

**THE PROFESSIONAL ETHICS COMMITTEE
FOR THE STATE BAR OF TEXAS
Opinion No. 607**

July 2011

QUESTION PRESENTED

Under the Texas Disciplinary Rules of Professional Conduct, may a lawyer proposing to move to another law firm reveal to the prospective law firm information relating to the lawyer's prior work for clients so that the law firm may determine whether the employment of the lawyer will create conflicts of interest for the firm?

STATEMENT OF FACTS

A lawyer proposes to move from his current firm to another law firm. The prospective firm has extended an offer of employment subject to a review of possible conflicts of interest that might be created by employing the lawyer. The prospective firm asks that the lawyer provide information relating to the lawyer's prior work, including identification of clients and matters, so that the firm can determine whether employment of the lawyer would create conflicts of interest for the firm.

DISCUSSION

Lawyers have become increasingly mobile. When a lawyer who is already in law practice proposes to join a law firm, the firm and the lawyer must be concerned with the effects of the lawyer's employment on the law firm's obligations to its clients as well as the lawyer's continuing obligations with respect to clients for whom the lawyer worked before joining the firm. Rule 1.09(a) sets out the circumstances in which a lawyer is prohibited from representing another person in a matter adverse to a client for whom the lawyer had personally performed services before joining the firm:

“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.”

If a lawyer who has joined a law firm from other private practice is prohibited by Rule 1.09(a) from representation adverse to a former client, then under Rule 1.09(b) no lawyer in the

firm is permitted knowingly to participate in such representation. For a lawyer joining a law firm after working for a governmental entity, Rule 1.10(b) provides that the firm may generally avoid a conflict of interest if the former government lawyer is “screened” from matters in which the lawyer had some involvement while employed by the government and the governmental unit is notified in writing.

In order to apply the requirements of Rule 1.09 or Rule 1.10 as the case may be, a law firm employing a lawyer who has previously been practicing law must have information about the newly employed lawyer’s prior legal work. Particularly in the case of a lawyer who has been in private practice, if the law firm learns of a conflict after employing the lawyer, the law firm may be required to choose either to cease a representation where a conflict of interest exists or to terminate the lawyer’s recently begun employment. Although in some cases consent of all affected clients might be a solution, it is likely that in many cases all required consents will not be obtainable. As a result, under the applicable Texas Disciplinary Rules on conflicts of interest as to former clients and representations, a law firm can ensure its compliance with applicable conflicts of interest rules while avoiding the possible need to terminate representations of current clients only if the firm can receive, in advance of the final decision on employment, information regarding the clients and matters on which the lawyer has previously worked. If the Texas Disciplinary Rules of Professional Conduct were interpreted to prohibit the provision of such information, the result would be that the mobility of lawyers among law firms would be severely restricted, to the detriment of the quality and efficiency of legal services provided to clients.

A Texas lawyer is generally prohibited by Rule 1.05 from disclosing confidential information concerning a client other than for the benefit of the client. The term “confidential information” is defined broadly in Rule 1.05(a) and will usually include the nature of matters for which legal services have been provided to specified clients. See Professional Ethics Committee Opinions 464 (August 1989) and 495 (March 1994). Several exceptions apply to the general requirement that lawyers protect the confidential information of clients. The exception of particular relevance to the circumstances here considered is the exception set forth in Rule 1.05(c)(4) that permits a lawyer to reveal confidential information “[w]hen the lawyer has reason to believe it is necessary to do so in order to comply with a court order, a Texas Disciplinary Rule of Professional Conduct, or other law.”

When a lawyer considers moving from one law firm to another, a certain amount of disclosure of client confidential information will be necessary to permit the lawyer and the prospective employing law firm to comply with the requirements of Rule 1.09. Such disclosures are made necessary by the lawyer’s proposed move from one law firm to another. Although this need for disclosure could be eliminated if the lawyer did not consider changing employment, the disclosure becomes necessary once a change in employment is accepted as a real possibility. Moreover, it is now generally agreed that relatively free movement of lawyers between employing law firms permits lawyers and law firms to meet client needs for legal services more effectively and efficiently. Accordingly, it is the opinion of this Committee that, in the circumstances considered, limited disclosure concerning a lawyer’s clients and prior legal work is necessary to comply with applicable Texas Disciplinary Rules and is therefore permitted by Rule 1.05(c)(4).

Disclosures by a lawyer to a prospective law firm employer concerning the lawyer's prior clients and work will be necessary for compliance with the Texas Disciplinary Rules and will be permitted by Rule 1.05(c)(4) if all of the following requirements are met:

(1) The disclosure of the information is "necessary" in the sense that the provision of the information is a late step in the consideration of possible employment of the lawyer by the law firm and comes only after all other material issues regarding the law firm's employment of the lawyer have been favorably resolved between the lawyer and the law firm.

(2) The information is provided by the lawyer to the law firm pursuant to a legally enforceable agreement, preferably in writing, that for as long as the information remains confidential the law firm will keep the information confidential within the firm and use the information solely for purposes of determining whether to hire the lawyer and for purposes of complying with the requirements of Rule 1.09 or Rule 1.10, as applicable, if the lawyer is hired.

(3) The information provided by the lawyer to the law firm is no more extensive than is necessary for the law firm to determine compliance with Rule 1.09 or Rule 1.10 as the case may be. As noted in Comment 14 to Rule 1.05, a disclosure permitted under an exception to the Rule "should be no greater than the lawyer believes necessary to the purpose."

(4) The lawyer does not disclose any information concerning a client to the law firm that would in the reasonable judgment of the lawyer create a significant risk, taking into account the law firm's obligation of confidentiality with respect to the information provided, of adverse effect on material interests of the client. For purposes of this requirement, the lawyer must weigh the extent of harm to the client's interests of any disclosure by or through the law firm and the likelihood that such disclosure might occur. Examples of circumstances where the lawyer might conclude that the risk to client interests is significant include confidential information on a highly sensitive business transaction and confidential information relating to the marital or parental status of a client. If the lawyer determines that risk to the client from proposed disclosure to the law firm is significant, the information must not be provided to the law firm without client consent, and when information is withheld to protect confidential client information the lawyer must inform the law firm of that fact without revealing the confidential information itself. In such a case, the obligation to protect client confidential information set forth in Rule 1.05 will prevent the law firm's verification of full compliance with Rule 1.09 or Rule 1.10. The result may be that the law firm's proposed employment of the lawyer will not be possible at that time.

The conclusions reached in this opinion are generally consistent with the conclusions reached in American Bar Association Standing Committee on Ethics and Professional Responsibility Formal Opinion 09-455 (October 8, 2009), which concluded that disclosure of conflicts information during the process of lawyers moving between firms is ordinarily permissible, subject to limitations.

CONCLUSION

Under the Texas Disciplinary Rules of Professional Conduct, a lawyer being considered for employment by a law firm may ordinarily provide information concerning his prior legal work, including confidential information of former clients, that would be necessary for the lawyer and the law firm to comply with applicable conflicts of interest rules relating to the lawyer's prior employment if the lawyer is subsequently employed by the law firm, provided that all of the following requirements are met: (1) provision of the information comes only after all other material issues regarding the law firm's employment of the lawyer have been favorably resolved, (2) the information is provided pursuant to the law firm's agreement that the information will remain confidential and will be used solely for the purpose of determining whether conflicts of interest exist, (3) the information provided is no more extensive than is necessary for the law firm to determine whether conflicts of interest may exist, and (4) in the reasonable judgment of the lawyer, the provision of the information in the particular circumstances is not such as would be likely to prejudice materially the client or former client concerned.