

Disqualification and Chinese Walls:
When New Kids on the Block Can Get You Disqualified.

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2016 UT Conference on State and Federal Appeals
June 9, 2016

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A. Introduction and scope of this paper

There are various ways that a lawyer may be disqualified from representing a particular client in a particular piece of litigation. The lawyer (or another lawyer in her firm) may have handled the same or a substantially related matter in the past, or may be adverse to the potential new client in another matter, or may be disqualified from continuing to represent a client in a matter if there has been a joint representation of multiple clients, but a conflict arises between the clients. This paper will not cover the whole waterfront of potentially disqualifying events. Rather, the scope is very narrow, and it involves changes in personnel: when can an individual—a new lawyer or paralegal in a firm, a fact witness interviewed in the course of litigation—disqualify an attorney or firm from representing a client in litigation? And when can adequate screening procedures—sometimes called Chinese walls—prevent such a disqualification?

B. Migrating lawyers

One fundamental principle of attorney disqualification is the concept of imputed knowledge. If an attorney in a firm represents a client, then that attorney's knowledge of client confidences is imputed by law to all other attorneys in the firm, and all are disqualified from taking a representation contrary to the client. *Nat'l Med. Enters., Inc. v. Godbey*, 924 S.W.2d 123, 131 (Tex. 1996) (orig. proceeding). A corollary to that rule is the principle that, when an attorney joins a new firm, her knowledge of client confidences is imputed to all of the attorneys in the new firm, such that all are disqualified from taking a representation contrary to the new attorney's clients and former clients. *Id.* One recent Texas appellate opinion resolves the issue of whether an attorney who leaves a law firm carries with her the knowledge that was imputed to her at the first firm, then imputes it to attorneys in her new firm, such that the new firm is disqualified from taking on a representation contrary to a client of the old firm, even if the migrating attorney never actually worked with the client or had actual knowledge of any client confidences. The answer to that question is no. *See In re Nat'l Lloyds Ins. Co.*, No. 13-15-00521-CV, 2016 WL 552112 (Tex. App.—Corpus Christi Feb. 10, 2016, orig. proceeding) (mem. op.).

1. Disciplinary rules regarding former clients

Rule 1.09, entitled “Conflict of Interest: Former Client,” provides:

(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.

(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).

(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.

Tex. Disciplinary R. Prof. Conduct R. 1.09. Under Texas Rule 1.09(b), the personal conflicts of one attorney are imputed to all other members of a firm. *Id.* Comment 7 to Rule 1.09 provides that this imputation can be removed when an attorney leaves a firm: "should ... other lawyers cease to be members of the same firm as the lawyer affected by paragraph (a) *without personally coming within its restrictions*, they thereafter may undertake the representation against the lawyer's former client unless prevented from doing so by some other of these Rules." *See id.* 1.09 cmt. 7 (emphasis added).

2. Imputed knowledge and irrebuttable presumptions

The basic conflict rule mandates that a lawyer who has previously represented a client may not represent another person on a matter adverse to the client if the matters are the same or substantially related. *In re Guar. Ins. Servs.*, 343 S.W.3d 130, 133–34 (Tex. 2011); *In re Columbia Valley Healthcare Sys. L.P.*, 320 S.W.3d 819, 824 (Tex. 2010) (orig. proceeding). If the lawyer works on a matter, there is an irrebuttable presumption that the lawyer obtained confidential information during the representation. *In re Guar. Ins. Servs.*, 343 S.W.3d at 134;

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First appeared as part of the conference materials for the 26th Annual Conference on State and Federal Appeals session "Disqualification Update"