

Professor Schuwerk was quoted in an article in the Texas Lawyer and posted on Law.com, commenting on a case before the 5th U.S. Circuit Court of Appeals that will decide whether there is a rebuttable or irrebuttable presumption that an attorney had the confidences of all of the firm's clients when leaving the firm.

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5th Circuit to Interpret Departing-Lawyer Rule John Council

The 5th U.S. Circuit Court of Appeals heard arguments on Oct. 8 in a case that could affect every lawyer who leaves a law firm for other legal employment.

The key question the court is considering in Kirk A. Kennedy and Mark A. D'Andrea v. Mindprint Inc. is this: Is there a rebuttable or irrebuttable presumption that an attorney had the confidences of all of the firm's clients when he left the firm?

Three legal ethics experts say the decision in the conflict-of-interest case is important to lawyers who work in firms with hundreds of clients. Should the 5th Circuit uphold lower court rulings in the case, a lawyer who leaves a firm could be prevented from ever representing a party that is adverse to a client of his former firm -- even if the attorney had no contact with the client while he worked there, the experts say.

According to both parties' briefs, the background in the complicated bankruptcy case, which contains numerous appeals, cross-claims and an attorney fee dispute, is as follows: Kennedy worked as a senior counsel in the bankruptcy section at the Houston office of Jackson Walker from 2003 until 2004. He left the firm and later became in-house counsel at Gulf Coast Cancer Center, where D'Andrea is the medical director.

In 2006, Kennedy began representing D'Andrea as a creditor in a bankruptcy case, In Re: ProEducation International Inc., pending before U.S. Bankruptcy Judge Karen Brown in the Southern District of Texas. Mindprint Inc. is adversarial to D'Andrea in the case and is a client of Jackson Walker. Mindprint filed a motion with Brown to disqualify Kennedy from representing D'Andrea, arguing that Kennedy had a conflict of interest because he was employed by Jackson Walker while Mindprint was the firm's client. Kennedy later testified during a disqualification hearing that he had never performed legal work for Mindprint while employed at Jackson Walker and did not even know the company was a client until after he left the firm. After a series of hearings, Brown issued an order in March 2008 that disqualified Kennedy from representing D'Andrea in the bankruptcy litigation.

Kennedy and D'Andrea appealed to U.S. District Judge Lynn Hughes, and the style of the case changed to Kirk A. Kennedy and Mark A. D'Andrea v. Mindprint Inc. Hughes affirmed Brown's ruling, so Kennedy and D'Andrea appealed to the 5th Circuit. In their

brief, they argued that Hughes improperly interpreted Rule 1.09(a) of the Texas Disciplinary Rules of Professional Conduct by finding Kennedy was "irrebuttably presumed to have acquired all confidential communications of clients of the firm." Rule 1.09(a) prevents a lawyer from representing a client that is adverse to a former client that the attorney had "personally" represented.

Mindprint argued in its brief to the 5th Circuit that Hughes interpreted Rule 1.09(a) correctly because "the imputation of knowledge about the substance of a client's representation to attorneys within the same law firm mandated by the case law is appropriate here, particularly (as noted by Judge Hughes) where Kennedy officed on the same floor just down the hall from MindPrint's counsel during the entirety of his tenure with Jackson Walker."

RULE 1.09

Texas Lawyer listened to an audio recording of the oral arguments before the 5th Circuit on Oct. 8. Kennedy began by telling told the three judges -- Fortunato "Pete" Benavides, Carolyn Dineen King and Eugene Davis -- that the issue presented in the case and their interpretation of the so-called "the departing lawyer rule" found in Rule 1.09 was an important one for the legal profession in Texas.

"The touchstone of this appeal focuses on one legal issue that this court should decide and correct the error of the bankruptcy court. And that one legal ethical issue is this: When an attorney leaves a law firm, is the presumption that the attorney acquired client confidences irrebuttable or rebuttable? That's the issue that this court needs to decide today," Kennedy said, arguing that such a presumption is rebuttable.

"I've not seen a case in any of the circuits or reported opinions that squarely address on all fours the departing lawyer rule," he said. "And that's why this rule and this decision today is so important to the legal profession. This goes to the ability of attorneys to move between firms in the megafirm context."

