

**THE PROFESSIONAL ETHICS COMMITTEE  
FOR THE STATE BAR OF TEXAS  
Opinion No. 644**

**August 2014**

**QUESTION PRESENTED**

Do the Texas Disciplinary Rules of Professional Conduct require a law firm to withdraw from representing a client in a lawsuit if the law firm hires a new lawyer who, prior to becoming a lawyer, was employed as a law clerk for the law firm representing the opposing party in the lawsuit and in that capacity helped provide services to the opposing party with respect to the lawsuit?

**STATEMENT OF FACTS**

Individual X, while in law school and before becoming a lawyer, worked as a law clerk for a law firm (“Firm A”) and prepared research memos for the firm related to a lawsuit in which the firm represented the plaintiff, Business P, against Business D. After graduation from law school and passing the bar examination, Individual X began working as an associate for a second law firm (“Firm B”), which represents the defendant, Business D, in the lawsuit brought by Business P. Once Firm B learns that Individual X worked for Firm A as a law clerk while in law school and was involved in Firm A’s representation of Business P in the lawsuit against Business D, Firm B seeks to determine whether it must withdraw from representing Business D in the lawsuit or whether it can continue to represent Business D if it utilizes screening procedures to prevent Individual X from being involved in the representation of Business D and from sharing any confidential information concerning Business P with anyone in Firm B. Business P and Firm A have not waived their rights concerning information entrusted to Individual X.

**DISCUSSION**

The factual circumstances considered here fall between two situations where the requirements are known. If a lawyer at Firm A represented Business P in the lawsuit against Business D and then left Firm A and joined Firm B, Firm B would not be permitted to continue to represent Business D in the lawsuit. Rule 1.09 of the Texas Disciplinary Rules of Professional Conduct; *Henderson v. Floyd*, 891 S.W.2d 252, 254 (Tex. 1995) (“The simple fact is that relator’s former lawyer is now associated with his opponent’s lawyer. Rule 1.09 does not permit such representation . . .”). On the other hand, if a member of the staff of Firm A, such as a secretary or paralegal, worked on a matter involving the representation of Business P and then left Firm A and went to work for Firm B, Firm B would be allowed to continue to represent Business D if adequate screening procedures were put in place for the purpose of preventing the staff member from sharing Business P’s confidential information with members of Firm B. *In re Guaranty Insurance Services, Inc.*, 343 S.W.3d 130 (Tex. 2011); *In re Columbia Valley*

*Healthcare System, L.P.*, 320 S.W.3d 819 (Tex. 2010); *Grant v. Thirteenth Court of Appeals*, 888 S.W.2d 466 (Tex. 1994); *Phoenix Founders, Inc. v. Marshall*, 887 S.W.2d 831 (Tex. 1994); Professional Ethics Committee Opinion 472 (June 1991). The Texas Supreme Court decisions cited above all recognize that, when a lawyer or a staff member of a law firm works on a matter for a client, there is a conclusive presumption that confidential information of the client was imparted to the lawyer or staff member. This conclusive presumption prevents the client from being required to reveal the confidential information as part of a court disqualification action. In cases involving lawyers moving from one law firm to another, there is a second conclusive presumption that underlies Rule 1.09 and court disqualification decisions. The second conclusive presumption is that the lawyer shares the client's confidential information with the lawyers in his or her new firm. In contrast, in cases involving staff members moving from one law firm to another, there is a presumption that the staff member shares the client's confidential information with the lawyers in his or her new firm but that presumption is not conclusive and it can be overcome by the implementation of appropriate screening procedures.

The situation addressed in this opinion falls between the two scenarios discussed above because Individual X was a staff member, a law student serving as a law clerk, at Firm A, but Individual X is a lawyer at Firm B. In this case, Rule 1.09 is not applicable. Rule 1.09 involves situations in which one lawyer has in the past personally represented a client in a matter. In this case, Individual X was not a lawyer at Firm A and therefore did not personally represent Business P as a client of Firm A even though Individual X worked on matters for Business P as a law clerk at Firm A. *But see In re Mitcham*, 133 S.W.3d 274 (Tex. 2004) (discussing application of Rule 1.09 in the case of a person working as a paralegal at one law firm and then as a lawyer at a second law firm but ultimately holding that the second firm was disqualified based on the terms of an agreement binding the second firm).

