

OPINION 527

April 1999

QUESTION PRESENTED

May a law firm composed of former members of another law firm that represented and now represents one party to litigation represent an opposing party in that litigation?

FACTS

Corporation P sued Corporation D, alleging that it purchased tires from Corporation D and that it was damaged by Corporation D's failure to deliver some tires. Corporation P also alleged that Corporation D added an unauthorized "signature" of a representative of Corporation P to a sales invoice. Corporation D claims it delivered all tires ordered by Corporation P and claims to know nothing about the alleged unauthorized signature.

Corporation D wants to employ Law Firm 2 and Attorney A, a partner in Law Firm 2, to represent it in the suit.

Prior to 1993, Attorney A was an associate in Law Firm 1 and his partners in Law Firm 2 were partners in Law Firm 1. In 1993, the attorneys who now are partners in Law Firm 2 left the employment of Law Firm 1 and formed Law Firm 2.

During the period of time that the lawyers in Law Firm 2 were members of Law Firm 1, Law Firm 1 continuously represented Corporation P in various matters, including litigation.

While they were members of Law Firm 1, three of the attorneys who now are partners in Law Firm 2 personally handled several legal matters for Corporation P, but none of those matters involved a dispute similar to the present lawsuit between Corporation P and Corporation D or the tire contract that is the subject of the present suit. No information (confidential or otherwise) relevant to the present suit was obtained while practicing law with Law Firm 1 by any attorney who now is a partner in or associated with Law Firm 2.

The alleged acts and omissions that are the subject of the current suit occurred after the members of Law Firm 2 left Law Firm 1.

QUESTION

Are the members of Law Firm 2 disqualified from representing Corporation D by virtue of their prior personal representation of Corporation P, or vicariously by the prior representation of Corporation P by other members of Law Firm 1 while the members of Law Firm 2 were members of Law Firm 1?

DISCUSSION

The Disciplinary Rules dealing with conflicts of interest are Rule 1.06 Conflict of Interest: General Rule; Rule 1.07 Conflict of Interest: Intermediary; Rule 1.08 Conflict of Interest: Prohibited Transactions; and Rule 1.09 Conflict of Interest: Former Client. Rule 1.05 Confidentiality of Information is also relevant.

Law Firm 2 is not disqualified by any provision of Rule 1.06, because Corporation P is not presently represented by any member of Law Firm 2 and Law Firm 2 will not be representing opposing parties to the same litigation. Rule 1.07 does not disqualify Law Firm 2, as it will not be acting as an intermediary between Corporation D and Corporation P. Rule 1.08 is not applicable because the conduct involved is not a transaction with a client within the meaning of that rule.

Rule 1.09 Conflict of Interest: Former Client is applicable to the question presented in this opinion. Rule 1.09 provides:

(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 Rule 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 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.

Earlier Opinions 453, 472, 494, and 501 were considered in answering the question presented.

Opinion 453 dealt with (1) the disqualification of an associate who left a law firm which represented Client A in ongoing litigation to represent Client B, which was an existing client of the new firm to which he moved; and (2) whether other members of the firm to which he moved were also disqualified. That opinion held that the associate, although having done no work for the client of the former firm, was disqualified from representing Client B; however it concluded that the associate's disqualification did not extend to other members of the firm to which he was moving and that other members of that firm could ethically continue to represent Client B.

The associate in Opinion 453, although having performed no legal services for Client A, was held to be vicariously disqualified from representing Client A's opponent in the pending litigation. Additionally, his vicarious disqualification did not end when he left his former firm. That conclusion was reached due to the presumption that confidences of a client disclosed to one member of a firm are shared with all other members of a firm. Opinion 453 held that the associate's vicarious disqualification did not, however, vicariously disqualify the other members of the new firm to which

he had moved. In the absence of facts that the associate possessed confidential information that might be used to the detriment of Client A, members of his new firm were not ethically precluded from continuing to represent Client B.

