

## ETHICS OPINION 538

## Questions Presented

Is a lawyer, who is the newly elected district attorney, prohibited from prosecuting a motion seeking to revoke the probation of a former client in a case where the lawyer served as defense counsel for the former client in the original proceeding?

Is a lawyer, who is the newly elected district attorney, prohibited from prosecuting a former client in a new criminal proceeding?

If not so prohibited, is the lawyer, as the newly elected district attorney, prohibited from offering in evidence a prior conviction in which the lawyer was defense counsel in the prior proceeding for purposes of:

1. impeachment of the former client under Tex. R. Evid. 609; or
2. showing character of the former client under Tex. R. Evid. 404(b); or
3. punishment evidence under Tex. Code Crim. Proc. Art. 37.07 § 3(a)?

## Statement of Facts

For the past twelve years, a lawyer, as a duly appointed state public defender, has defended indigent persons in a myriad of state felony, misdemeanor, and juvenile criminal offenses in a certain judicial district. Now the lawyer has been elected district attorney for that judicial district, and will be responsible for the prosecution of all persons in felony criminal cases in that district. It must be assumed that the lawyer, as the newly elected district attorney, will be required to prosecute former clients in new criminal proceedings as well as prosecute former clients in probation revocation cases where the lawyer was the defense counsel in the original proceeding.

## Discussion

A lawyer licensed or specially admitted in Texas and representing a governmental agency in the capacity of, for example, a state or federal prosecutor, is subject to the Texas Disciplinary Rules of Professional Conduct (the "Rules"), including adherence to the protection afforded former clients in Rule 1.09. See Comment 2, Rule 1.10.

Rule 1.09, which specifically concerns former client conflicts of interest, prohibits a lawyer who personally formerly represented a client in a matter from representing, without prior consent, a person in a matter adverse to the former client if:

1. that person questions the validity of the lawyer's service or work product to the former client; or
2. the representation, in reasonable probability, will involve unauthorized disclosure or improper use of confidential information in violation of Rule 1.05; or
3. the matter is the same or a substantially related matter.

With respect to the last circumstance, the "same matter" aspect prevents a lawyer from switching sides during the course of the same proceeding. The "substantially related" aspect primarily involves current proceedings where a lawyer could have acquired confidential information in a

previous representation that could now be used to the former client's disadvantage or the advantage of a current client or some other person. See Comment 4, Rule 1.09.

Rule 1.05(a) defines confidential information as including both privileged and unprivileged client information, that is, information made privileged by the rules of evidence, as well as all other unprivileged information learned or acquired in the course of representation, regardless of its source.

To obtain the consent of the former client to criminally prosecute him requires full disclosure of the existence, nature and implications of the conflict of interest and the many possible adverse consequences of consenting to such a prosecution. See Rule 1.06(c)(2). Of course, consent should not be obtained with an inappropriate expectation of leniency. However, the lawyer should keep in mind that, as the Rules recognize, there may be occasions where the lawyer should not even ask for the former client's consent. Where a disinterested lawyer would conclude that the client should not agree to give the requested consent, the Rules discourage, if not prohibit, the lawyer from even asking for the former client's consent. See Rule 1.06(c)(1) and Comment 7, Rule 1.06.

Perhaps more pertinent, Rule 1.10(e), the Rule governing successive government and private employment, states:

(e) Except as law may otherwise expressly permit, a lawyer serving

as a public officer or employee shall not:

(1) Participate in a matter involving a private client when the lawyer had

represented that client in the same matter while in private practice ... unless under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer's stead in the matter ....

The term "matter" is defined broadly to include "[a]ny adjudicatory proceeding, ... or other determination ... claim, controversy, investigation, accusation, arrest or other similar, particular transaction involving a specific party or parties ...." Rule 1.10(f)(1). No allowance for participation because of consent by the former client is provided for in this Rule.

In light of these Rules, the Committee believes that regardless of consent, a lawyer may not prosecute, as newly elected district attorney, a motion seeking to revoke the probation of a former client in a case where the lawyer served as defense counsel in the original proceeding resulting in the probation. The proceeding to revoke probation is undoubtedly the same "matter" as the original proceeding. [Rule 1.10(e)(1) and (f)(1).] Moreover, by statute, this prosecution of a former client for violation of probation is prohibited. See Art. 2.01, Tex. Code Crim. Proc.: "Each district attorney shall represent the State in all criminal cases in the district courts of his district ... except in cases where he has been, before his election, employed adversely." Moreover, this practice has been held to violate the former client's due process rights. See e.g. *Ex Parte Morgan*, 616 S.W. 2d 625 (Tex. Crim. App. 1981).

