

**THE PROFESSIONAL ETHICS COMMITTEE
FOR THE STATE BAR OF TEXAS
Opinion No. 644 (Revised)**

July 2016

NOTE REGARDING REVISED OPINION:

Following the March 22, 2016 Order of the Supreme Court of Texas, amending comments to Rules 1.06 and 1.09 of the Texas Disciplinary Rules of Professional Conduct, the Committee withdraws its original Opinion 644 (August 2014) and issues this revised Opinion 644 in its place.

QUESTION PRESENTED

Do the Texas Disciplinary Rules of Professional Conduct require a law firm to withdraw from representing a client in a lawsuit if the law firm hires a new lawyer who, before becoming a lawyer, was employed as a law clerk for the law firm representing the opposing party in the lawsuit and in that capacity helped provide services to the opposing party with respect to the lawsuit?

STATEMENT OF FACTS

Individual X, while in law school and before becoming a lawyer, worked as a law clerk for a law firm (“Firm A”) and prepared research memos for the firm related to a lawsuit in which the firm represented the plaintiff, Business P, against Business D. After graduation from law school and passing the bar examination, Individual X began working as an associate for a second law firm (“Firm B”), which represents the defendant, Business D, in the lawsuit brought by Business P. Once Firm B learns that Individual X worked for Firm A as a law clerk while in law school and was involved in Firm A’s representation of Business P in the lawsuit against Business D, Firm B seeks to determine whether it must withdraw from representing Business D in the lawsuit or whether it can continue to represent Business D if it utilizes screening procedures to prevent Individual X from being involved in the representation of Business D and from sharing any confidential information concerning Business P with anyone in Firm B. Business P and Firm A have not waived their rights concerning information entrusted to Individual X.

DISCUSSION

The factual circumstances considered here fall between two situations where the requirements are known. If a lawyer at Firm A represented Business P in the lawsuit against Business D and then left Firm A and joined Firm B, Firm B would not be permitted to continue to represent Business D in the lawsuit. Rule 1.09 of the Texas Disciplinary Rules of Professional Conduct; *Henderson v. Floyd*, 891 S.W.2d 252, 254 (Tex. 1995) (“The simple fact is that relator’s former lawyer is now associated with his opponent’s lawyer. Rule 1.09 does not permit such

representation . . .”). On the other hand, if a member of the staff of Firm A, such as a secretary or paralegal, worked on a matter involving the representation of Business P and then left Firm A and went to work for Firm B, Firm B would be allowed to continue to represent Business D if adequate screening procedures were put in place for the purpose of preventing the staff member from sharing Business P’s confidential information with members of Firm B. *In re Guaranty Insurance Services, Inc.*, 343 S.W.3d 130 (Tex. 2011); *In re Columbia Valley Healthcare System, L.P.*, 320 S.W.3d 819 (Tex. 2010); *Grant v. Thirteenth Court of Appeals*, 888 S.W.2d 466 (Tex. 1994); *Phoenix Founders, Inc. v. Marshall*, 887 S.W.2d 831 (Tex. 1994); Professional Ethics Committee Opinion 472 (June 1991).

The situation addressed in this opinion falls between the two scenarios discussed above because Individual X was a staff member, a law student serving as a law clerk, at Firm A, but Individual X is now a lawyer at Firm B. In this case, Rule 1.09 is not applicable. Rule 1.09 involves situations in which one lawyer has in the past personally represented a client in a matter. Here, Individual X was not a lawyer at Firm A and therefore did not personally represent Business P as a client of Firm A. *But see In re Mitcham*, 133 S.W.3d 274 (Tex. 2004) (discussing the application of Rule 1.09 in the case of a person working as a paralegal at one law firm and then as a lawyer at a second law firm but ultimately holding that the second firm was disqualified based on the terms of an agreement binding the second firm).

Although Rule 1.09 is inapplicable, Rule 1.06(b)(2) does apply. Rule 1.06(b) provides in pertinent part as follows:

“ . . . 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(c) provides that this limitation does not apply if “the lawyer reasonably believes the representation of each client will not be materially affected” (Rule 1.06(c)(1)) and there is informed consent from each affected client (Rule 1.06(c)(2)).

Assuming the absence of informed client consent, Individual X may not personally represent Business D in the lawsuit against Business P. Even though Individual X was not a lawyer at Firm A, Individual X remains under personal obligations to his former employer Firm A and to Business P with respect to confidential information concerning Business P and its lawsuit against Business D. Indeed, for purposes of a court proceeding to determine disqualification, a non-lawyer employee who works on a matter is subject to a conclusive presumption that confidences and secrets were imparted to the employee regarding the matter. *In re Columbia Valley Healthcare System, L.P.*, 320 S.W.3d at 824.

As for Firm B, Rule 1.06(f) provides that “[i]f 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.” The Texas Supreme Court’s recent amendment to the Comments to Rule 1.06 (by Order dated March 22, 2016), however, clarifies that the general

prohibition of Rule 1.06(f) does not apply to the situation in which the lawyer's conflict arises from his or her employment with another law firm before becoming a lawyer. Comment 19 to Rule 1.06 provides:

“A law firm is not prohibited from representing a client under paragraph (f) merely because a nonlawyer employee of the firm, such as a paralegal or legal secretary, has a conflict of interest arising from prior employment or some other source. Nor is a firm prohibited from representing a client merely because a lawyer of the firm has a conflict of interest arising from events that occurred before the person became a lawyer, such as work that the person did as a law clerk or intern. But the firm must ordinarily screen the person with the conflict from any personal participation in the matter to prevent the person's communicating to others in the firm confidential information that the person and the firm have a legal duty to protect. [citations omitted]”

Thus, Rules 1.06(b)(2) and 1.06(c)(1) prohibit Individual X from personally representing Business D in the lawsuit. The other lawyers in Firm B, however, are not prohibited from such representation so long as Firm B screens Individual X from any personal participation in the matter to prevent Individual X's communicating to others in Firm B confidential information that Individual X and Firm B have a legal duty to protect.

CONCLUSION

Under the Texas Disciplinary Rules of Professional Conduct, a law firm is not required to withdraw from representing a client in a lawsuit if the law firm hires a new lawyer who, before becoming a lawyer, was employed as a law clerk for the law firm representing the opposing party in the lawsuit and in that capacity helped provide services to the opposing party with respect to the lawsuit, so long as the law firm screens the new lawyer from any personal participation in the matter to prevent the new lawyer's communicating to others in the law firm confidential information that the new lawyer and the law firm have a legal duty to protect.