WHAT IS THE “SUBSTANTIAL RELATIONSHIP” TEST ANYWAY?

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WHAT IS THE “SUBSTANTIAL RELATIONSHIP” TEST ANYWAY?

I. ELEMENTS OF THE “SUBSTANTIAL RELATIONSHIP” TEST

Courts use the substantial relationship test to determine whether an attorney’s current representation of an individual conflicts with the attorney’s prior representation of a former client. The purpose is to maintain a client’s confidentiality even after the termination of the attorney-client relationship. Under this test, no attorney can represent a current client against a former client in a matter substantially related to a matter in which the attorney represented the former client.

In 1983, the ABA adopted the substantial relationship test in Rule 1.9 of the Model Rules of Professional Responsibility. By 1998, almost every state, including Texas, has mimicked the ABA’s codification of the substantial relationship test in their respective lawyer codes.

One of the best discussions of the substantial relationship test is *Koch v. Koch Industries*. 798 F.Supp 1525 (D.Kan 1992). In *Koch*, the court held that “in determining whether a substantial relationship exists, the court [should] evaluate the similarities between the factual bases of the two representations.” Id. at 1536. To determine whether an attorney is disqualified under the substantial relationship test, “a court must be able to reconstruct the attorney’s representation of the former client, to infer what confidential information could have been imparted in that representation, and to decide whether that information has any relevance to the attorney’s representation of the current client.” Id. “What confidential information could have been imparted involves considering what information and facts ought to have been or would typically be disclosed in such a relationship.” Id.

The 5th Circuit has also adopted the ABA Model substantial relationship test. *In re American Airlines*, 972 F.2d 605 (5th Cir. 1997). In *In re American Airlines*, the court held that the party seeking to disqualify the opposing counsel under the substantial relationship test must prove two elements. First, there must have existed an actual attorney-client relationship between that party and the attorney to be disqualified. Second, there must be a substantial factual relationship between the subject matter of the former and the present disputes. After proof of these elements, the court will make an irrebuttable presumption that relevant confidential information was disclosed to the attorney in the former representation.

In Texas, Rule 1.09 of the Texas Rules of Professional Responsibility1 codifies the substantial relationship test. Rule 1.09 states that a lawyer who personally represented a former client in a matter shall not thereafter represent another person in a matter adverse to his former client if such matter is the same or a substantially related matter.

The landmark substantial relationship case in Texas is *NCNB Texas Nat’l Bank v. Coker*, 765 S.W.2d 398 (Tex. 1989). See *Texaco Inc. v. Garcia*, 891 S.W.2d 255 (Tex. 1994); *Ghindoni v. Stone Oak, Inc.*, 966 S.W.2d 573 (Tex.App.—San Antonio 1998, no writ); *Centerline Industries, Inc. v. Knize*, 894 S.W.2d 874 (Tex.App.—Waco 1995). In *Coker*, the Texas Supreme Court broke the substantial relationship test into three parts. First, the movant must establish the existence of a prior attorney-client relationship with the attorney. Second, the movant must prove that in the current dispute, his former attorney is, in fact, representing his new client in a matter adverse to the movant’s interests. Third, the movant must prove that the factual issues in the current case are so related to those of the prior dispute that there exists a genuine threat that confidences which the movant revealed to the attorney in the prior

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1 Rule 1.09 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 . . . (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 would involve violation of Rule 1.05.”

2 At the time of the *Coker* decision, Rule 1.09 had not been adopted. However, Texas courts have held that the *Coker* analysis applies to rule 1.09.
dispute will be divulged in the present litigation. *Id.* at 400.

The Supreme Court stated the substantial relationship test applied to prevent a motion to disqualify from being used as a dilatory tactic. The Court focused on the third requirement, the “substantial relationship of the facts,” in addressing this issue of strict application. The “strict adherence to the exacting standard” requires that the movant provide evidence of specific factual similarities between the prior and the current disputes. *Id.* at 400. The Court noted that to survive on appeal, the factual similarities between the two disputes must be stated with specificity in the disqualification order. *Id.* The burden is on the movant to establish a preponderance of facts indicating this substantial relationship. *Id.*

Once the movant meets this burden, the court will disqualify the attorney. To meet the three requirements, the movant need not prove that the former attorney actually possesses confidential information obtained from the movant. If the movant proves the existence of a substantial relationship, it is conclusively presumed that the client imparted confidential information relevant to the current dispute to the attorney, and the attorney is disqualified.

II. POTENTIAL FOR USE OF RULE 1.09 AS A STRATEGIC WEAPON

Courts have held that a party who fails to bring a motion for disqualification under the substantial relationship doctrine in a timely manner waives his complaint. *Syntec Finance v. Metropolitan Life Ins.*, 880 S.W.2d 26, 34 (Tex.App.—Dallas 1994) *rev’d on other grounds, Metropolitan Life Ins. v. Syntex Finance Corp.*, 881 S.W.2d 319 (Tex. 1994) (motion brought two months after learning of the substituted relationship upheld timely). The timeliness requirement helps ensure that litigants use rule 1.09 to protect the legitimate interests of a former client, and not as a tactical tool. Without this requirement, the former client could bring its motion after the opposing party had gone to significant expense in preparing his case. *Id.*

The courts are also cognizant of the potential for the opposing party’s counsel to hide behind the timeliness requirement to prevent disqualification. Since the party seeking disqualification under Rule 1.09 has the burden of proving the facts of the two disputes were substantially related, the party seeking to avoid disqualification of its counsel might attempt to conceal those facts until the motion to disqualify would be considered untimely. Courts have therefore measured the timeliness requirement from the time of the discovery of the substantial relationship, not from the time of the filing of the suit. *Id.* at 34. If an attorney chooses to represent a party in a matter adverse to a former client, the attorney should therefore set forth every claim giving rise to a potential conflict at the outset.

