

**THE PROFESSIONAL ETHICS COMMITTEE
FOR THE STATE BAR OF TEXAS
Opinion No. 584**

September 2008

QUESTION PRESENTED

Is it permissible under the Texas Disciplinary Rules of Professional Conduct for a lawyer to continue to represent a client in a proceeding after learning that the conduct of the lawyer's former client may be material to the proceeding?

STATEMENT OF FACTS

Client hired Lawyer to represent Client in a child custody modification proceeding against Client's former spouse, B. After Lawyer was employed by Client, Lawyer learned from another source that C, whom Lawyer had represented in a divorce proceeding, had a relationship with B. Lawyer has no continuing obligations or responsibilities to C other than Lawyer's obligations to C arising from C's status as a former client.

DISCUSSION

In the facts presented, C is a former client of Lawyer. Lawyer's conduct will be governed by [Rule 1.09](#) of the Texas Disciplinary Rules of Professional Conduct if the change of custody matter is adverse to C. Rule 1.09(a) provides as follows:

“(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.”

Whether the matter is adverse to former client C and therefore Rule 1.09(a) is applicable will depend on the likelihood and degree to which the current representation may result in legal, financial, or other identifiable harm to C. The Texas Supreme Court has held that “[a]dversity is a product of the likelihood of the risk and the seriousness of its consequences.” *National Medical Enterprises Inc. v. Godbey*, 924 S.W.2d 123, 132 (Tex. 1996). Applying this test, the Court disqualified a law firm from representing patients in a lawsuit against a company that operated psychiatric hospitals because a lawyer in the firm had previously represented the defendant company's regional hospital administrator during an investigation of the company. Even though the administrator was not a party to the current suit, the Court held that the interests of the law firm's current clients were adverse to the former client's interests because the litigation posed a

small risk of leading to criminal or civil proceedings against the former client. See also *Selby v. Revlon Consumer Products Corp.*, 6 F. Supp.2d 577 (N.D. Tex. 1997) (representation of current client in sexual harassment suit was materially adverse to former client, whose testimony in current client's case could expose her to defamation claims and damage her business reputation).

With regard to the applicability of Rule 1.09(a) to the facts presented, the custody proceeding between Client and B does not involve the validity of prior work by Lawyer for C within the meaning of Rule 1.09(a)(1), and the matter is not "the same" within the meaning of Rule 1.09(a)(3) as the matter in which Lawyer previously represented C. The next issue to be considered is whether the two matters are "substantially related" within the meaning of Rule 1.09(a)(3). The Texas Supreme Court has held that two matters are "substantially related" within the meaning of Rule 1.09 "when a genuine threat exists that a lawyer may divulge in one matter confidential information obtained in the other because the facts and issues involved in both are so similar." *In re EPIC Holdings, Inc.*, 985 S.W.2d 41, 51 (Tex. 1998). If a substantial relationship exists, the courts apply a conclusive, irrebuttable presumption that confidential information was received by the lawyer in the course of representing the former client. This presumption prevents the former client from being forced to reveal the very confidences sought to be protected. *Phoenix Founders, Inc. v. Marshall*, 887 S.W.2d 831, 834 (Tex. 1994). Since nothing in the statement of facts indicates that the two matters are substantially related, Rule 1.09(a)(3) does not apply based on the facts presented.

Consequently, if the representation of Client involves a matter adverse to C, whether Lawyer is permitted under Rule 1.09 to represent Client will turn on whether a reasonable probability exists within the meaning of Rule 1.09(a)(2) that the representation would cause Lawyer to violate the obligations of confidentiality owed to C under [Rule 1.05](#). Rule 1.05(b)(1) generally prohibits a lawyer from revealing confidential information of a former client. Rule 1.05(b)(3) generally prohibits a lawyer from using 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. Comment 4 to Rule 1.09 makes clear that "if there were a reasonable probability that the subsequent representation would involve either an unauthorized disclosure of confidential information under Rule 1.05(b)(1) or an improper use of such information to the disadvantage of the former client under Rule 1.05(b)(3), that representation would be improper under paragraph (a)." The Comment further notes that "[w]hether such a reasonable probability exists in any given case will be a question of fact." For example, such a probability would normally exist in the circumstances here considered if C admitted drug abuse to Lawyer in the course of Lawyer's earlier representation of C and Client in the subsequent matter sought modification of the child custody order based in part on allegations concerning C's character.

If Lawyer is not prohibited under Rule 1.09(a) from continuing to represent Client in the child custody matter (either because the matter is not adverse to C or because there is no reasonable probability that the representation would cause Lawyer to violate confidentiality obligations to C under Rule 1.05), Lawyer must in all events comply with Lawyer's continuing obligations under Rule 1.05 to protect the confidential information of C as a former client of Lawyer. Under Rule 1.05(b)(1) and (3), Lawyer in the representation of Client generally must not reveal confidential information of C or use confidential information of C to C's disadvantage unless C consents after consultation or the information has become generally known.

CONCLUSION

Under the Texas Disciplinary Rules of Professional Conduct, a lawyer may continue to represent a client in a proceeding after learning that the conduct of the lawyer's former client may be material to the proceeding if (1) the matter is not adverse to the former client or (2) the matter is adverse to the former client but the representation does not question the lawyer's work for the former client, the representation does not involve a matter that is the same as or substantially related to the matter for which the lawyer represented the former client, and the representation will not in reasonable probability involve a violation of Rule 1.05 with respect to confidential information of the former client. Regardless of whether the representation of the current client is adverse to the former client, the lawyer may represent the current client in the matter only if the lawyer complies with obligations under Rule 1.05 not to reveal confidential information of the former client and not to use confidential information of the former client to the former client's disadvantage unless the former client consents after consultation or the information has become generally known.