

Breaking Up Is **HARD TO DO**

WIFE AND HUSBAND HAVE BEEN MARRIED FOR MANY YEARS. Seven years ago, Wife was considering divorcing her Husband. At the time, unbeknownst to Husband, she consulted with Taylor, a family law attorney at the XYZ Law Firm. Wife wanted to know what her options were and how the property would be split if she were to go through with filing for divorce. She discussed her situation with Taylor, who offered advice and took notes during their conversation. At the conclusion of the meeting, Wife was still undecided, so Taylor prepared an engagement agreement and told Wife to sign and return it if she decided to retain the XYZ Law Firm. Ultimately, Wife decided not to go through with filing for divorce, and Taylor did not take any other steps to take her on as a client.

Seven years later, Husband decides to file for divorce. Unaware that Wife previously consulted with the XYZ Law Firm, he contacts and consults with another attorney at the XYZ Law Firm, Cory. When Cory does a conflict check, it turns up the single meeting with Taylor, who is still at the firm. Cory talks to Taylor, who has no recollection of the meeting or of Wife at all, including anything that might have been discussed. Taylor also says that if any notes were taken, they would have been discarded years ago in accordance with firm policy regarding consultations that don't result in the firm being retained. When learning that Husband has retained the XYZ Law Firm, Wife makes clear that she will not waive any conflict of the XYZ Law Firm or its attorneys.

As Cory considers whether to take on Husband as a client, which of the following is most accurate under a recent Ethics Opinion from the Professional Ethics Committee for the State Bar of Texas?

- A. Cory cannot represent Husband.
- B. Cory can represent Husband if Taylor is screened from the representation and does not participate in any way.
- C. Cory can represent Husband if Taylor is screened *and* the firm has no files or notes related to Wife's consultation five years earlier.
- D. Cory can represent Husband without screening Taylor because Wife never signed the engagement agreement and therefore never became a client of the firm.



ABOUT THE CENTER

The Texas Center for Legal Ethics was created by three former chief justices of the Supreme Court of Texas to educate lawyers about ethics and professionalism. Lawyers can access the Texas Disciplinary Rules of Professional Conduct, the Texas Lawyer's Creed, and a variety of other online ethics resources by computer or smart device at legaethicstexas.com.

DISCLAIMER

The information contained in Ethics Question of the Month is intended to illustrate an ethics issue of general interest in the Texas legal community; it is not intended to provide ethics advice that applies regardless of particular facts. For specific legal ethics advice, readers are urged to consult the Texas Disciplinary Rules of Professional Conduct (including the official comments) and other authorities and/or a qualified legal ethics adviser.

ANSWER: Because Wife never became a client of the firm, duties owed to current and former clients do not apply here. But in Ethics Opinion 691, the Committee on Professional Ethics makes clear that law firms still have obligations with respect to non-clients. The committee noted that Rule 1.06(b)(2) of the Texas Disciplinary Rules of Professional Conduct prohibits a law firm from representing a person when doing so would be “adversely limited” by the firm’s responsibilities to a “third person.” Here, while Wife was never a client, she was a *prospective* client. The committee found that attorneys do have a duty of confidentiality to prospective clients under Rule 1.05 and Texas Rule of Evidence 503(a)(1)(B). Therefore, Taylor cannot represent Husband, and his conflict is imputed to every other lawyer at the XYZ Law Firm under Rule 1.06(f) of the Texas Disciplinary Rules of Professional Conduct. Cory cannot represent Wife. The correct answer is A.