

**THE PROFESSIONAL ETHICS COMMITTEE
FOR THE STATE BAR OF TEXAS
PO-21-1**

Posted for Comment January 21, 2021

QUESTION PRESENTED

Under the Texas Disciplinary Rules of Professional Conduct, when may a lawyer represent a client adverse to a former prospective client of the lawyer or another lawyer in the lawyer's firm?

STATEMENT OF FACTS

Husband and Wife are married. Five years ago, Wife approached Lawyer A to discuss the possibility of retaining Lawyer A to bring a divorce action against Husband. Wife met with Lawyer A for approximately 45 minutes. Lawyer A presented Wife with an engagement letter, but Wife declined to retain Lawyer A. Wife took no further action to divorce Husband.

Lawyer B has been Lawyer A's partner for many years. Recently, Husband asked Lawyer B to represent him in divorcing Wife. Before entering into a client-lawyer relationship with Husband, Lawyer B learned that Wife had previously met with Lawyer A to discuss potential divorce representation.

Lawyer A retained no notes or other documents from his meeting with Wife and claims to have no recollection of any information shared by Wife during the meeting. Wife is unwilling to consent to Lawyer B's representation of Husband in the divorce or otherwise waive any conflict of interest arising from her prior consultation with Lawyer A.

Lawyer B asks whether the Texas Disciplinary Rules of Professional Conduct prohibit him from accepting representation of Husband and, if so, whether such prohibition might have been avoided by Wife's advance consent.

DISCUSSION

Lawyers owe a duty of confidentiality to prospective clients. In the following discussion, a "prospective client" is a person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter but who does not enter into a client-lawyer relationship with the lawyer. For purposes of this discussion:

- (1) A person who sends information to a lawyer unilaterally and without the lawyer's express or implied invitation is not necessarily a "prospective client." *Cf.* Professional Ethics Committee Opinion 651 (November 2015) (discussing duties owed to persons who submit information to a lawyer via links on the lawyer's website); and
- (2) A person who consults with a lawyer for the purpose of disqualifying the lawyer is not a "prospective client." *See generally* ABA Model Rule 1.18, comment 2.

There is no Texas Rule devoted to defining a lawyer's duties with regard to prospective clients. Nevertheless, the Preamble to the Rules indicates that such duties exist and may include the duty of confidentiality. Paragraph 12 of the Preamble ("Scope") provides:

"Most of the duties flowing from the client-lawyer relationship attach only after the client has requested the lawyer to render legal services and the lawyer has agreed to do so. For purposes of determining the lawyer's authority and responsibility, individual circumstances and principles of substantive law external to these rules determine whether a client-lawyer relationship may be found to exist. But there are some duties, such as of that of confidentiality, that may attach before a client-lawyer relationship has been established."

Rule 1.05 addresses a lawyer's duties with respect to confidential client information. Rule 1.05(a) provides, in relevant part:

"'Confidential information' includes both 'privileged information' and 'unprivileged client information.' 'Privileged information' refers to the information of a client protected by the lawyer-client privilege of Rule 503 of the Texas Rules of Evidence or of Rule 503 of the Texas Rules of Criminal Evidence or by the principles of attorney-client privilege governed by Rule 501 of the Federal Rules of Evidence for United States Courts and Magistrates."

The Committee concludes that Rule 1.05's internal reference to Texas Rule of Evidence 503 means that a lawyer's duty of confidentiality under Rule 1.05 extends to information provided by prospective clients. Texas Rule of Evidence 503(a)(1)(B) provides that a "client" includes a person who "consults a lawyer with a view to obtaining professional legal services from the lawyer." This is consistent with comment 1 to Rule 1.05, which states that "[t]he ethical obligation of the lawyer to protect the confidential information of the client not only facilitates the proper representation of the client but also encourages potential clients to seek early legal assistance." *See also* Opinion 651 (November 2015) (absent an effective warning to the contrary, the duty of confidentiality may apply to information submitted by a prospective client in response to an invitation to submit such information via links on the lawyer's website).