The question of whether Firm B, having hired Individual X as one of its lawyers, may continue to represent Business D in the lawsuit brought against Business D by Firm A on behalf of Business P should be decided based upon the provisions of Rule 1.06 relating to conflicts of interest. Rule 1.06(b) provides in pertinent part as follows:

“ . . . 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.”

Rule 1.06(c) provides that this limitation does not apply if “the lawyer reasonably believes the representation of each client will not be materially affected” (Rule 1.06(c)(1)) and there is informed consent from each affected client (Rule 1.06(c)(2)). Rule 1.06(f) provides that “[i]f a lawyer would be prohibited by this Rule from engaging in particular conduct, no other lawyer while a member or associated with that lawyer's firm may engage in that conduct.”

Under the decisions of the Texas Supreme Court cited above, since Individual X personally worked as a law clerk for Firm A on Business P's lawsuit against Business D,

Individual X is conclusively presumed to have confidential information concerning Business P and its claim against Business D. Now that Individual X is a lawyer, Individual X is expected to “zealously pursue clients’ interests within the bounds of the law.” Texas Disciplinary Rules of Professional Conduct, Preamble: A Lawyer’s Responsibilities, Paragraph 3. In zealously pursuing the interests of his client in a litigation matter, a lawyer is required to use as appropriate all information at his disposal to further the client’s interests in the litigation. In this case, except in the highly unlikely event that Firm A and Business P waive all claims concerning confidential information acquired by Individual X while working at Firm A, Individual X remains under obligations to his former employer Firm A and to Business P with respect to confidential information concerning Business P and its lawsuit against Business D. Any use of this information contrary to the interests of Business P and Firm A could be expected to result in claims against Individual X and Firm B for misuse of confidential information that was entrusted to Individual X in connection with his prior employment with Firm A. *See City of Garland v. Booth*, 895 S.W.2d 766 (Tex. App.-Dallas 1995, writ denied). Consequently, if, contrary to the facts presented, Individual X were to actually represent Business D in the litigation against Business P, such representation would violate Rule 1.06(b)(2) because the representation of Business D would reasonably appear to be adversely limited by Individual X’s responsibilities to his former employer Firm A and to Business P and by Individual X’s own interests in avoiding claims for misuse of confidential information previously entrusted to him. Moreover, in such a circumstance it would not be possible for Individual X to meet the requirement of Rule 1.06(c)(1) that he reasonably believe his representation of Business D would not be materially affected by his obligations to Firm A and Business P. With respect to Firm B, Rule 1.06(f) provides that “[i]f a lawyer would be prohibited by this Rule [1.06] from engaging in particular conduct, no other lawyer while a member or associated with that lawyer’s firm may engage in that conduct.” Thus, since Individual X would be prohibited under Rule 1.06(b)(2) and Rule 1.06(c)(1) from personally representing Business D in the lawsuit, all other lawyers in Firm B are prohibited under Rule 1.06(f) from such representation even when Individual X would have no actual involvement in the litigation. This prohibition is not affected by any attempt by Firm B to screen Individual X from the representation of Business D and to prevent the disclosure by Individual X to other Firm B lawyers of confidential information concerning Firm A and Business P. *See Professional Ethics Committee Opinion 569* (April 2006) (relating to requirements under Rule 1.06); and *Opinions 578* (July 2007) and *598* (July 2010) (relating to cases of successive private employment of lawyers governed by Rule 1.09).

## CONCLUSION

Under the Texas Disciplinary Rules of Professional Conduct, a law firm is required to withdraw from representing a client in a lawsuit if the law firm hires a new lawyer who, prior to becoming a lawyer, was employed as a law clerk for the law firm representing the opposing party in the lawsuit and in that capacity helped provide services to the opposing party with respect to the lawsuit. The requirement for the withdrawal of the law firm employing the new lawyer cannot be avoided by screening the newly hired lawyer from the firm’s work on the lawsuit.