III. THE PROBLEM OF THE MIGRATORY ATTORNEY

It is not uncommon for attorneys to move from one firm to another. Nearly every law office of even moderate size has one or more attorneys who have previously worked at another firm. These lateral transfers give rise to attorney-client confidentiality concerns. Laterally hiring an attorney expands a firm’s vulnerability to attorney disqualification under Rule 1.09.

Rule 1.09(b) states that “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…[under the substantial relationship test].” The Texas Supreme Court recently gave this clause expansive application. *Texaco, Inc. v. Garcia*, 891 S.W.2d 255 (Tex. 1994). The Court held that knowledge of confidential information, which an attorney is presumed to have access to while with his former firm, remains with the attorney when the attorney joins another firm. The Court held that the attorney “contaminates” the entire new firm. If the migrating attorney is disqualified under Rule 1.09 from representing a client, his entire new firm will also be disqualified.

One appellate court has presumed that the migrating attorney shared the knowledge of confidential information with other attorneys in the firm. *Contico Intern., Inc. v. Alvarez*, 910 S.W.2d 29 (Tex.App.—El Paso 1995, no writ). Thus, even if a migrating attorney never actually participated in his former firm’s representation of a client, the attorney is presumed to have knowledge of the confidential information actually obtained by others in that firm. This confidential information, which that attorney is presumed to have acquired, is also presumed to have been shared with the members of his new firm. Under *Alvarez*, Rule 1.09 is therefore imparted practically unlimited applicability.

It is not likely that courts will follow *Alvarez*. However, Texas courts have not yet determined the extent of Rule 1.09’s reach. A recent Ethics Committee Opinion suggests where an attorney actually participates in the defense of a client while at his former firm, his subsequent law firm is precluded from representing a party in a matter against his former firm’s client in a substantially related matter. Ethics Com. Op. 453. The opinion suggests that, if the attorney personally did no work for and has no
knowledge of the matters affecting the former client, then members of the new firm are not precluded from representing parties adverse to the former firm’s client. *Id.* The unanswered question is what must the attorney show if the attorney tries to prove that he has no knowledge of a given case.

**IV. A FORMER CODEFENDANT’S SUBSEQUENT RIGHTS UNDER RULE 1.09**

The Texas Supreme Court has also held that the protective nature of Rule 1.09 extends not only to an attorney’s former clients, but also to parties who were codefendants of the former client. *National Medical Enterprises, Inc. v. Godbey*, 924 S.W.2d 123 (Tex. 1996). In *Godbey*, several employees and their employer entered into a joint defense agreement. The agreement contained a clause stating that “all communications between the client members are confidential.” Another clause, however, stated that each individual defendant understood that he was represented by his attorney only. Although attorneys representing the employees and the employer owed a duty of confidentiality to one another, they owed a duty to maintain loyalty to their client alone. While representing one former employee, the attorney in question joined another law firm. Not long after, he withdrew from his representation of the employee prior to any litigation. Subsequently, this attorney’s new firm agreed to represent an individual in a dispute against one of the codefendants of the attorney’s former client, the client’s employer. Upon learning of this, both the former client and the employer filed motions to disqualify under Rule 1.09. The trial court denied both motions. The Texas Supreme Court reversed the trial court’s decision, granting both motions.

The Court held that the law firm’s representation of the current client against the former client’s employer would adversely affect the former client. The Court reasoned that there was a substantial risk that confidential information obtained from the former client would arise in the current suit. That information had the potential to harm the employee in subsequent civil and criminal proceedings. The Court next found that the substantial factual relationship requirement had been met. Each requirement for attorney disqualification under Rule 1.09 was met, and the court granted the former client’s motion to disqualify.

The court’s decision to grant the former client’s motion represents a deviation from the assumption that Rule 1.09 protects only former clients who are now directly involved in current litigation in which that party’s former attorney is representing the other side. The Court’s granting of this motion shows that a former client does not necessarily need to be an actual party to a subsequent suit to be protected by Rule 1.09.

The Court also granted the former codefendant’s motion to disqualify. Based upon the confidentiality clause of the joint defense agreement, the Court held that the attorney who formerly represented the employee owed a duty of confidentiality to the employer as a codefendant. That duty was breached when the attorney’s law firm subsequently represented a party in a suit substantially related to the previous matter against the former codefendant. Therefore, under Rule 1.09, the Court held that the law firm was disqualified.

The Court’s decision to grant the employer’s motion is an even broader application of Rule 1.09. For the first time, courts extended Rule 1.09 to protect the confidentiality of individuals other than former clients. The decision opens the door for individuals with whom an attorney had never established an attorney-client relationship to bring motions to disqualify under Rule 1.09. While the Supreme Court based its decision on the joint defense agreement, the case nevertheless represents an expansion of Rule 1.09.

**V. CONCLUSION**

The attorney-client relationship is a confidential one. All necessary and reasonable steps must be taken to ensure that information obtained by an attorney through such a relationship will not be later used against his former client. Courts, in dicta, have stated that Rule 1.09 should be strictly applied only to those cases in which a former client’s interests are in real danger. However, those courts have steadily expanded the scope of the test and have made Rule 1.09 applicable to an increasing number of situations.