



Opinion No. 598, July 2010

QUESTION PRESENTED

May a law firm continue to represent a client in a suit after the firm hires a lawyer who had previously represented the adverse party in another matter?

Statement of Facts

Prior to seeking employment as an associate with a law firm, a lawyer personally represented a person (“Former Client”) in several breach of contract suits. The law firm currently represents a client who is suing Former Client in a breach of contract action. The matter involved in the current lawsuit is not the same as the matters in which the lawyer being considered for employment had represented Former Client. If the law firm hires the lawyer, the law firm proposes to screen the new associate from all

matters involving Former Client.

Discussion

The facts here considered present a question of possible conflict of interest involving a former client. Rule 1.09 of the Texas Disciplinary Rules of Professional Conduct governs such conflicts of interest. 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.

In the facts presented, the lawyer who seeks employment with the law firm personally represented Former Client in breach of contract actions. Even though the new law firm does not plan to have the lawyer work on cases against Former Client, the lawyer’s conflict, if any, will be imputed to all other lawyers in the firm under Rule 1.09(b), which provides as follows:

- (b) Except to the extent authorized by Rule 1.10 [concerning successive government and private employment], 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) [of Rule 1.09].

Therefore, screening the associate from matters relating to Former Client will not cure an otherwise prohibited representation by the new firm. See Professional Ethics Committee Opinion 578 (July 2007); *Henderson v. Floyd*, 891 S.W.2d 252, 254 (Tex. 1995) (screening of associate who transferred to opposing counsel’s firm did not prevent disqualification of firm).

Because the associate’s conflict of interest with respect to Former Client will be imputed to all other lawyers in the law firm, it is necessary to review the relevant prohibitions contained in Rule 1.09(a). In the circumstances considered, Rule 1.09(a)(1) is not relevant since there is no issue as to the validity of the associate’s work for Former Client. Under Rule 1.09(a)(2), absent Former Client’s consent, no lawyer in the firm may undertake a representation against Former Client if a reasonable probability exists that representation by the associate against Former Client in the matter would violate the obligations of confidentiality owed to Former Client under Rule 1.05. Rule 1.05 requires that, with exceptions not here relevant, a lawyer not reveal confidential information acquired by the lawyer in representing a client or, in the case of a former client, use such information to the disadvantage of the former client without the former client’s consent after consultation. Thus, without Former Client’s consent to the continuing representation, a representation by the law firm of a client against Former Client will be improper under Rules 1.09(a)(2) and 1.09(b) if a reasonable probability exists that representation by the associate of the law firm client against Former Client in the matter would involve either an unauthorized disclosure of confidential information or an improper use of such information to the disadvantage of Former Client. Whether such a reasonable probability exists in any given case is a question of fact. See Comment 4 to Rule 1.09.

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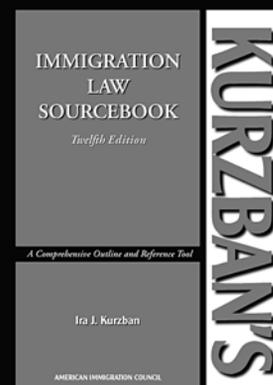
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This Committee recognized in Professional Ethics Committee Opinion 578 (July 2007) that a substantial overlap exists between the prohibitions contained in subparagraphs (a)(2) and (a)(3) of Rule 1.09. Matters are "substantially related" under subparagraph (a)(3) in situations where a lawyer "could have acquired confidential information concerning a prior client that could be used either to that prior client's disadvantage or for the advantage of the lawyer's current client or some other person." Comment 4B to Rule 1.09.

Although the Texas Disciplinary Rules of Professional Conduct are not designed to be rules for procedural decisions, Texas courts have looked to Rule 1.09 for guidelines in the case of disqualification motions based on prior representation of former clients. *In re Epic Holdings, Inc.*, 985 S.W.2d 41, 48 (Tex. 1998). 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 at 51. If a substantial relationship exists, the courts apply a conclusive, irrebuttable presumption that the lawyer in the course of representing the former client received confidential information. See Texas Professional Ethics Committee Opinion 584 (September 2008). 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).

