April 13, 2015

Mr. Mark N. Osborn  
Chair, Professional Ethics Committee for the State Bar of Texas  
Kemp Smith, LLP  
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Via Email: mosborn@kempsmith.com

Re: Professional Ethics Committee for the State Bar of Texas, Opinion No. 644 (August 2014)

Dear Mr. Osborn:

As the ten deans of the law schools of Texas, we unanimously write to you about a matter of importance to our students. We respectfully request that the committee reconsider Opinion 644, concerning conflicts of interest of lawyers arising out of their previous work as law clerks. We appreciate all the hard work that went into Opinion 644, but we offer a different view from our perspective as legal educators that we hope causes you to reconsider your approach. As it stands, Opinion 644 creates concerning limitations on educational opportunities for young law students and employment opportunities for recent law graduates. We urge you instead to adopt the position of the American Bar Association and the American Law Institute.

Opinion 644

In Opinion 644, the committee advised:

Under the Texas Disciplinary Rules of Professional Conduct, a law firm is required to withdraw from representing a client in a lawsuit if the law firm hires a new lawyer who, prior to becoming a lawyer, was employed as a law clerk for the law firm representing the opposing party in the lawsuit and in that capacity helped provide services to the opposing party with respect to the lawsuit. The requirement for the withdrawal of the law firm employing the new lawyer cannot be avoided by screening the newly hired lawyer from the firm’s work on the lawsuit.

As Opinion 644 notes, a law clerk who leaves a firm, becomes a lawyer, and joins a different firm falls between two situations: 1) when a non-lawyer legal assistant moves from one firm to another, and 2) when a lawyer moves from one firm to another.

In Phoenix Founders, Inc. v. Marshall, 887 S.W.2d 831 (Tex. 1994), the Texas Supreme Court held that disqualification of a firm that hires a non-lawyer legal assistant that previously worked on the opposite side of a matter is not required if the firm is able to establish that it has timely and effectively screened the legal assistant.

Phoenix Founders works the same way when a law clerk moves from Firm A to work as a law clerk at Firm B. As long as the second firm screens the clerk from any matter the clerk worked
on at the first firm, *Phoenix Founders* does not disqualify the firm. Opinion 644 does not require any change in how law firms treat clerks moving from one firm to another. Indeed, firms could justifiably merely rename law clerks as legal assistants if anything of consequence turned on the job title.

Law clerks do the same sorts of tasks as legal assistants—research, discovery, case preparation—and both may have access to similar sorts of confidential information. If anything, a legal assistant—who is a long-term employee—is more likely immersed in a case and exposed to confidential information than a law clerk—who may work at a firm a few weeks or a few months. Certainly, many experienced and highly trained legal assistants better recognize the usefulness of certain former client information and are better able to apply that knowledge than many law clerks who are still students. Yet, the Texas Supreme Court has decided that a timely and effective ethical screen is sufficient for non-lawyer legal assistants.

The issue then is a law clerk who later becomes a lawyer. Before Opinion 644, law firms treated such a lawyer as disqualified, but rather than impute the disqualification to the firm, screened the lawyer under *Phoenix Founders*. In contrast, Opinion 644 says that the Texas Disciplinary Rules of Professional Conduct disqualify the law clerk turned lawyer; that the rules imputed the disqualification to the firm; and that screening makes no difference.

Opinion 644 creates a telling anomaly. If a law clerk moves from Firm A to Firm B, under *Phoenix Founders*, Firm B can screen the law clerk. Under Opinion 644, though, if the same law clerk joins Firm B as a lawyer, Firm B cannot screen the lawyer. This suggests something fundamentally wrong with Opinion 644. Moreover, Opinion 644 puts Texas at odds with both the American Bar Association and the American Law Institute.

**American Bar Association’s Position**

The American Bar Association’s Model Rules of Professional Conduct allow for screening a lawyer disqualified because of work the lawyer did as a law clerk. Rule 1.10, Comment 4, provides:

> The rule in paragraph (a) also does not prohibit representation by others in the law firm where the person prohibited from involvement in a matter is a nonlawyer, such as a paralegal or legal secretary. Nor does paragraph (a) prohibit representation if the lawyer is prohibited from acting because of events before the person became a lawyer, for example, work that the person did as a law student. Such persons, however, ordinarily must be screened from any personal participation in the matter to avoid communication to others in the firm of confidential information that both the nonlawyers and the firm have a legal duty to protect. See Rules 1.0(k) and 5.3.

The ABA position is consistent with how firms applied *Phoenix Founders* before Opinion 644.
American Law Institute’s Position

The American Law Institute has taken the same position in its highly respected Restatement (Third) of the Law Governing Lawyers (2000). In § 123, comment f, the Restatement provides:

\[ f. \textit{Imputed conflicts through nonlawyer employees.} \]
Nonlawyer employees of a law office owe duties of confidentiality by reason of their employment (see Restatement Second, Agency § 396). However, their duty of confidentiality is not imputed to others so as to prohibit representation of other clients at a subsequent employer. Even if the person learned the information in circumstances that would disqualify a lawyer and the person has become a lawyer, the person should not be regarded as a lawyer for purposes of the imputation rules of this Section.

Law students who clerk in firms, like other nonlawyer employees, typically have limited responsibilities and thus might acquire little sensitive confidential information about matters. Absent special circumstances, they should be considered nonlawyer employees for the purposes of this Section. Persons who have completed their legal education and are awaiting admission to practice at the time of providing services to a client of a law firm typically have duties comparable to admitted lawyers and accordingly should ordinarily be treated as lawyers for purposes of imputation.