Subject to the exceptions in Rule 1.05, therefore, a lawyer's unauthorized use or disclosure of confidential information provided by a prospective client violates Rule 1.05 and subjects the lawyer to possible disciplinary sanction. Accordingly, Lawyer A has a duty to maintain the confidentiality of any information disclosed by Wife in their meeting to discuss possible divorce representation.

The next question is whether Lawyer A's duty of confidentiality creates a conflict of interest that prevents Lawyer A from representing Husband in divorcing Wife and, if so, whether Lawyer A's conflict is imputed to his partner, Lawyer B. The potentially applicable Rules relating to conflicts of interest are Rules 1.09 and 1.06.

Consultation with a prospective client does not create a “former client” conflict under Rule 1.09. Rule 1.09(a) addresses whether a lawyer may represent a person in a matter adverse to a former client:

- (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.”

Because Rule 1.09 only applies when a lawyer has formerly “represented” a client, a conflict in violation of Rule 1.09 does not arise when a lawyer represents a person adverse to a former prospective client.

Consultation with a prospective client does not create an opposing party representation conflict under Rule 1.06(a). Rule 1.06(a) prohibits a lawyer from representing opposing parties in the same litigation. Because Rule 1.06(a) applies only if the lawyer represents both opposing parties, it does not apply to a representation adverse to a prospective client.

Consultation with a prospective client may create an adverse limitation conflict under Rule 1.06(b)(2). Rule 1.06(b) 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:
 - (1) involves a substantially related matter in which that person's interests are materially and directly adverse to the interests of another client of the lawyer or the lawyer's firm; or
 - (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)(1) is expressly limited to representations adverse to the interests of “another client.” Unlike Rule 1.05, Rule 1.06 does not refer to clients as defined in Texas Rule of Evidence 503. In the opinion of the Committee, (a) the word “client” in Rule 1.06 means a person in a duly formed client-lawyer relationship with the lawyer or the lawyer’s firm, and (b) Rule 1.06(b)(1) does not apply to representations adverse to the interests of a prospective client.

Rule 1.06(b)(2), on the other hand, is not limited to conflicts relating to “another client.” Among other things, Rule 1.06(b)(2) prohibits representations that reasonably appear to be “adversely limited by the lawyer’s or law firm’s responsibilities to . . . a third person.” A lawyer’s duty of confidentiality to a prospective client is the type of responsibility to a third person that may result in an adverse limitation under Rule 1.06(b)(2).

Whether a lawyer’s duty of confidentiality to a prospective client reasonably appears to adversely limit the lawyer’s representation of a client is ordinarily a question of fact. As a general rule, a lawyer should not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter. In evaluating whether a conflict is caused by consultation with a prospective client, the lawyer should consider circumstances including: (a) the nature of the representation sought by the prospective client; (b) the nature of the matter adverse to the prospective client; (c) the length of discussion with the prospective client; (d) the matters actually discussed; and (e) the contents of any documents given or shown to the lawyer.

The fact that the lawyer claims to be unable to remember all or some of the information disclosed by the prospective client is not determinative of whether a conflict exists under Rule 1.06(b)(2).

In the opinion of the Committee, based on the limited facts presented, Lawyer A’s previous consultation with Wife creates a conflict of interest that would prevent Lawyer A from representing Husband in divorcing Wife. Given that Lawyer A’s consultation with Wife lasted forty-five minutes and related to the same matter as the proposed representation of Husband, the Committee believes a reasonable lawyer would conclude that Wife likely shared confidential information during the consultation that could be significantly harmful if revealed or used against her in a divorce from Husband. Accordingly, the Committee concludes that Lawyer A’s duty of confidentiality to Wife reasonably appears to adversely limit his ability to represent Husband in divorcing Wife and that Rule 1.06(b)(2) therefore prohibits that representation.

Vicarious disqualification. Rule 1.06(f) provides:

“If a lawyer would be prohibited by this Rule [1.06] from engaging in particular conduct, no other lawyer while a member or associated with that lawyer’s firm may engage in that conduct.”