As noted in Professional Ethics Committee Opinion 578 cited above, if a law firm's hiring of a lawyer might cause a litigation opponent to seek disqualification of the law firm in a pending matter for a client, the law firm should disclose to the client this circumstance and the potential consequences of disqualification:

The possibility that such a disqualifi-

cation might be sought by the former client or granted by a court, however, is a matter that could be of substantial importance to the present client in deciding whether or not to retain or continue to employ a particular lawyer or law firm as its counsel. Consequently, a lawyer should disclose those possibilities, as well as their potential consequences for the representation, to the present client as soon as the lawyer becomes aware of them; and the client then should be allowed to decide whether or not to obtain new counsel. Comment 9 to Rule 1.09.

Conclusion

Under the Texas Disciplinary Rules of Professional Conduct, absent consent by the adverse party, a law firm may not continue as counsel in a litigation matter after hiring as an associate a lawyer who formerly represented an adverse party if a reasonable probability exists that representation in the litigation by the associate would violate obligations of confidentiality under Rule 1.05 owed to the adverse party or if the current litigation matter is the same as, or substantially related to, the matter in which the associate represented the adverse party. If the new associate could not represent the law firm's client in current litigation because of the associate's prior representation of the adverse party, the entire law firm would be prohibited from continuing the current representation. If the representation is prohibited, this prohibition would not be affected by the law firm's screening the newly hired associate from the current representation against the associate's former client.



Opinion No. 599, July 2010

QUESTION PRESENTED

Under the Texas Disciplinary Rules of Professional Conduct, may a lawyer who serves as bail bondsman for his client in a criminal prosecution add to the court's form of bond a provision in which the client agrees that, if the client fails to appear in court, the attorney is authorized to enter a "no contest" plea that will result in a fine and may result in the issuance of a warrant for the client's arrest?

Statement of Facts

A lawyer represents an individual who is being prosecuted for a misdemeanor in municipal court. In addition to representing the client in the criminal prosecution, the lawyer also serves as the client's bail bondsman.

The municipal court promulgates a form for bail bonds used in the court's criminal proceedings. The bond form obligates the client, as principal, and the client's surety (here, the lawyer) to pay a specified amount plus fees and expenses that may be incurred by a peace officer in re-arresting the client if any of the conditions of the bond are violated. The conditions of the bond include the client's promise to appear before the municipal court at a specified date and time.

In addition to the standard language in the municipal court's form of bond, the lawyer has added language providing for the client's agreement that, if the client does not make the required personal appearance before the court, the lawyer or an associate is authorized to plead "no contest" on behalf of the client. The language added by the lawyer includes an acknowledgement by the client that such "no contest" plea for the client will have the effect of a guilty plea and will bind the client to pay a fine and court costs, which if unpaid will result in the issuance of a warrant for the client's arrest.

Discussion

In the scenario described above, the lawyer, in addition to representing the client, is engaging in a business transaction with the client by serving as the client's bail bondsman. Rule 1.08(a) of the Texas Disciplinary Rules of Professional Conduct prohibits a lawyer from entering into a business transaction with a client unless specified conditions are met:

- (a) A lawyer shall not enter into a business transaction with a client unless:
 - (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed in a manner that can be reasonably understood by the client;
 - (2) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and
 - (3) the client consents in writing thereto.

In the opinion of the Committee, the transaction violates the requirement of Rule 1.08(a)(1) that the terms of the transaction be "fair and reasonable to the client." The provision added to the bond form is contrary to the interests of the client because the provision subjects the client to the possibility of automatic

punishment without regard to whether any punishment is deserved and without regard to whether or not the court would have excused the client's failure to appear. On the facts presented, the added provision is of no benefit to the client but has been added by the lawyer solely to protect the financial interest of the lawyer. Hence, even if all other requirements of Rule 1.08(a) were met, the proposed arrangement would violate Rule 1.08(a)(1) because the terms of the transaction are not "fair and reasonable" to the client.

