

**THE PROFESSIONAL ETHICS COMMITTEE
FOR THE STATE BAR OF TEXAS
Opinion No. 615**

April 2012

QUESTION PRESENTED

Under the Texas Disciplinary Rules of Professional Conduct, may a district attorney take responsibility for the investigation and possible prosecution of a local elected official in a criminal proceeding or a civil removal proceeding when the district attorney previously represented and advised the official on matters relating to the official's performance of public duties?

STATEMENT OF FACTS

A district attorney in the past provided, under section 157.901 of the Local Government Code, legal representation and written advice to a local elected official ("Official A") concerning issues relating to Official A's performance of public duties. However, the district attorney does not routinely provide representation to Official A. The district attorney's legal work for Official A has been completed and no legal services are currently being provided by the district attorney to Official A.

The district attorney and his office have been requested to investigate, and possibly prosecute or institute removal proceedings against, Official A for alleged abuse of office or official oppression. Unless the district attorney withdraws from the matter, any decision concerning legal action against Official A for the alleged misconduct will be made by the district attorney.

DISCUSSION

In the facts presented, the district attorney represented Official A in the past but that representation has been completed and no legal services are currently being provided to Official A by the district attorney's office. Official A is therefore a former client. Rule 1.09 of the Texas Disciplinary Rules of Professional Conduct addresses a lawyer's obligations to a former client. This Committee has previously concluded that a lawyer representing a governmental entity in the capacity of a state or federal prosecutor is subject to the Texas Disciplinary Rules of Professional Conduct, including the protections for former clients provided in Rule 1.09. Professional Ethics Committee Opinion 538 (June 2001). Comment 2 to Rule 1.10 notes that a lawyer representing a governmental body "is subject to the prohibition against representing adverse interests stated in Rule 1.06 and the protection afforded former clients in Rule 1.09."

Under Rule 1.09, a lawyer may not, without the consent of the former client, engage in representation that would be adverse to the former client if the lawyer will, in reasonable probability, use or reveal confidences of the former client in violation of Rule 1.05 or if the current matter bears a substantial relationship to the previous representation. In pertinent part, Rule 1.09 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:

...

(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.”

Rule 1.05 defines confidential information and prohibits a lawyer from knowingly revealing or using confidential information of a former client to the disadvantage of the former client unless the client consents after consultation. The term “substantially related matter” in Rule 1.09(a)(3) primarily refers to situations where a lawyer could have acquired confidential information concerning a former client that could now be used to the former client’s disadvantage or for the advantage of the lawyer’s current client or some other person. Thus, as noted in Comment 4B to Rule 1.09, there is substantial overlap between the prohibitions set forth in paragraphs (a)(2) and (a)(3) of Rule 1.09.

In the facts presented, the district attorney personally represented Official A with regard to civil matters arising from the performance of Official A’s public duties. Depending on the particular facts, there may or may not be a reasonable probability that the district attorney’s representation of the State against Official A would involve a misuse of confidential information relating to Official A in violation of Rule 1.05. The particular facts will likewise determine whether the conduct of Official A that is the subject of the current investigation is a “substantially related matter” with respect to the matters for which the district attorney represented Official A in the past. If there is a reasonable probability of a violation of obligations concerning confidential information of Official A or if the current matter and one or more of the prior matters are substantially related, then the district attorney is not permitted to be involved in the investigation unless Official A consents to the adverse representation by the district attorney.

The protections afforded a former client under Rule 1.09 may be waived by the client but only if there is consent after disclosure of the relevant circumstances, including the district attorney’s past or intended role on behalf of Official A as the district attorney’s former client and on behalf of the State as the district attorney’s current client. See Comment 10 to Rule 1.09.

Even if the proposed representation adverse to Official A is permitted under Rule 1.09 (either because of Official A’s consent or because such consent is not required under the Rule), the requirements of Rule 1.06 on conflicts of interest with respect to a current client, in this case the State, must also be considered. Rule 1.06(b) provides in pertinent part:

“(b) In other situations and except to the extent permitted by paragraph (c), a lawyer shall not represent a person if the representation of that person:

...

