

**THE PROFESSIONAL ETHICS COMMITTEE  
FOR THE STATE BAR OF TEXAS  
Opinion No. 645**

**September 2014**

**QUESTIONS PRESENTED**

Is it a violation of the Texas Disciplinary Rules of Professional Conduct for a lawyer to represent an individual debtor in a bankruptcy proceeding in Texas in which one of the creditors in the proceeding is a client the lawyer currently represents in other bankruptcy and non-bankruptcy matters that do not involve the individual debtor? Would the answer be different if the lawyer represented the creditor in the past in other unrelated matters but does not currently represent the creditor?

**STATEMENT OF FACTS**

A lawyer is asked to represent an individual debtor in a bankruptcy filing in Texas in which one of the debtor's creditors is a client the lawyer represents as a creditor in other bankruptcy and non-bankruptcy matters, all unrelated to the debtor. The lawyer has examined the debtor's bankruptcy case and the matters in which he represents the creditor and has determined (1) that the debtor's bankruptcy case and the creditor's matters do not involve substantially related matters in which the debtor's interests are materially and directly adverse to the interests of the creditor and (2) that the lawyer's representation of the debtor will not be adversely limited by the lawyer's or his law firm's responsibilities to the creditor or to a third person or by the lawyer's or his firm's own interests. The creditor has not given consent to the lawyer's representation of the debtor in the bankruptcy case.

**DISCUSSION**

Rule 1.06 of the Texas Disciplinary Rules of Professional Conduct, provides in pertinent part as follows:

“(a) A lawyer shall not represent opposing parties to the same litigation.

(b) In other situations and except to the extent permitted by paragraph (c), a lawyer shall not represent a person if the representation of that person:

(1) involves a substantially related matter in which that person's interests are materially and directly adverse to the interests of another client of the lawyer or the lawyer's firm; or

(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(a) is not implicated because the lawyer will not be representing the creditor in the debtor's bankruptcy case. Rule 1.06(b) is not implicated because, in the facts presented, (1) the debtor's bankruptcy case and the bankruptcy and other matters in which the lawyer represents the creditor do not involve substantially related matters in which the debtor's interests are materially and directly adverse to the interests of the creditor and (2) the lawyer's representation of the debtor will not be adversely limited by the lawyer's or his firm's responsibilities to the creditor or to a third person or by the lawyer's or his firm's own interests. Therefore, under the facts presented, a lawyer representing the debtor in a bankruptcy case in which one of the debtor's creditors is a current client of the lawyer in other matters would not violate Rule 1.06.

The fact that a conflict of interest under Rule 1.06 of the Texas Disciplinary Rules of Professional Conduct is not presented in a bankruptcy case cannot be the end of a lawyer's considerations with respect to conflict of interest issues. Since bankruptcy cases are the exclusive jurisdiction of the federal courts, the standards concerning conflicts of interest used in federal courts in Texas, particularly with respect to disqualification, must also be considered. For bankruptcy cases in Texas, standards adopted by the United States Court of Appeals for the Fifth Circuit will apply even when these standards differ from the Texas Disciplinary Rules of Professional Conduct. For courts in the Fifth Circuit, including bankruptcy and other federal courts in Texas, the standard used in the case of conflicts of interest concerning a lawyer's current clients differs from that set forth in Rule 1.06 of the Texas Disciplinary Rules. The rule in the Fifth Circuit is that, in the absence of exceptional circumstances (which are not present in the facts considered in this opinion), a lawyer may not be adverse to a current client, except with the consent of both clients, regardless of whether the matters are substantially related and regardless of whether the representation could be expected to be adversely limited in any way by the representation of the adverse party in other matters. See *In re Dresser Industries, Inc.*, 972 F.2d 540 (5<sup>th</sup> Cir. 1992); *Hill, III, v. Hunt*, No. 3:07-CV-02020-O, 2008 WL 4108120 (N.D. Tex. Sept. 4, 2008). Thus, in a bankruptcy case, a lawyer is not permitted, except with consent of both clients, to represent a debtor if one of the creditors in the case is a client that the lawyer represents in other unrelated matters even when the representation would not violate Texas Disciplinary Rule 1.06. A Texas lawyer in a bankruptcy case who knowingly violated the rule of the federal courts in Texas against representation adverse to another existing client would be violating Texas Disciplinary Rule 3.04(d), which provides, with exceptions not applicable here, that a lawyer shall not “knowingly disobey . . . an obligation under the standing rules of or a ruling by a tribunal . . . .”

In the situation here considered, if the lawyer had in the past represented the creditor, but did not currently represent the creditor in any matter, the rule of the Fifth Circuit on conflicts of interest involving current clients discussed above would not apply and Rule 1.09, rather than Rule 1.06, of the Texas Disciplinary Rules of Professional Conduct would have to be considered. Rule 1.09 provides in pertinent part as follows:

“(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.”

Under the facts considered in this opinion, the matters are not substantially related and it does not appear the bankruptcy case representation will involve either questioning the validity of the lawyer’s services or work product for the former client or a reasonable probability of a violation of Rule 1.05 concerning protection of confidential client information. Therefore, in this factual situation, representing the debtor when one of the creditors is a former client would not violate Rule 1.09. The rules applied in the Fifth Circuit with respect to a lawyer’s representation adverse to a former client are generally similar to the standards of the Texas Disciplinary Rules. See *In re American Airlines, Inc.*, 972 F.2d 605 (5th Cir. 1992). Thus, under both Rule 1.09 of the Texas Disciplinary Rules and the rules applied in federal courts in the Fifth Circuit, the lawyer, in the circumstances considered, would not be prohibited from representing the debtor in a bankruptcy proceeding involving a creditor that is a former client of the lawyer.

## CONCLUSION

A lawyer’s representation of a debtor in a bankruptcy case in which one of the creditors is also represented by the lawyer in other unrelated matters would not violate specific provisions of the Texas Disciplinary Rules of Professional Conduct on conflicts of interest if (1) the matters do not involve substantially related matters in which the debtor’s interests are materially and directly adverse to the interests of the creditor and (2) the lawyer’s representation of the debtor will not be adversely limited by the lawyer’s or his firm’s responsibilities to the creditor or to a third person or by the lawyer’s or his firm’s own interests. However, absent consent of both the debtor and the creditor, the lawyer will be prohibited from the representation under the conflict of interest rule concerning representation adverse to a current client applicable to bankruptcy courts and other federal courts in the Fifth Circuit. In contrast, in a case where the creditor is a former client, if the matters involved are not substantially related and the bankruptcy case representation will not involve either questioning the validity of the lawyer’s work for the former client or a likely violation of obligations concerning confidential client information, the lawyer’s representation of the debtor will not violate either the Texas Disciplinary Rules of Professional Conduct or the rules generally applicable to bankruptcy courts in Texas concerning representation of a current client against a former client.