The arrangement here considered also creates an impermissible conflict of interest for the lawyer in violation of Rule 1.06. Rule 1.06(b) provides that "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 own interests." Rule 1.06(c) generally allows representation to continue with client consent in spite of a conflict of interest within the meaning of Rule 1.06(b) if under Rule 1.06(c)(1) "the lawyer reasonably believes the representation of each client will not be materially affected." However, in the situation here considered, the lawyer could not reasonably believe that the representation of the client would not be materially affected. The language the lawyer has added to the conditions of the bond gives the lawyer a substantial incentive to enter a plea of "no contest" on the client's behalf, without regard to whether such a plea is truly in the client's best interest. Rather than zealously representing the client by arguing that the court should excuse the client's failure to appear and rather than simply standing liable under the terms of the bond, the lawyer's own interests will be better (or more easily) served if the lawyer simply enters the "no contest" plea. This arrangement thus creates a prohibited direct conflict of interest for the lawyer. The result is a situation described in Comment 4 to



Rule 1.06:

Loyalty to a client is impaired ... in any situation when a lawyer may not be able to consider, recommend or carry out an appropriate course of action for one client because of the lawyer's own interests or responsibilities to others. The conflict in effect forecloses alternatives that would otherwise be available to the client.

Finally, the proposed arrangement is contrary to Rule 1.02(a), which provides that, except in circumstances not here applicable, "a lawyer shall abide by a client's decisions ... (3) In a criminal case, after consultation with the lawyer, as to a plea to be entered, whether to waive

jury trial, and whether the client will testify." The language added by the lawyer in the bond purports to authorize the lawyer to enter a "no contest" plea on the client's behalf but does not condition the entry of such plea on a further consultation between the lawyer and the client. Thus, if the lawyer acts on this added language without a contemporaneous decision by the client after consultation, the lawyer will violate the lawyer's duty under Rule 1.02(a)(3) to consult with his client and abide by the client's decision with respect to the entry of a plea.

Conclusion

Under the Texas Disciplinary Rules of Professional Conduct, it is not permissi-

ble for a lawyer who serves as bail bondsman for his client in a criminal prosecution to add to the court's form of bond a provision in which the client agrees that, if the client fails to appear in court, the attorney is authorized to enter a "no contest" plea that will result in a fine and may result in the issuance of a warrant for the client's arrest. Such an arrangement is a prohibited business transaction between lawyer and client that is not on terms fair and reasonable to the client, creates an impermissible conflict of interest for the lawyer, and impermissibly purports to eliminate the lawyer's duty to consult with, and abide by the decision of, the client concerning the entry of a plea.

Opinion No. 600, August 2010

QUESTION PRESENTED

Under the Texas Disciplinary Rules of Professional Conduct, is a lawyer for a Texas governmental agency required to ensure that the agency's enforcement officers do not communicate directly with a regulated person who is represented by a lawyer except with such lawyer's consent?

Statement of Facts

A Texas governmental agency issues licenses to qualified persons to engage in a specific business. The agency is composed of a legal division and an enforcement division. The legal division represents the agency in obtaining enforcement orders but does not have supervisory authority or control over the enforcement division.

The enforcement division of the agency, which is staffed by licensed officers who are not lawyers, investigates complaints against persons regulated by the agency and monitors such persons' compliance with orders previously issued for violations of the agency's regulations. Lawyers in the agency's legal division are not involved in the investigation of violations until the matter is referred to the

legal division for the possible issuance of a disciplinary order. After a disciplinary order is issued against a regulated person, the enforcement division, without further involvement of the legal division, is charged with monitoring the regulated person's compliance with the requirements of the order, which may continue for up to five years.

