

**THE PROFESSIONAL ETHICS COMMITTEE  
FOR THE STATE BAR OF TEXAS  
Opinion No. 579**

**November 2007**

**QUESTIONS PRESENTED**

Question 1: May a lawyer in a public defender's office avoid a conflict of interest arising from representation of two different clients by referring one of the clients to another lawyer in the same public defender's office?

Question 2: May a lawyer in a public defender's office, after concluding that a conflict exists, continue to represent a client subsequent to withdrawing as counsel for another client?

**STATEMENT OF FACTS**

Lawyer, employed in a public defender's office, represents Client A in a criminal case. While this case is pending, Lawyer receives another assignment to represent Client B in a separate criminal case. During the initial interview of Client B, it becomes apparent to Lawyer that the criminal charges against both clients are substantially related to a single alleged incident. It also becomes apparent to Lawyer that the interests of each client could become adverse to the interests of the other client. Lawyer then concludes that, in view of Lawyer's representation of Client A, Lawyer will not be able to represent Client B because the continuing representation of Client B would be materially affected by Lawyer's continuing representation of Client A. Lawyer proposes to continue to represent Client A and to withdraw from representing Client B and arrange for another lawyer in the public defender's office to take over Client B's case.

**DISCUSSION**

Raising questions of conflict of interest is first and foremost the responsibility of the lawyers undertaking the representation of clients. See Comment 17 to [Rule 1.06](#) of the Texas Disciplinary Rules of Professional Conduct. In the facts presented, Lawyer correctly determined that a conflict of interest under Rule 1.06(b)(2) would exist in the continued representation of both Client A and Client B.

Rule 1.06(b) addresses conflicts of interest that arise in cases where clients are not opposing each other in the same litigation within the meaning of Rule 1.06(a). Client A and Client B, in the facts presented, are not opposing each other in the same litigation. Rule 1.06(b)(2) provides:

“(b) In other situations and 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."

Rule 1.06(b)(2) precludes the representation of Client B on the facts presented here because Lawyer's representation of Client B appears likely to become adversely limited by Lawyer's responsibilities to Client A. Moreover the exception provided by Rule 1.06(c) does not apply because Lawyer has concluded that representation of one of the two clients would be materially affected by representation of the other.

The issue then becomes whether transferring Client B to another lawyer in the public defender's office will resolve the conflict. Transferring Client B to another lawyer in the public defender's office does not resolve this conflict of interest. Under Rule 1.06(f), any conflict that prevents a particular lawyer from undertaking or continuing representation of a client also prevents any other lawyer who is a member of or an associate with that lawyer's firm from undertaking the same representation. See also Comment 1 to Rule 1.06. A "law firm" is defined in the Terminology section of the Texas Disciplinary Rules of Professional Conduct as ". . . 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." All lawyers in a public defender's office are in the same "law firm" for purposes of Rule 1.06(f). Therefore, another lawyer in the public defender's office may not represent Client B after Lawyer withdraws from representing Client B because of a conflict of interest based on representation of Client A.

If Lawyer withdraws from representation of Client B and the representation is not undertaken by another lawyer in the public defender's office, Lawyer may continue to represent Client A without violation of the Texas Disciplinary Rules of Professional Conduct if the following requirements are met: (1) Lawyer does not use to the disadvantage of Client B confidential information that was obtained from Client B and that has not become generally known unless Client B consents after consultation under [Rule 1.05\(b\)\(3\)](#) and (2) the representation of Client A is not "adverse" to Client B within the meaning of [Rule 1.09\(a\)](#) or, if the representation is adverse to Client B, Client B consents to Lawyer's representation of Client A under Rule 1.09(a).

Rule 1.06(e) contemplates that there will be circumstances in which, after multiple representation becomes improper under Rule 1.06, the lawyer withdraws from representation of one or more clients in order to remove the conflict of interest and then continues the representation of one or more other clients. However, in such cases, the requirements of Rule 1.09 relating to conflicts of interest involving former clients must be considered. Rule 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:

...  
(3) if it is the same or a substantially related matter."

If Lawyer's representation of Client A is not adverse to Client B, then Rule 1.09 would not affect the representation. However on the facts presented Lawyer would have to consider whether it was likely that either Client A or Client B would be a witness against the other. See Comment 4A to Rule 1.09. If because of such circumstance or for some other reason, the representation of Client A would be adverse to Client B, then Lawyer could represent Client A only if Client B gave valid consent to the representation under Rule 1.09(a).

## **CONCLUSION**

Question 1 is answered in the negative. A public defender's office is a "law firm" as defined in the Terminology section of the Texas Disciplinary Rules of Professional Conduct. Therefore, under Rule 1.06(f), a conflict of interest precluding a lawyer in the public defender's office from representation of a client precludes the representation of the client by any other lawyer in that office.

Question 2 is answered in the affirmative, provided that the continued representation is not "adverse" to the former client under Rule 1.09 of the Texas Disciplinary Rules of Professional Conduct and that there is no violation of Rule 1.05 relating to use of confidential information obtained from the former client. If, however, the continued representation of a client is or becomes "adverse" to the former client, consent for continuing representation of the client must be obtained from the former client as required under Rule 1.09. Further, in the absence of an exception to the general prohibition on revealing or using confidential information received from clients, confidential information that was obtained from the former client and remains confidential may not be used to the disadvantage of the former client without the former client's consent after consultation as required by Rule 1.05(b)(3).