THE PROFESSIONAL ETHICS COMMITTEE
FOR THE STATE BAR OF TEXAS
Opinion No. 693
February 2022

QUESTIONS PRESENTED

1. May a lawyer who practices in a private law firm that regularly represents a public entity accept a position with a hiring law firm that is routinely adverse to the public entity, without creating a conflict for all lawyers in the hiring firm?

2. Given that the public entity client is governed by open meetings and open records laws, and aspects of the firm's representation of the public entity are disclosed publicly or are available under law, does the "generally known" exception to a lawyer's obligations of confidentiality allow the hiring firm to avoid the migrating lawyer's conflicts?

3. Does Rule 1.10 of the Texas Disciplinary Rules of Professional Conduct, which allows ethical screening for government lawyers who move to a private law firm, apply to a lawyer who previously represented public entities at a private law firm?

STATEMENT OF FACTS

Firm A regularly, if not exclusively, represents public entities, such as school districts or municipalities. A lawyer at Firm A (the "migrating lawyer") plans to leave Firm A and join Firm B. The migrating lawyer does not intend to bring any clients to Firm B.

Firm B routinely represents clients adverse to the same public entities that Firm A regularly represents, including in pending litigation. Firm B is concerned that if it hires the migrating lawyer it can no longer represent clients adverse to Firm A's clients.

Firm A provides a wide range of legal services to its public entity clients, including legal advice and representations regarding transactions, administrative proceedings, and litigation. Much of the subject matter of the public entity's legal representation is discussed in public sessions of the entity or may be accessible through governmental open records requests by the public. Firm B asks whether the migrating lawyer's potential conflicts might be alleviated by the "generally known" exception to Rule 1.05's restriction on the use of client confidential information.

Finally, Firm B asks whether it can effectively screen the migrating lawyer under Rule 1.10, given that the migrating lawyer previously represented only governmental entities.

DISCUSSION

The first question presented is whether the migrating lawyer and Firm B will be conflicted out of representations adverse to the clients of Firm A. The answer to this question is generally governed by Rule 1.09 ("Conflict of Interest: 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:
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> > (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.
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> (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).
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> (c) When the association of a lawyer with a firm has terminated, the lawyers who were then associated with that lawyer shall not knowingly represent a client if the lawyer whose association with that firm has terminated would be prohibited from doing so by paragraph (a)(1) or if the representation in reasonable probability will involve a violation of Rule 1.05.

In summary, Rule 1.09 prohibits the migrating lawyer from representing any client if (i) the matter is adverse to a client that the migrating lawyer "personally has formerly represented," and (ii) any of the three circumstances of Rule 1.09(a) apply. Further, if the migrating lawyer is personally conflicted out of a representation under Rule 1.09, all lawyers in the hiring law firm will share the same conflict while the migrating lawyer remains in the firm.

Personal representation under Rule 1.09. Rule 1.09 does not define when a lawyer "personally" represents a client, but in the opinion of the Committee the phrase requires only that a lawyer provided *some* representation to the client, albeit minimal. For example, "personal representation" does not require that the lawyer appear formally as an attorney of record in litigation or provide a significant quantity of legal services to the client. The term might include providing limited advice to another lawyer in the firm about the client's representation, working on an isolated legal research project for the client, or merely organizing or reviewing the client's documents. Further, "personal representation" does not require that the lawyer bill or charge the client for the representation. In other words, a lawyer may be considered to have "personally represented" a client under

relatively modest circumstances. *See, e.g.*, *Henderson v. Floyd*, 891 S.W.2d 252 (Tex. 1995); *In re ProEducation Int'l, Inc.,* 587 F.3d 296 (5th Cir. 2009).

A lawyer who migrates to another law firm leaves behind any conflicts arising solely due to imputation, because purely imputed conflicts are not based on the lawyer's personal representation of a client. Although Rule 1.06(f) imputes the conflicts of each lawyer at Law Firm A to every other lawyer still associated with that firm, such purely imputed conflicts do not apply to a lawyer who leaves Law Firm A. Under Rule 1.09, therefore, neither the migrating lawyer nor Law Firm B are subject to conflicts related to a client that the migrating lawyer did not personally represent. *See* Professional Ethics Committee Opinion 527 (April 1999) (discussing Texas disqualification law); *see also* Opinion 578 (July 2007) (discussing conflicts in lawyers representing municipalities against each other) and Comment 7 to Rule 1.09.

In some circumstances, a migrating lawyer may have a personal conflict of interest even though the lawyer did not "personally represent" the party in question. *See* Rule 1.06(b)(2) (prohibiting representation that "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"); Opinion 691 (June 2021) (discussing conflicts arising from exposure to confidential information of former prospective client that never retained the lawyer). This Opinion, however, addresses only former client conflicts under Rule 1.09, which require previous personal representation by the migrating lawyer.

Avoiding conflicts from a migrating lawyer. Before hiring a lawyer, the hiring firm should attempt to detect and analyze potential conflicts of interest created by the lawyer's previous personal representations. In particular, the hiring firm should ask for a list of clients personally represented by the migrating lawyer and then determine whether the hiring firm is handling any matters adverse to the listed clients. If so, the next step is to determine whether the representations adverse to the listed clients are prohibited because they fall within one of the three categories set out in Rule 1.09(a). Detection and evaluation of potential conflicts may require the limited sharing of client confidential information by the migrating lawyer with the hiring firm, as permitted under the conditions set out in Opinion 607 (July 2011).

A hiring firm's failure to analyze a migrating lawyer's conflicts carefully may result in harm to the hiring firm and its existing clients. Once the migrating lawyer is associated with the hiring firm, any conflicts arising from the migrating lawyer's personal representation will be imputed to all lawyers in the hiring firm under Rule 1.09(b). Accordingly, the hiring firm should attempt to detect and analyze the migrating lawyer's personal representation conflicts *before* the migrating lawyer is hired.