As noted, Rule 1.06(b)(2) prohibits Lawyer A from representing Husband in divorcing Wife. Rule 1.06(f) automatically extends that prohibition to Lawyer B and any other lawyer presently in Lawyer A’s firm. The firm-wide imputation of conflicts arising from relatively brief prospective client interviews may in some cases lead to harsh results, but the language of Rule 1.06(f) currently allows for no exception. *Compare* Rule 1.06(f) with ABA Model Rule 1.18 (limiting imputation of prohibition arising from consultation with prospective client, subject to certain conditions). The Committee notes that as of the date of this opinion the Committee on Disciplinary Rules and Referenda has proposed the addition of a new Texas Rule modeled on ABA

Model Rule 1.18, but the proposed Texas Rule has not yet been adopted. *See* 83 Texas Bar Journal 618 (September 2020).

Effective consent. In the fact scenario assumed in this opinion, Wife is unwilling to consent to Lawyer A's or Lawyer B's representation of Husband. The Committee notes, however, that a lawyer may be able to proceed with a representation prohibited under Rule 1.06(b)(2) if the lawyer can obtain effective consent of both the former prospective client and the proposed client whose representation would otherwise be prohibited. Effective consent under Rule 1.06(c) requires two elements:

- (c) "A lawyer may represent a client in the circumstances described in (b) if:
- (1) the lawyer reasonably believes the representation of each client will not be materially affected; and
 - (2) each affected or potentially affected client consents to such representation after full disclosure of the existence, nature, implications, and possible adverse consequences of the common representation and the advantages involved, if any."

Rule 1.06(c) does not expressly address the need to obtain consent from non-clients when the potential conflict is based on the adverse limitation due to the interests of a third party. Nevertheless, the Committee believes that when representation is prohibited based on a consultation with a former prospective client, effective consent requires the informed consent of both the former prospective client and the currently proposed client, as well as the lawyer's reasonable belief that the representation can proceed without violation of the duty of confidentiality owed to the former prospective client.

A former prospective client may place limitations on its consent under Rule 1.06(c). For example, the former prospective client might condition consent on the adoption of an agreed screening arrangement whereby the individual lawyer(s) who consulted with that prospective client would be prohibited from participating in the proposed adverse representation or disclosing the prospective client's confidences to any other person. Assuming the former prospective client, the lawyer, the law firm, and the law firm's proposed client all agree, such a screening arrangement would allow other lawyers in law firm to undertake the representation adverse to the interests of the former prospective client, notwithstanding imputation of the conflict under Rule 1.06(f). The Committee notes that screening will not avoid a Rule 1.06(b)(2) conflict based on a consultation with a former prospective client unless all parties consent to the arrangement in accordance with Rule 1.06(c).

CONCLUSION:

A lawyer who consults with a person about the possibility of forming a client-lawyer relationship with respect to a matter owes that person a duty of confidentiality under Rule 1.05 of the Texas Disciplinary Rules of Professional Conduct and may not use or reveal information communicated by the prospective client except in accordance with that Rule.

A lawyer's consultation with a prospective client may result in a disqualifying adverse limitation under Rule 1.06(b)(2). Whether a lawyer's representation of a client reasonably appears to be adversely limited by the lawyer's duty of confidentiality to a former prospective client is ordinarily a factual inquiry. As a general rule, a lawyer should not represent a client with interests materially adverse to those of a former prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter.

If Rule 1.06(b)(2) prohibits a lawyer from undertaking a representation adverse a former prospective client, then no other lawyer while a member or associated with that lawyer's firm may accept the representation. Screening will not avoid the imputation of a Rule 1.06(b)(2) conflict based on a consultation with a former prospective client unless all parties consent to the screening arrangement in accordance with Rule 1.06(c).

Under the fact scenario presented in this Opinion, Lawyer A owes a duty of confidentiality to Wife and may not use or reveal information communicated by Wife except in accordance with Rule 1.05. Rule 1.06(b)(2) prohibits Lawyer A from representing Husband in his divorce because Lawyer A previously had a substantive consultation with Wife about possible divorce representation. Lawyer A's disqualifying conflict is imputed to Lawyer B and all other lawyers in the Lawyer A's law firm.