

OPINION 501

April 1994

Question Presented

Do the Texas Disciplinary Rules of Professional Conduct prohibit a lawyer from representing a husband in a divorce action under circumstances where the wife previously consulted with the lawyer's former law partner concerning a divorce but did not actually hire the former partner?

Statement of Facts

A wife consulted with Attorney A of Law Firm ABC with regard to a divorce, but did not actually hire Attorney A to represent her when she later filed for divorce. The wife paid a \$400.00 fee to Attorney A for his services. Attorney C, although a partner at Law Firm ABC when Attorney A consulted with the wife, did not personally obtain any confidential information regarding wife while employed by Law Firm ABC. Attorney A and Attorney C never discussed Attorney A's consultation with the wife.

Attorney C subsequently withdrew from law Firm ABC and formed a new law firm, Law Firm CDE, in which Attorney A is not associated in any capacity. After Attorney C formed Law Firm CDE and approximately 18 months after wife consulted with Attorney A, the wife's husband hired Attorney C to represent him in his divorce from the wife.

The wife now asserts that Attorney C's representation of the husband creates a conflict of interest under the Texas Disciplinary Rules requiring that Attorney C cease representing the husband.

The husband informs Attorney C that he does not wish for him to withdraw from the representation, and Attorney C desires to continue the representation of the husband provided that such representation does not violate the disciplinary rules.

Discussion

Since Attorney C was no longer in the same law firm as Attorney A at the time that Attorney C accepted the representation of the husband, and Attorney C never personally represented or consulted with wife, the primary issue is whether Attorney C is now vicariously disqualified, or disqualified by imputation, from representing the husband because his former partner, Attorney A, consulted with wife at the time that Attorney A and Attorney C were partners in Law Firm ABC.

The Texas Disciplinary Rules that are applicable to this situation are [DRs 1.09](#) and [1.05](#) and the comments thereto. DR 1.09 was amended in October, 1991, to eliminate certain textual errors that had caused ambiguities and confusion. As amended, DR 1.09 states:

- 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:
 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.
- b Except to the extent authorized by [DR 1.10](#), when lawyers are or have become members

of or associated with a firm, none of them shall knowingly represent a client if any one of them practicing alone would be prohibited from doing so by paragraph (a).

c. When the association of a lawyer with a firm has terminated, the lawyers who were then associated with that lawyer shall not knowingly represent a client if the lawyer whose association with that firm has terminated would be prohibited from doing so by paragraph (a)(1) or if the representation in reasonable probability will involve a violation of Rule 1.05.

Attorney A appears to have had a brief attorney-client relationship with the wife. Attorney A would be prohibited from representing the husband because any such representation would involve the same matter as previously discussed between Attorney A and the wife, which is a violation of DR 1.09(a)(3), and because DR 1.09(a)(2) proscribes a representation that in reasonable probability involves disclosure of confidential information contrary to DR 1.05.

Several provisions in the disciplinary rules specify that when a lawyer is prohibited from certain employment, all other lawyers in the same firm or with whom the lawyer is associated are also prohibited from that employment. See [DRs 1.06\(f\)](#), [1.07\(e\)](#), [1.08\(i\)](#), and [1.09\(b\)](#). These rules are based on the realistic assumption that employment of a lawyer is generally equivalent to employment of the lawyer's law firm, as well as the principles that lawyers and their law firms should not be permitted to switch sides and should protect confidential information.

Under the statement of facts, Attorney C is no longer in the same law firm as Attorney A, and Attorney C never personally represented or consulted with the wife. Moreover, Attorney C did not personally obtain any confidential information regarding the wife while he was employed at Law Firm ABC.

This problem often arises in two closely related instances. A lawyer in the position of Attorney A leaves a law firm and now his former partners or associates who remained at that firm desire to represent a person adverse to one of the persons Attorney A represented while such lawyers were in the same law firm (herein referred to as "Situation One"). Or, on the other hand, as presented in the Statement of Facts, one of the lawyers who was associated with Attorney A in Law Firm ABC leaves that firm to establish or join a different law firm and now the lawyer that left (Attorney C) desires to represent a person who Attorney A formerly represented or consulted with when Attorney A and Attorney C were in the same law firm (herein referred to as "Situation Two"). Both of these situations are primarily governed by DR 1.09(c) and the Comments thereto.

The language of [DR 1.09\(c\)](#) speaks directly to Situation One, which assumes that Attorney A left Law Firm ABC rather than Attorney C. In that instance, Attorney C would be vicariously disqualified from representing the husband if Attorney A is prohibited from representing the wife by reason of DR 1.09(a)(1), which involves questions about the validity of Attorney A's services or work product for the former client, or under DR 1.09(a)(2) if the representation by Attorney C will in reasonable probability involve a violation of DR 1.05. As explained in a new sentence added to Comment 7 in the 1991 amendments to DR 1.09:

If, on the other hand, a lawyer disqualified by paragraph (a) should leave a firm, paragraph (c) prohibits lawyers remaining in that firm from undertaking a representation that would be forbidden to the departed lawyer *only* if that representation would violate sub-paragraphs (a)(1) or (a)(2).

No question has been raised about the validity of Attorney A's services or work product for the wife under the statement of facts so DR 1.09(a)(1) is not applicable. With respect to the issue of whether the

representation by the lawyer in the position of Attorney C will in reasonable probability involve using confidential information provided by the wife to Attorney A in violation of [DR 1.05](#), Comment 4 to DR 1.09 states that "reasonable probability" of violating DR 1.05 is a question of fact. Hence, there is no irrefutable presumption in Situation 1 that Attorney C, who is no longer associated with Attorney A, vicariously possesses confidential information provided by the wife to Attorney A.

Situation Two, which is the particular inquiry of this opinion, is dealt with in the last sentence of Comment 7 of [DR 1.09](#), which provides:

Finally, should those other lawyers cease to be members of the same firm as the lawyer affected by paragraph (a) without personally coming within its restrictions, they thereafter may undertake the representation against the lawyer's former client unless prevented from doing so by some other of these Rules.

Accordingly, under the disciplinary rules a lawyer, such as Attorney C who previously left Attorney A's law firm, is one step further removed from the restrictions on representation inherent in Situation One. Under DR 1.09, if Attorney C in the Statement of Facts does not *personally* come within the provisions of DR 1.09(a), he will not be deemed to be vicariously "contaminated" by Attorney A's prior representation or consultation with a person such as the wife in the statement of facts. Whether Attorney C can represent the husband will depend on whether such representation is prohibited by any disciplinary rule other than DR 1.09. Such a prohibition could result, for example, under DR 1.05 if Attorney C personally learned confidential information of the wife's while he was previously associated with Law Firm ABC, or under [DR 1.06](#) in the event Attorney C's representation of the husband would result in an impermissible conflict of interest with a current client of Attorney C or Law Firm CDE.

Conclusion

Attorney C is no longer associated with Attorney A and Law Firm ABC, and Attorney C does not personally possess any confidential information imparted by the wife to Attorney A. Under the statement of facts such representation of the husband by Attorney C does not violate [DR 1.09\(c\)](#), and there appears to be no reasonable probability of a violation of [DR 1.05](#) or a violation of any other Texas disciplinary rule. Attorney C may represent the husband in the divorce proceedings against the wife.