

**THE PROFESSIONAL ETHICS COMMITTEE
FOR THE STATE BAR OF TEXAS
Opinion No. 598**

July 2010

QUESTION PRESENTED

May a law firm continue to represent a client in a suit after the firm hires a lawyer who had previously represented the adverse party in another matter?

STATEMENT OF FACTS

Prior to seeking employment as an associate with a law firm, a lawyer personally represented a person ("Former Client") in several breach of contract suits. The law firm currently represents a client who is suing Former Client in a breach of contract action. The matter involved in the current lawsuit is not the same as the matters in which the lawyer being considered for employment had represented Former Client. If the lawyer is hired by the law firm, the law firm proposes to screen the new associate from all matters involving Former Client.

DISCUSSION

The facts here considered present a question of possible conflict of interest involving a former client. Such conflicts of interest are governed by Rule 1.09 of the Texas Disciplinary Rules of Professional Conduct. Rule 1.09(a) provides as follows:

“(a) Without prior consent, a lawyer who personally has formerly represented a client in a matter shall not thereafter represent another person in a matter adverse to the former client:

(1) in which such other person questions the validity of the lawyer’s services or work product for the former client;

(2) if the representation in reasonable probability will involve a violation of Rule 1.05; or

(3) if it is the same or a substantially related matter.”

In the facts presented, the lawyer who seeks employment with the law firm personally represented Former Client in breach of contract actions. Even though the new law firm does not plan to have the lawyer work on cases against Former Client, the lawyer’s conflict, if any, will be imputed to all other lawyers in the firm under Rule 1.09(b), which provides as follows:

“(b) Except to the extent authorized by Rule 1.10 [concerning successive government and private employment], when lawyers are or have become members of or associated with a firm, none of them shall knowingly represent a

client if any one of them practicing alone would be prohibited from doing so by paragraph (a) [of Rule 1.09].”

Therefore, screening the associate from matters relating to Former Client will not cure an otherwise prohibited representation by the new firm. See Professional Ethics Committee Opinion 578 (July 2007); *Henderson v. Floyd*, 891 S.W.2d 252, 254 (Tex. 1995) (screening of associate who transferred to opposing counsel’s firm did not prevent disqualification of firm).

Because the associate’s conflict of interest with respect to Former Client will be imputed to all other lawyers in the law firm, it is necessary to review the relevant prohibitions contained in Rule 1.09(a). In the circumstances considered, Rule 1.09(a)(1) is not relevant since there is no issue as to the validity of the associate’s work for Former Client. Under Rule 1.09(a)(2), absent Former Client’s consent, no lawyer in the firm may undertake a representation against Former Client if a reasonable probability exists that representation by the associate against Former Client in the matter would violate the obligations of confidentiality owed to Former Client under Rule 1.05. Rule 1.05 requires that, with exceptions not here relevant, a lawyer not reveal confidential information acquired by the lawyer in representing a client or, in the case of a former client, use such information to the disadvantage of the former client without the former client’s consent after consultation. Thus, without Former Client’s consent to the continuing representation, a representation by the law firm of a client against Former Client will be improper under Rules 1.09(a)(2) and 1.09(b) if a reasonable probability exists that representation by the associate of the law firm client against Former Client in the matter would involve either an unauthorized disclosure of confidential information or an improper use of such information to the disadvantage of Former Client. Whether such a reasonable probability exists in any given case is a question of fact. See Comment 4 to Rule 1.09.

This Committee recognized in Professional Ethics Committee Opinion 578 (July 2007) that a substantial overlap exists between the prohibitions contained in subparagraphs (a)(2) and (a)(3) of Rule 1.09. Matters are “substantially related” under subparagraph (a)(3) in situations where a lawyer “could have acquired confidential information concerning a prior client that could be used either to that prior client’s disadvantage or for the advantage of the lawyer’s current client or some other person.” Comment 4B to Rule 1.09.

Although the Texas Disciplinary Rules of Professional Conduct are not designed to be rules for procedural decisions, Texas courts have looked to Rule 1.09 for guidelines in the case of disqualification motions based on prior representation of former clients. *In re Epic Holdings, Inc.*, 985 S.W.2d 41, 48 (Tex. 1998). The Texas Supreme Court has held that two matters are “substantially related” within the meaning of Rule 1.09 “when a genuine threat exists that a lawyer may divulge in one matter confidential information obtained in the other because the facts and issues involved in both are so similar.” *In re EPIC Holdings, Inc.*, 985 S.W.2d at 51. If a substantial relationship exists, the courts apply a conclusive, irrebuttable presumption that confidential information was received by the lawyer in the course of representing the former client. See Texas Professional Ethics Committee Opinion 584 (September 2008). This presumption prevents the former client from being forced to reveal the very confidences sought to be protected. *Phoenix Founders, Inc. v. Marshall*, 887 S.W.2d 831, 834 (Tex. 1994).

As noted in Professional Ethics Committee Opinion 578 cited above, if a law firm's hiring of a lawyer might cause a litigation opponent to seek disqualification of the law firm in a pending matter for a client, the law firm should disclose to the client this circumstance and the potential consequences of disqualification:

"The possibility that such a disqualification might be sought by the former client or granted by a court, however, is a matter that could be of substantial importance to the present client in deciding whether or not to retain or continue to employ a particular lawyer or law firm as its counsel. Consequently, a lawyer should disclose those possibilities, as well as their potential consequences for the representation, to the present client as soon as the lawyer becomes aware of them; and the client then should be allowed to decide whether or not to obtain new counsel."

Comment 9 to Rule 1.09.

CONCLUSION

Under the Texas Disciplinary Rules of Professional Conduct, absent consent by the adverse party, a law firm may not continue as counsel in a litigation matter after hiring as an associate a lawyer who formerly represented an adverse party if a reasonable probability exists that representation in the litigation by the associate would violate obligations of confidentiality under Rule 1.05 owed to the adverse party or if the current litigation matter is the same as, or substantially related to, the matter in which the associate represented the adverse party. If the new associate could not represent the law firm's client in current litigation because of the associate's prior representation of the adverse party, the entire law firm would be prohibited from continuing the current representation. If the representation is prohibited, this prohibition would not be affected by the law firm's screening the newly hired associate from the current representation against the associate's former client.