THE PROFESSIONAL ETHICS COMMITTEE
FOR THE STATE BAR OF TEXAS
Opinion No. 578
July 2007

QUESTIONS PRESENTED

Under what circumstances is a law firm permitted to represent one municipality against another municipality that was a former client of the law firm? Would screening lawyers who had been involved in representation of the former client have an effect on the law firm's eligibility to undertake the proposed representation against the former client?

STATEMENT OF FACTS

Municipality A and Municipality B are involved in a controversy that they expect to result in litigation. Municipality A proposes to hire a lawyer employed by Firm C. Firm C had previously represented Municipality B in a matter unrelated to the current controversy. The lawyer in Firm C that Municipality A wishes to hire did no work for Municipality B in the prior matter. Firm C proposes to screen all lawyers who had previously worked on the prior unrelated matter for Municipality B so that these lawyers will not participate in Firm C's proposed representation of Municipality A. When asked to consent to Firm C's representation of Municipality A in the current controversy, Municipality B declined to give such consent. The dispute between the municipalities does not involve the validity of the services or work product of Firm C in the prior representation of Municipality B.

DISCUSSION

A lawyer's duty to protect a client's confidential information does not end with the termination of the lawyer-client relationship. Instead, in handling matters for current clients, a lawyer owes a continuing duty not to reveal or use confidential information that was gained in the representation of a former client. This duty is reflected in Rule 1.09(a) and (b) of the Texas Disciplinary Rules of Professional Conduct:

"(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;
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> (2) if the representation in reasonable probability will involve a violation of Rule 1.05; or
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> (3) if it is the same or a substantially related matter.

(b) Except to the extent authorized by Rule 1.10, 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)."

Under the facts presented, the current litigation matter for Municipality A is not the same as, and is not substantially related to, the matter for which Firm C had represented Municipality B, and the proposed representation for Municipality A does not

question the validity of Firm C's prior services or work product for Municipality B. The requirement of subparagraph (a)(2) of Rule 1.09(a) remains: the representation must not "in reasonable probability" involve a violation of 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. 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 4A to Rule 1.09.

Under Rule 1.09(a)(2), Firm C may not undertake representation against its former client Municipality B if there is a reasonable probability that the representation would cause the firm to violate the obligations of confidentiality owed to the former client under Rule 1.05. "[I]f 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). Whether such a reasonable probability exists in any given case will be a question of fact." Comment 4 to Rule 1.09. Thus, whether Firm C would be prohibited by Rule 1.09(a)(2) from representing Municipality A would depend on the particular facts as to whether there is a reasonable probability that the representation of Municipality A against Municipality B in the proposed matter would involve either disclosure of confidential information acquired by Firm C in representing Municipality B or use of such confidential information to the disadvantage of Municipality B.

The provisions of the Texas Disciplinary Rules of Professional Conduct specify the standards for professional discipline of Texas lawyers. The Texas Disciplinary Rules are not designed to be rules for procedural decisions, including decisions by courts as to disqualification of Texas lawyers because of prior representation of other clients. See paragraph 15 of the Preamble to the Texas Disciplinary Rules. However, Texas courts have chosen to look 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). Courts address the question of disqualification at the request of a former client by analyzing whether the two matters are "substantially related" under Rule 1.09, applying the following test: "[t]wo 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." 985 S.W.2d at 51.

In these circumstances, Firm C should disclose to Municipality A the possibility that Municipality B may seek disqualification of the firm and the potential consequences of such action:

"The possibility that such a disqualification 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.

The proposed screening of the particular lawyers in Firm C who previously represented Municipality B would not alter the application of Rule 1.09(a). The lawyers who participated in the representation of Municipality B and the lawyer who is proposed to represent Municipality A are members of or associated with Firm C. Hence under Rule 1.09(b), if the lawyers in Firm C who had represented Municipality B are prohibited from representing Municipality A in the proposed matter, all lawyers in Firm C are similarly prohibited. The exception in Rule 1.09(b) relating to authorization under Rule 1.10 is not applicable in this case since Rule 1.10 applies in the case of lawyers who are public officers or employees and not in the case of lawyers in private practice who represent governmental entities. Therefore, in the circumstances presented, the proposal to screen the lawyers who previously represented Municipality B will not cure an otherwise prohibited representation by Firm C. See *National Medical Enterprises, Inc.* v. *Godbey*, 924 S.W.2d 123, 131 (Tex. 1996) (presumption that lawyers in the same firm share confidences is irrebuttable); see generally *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).

CONCLUSION

Under the Texas Disciplinary Rules of Professional Conduct, a law firm is permitted to represent a municipality against another municipality that was a former client without prior consent of the former client if the litigation matter does not involve questioning the validity of the law firm's services or work product for the former client, the proposed representation does not involve a matter that is the same or substantially related to the matter for which the firm represented the former client, and there exists no reasonable probability that the proposed representation would cause the law firm to violate the obligations of confidentiality owed to the former client under Rule 1.05. If any lawyer in the law firm could not represent the municipality client in the proposed matter because of prior representation of a former client while the lawyer was in private law practice, the entire law firm would be prohibited from undertaking the representation. The representation would be prohibited without regard to the law firm's attempt to screen from the current representation all lawyers who could not themselves represent the current client in the proposed matter because of their prior representation of the adverse party.