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**CONFLICTS OF INTEREST,
DISQUALIFICATION RISKS, AND
ATTORNEY-CLIENT PRIVILEGE CONSIDERATIONS
IN LIMITED LIABILITY COMPANY
MEMBER DISPUTES**

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Suits by limited liability company (“LLC”) members individually or derivatively against fellow members involving the business or activities of the company can raise complicated conflict-of-interest concerns, disqualification risks, and attorney-client privilege issues.

Sections 101.451-101.463 of the Texas Business Organizations Code govern derivative proceedings for LLCs. Together, these sections generally provide that an LLC member may bring a derivative proceeding: (1) if the member was a member of the LLC at the time of the act or omission complained of (or became a member by operation of law originating from a person that was a member at the time); and (2) the member fairly and adequately represents the interests of the LLC in enforcing the right of the LLC. TEX. BUS. ORGS. CODE ANN. § 101.452(a). In addition to derivative lawsuits under the Texas Business Organizations Code, LLC members can bring direct lawsuits for harm to them individually.

May counsel for LLC subsequently represent the then-controlling members in a derivative action? Must the entity engage independent counsel to represent the business itself? Must a waiver of any conflict or approval of permissive indemnification be made by a majority of disinterested members? Does representation of the LLC impose duties on counsel to the LLC’s individual members? May a lawyer represent both the LLC and individual members in a dispute among them where there is a history of the lawyer representing the LLC and historically advising the members about their interests, but litigation later ensues between the members and the company?

Details of the conflict-of-interest concerns, disqualification risks, and attorney-client privilege complications related to these lawsuits are discussed below.

I. Conflict considerations in connection with disputes among LLC members.

“A lawyer owes his current litigation client a duty of zealous advocacy . . . Indeed, an attorney ‘should not put himself in a position where, even unconsciously, he will be tempted to “soft pedal” his zeal in furthering the interests of one client in order to avoid an obvious clash with those of another.’” *Selby v. Revlon Consumer Products Corp.*, 6 F. Supp. 2d 577, 581 n.5 (N.D. Tex. 1997) (quoting ABA Comm. on Ethics and Professional Responsibility, Formal Op. 92-367 (1992)). With disputes among LLC members including derivative lawsuits on behalf of the LLC, issues of dual representation arise and care should be taken to examine conflict-of-interest issues. Conflict-of-interest concerns arise in disputes among LLC members in two respects. The first relates to an attorney’s professional obligations, governed by the Texas Disciplinary Rules of Professional Conduct. The second relates to the disqualification of an attorney representing parties in such a dispute based on conflicts of interest. Each of these potential concerns is addressed in detail below.

A. *Texas Disciplinary Rules of Professional Conduct*

The Texas Disciplinary Rules of Professional Conduct govern the conduct and professional responsibilities of lawyers admitted to practice in the State of Texas. TEX. DISCIPLINARY RULES PROF’L CONDUCT R.8.05(a). A violation of the Rules can subject a lawyer to discipline for misconduct. *Id.* R.8.04(a). Rule 1.12 addresses the unique nature of an entity as a client. *See id.* R.1.12. “A lawyer employed or retained by an organization

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