In most cases, regulated persons that are investigated by the agency's enforcement division or are subject to monitoring for compliance with a disciplinary order are represented by legal counsel with respect to the agency's regulation. In some cases, lawyers for regulated persons have formally requested that the agency's enforcement division personnel communicate with a regulated person only through the particular regulated person's lawyer.

Discussion

Rule 4.02(a) of the Texas Disciplinary Rules of Professional Conduct provides as follows:

- (a) In representing a client, a lawyer shall not communicate or cause or encourage another to communicate about the subject of the representation with a person, organization or entity of government the lawyer knows to be represented by another lawyer regarding that subject, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

Rule 4.02(a) thus prohibits a lawyer from communicating directly concerning a matter with a person known to be represented by a lawyer with respect to that matter unless the person's lawyer consents or the communication is otherwise authorized by law. In addition to generally prohibiting direct communications by a lawyer with a represented person except with the consent of the lawyer for the represented person, Rule 4.02(a) also prohibits the lawyer from indirectly affecting such communications by causing or encouraging a non-lawyer to com-



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municate with the represented person in such circumstances. As noted in Comment 1 to Rule 4.02, Rule 4.02(a) prohibits communications that are in form between a lawyer's client and another person represented by counsel where, "because of the lawyer's involvement in devising and controlling their content," such communications are in substance between the lawyer and the represented person. However, as noted in Comment 2 to Rule 4.02, Rule 4.02(a) does not prohibit communications between a lawyer's client and persons represented by counsel "as long as the lawyer does not cause or encourage the communication without the consent of the lawyer for the other party." This Comment further recognizes that Rule 4.02(a) "does not impose a duty on a lawyer to affirmatively discourage communication

between the lawyer's client and other represented persons, organizations or entities of government."

In this case, the lawyer's client is the governmental agency. It is assumed for purposes of this opinion that there is no other legal authorization for the communications in question if consent of a regulated person's lawyer for direct communications with the regulated person would otherwise be required by Rule 4.02(a). However, provided that the agency's lawyer does not have direct supervisory authority over the enforcement personnel of the agency and does not cause or encourage communications by such personnel with represented persons, neither Rule 4.02(a) nor any other provision of the Texas Disciplinary Rules of Professional Conduct imposes restrictions on the lawyer with respect to com-

munications by enforcement personnel with represented persons. There is likewise no requirement under the Texas Disciplinary Rules of Professional Conduct that a lawyer for the agency comply with a request from a regulated person's lawyer that all communications by enforcement personnel with the regulated person be carried out through the lawyer.

A different analysis would apply if the agency lawyer had direct supervisory authority over enforcement personnel of the agency. In that event, Rule 5.03 would make the lawyer responsible for the actions of the employees supervised by the lawyer. Under Rule 5.03(b), the lawyer would be in violation of the Texas Disciplinary Rules of Professional Conduct if the lawyer ordered, encouraged, or permitted employees under the lawyer's direct supervision to communicate with represented persons contrary to the requirements of Rule 4.02(a).

Conclusion

Under the Texas Disciplinary Rules of Professional Conduct, a lawyer for a Texas governmental agency is not required to limit communications by the agency's enforcement officers who are not subject to the lawyer's direct supervisory authority with regulated persons who are represented by lawyers. However, a lawyer for a governmental agency is not permitted to communicate directly with a regulated person that is represented in the matter by a lawyer who has not consented to the communications and is not permitted to cause or encourage such communications by other agency employees, and the agency lawyer is obligated to prevent such communications by employees over whom the lawyer has direct supervisory authority. ❖

The Supreme Court of Texas appoints the nine members of the Professional Ethics Committee for the State Bar of Texas from members of the bar and the judiciary. The court also appoints the committee's chair. According to Section 81.092(c) of the Texas Government Code, "Committee opinions are not binding on the supreme court."

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