As indicated below, the holding in Opinion 453 that the associate was disqualified, notwithstanding the fact that he had done no work for and possessed no confidential information regarding the client of his former firm, was based on the former Texas Code of Professional Responsibility. Opinion 453 conflicts with Opinion 501, which was issued after the disciplinary rules applicable to Texas lawyers had been substantially revised and current Rule 1.09 was adopted.

Opinion 472 dealt with the question of whether a law firm that hired a legal assistant who had been fired from another law firm was disqualified from further representation of a person adverse to the client of the law firm for whom the legal assistant had worked. The opinion concluded that if the supervising lawyer of the legal assistant in the new firm complied with Rule 1.05 concerning client confidences, Rule 1.06 concerning conflicts of interest, and Rule 1.09 concerning former client conflicts of interest, so as to ensure that the non-lawyer's conduct is compatible with the professional obligations of a lawyer, employment of the legal assistant by the new law firm did not ethically disqualify it from representing a person adverse to the client of the assistant's former employer.

Opinion 494 held that an attorney who had been consulted by a husband in connection with a divorce proceeding could not ethically represent the wife in a later divorce proceeding because the factual matters in the representation were so related that there was a genuine threat that confidences gained in the former representation of the husband would be divulged to the wife. Under the facts stated in the present opinion, no relevant confidential information from the former client is within the possession or knowledge of the members of Law Firm 2.

Opinion 501 considered the question of whether Attorney C, who was a member of Law Firm CDE, could represent a husband in a divorce action under circumstances where the wife had consulted with Attorney C's former law partner (Attorney A) at Law Firm ABC concerning a divorce while both attorneys were partners at Law Firm ABC. Attorney C personally had not obtained any confidential information regarding the wife while a member of Law Firm ABC. Since Attorney C was no longer associated with the attorney who had consulted with the wife, and since Attorney C did not personally possess any confidential information imparted by the wife to his former partner at Law Firm ABC, no conflict existed that prevented Attorney C from representing the husband.

In Opinion 501 (1994) and Opinion 453 (1987), the attorneys whose possible disqualifications were in issue had not personally represented the client of their former firm (or partner), and had not obtained any confidential information regarding the client of the former firm (or partner). However, the attorneys were vicariously disqualified while associated with their former firm (or partner) because their former firm (or partner) was disqualified.

In Opinion 453, the attorney's vicarious disqualification was held to continue after he left the former firm, whereas in Opinion 501 the attorney's vicarious disqualification was held not to continue after he was no longer associated with his former partner who had represented the client. Opinion 501 was based on Texas Disciplinary Rule 1.09. Rule 1.09 specifically deals with avoidance of conflicts of interest with former

clients and sets out (1) the basis for determining the disqualification of lawyers who have personally represented a former client or are associated with a lawyer who has personally represented a former client; and (2) a separate basis for determining the disqualification of lawyers who have not personally represented a former client and are no longer associated with a lawyer who has personally represented a former client. Based on the provisions of Rule 1.09, the presumption that confidences of a client disclosed to one member of a firm are shared with all other members of a firm terminates after a lawyer is no longer associated with a personally disqualified lawyer. Opinion 501 is consistent with Rule 1.09.

To the extent that it conflicts with Opinion 501 and this opinion, Opinion 453 is overruled. Opinion 453 was correctly decided under the Texas Code of Professional Responsibility in effect when it was published, but is not consistent with new Rule 1.09.

Opinion 501 addressed two fact situations under Rule 1.09 dealing with a lawyer who moved from one law firm to another. The question presented in the current opinion addresses a third situation under Rule 1.09. The last sentences of comment 5 to Rule 1.09 describe this third fact situation:

Similarly, if a lawyer severs his or her association with a firm and that firm retains as a client a person whom the lawyer personally represented while with the firm, that lawyer's ability thereafter to undertake a representation against that client is governed by paragraph (a); and all other lawyers who are or become members of or associates with that lawyer's new firm are treated in the same manner by paragraph (b).

If an attorney has personally represented a client in a matter, he shall not thereafter represent another person in a matter adverse to his former client that violates any of the provision of paragraph (a) of Rule 1.09. Any attorney in Law Firm 2 who personally represented Corporation P while he was a member of Law Firm 1 is subject to the provision of paragraph (a) and all lawyers, including Attorney A, who are presently associated with that attorney are deemed subject to the provisions of Rule 1.09(a) because of Rule 1.09(b).