Benavides said to Kennedy, "It would seem to me that the judge's order as directed to you has disqualified you in terms of any person in your former law firm whether you knew about them or didn't know about it and that that presumption is irrebuttable. I don't know why your ability to practice law hasn't been severely impacted by this order."

"I agree with the court entirely," Kennedy said.

Next up was Lionel M. Schooler, a partner in the Houston office of Jackson Walker, who argued on behalf of Mindprint.

Right off the bat, King asked him, "Why isn't Judge Brown just dead wrong on this?"

"Respectfully, to respond to the comment of Judge Benavides, this case has had absolutely no impact on the practice life of Kirk Kennedy. The evidence in the case

demonstrates clearly and in an unrebutted fashion that Mr. Kennedy found work with The Gulf Coast Cancer Center within four months of leaving Jackson Walker," Schooler replied.

"But that's not the issue," King said.

She later said to Schooler: "Now wait. Let's get something straight here. It is unrebutted on this record that he had no connection with the litigation that was pending in your law firm that involved Mindprint. ... I mean, there's no question about that as I understand it."

"He did not directly," Schooler replied. "There was evidence to indicate that he got to participate in monthly bankruptcy section meetings where cases like this were discussed at the time the case was going on."

"Well that's not in this record," King told Schooler.

Schooler also argued that the 5th Circuit's 1992 opinion in *In Re: American Airlines* supported his position that Kennedy should be disqualified. In that opinion, the court wrote that a firm was disqualified from representing a party adverse to a former client. But King took issue with Schooler's interpretation, noting that American Airlines involved lawyers who all actually had represented the former client.

"So this isn't American Airlines," King told Schooler. "This is a case where his [Kennedy's] lack of involvement in what was being handled by your law firm is unrebutted."

Schooler concluded his argument by telling the court: "I hope you don't choose this case to show that his [Kennedy's] conduct is rewarded by being reinstated in the case."

"We're going to do whatever we have to do," King replied.

In an interview, Schooler says the 5th Circuit judges "clearly were interested in the subject of how a migrating attorney can show whether he can get out from under a disqualification and whether it should be a rebuttable or irrebutable presumption."

Kennedy says he feels good about his argument. "When a court isn't challenging a party or when they have generally favorable comments or questions when they are asking you to concur with the way they see it, it leads one to think that they're in tune with what you're trying to say," he says.

WHO KNOWS WHAT?

Houston solo Lillian Hardwick, who chairs the State Bar of Texas Disciplinary Rules of Professional Conduct Committee, says the key issue in Kennedy is significant -- especially now.

"It's an important issue because in this economy lawyers are tending to move laterally and going to other law firms," Hardwick says. "And the question is do they take with them not only every case they've ever worked on for conflict purposes, or do they take all of the cases that were in their law firm?"

Linda Eads, a professor at Southern Methodist University Dedman School of Law who teaches professional responsibility, believes the 5th Circuit will rule that there is a rebuttable presumption regarding whether Kennedy had client confidences of Mindprint.

"Legally, in terms of caselaw on disqualification, it's always been rebuttable," Eads says. "And the reason is if the only knowledge a lawyer has about the former client is what's been imputed to him because he's in the firm, he doesn't have actual knowledge. Then when he moves he can rebut the presumption of having actual confidential information.

"If you're in a law firm and you don't work on a case, you're imputed to have knowledge. It's in Rule 1.09," Eads says. "But once you move out of that law firm, the only knowledge you take with you is your real knowledge."

Robert Schuwerk, a professor at the University of Houston Law Center -- who filed an expert opinion affidavit with the bankruptcy court and with the district court supporting Kennedy's position that he should not be disqualified from representing D'Andrea -- says if the 5th Circuit upholds the lower court decisions it will lead to "utter chaos."

"Essentially what it would mean was a lawyer who ever served at a large firm would essentially be charged with knowledge of every case that anyone in that firm handled while that lawyer was there," Schuwerk says. Therefore, an attorney "would be subject to being disqualified in literally thousands of cases in which the lawyer knew absolutely nothing. It would almost make it impossible for a lawyer at a large law firm to find employment elsewhere."