(2) 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.”

The district attorney’s current client is the State and his former client, Official A, would be treated as a third person under Rule 1.06(b)(2). Loyalty to a client is paramount and that loyalty is impaired if a lawyer may not be able to consider, recommend, or take a course of action for one client because of the lawyer’s responsibilities to a third person. In such cases the critical question is the likelihood that a conflict of interest exists and, if there is a conflict of interest, whether it will materially and adversely affect the lawyer’s independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the lawyer’s current client. See Comment 4 to Rule 1.06. Accordingly, if it reasonably appears that the district attorney’s representation of the State in investigating and possibly prosecuting or seeking to remove Official A would be adversely limited by the district attorney’s responsibilities to Official A or by the district attorney’s own interests, the required loyalty to the State as the current client would be impaired and a conflict of interest would exist.

If a conflict of interest exists under the terms of Rule 1.06(b)(2), then it must be determined whether the district attorney may nonetheless continue to represent the State under the standards of Rule 1.06(c), which provides:

“(c) A lawyer may represent a client in the circumstances described in (b) if:

(1) the lawyer reasonably believes the representation of each client will not be materially affected; and

(2) each affected or potentially affected client consents to such representation after full disclosure of the existence, nature, implications, and possible adverse consequences of the common representation and the advantages involved, if any.”

Under this Rule, the district attorney’s continued representation of the State requires a two-step analysis. First, the district attorney must reasonably believe that his representation of the State will not be materially affected by the prior representation of Official A. Second, the State must consent to such representation after full disclosure of the existence, nature, implications, and possible adverse consequences of the common representation and the advantages involved, if any. Absent a constitutional provision or statute authorizing an officer of the State to give consent on behalf of the State, it may not be possible to obtain the required consent on behalf of the State, and in such circumstances the district attorney would be prohibited from investigating and prosecuting alleged misconduct of his former client, Official A. See Professional Ethics Committee Opinion 539 (February 2002). This Committee does not have authority to decide questions of law and can therefore express no opinion on the question of whether or from whom the district attorney might obtain a valid consent in the circumstances considered.

It should be noted that, since the district attorney's office is a "firm" under the Texas Disciplinary Rules, if the district attorney is prohibited by Rule 1.09 or Rule 1.06 from representing the State in a manner adverse to Official A, then all other lawyers in the district attorney's office would likewise be prohibited from such representation of the State. See definition of "Firm" in Texas Disciplinary Rules of Professional Conduct, Terminology; Rule 1.09(c) and Rule 1.06(f); Opinion 539 cited above.

CONCLUSION

Under the Texas Disciplinary Rules of Professional Conduct, a district attorney is permitted to take responsibility for the investigation and possible prosecution of a local elected official in a criminal proceeding or a civil removal proceeding when the district attorney previously represented and advised the official on matters relating to the official's performance of public duties only if either (1) there is no reasonable probability that confidential information obtained in the representation of the official will be disclosed or used in violation of the district attorney's obligations to protect the confidential information of the official and the proposed current representation is not substantially related to the prior representation of the official or (2) the official consents after disclosure of the circumstances. If representation would be permitted under the standard set forth in the preceding sentence, the representation would nevertheless be prohibited unless either (1) the district attorney's current representation of the State in the matter would not reasonably appear to be adversely limited by district attorney's responsibilities to the official as a former client or (2) the district attorney reasonably believes that the representation of the State in the current matter will not be adversely affected by responsibilities to the official and the State validly consents to the representation. No opinion is expressed by the Committee as to whether under Texas law it is possible for the State to give such consent if it would be required under the Texas Disciplinary Rules for a district attorney's representation of the State in a particular case. If the district attorney is prohibited under the Texas Disciplinary Rules from representing the State in a proceeding adverse to the official, then all other lawyers in the district attorney's office would likewise be prohibited from such representation.