

THE PROFESSIONAL ETHICS COMMITTEE
FOR THE STATE BAR OF TEXAS
OPINION No. 563

October 2005

QUESTION PRESENTED:

May a lawyer who leaves employment with a law firm solicit and accept employment on a contingent fee basis from a client of the law firm on a matter for which the lawyer had performed legal services while an employee of the law firm?

Statement of Facts

Client employed law firm ABC on an hourly fee basis to represent Client in a lawsuit. Lawyer D, employed by ABC, had primary responsibility for handling Client's case, had done most of the work on the case, and was listed as an attorney of record in the case. In the course of his work on the case, Lawyer D obtained information indicating Client had a strong case. After terminating his employment with ABC (and before withdrawing as an attorney of record in the case), Lawyer D offered to handle Client's lawsuit on a contingent fee basis. Client subsequently terminated the employment of ABC on the lawsuit and employed Lawyer D to handle the lawsuit on a contingent fee basis.

Discussion

The inquiry involves a number of legal issues not within the province of the Committee, such as whether a fiduciary duty is owed by a lawyer to his or her employer, the scope of any such duty, whether the action of Lawyer D would constitute a violation of any such duty, and whether a lawyer may use confidential and/or proprietary information obtained in the course of representing a client to evaluate the client's claim before accepting employment on a contingent fee basis.

Although Client initially employed ABC, under the facts presented, Client had a lawyer-client relationship with Lawyer D and with ABC while Lawyer D was employed by ABC. Since Lawyer D had a lawyer-client relationship with Client with respect to the matter before entering into a contingent fee contract with Client on the matter, Lawyer D must comply in particular with Rules 1.03, 1.05, 1.06, and 2.01 of the Texas Disciplinary Rules of Professional Conduct in his continuing representation of Client.

Rule 1.03(b) provides:

"A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."

Rule 1.05(b) provides in pertinent part:

“ Except as permitted by paragraphs (c) and (d), or as required by paragraphs (e), and (f) a lawyer shall not knowingly:

...

(2) Use confidential information of a client to the disadvantage of the client unless the client consents after consultations.

...

(4) Use privileged information of a client for the advantage of the lawyer or of a third person, unless the client consents after consultation.

Rule 1.06(b) and (c) provide in relevant part:

“(b) ... 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.

(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.”

Rule 2.01, entitled “Advisor,” provides:

“In advising or otherwise representing a client, a lawyer shall exercise independent professional judgment and render candid advice.”

In the circumstances presented, Lawyer D must comply with each of the above Rules because Client was his client when Lawyer D solicited employment and entered into the contingent fee contract with Client. In addition, Lawyer D must in these circumstances particularly ensure compliance with Rule 1.04 “Fees” and Rule 7.02 “Communications Concerning a Lawyer’s Services.”

These rules are consistent with a lawyer’s fiduciary duties to his or her client. When a lawyer participates in changing, with respect to a matter as to which the lawyer already represents a client, a legal fee arrangement with the client, Texas courts have held that there is a presumption of unfairness or invalidity with the new fee agreement and the burden of proof is upon the lawyer to prove that the new fee arrangement is fair and reasonable. See *Archer v. Griffith*, 390 S.W.2d 735 (Tex. 1964). This is part of the lawyer’s disclosure obligations

under Rule 1.06(c)(2), as well as the lawyer's obligations under Rule 1.05(b), concerning use of confidential information, and under Rule 2.01, concerning the lawyer's role as advisor.

Under the facts presented, Client's fee arrangement with ABC was on an hourly fee basis. Services paid for by Client resulted in Lawyer D's receiving information that was useful to Lawyer D in evaluating Client's claim and determining to seek employment from Client on a contingent fee basis. Without question, such information was used for the advantage of Lawyer D. Potentially, it could have been used to the disadvantage of Client. If Client would have paid a lesser fee on an hourly fee basis, the information was used to the disadvantage of Client. Lawyer D, being Client's lawyer and having access to confidential information relevant to evaluation of the merits of Client's claim and potential recovery, cannot use that information to the disadvantage of Client or to Lawyer D's own advantage unless Client consents after consultation.

Whether it is advantageous for Client to continue to use ABC's services on an hourly fee basis or retain Lawyer D and pay possibly a greater fee under the contingent fee contract are factors that must be considered by Client. Lawyer D is in a better position than is Client to evaluate Client's claim and to form a judgment about whether the legal fees would be greater if computed on an hourly fee basis or pursuant to the proposed contingent fee contract. Client is entitled to the benefit of independent professional judgment and candid advice before entering into such a contract. Lawyer D must fully disclose and explain those matters to Client so Client can make an informed decision regarding the representation prior to entering into any contingent fee contract with Lawyer D.

Conclusion

A lawyer leaving employment with a law firm may solicit and accept employment from a client of the law firm for whom the lawyer has rendered legal services provided that the lawyer complies with Rules 1.03, 1.04, 1.05, 1.06, 2.01, and 7.02 of the Texas Disciplinary Rules of Professional Conduct. A lawyer is not permitted to use confidential information to the disadvantage of a client or to the lawyer's own advantage vis-à-vis a client unless the client consents after consultation. A lawyer who proposes to continue the representation of a client upon terminating his employment at a law firm, but on the basis of a contingent fee arrangement that may be financially disadvantageous to the client as compared to an hourly fee arrangement, must advise the client to seek independent advice from another lawyer before entering into the proposed contingent fee arrangement.