Within the meaning of Rule 1.09, Corporation P is a "former client" of those members of Law Firm 2 who were members of Law Firm 1 at the time Law Firm 1 represented Corporation P. That fact does not necessarily disqualify Attorney A and Law Firm 2 from representing Corporation D. Rule 1.09 clearly contemplates that a transferring attorney and his new firm are not always prohibited from accepting employment adverse to a former client.

Rule 1.09(a) includes three circumstances that create a disqualifying conflict of interest. Law Firm 2's proposed representation of Corporation D does not involve the validity of the lawyer's services or work product for the former client as set forth in Rule 1.09(a)(1), so there is no violation of that provision under the facts presented.

Whether under Rule 1.09(a)(2) Law Firm 2's representation of Corporation D will in reasonable probability involve a violation of Rule 1.05 is a fact question. Rule 1.05(b)(3) provides that a lawyer shall not knowingly "use confidential information of a former client to the disadvantage of the former client after the representation is concluded unless the former client consents after consultation or the confidential information has become generally known."

Corporation P remained a client of Law Firm 1 when Attorney A and other present members of Law Firm 2 terminated their association with Law Firm 1. No member of Law Firm 2 was a member of Law Firm 1 when Law Firm 1 was employed to represent Corporation P in the litigation against Corporation D. No information (confidential or otherwise) material or relevant to the present suit was obtained while practicing with Law Firm 1 by any attorney who is now a partner in or is associated by Law Firm 2. Obviously, confidential information obtained by Law Firm 1 after the lawyers left it to form Law Firm 2 cannot be imputed to the members of Law Firm 2.

More than three years have passed since any member of Law Firm 2 represented Corporation P. Under the facts presented, there appears to be no reasonable probability that Law Firm 2's representation of Corporation D will violate any obligations of confidentiality with respect to Corporation P.

Under Rule 1.09(a)(3), Law Firm 2 would be disqualified if its representation of Corporation D in the present litigation is the "same or substantially related" to the prior representation performed for Corporation P by any lawyer now associated with Law Firm 2. Under the facts presented, this does not appear to be the case and for purposes of this opinion we assume the current representation of Corporation D and the prior representations of Corporation P by lawyers now associated with Law Firm 2 are not substantially related. Accordingly, the attorneys in Law Firm 2 are not precluded from representing Corporation P in the current litigation because such representation will not violate any provision of Rule 1.09(a).

This opinion is consistent with the holdings of the Texas Supreme Court in *Henderson v. Floyd*, 891 S.W.2d 252 (Tex. 1995) and *Texaco, Inc. v. Garcia*, 891 S.W.2d 255 (Tex. 1995).

In *Henderson v. Floyd*, an associate who moved from one law firm to another law firm and his new law firm were held to be disqualified under Rule 1.09 because, while at his former firm, he had seen the files relating to a suit and may have handled them, may have had some involvement in the suit, and attended "file review" meetings at which the suit was discussed. The associate could not deny having some involvement in the lawsuit while employed at his former firm and under the factual record was deemed to have personally represented the complaining former client. The same matter was involved, so the "same or substantially related" standard of Rule 1.09(a)(3) disqualified the associate from representing the adversary of the client of his former law firm. Although the firm to which the associate had moved had attempted to shield him from any involvement in the case at his new firm, the court held that each member of the firm to which he moved likewise was disqualified to represent the former client's adversary.

In *Texaco, Inc. v. Garcia*, the attorney who represented the plaintiffs in a suit alleging environmental damages previously had represented Texaco while with another firm and while with his other firm had actively participated in defending Texaco in another environmental contamination suit. The court held that the present suit in which the attorney represented the plaintiffs involved a substantially related matter within the meaning of Rule 1.09.

