewer himself has an irreconcilable conflict of interest. Mr. Brewer is the son-in-law of Angus McQueen and brother-in-law of Ackerman McQueen's CEO, Revan McQueen. Mr. Brewer has demonstrated, in words and deeds, his animus for Ackerman McQueen and these family members and that animus pervades the Brewer firm's dealings with Ackerman McQueen, whether dealing directly with Ackerman McQueen or through other members of his firm."[7]	**11 months, 15 days**
BAC is a business competitor of AMc in the public-relations market.[8]	In AMc's Counterclaim, dated May 23, 2019, in the Virginia Action, AMc states that: "The NRA's Executive Vice President and long-time leader Wayne LaPierre, enabled by his chosen attorney, William Brewer of William Brewer Associates and Counselors, has set the NRA on a course to eliminate AMc as the primary public relations vendor to the NRA."[9]	**10 months, 7 days**
Brewer created the fallacy that AMc was leaking information.[10]	In AMc's Counterclaim, dated May 23, 2019, in the Virginia Action AMc states that: "The NRA's decision to work with Brewer to release proprietary information gained from AMc to the New York Times is a breach of the NRA's implied covenant of good faith and fair dealing."[11]	**10 months, 7 days**
Brewer filed unauthorized lawsuits when the NRA was seeking to keep the peace with AMc.[12]	In AMc's Counterclaim, dated May 23, 2019, in the Virginia Action, AMc states that: "Upon information and belief, the NRA Board was not aware of the filing of this Lawsuit prior to it being filed and never approved or authorized the filing of this Lawsuit."[13]	**10 months, 7 days**

[6] *See* ECF 105 at ¶ 1.
[7] *See* Ex. 12 to the Collins Decl.
[8] ECF 105 at ¶ 1.
[9] *See* ¶ 11 of Ex. 57 to the Collins Decl.
[10] *See* ECF 105 at ¶ 43.
[11] *See* ¶ 82 of Ex. 57 to the Collins Decl.
[12] *See* ECF 105 at ¶ 43.
[13] *See* ¶ 3 of Ex. 57 to the Collins Decl.

Brewer caused AMc's Services Agreement with the NRA to be terminated.[14]	In AMc's Counterclaim, dated May 23, 2019, in the Virginia Action, AMc alleges that: "Defendants aver as a new matter, specifically requiring response, that the NRA's true purpose underlying this Lawsuit is to artificially construct a false claim for a technical breach of the Services Agreement that they erroneously believe will allow them to terminate the Services Agreement, move all of the Defendants' contractual services to a competing public relations unit, and not pay Defendants the required multi-million dollar termination/severance payment obligated under the Services Agreement."[15]	**10 months, 7 days**
Brewer is a necessary witness in this case.[16]	In AMc's Opposition to Plaintiff's Motion for *Pro Hac Vice* Admission from the *NRA v. AMc* Virginia Action, dated June 24, 2019, AMc states that: "Brewer Attorneys & Counselors and/or their founding partner, William A. Brewer III, were identified 26 times in the Defendants' Counterclaim in the first *NRA v. AMc* case and 23 times in the Defendants' Counterclaim in the second NRA v. AMc case. The attorneys seeking admission pro hac vice are very likely to become witnesses in the case."[17] Also, in the Transcript of Hearing, dated June 26, 2019, counsel for AMc states that: "Your Honor, it's not our position that Mr. Brewer is going to be the only witness in that firm, but that the other partners in the firm are also going to be witnesses. They're intricately linked."[18]	**9 months, 6 days**
Brewer used family relationships and prioritized his own personal financial interests, in violation of numerous ethical rules.[19]	In AMc's Opposition to Plaintiff's Motion for *Pro Hac Vice* Admission from the *NRA v. AMc* Virginia Action, dated June 24, 2019, AMc states that: "Mr. Brewer has spearheaded the litigation tactics of the NRA in the two suits against AMc in a	**9 months, 6 days**

[14] *See* ECF 105 at ¶ 43.
[15] *See* pp. 3-4 of Ex. 57 to the Collins Decl.
[16] *See* ECF 105 at ¶ 48.
[17] *See* ¶ 1 of Ex. 19 to the Collins Decl.
[18] *See* pp. 11-12 of Ex. 21 to the Collins Decl.
[19] *See* ECF 105 at ¶ 41.

	way that abuses the process of this Court to gain a public relations advantage, smear AMc, and intimidate witnesses supportive of AMc."[20] Also, in the Transcript of Hearing, dated June 26, 2019, counsel for AMc states that: "But it's not just that they are witnesses in this case. They financially benefit. They have an in-house public relations unit in the firm that is siphoning away business from Ackerman McQueen for the NRA work…"[21]	
BAC was a client of AMc as recently as December of 2019.[22]	In a Transcript of Hearing, dated June 26, 2019, from the *NRA v. AMc* Virginia Action, counsel for AMc states that: "Your Honor, my client is reminding me that the Brewer law firm is [actually] a client of Ackerman McQueen and has been a long-term client of the firm."[23]	**9 months, 4 days**

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[20] *See* p. 4 of Ex. 19 to the Collins Decl.
[21] *See* p. 15 of Ex. 21 of the Collins Decl.
[22] *See* ECF 105 at ¶ 2.
[23] *See* p. 15 of Ex. 21 to the Collins Decl.