The Committee has not been provided with enough information to evaluate whether hiring the migrating lawyer in this case would result in violation of Rule 1.09 based on the migrating lawyer's personal representation of a former client. If it would, Firm B should not hire the lawyer without the prior informed consent of the affected clients. *See* Rule 1.09, Comment 10 ("A waiver is effective only if there is consent after disclosure of the

relevant circumstances, including the lawyer's past or intended role on behalf of each client, as appropriate."). The Committee notes that constitutional or statutory limits on the authority of governmental officers may render it difficult or impossible to obtain effective informed consent from a governmental entity. *See, e.g.,* Opinion 615 (April 2012) (questioning whether it would even be possible for a district attorney to obtain a valid conflict waiver from the State); Opinion 539, n.2 (April 2002) (same).

Client confidential information and the "generally known" exception to Rule 1.05. Rule 1.05 defines a client's "confidential information" in exceptionally broad terms. That definition includes both "privileged information" and "unprivileged client information." The latter refers to "all information relating to a client or furnished by a client, other than privileged information, acquired by the lawyer during the course of or by reason of the representation of the client." Rule 1.05 generally prohibits the revelation or use of client confidential information for purposes other than the representation, subject to numerous exceptions. The "generally known" exception appears in Rule 1.05(b)(3):

> Except as permitted by paragraphs (c) and (d), or as required by paragraphs (e) and (f), a lawyer shall not knowingly:
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> . . .
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> (3) Use confidential information of a former client to the disadvantage of the former client after the representation is concluded unless the former client consents after consultation or the confidential information *has become generally known*." (emphasis added).

The Committee previously considered the meaning of "generally known" in Opinion 595 (February 2010). The Committee concluded that "generally known" refers to "information that is actually known to some members of the general public and is not merely available to be known if members of the general public choose to look where the information is to be found."

In the Committee's opinion, the fact that a public entity may engage with or discuss pending legal matters or advice with its lawyers in an open session of its governing body or that certain records pertaining to the public entity's representation by its lawyers may be available through an open records request of that public entity does not make all the public entity's client confidential information "generally known." Some of the client confidential information in this public entity context may be "generally known" due to some members of the public attending these open sessions or from media accounts of the meetings; however, that fact does not make the entire body of client confidential information relating to the lawyer's representation of the public entity "generally known."

Law Firm B's suggestion that the "generally known" exception to the Rule 1.05 protections encompasses the migrating lawyer's representation of a public entity is dubious, given that the lawyer may communicate with the entity and its representatives in closed executive sessions of the governing body, by privileged correspondence to the

entity's representatives, or by acquiring unprivileged client information in myriad ways during and by reason of the representation. Regarding specific litigation handled by Law Firm A for the public entity to which Law Firm B is adverse, this narrow "generally known" exception to client confidential information does not likely have any material effect on whether Rule 1.09 prohibits the second firm or the migrating lawyer from becoming or continuing to be adverse to that public entity.

Rule 1.10: Screening of former government lawyers. Rule 1.10, entitled "Successive Government and Private Employment," concerns the transition of a lawyer from public employment to private practice. Paragraphs (a) and (b) of Rule 1.10 provide:

> (a) Except as law may otherwise expressly permit, a lawyer shall not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency consents after consultation.
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> (b) No lawyer in a firm with which a lawyer subject to paragraph (a) is associated may knowingly undertake or continue representation in such a matter unless:
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> > (1) The lawyer subject to paragraph (a) is screened from any participation in the matter and is apportioned no part of the fee therefrom; and
> >
> > (2) written notice is given with reasonable promptness to the appropriate government agency.

Rule 1.10 applies only to lawyers who were public officers or employees and who have moved to private practice. Examples of lawyers migrating from public practice to private practice under Rule 1.10 include elected or appointed prosecutors who join or form criminal defense law firms as well as other governmental agency lawyers who join private law firms that practice in front of or adversely to those agencies.

Rule 1.10 does not apply to a lawyer who moves from one private law firm to another merely because the lawyer represents public entities or public officials. Such a lawyer is not a former "public officer or employee" and therefore is not eligible for ethical screening under Rule 1.10.

Except with the informed consent of the affected parties or as permitted by Rules 1.10 or 1.11, ethical screening for lawyers is not permitted by the Texas conflict of interest rules, including Rule 1.09. To the extent the migrating lawyer has a conflict of interest arising from the lawyer's personal representation of a client at Law Firm A, that conflict will follow the migrating lawyer to Law Firm B and will be imputed to all Law Firm B lawyers.

CONCLUSION

Without prior consent, a lawyer may not represent a person adverse to a client of the lawyer's former firm if the lawyer "personally represented" the client while at the former firm and if the adverse representation falls within any of the three categories set out

in Rule 1.09(a). Any conflict of interest based on the lawyer's former personal representation of a client will be imputed to all other lawyers at the lawyer's current law firm. Ethical screening of the lawyer will be ineffective to avoid the conflict unless Rule 1.10 or 1.11 applies or the affected clients provide informed consent to the screen.

The "generally known" exception to a lawyer's obligations of confidentiality does not eliminate conflicts of interest arising from the representation of a public entity client merely because the client may discuss some legal matters in public session or some records related to the legal representation may be available through an open records request.

Rule 1.10 relates to lawyers who are public officers or employees and who transition to private practice. Rule 1.10 is inapplicable to lawyers moving from one private law firm to another private law firm, even if the lawyer represents public entities. Accordingly, the ethical screen allowed by Rule 1.10 is not available to the migrating lawyer in the above fact scenario.