In both *Henderson v. Floyd* and *Texaco, Inc. v. Garcia*, the transferring lawyer was deemed to have personally represented the former client of his prior law firm; hence,

all provisions of Rule 1.09(a) were applicable and since one lawyer in the new firm was disqualified under Rule 1.09(a), all other lawyers now associated with the transferring lawyer were also disqualified because of imputed disqualification under Rule 1.09(b). Under the facts presented in this opinion, Rule 1.09(a) is applicable to Law Firm 2, but the prior representation of Corporation P by the attorneys who now are employed at Law Firm 2 does not violate subparts (1), (2) or (3) of Rule 1.09.

Henderson v. Floyd and Texaco, Inc. v. Garcia specifically dealt with the issue of the disqualification of an attorney due to his prior personal representation of a party, and not the vicarious disqualification of an attorney due to the prior representation of a person by another member of his prior or current firm. The result of this opinion would be the same if Law Firm 2 were considered to be a continuation of Law Firm 1 and the lawyers who are not in Law Firm 2 were considered to be practicing in a new firm.

In dealing with the vicarious disqualification of another attorney due to prior representation of a person by another member of his prior or current firm, reference should be made to the definition of "Firm" under the terminology section of the Disciplinary Rules:

"Firm" or "Law Firm" denotes a lawyer or lawyers in a private firm; or a lawyer or lawyers employed in the legal department of a corporation, legal services organization, or other organization, or in a unit of government.

"Firm," or "Law Firm," as used in Rule 1.09(b) and (c), clearly means and includes the lawyer or lawyers who practice or practiced together, and not the partnership, professional corporation, or other entity or organization in which the lawyer or lawyers practice or practiced.

Using the Rules definition of "Firm" to determine the meaning and scope of Rule 1.09(b), that rule means:

Except to the extent authorized by Rule 1.10, when lawyers are or have become associated with another lawyer or other lawyers in a private firm, in the legal department of a corporation, legal services organization, or other organization, or in a unit of government, none of those lawyers shall knowingly represent a client if any of them practicing alone would be prohibited from doing so by Rule 1.09(a).

Rule 1.09(b) therefore means that each lawyer in a firm is prohibited from representing a client if any one or more lawyers in that firm, if practicing alone, would be prohibited from representing that client by any part of Rule 1.09(a).

SUMMARY OF APPLICABLE RULE

Prior applicable ethics opinions, decisions of the Texas Supreme Court, and the provisions of Rule 1.09 may be summarized as follows:

1. Rule 1.09 prohibits an attorney who has personally represented a former client from representing a person in a matter adverse to the former client if such new representation would violate any of the provisions of Rule 1.09(a).
2. If an attorney is prohibited under Rule 1.09(a) from accepting a representation adverse to a former client, each attorney currently associated with such disqualified

attorney is vicariously prohibited from accepting such representation under Rule 1.09(b).

3. If an attorney who personally represented a former client leaves a law firm, the lawyers who remain at the firm are thereafter prohibited from knowingly representing a person adverse to that former client only if a lawyer presently associated with the firm is personally disqualified from accepting the representation under Rule 1.09(a) or the firm's proposed representation involves the validity of the departed lawyer's legal services or work product for such former client while he was associated with the firm, or the proposed representation will with reasonable probability involve a violation of Rule 1.05 with respect to the confidential information of such former client.

4. If, as in this ethics opinion, a lawyer terminates his association with a law firm and such firm retains as a client a person whom the departing lawyer personally represented while he was associated with the firm, any subsequent representation by the departed lawyer adverse to such former client is governed by Rule 1.09(a). And, all lawyers currently associated with the departed lawyer are treated the same by reason of Rule 1.09(b). The departed lawyer and members of his new firm can represent a person adverse to such former client only if the representation does not violate Rule 1.09(a)(1),(2), or (3).

CONCLUSION

Under the facts stated, Law Firm 2's representation of Corporation D will not violate any part of Rule 1.09(a); therefore Law Firm 2 can represent Corporation D in its lawsuit with Corporation P. If, however, any prior personal representation of Corporation P by any attorney currently associated with Law Firm 2 would result in a violation of Rule 1.09(a)(1),(2), or (3), then Law Firm 2 would be disqualified from representing Corporation D in the lawsuit.