With regard to whether a lawyer, as new district attorney, may prosecute a former client in a new criminal proceeding, the committee believes that, unless the former client consents, the Rules prohibit this practice if the new criminal proceeding involves the reasonable probability that confidential information could be disclosed without authorization, or could be used against the former client. [Rule 1.09 (a)(2).] Free discussions between lawyer and client are essential to the proper functioning of our legal system, and our confidentiality rules are designed to encourage such free discussions with the added guarantee that confidentiality will continue even after the attorney-client relationship is terminated. See Comment 1 and 8, Rule 1.05. To allow the real chance that the former representation could be used to the client's disadvantage at a subsequent

proceeding undermines our legal system. The broad prohibition on the use of "confidential information" would require the prosecutor to proceed cautiously, ignoring any fact known by the new prosecutor about the former client as a result of the former representation. Although a prosecutor has the responsibility to see that justice is done and not simply be an advocate Comment 1, Rule 3.09, the prosecutor is still obligated to act with competence, commitment, and dedication on the state's behalf. Comment 6, Rule 1.01. Adherence to the Rules places an impossible burden on an effective prosecutor and creates an almost certain probability that in the adversarial trial setting, confidentiality will be compromised. Similarly, to obtain and ensure protection, the objecting former client is forced to divulge the very same confidential information he seeks to prevent from disadvantageous use, thus defeating the purpose of the rules. These conflicting obligations impose conflicting duties on both the prosecutor and the former client and thus requires prohibition of this practice, absent the former client's consent. See Comment 7 to Rule 1.06.

Even if consent from the former client is obtained to prosecute him, the committee believes that the new prosecutor's use in evidence, in a new criminal proceeding of a prior conviction in which she was defense counsel, for purposes of impeachment, or for use against a former client as character evidence or punishment evidence is prohibited. First, as discussed above, the Rules clearly prohibit use of "confidential information" to the disadvantage of the former client. Rule 1.05 (b)(1) and (3). The committee believes the effective use of a prior conviction in such adversarial settings by the new prosecutor is reasonably likely to include divulgence and use of confidential information to the disadvantage of the former client. Second, these are clearly circumstances where a disinterested lawyer would conclude that the client should not agree to give consent in these particular instances. In these circumstances, the committee believes the lawyer should not even seek his former client's consent.

Additionally, the committee believes that the use in evidence for those purposes of such prior conviction makes the new proceeding a prohibited "matter" because the proceeding resulting in the prior conviction was a "matter" that is an "adjudicatory proceeding ... or other determination, charge, accusation, arrest ... involving a specific part[y]", the former client, within the meaning of Rule 1.10(f)(1). Use of the prior conviction for any of the three inquired purposes requires the new district attorney to "participate in a matter", that is, introduce in evidence the prior conviction, when the new district attorney represented the former client in the same "matter" in her prior practice. Such participation is prohibited, regardless of consent. Rule 1.10(e)(1).

The committee believes that a new district attorney faced with the prospect of prosecuting a former client can seek the appointment of a special prosecutor under Tex. Code Crim. Proc. Art. 2.07 and thus is able to and should comply with Rule 1.10(e)(1). The committee is unaware of any law that permits circumventing this rule. To encourage government service, the commentary to the Rules also suggests that other lawyers in the prosecutor's office would not be prohibited from prosecuting the case but the new district attorney should be screened away from the prosecution of the case against the former client. See Comment 3 and 9, Rule 1.10. In any event, the Rules require compliance by the new prosecutor and the other lawyers with the rules of confidentiality. Comment 9, Rule 1.10.

## Conclusion

A lawyer, who is the newly elected district attorney, is prohibited from prosecuting a motion to revoke probation in a case where he served as defense counsel in the original proceeding. A lawyer, who is the newly elected district attorney, is prohibited from prosecuting a former client in a new criminal proceeding, without the former client's consent. However, even if consent was obtained, a lawyer as newly elected district attorney, is prohibited from offering in evidence against a former client in a new criminal proceeding, a prior conviction in which the lawyer acted as defense counsel for purposes of impeachment under Tex. R. Evid. 609, or as character evidence under Tex. R. Evid. 404(b), or as punishment evidence under Tex. Code Crim. Proc. Art. 37.07 § 3

(a).