Some risk is involved in a rule that does not impute confidential information known by nonlawyers to lawyers in the firm. For example, law students might work in several law offices during their law-school careers and thereby learn client information at Firm A that could be used improperly by Firm B. Experienced legal secretaries and paralegal personnel similarly often understand the significance and value of confidential material with which they work. Incentives exist in many such cases for improper disclosure or use of the information in the new employment.

On the other hand, nonlawyers ordinarily understand less about the legal significance of information they learn in a law firm than lawyers do, and they are often not in a position to articulate to a new employer the nature of the information gained in the previous employment. If strict imputation were applied, employers could protect themselves against unanticipated disqualification risks only by refusing to hire experienced people. Further, nonlawyers have an independent duty as agents to protect confidential information, and firms have a duty to take steps designed to assure that the nonlawyers do so (see § 60, Comment d). Adequate protection can be given to clients, consistent with the interest in job mobility for nonlawyers, by prohibiting the nonlawyer from using or disclosing the confidential information (see § 124) but not extending the prohibition on representation to lawyers in the new firm or organization. If a nonlawyer employee in fact conveys confidential information learned about a client in one firm to lawyers in another, a prohibition on representation by the second firm would be warranted.
As we explain in the following discussion, we read the Texas rules in a way consistent with national standards. Such a reading is better for law students, law firms, and clients.

Texas Imputation Rules Do Not Apply to a Law Clerk Turned Lawyer

As the Restatement makes clear, a law clerk’s obligation to keep information confidential does not come from the rules governing lawyers, but from the law of agency. Texas Rule 1.05 on confidentiality does not apply to a law clerk, just as it does not apply to a legal assistant, because the rules govern only lawyers. Nonetheless, lawyers have an obligation to ensure that their non-lawyer personnel maintain confidentiality, but lawyers impose that obligation on employees as a condition of employment. See Texas Disciplinary Rule of Professional Conduct 5.03, Comment 1 (listing “law student interns”). Thus, like a legal assistant, a law clerk must keep information confidential because the terms of the clerk’s employment imposed by the firm employing the clerk require it. The Texas rules then prohibit any subsequent law firm employer from obtaining confidential information from former law clerks previously employed by another firm. See Texas Disciplinary Rule of Professional Conduct 4.04(a) (prohibiting illegal methods to obtain evidence) and Rule 8.04(a) (prohibiting inducing another to violate the rules).

The Texas rules, however, do not impute any disqualification of the former law clerk to the entire firm. Turn back to ABA Rule 1.10, Comment 4. In speaking about imputing a lawyer’s conflicts to the lawyer’s firm under the current client and the former client conflict rule, the Comment 4 says the imputation rule does not “prohibit representation if the lawyer is prohibited from acting because of events before the person became a lawyer, for example, work that the person did as a law student.” Although Texas has not adopted expressly adopted Comment 4, Texas based its rules on ABA rules, and the comment is therefore rulemaking history relevant to interpreting the Texas rules.

Of course, the ABA, the Restatement, and Phoenix Founders disqualify the clerk turned lawyer personally and require a firm to screen the clerk turned lawyer from participation in the firm’s representation. A screen ensures that a law firm does not obtain confidential information. As long as an effective screen is in place, a firm can undertake a representation even if a clerk turned lawyer in the firm cannot. For an instructive example of how a screen works when a former law clerk becomes a lawyer, see Actel Corp. v. Quicklogic Corp., No. C 94-20050 JW, 1996 WL 297045 1 (N.D. Cal. May 29, 1996).

Phoenix Founders stands for the proposition that screening works. While never quite saying it, Opinion 644 implicitly rejects the Supreme Court’s principle in Phoenix Founders. The opinion notes that a lawyer must be zealous and is required to use “as appropriate” all information at his disposal to further a client’s interest. Of course, the Texas rules prohibit a firm from prying secrets out of former law clerks, and it is never “appropriate” for a firm to undermine a screen. The consensus is that screens work: “the majority of professional legal ethics commentators, ethics tribunals, and courts have concluded that nonlawyer screening is a permissible method to protect confidences held by nonlawyer employees who change employment.” Leibowitz v. The Eighth Judicial Dist. Court of the State of Nev. ex rel. Cnty. of Clark, 119 Nev. 523, 531, 78 P.3d 515, 520 (2003).
Moreover, the Texas rules expressly embrace the idea that screening works—even for lawyers. Texas Rule 1.10 allows for screening in successive government and private employment, and Texas Rule 1.11 allows for the screening in successive employment as an adjudicatory official or law clerk and private employment. Lawyers are supposed to act zealously, but only within the bounds of the rules. Thus, the Texas rules assume lawyers will act honorably and screens will be effective.

Employing the old adage that the express provision of one thing is the implied exclusion of another, one might mistakenly reason that because the rules expressly authorize screening for government lawyers and judicial clerks, but are silent about screening law clerks who become lawyers, the rules impliedly prohibit screening former law clerks. The rules are also silent about screening non-lawyers, however, which Phoenix Founders authorized. In some instances, then screening is permissible even if not expressly provided in the rules.

Further, there is a reason the rules are silent about screening of both legal assistants and law clerks turned lawyers. The rules are silent about screening in both these instances because the rules have no occasion to expressly authorize exceptions to circumstances they do not expressly prohibit. In the words of ABA Comment 4, the terms of the imputation rules do not “prohibit representation if the lawyer is prohibited from acting because of events before the person became a lawyer, for example, work that the person did as a law student.” Thus, because they do not apply to non-lawyers, the rules do not expressly provide for screening of former law clerks turned lawyers.

In contrast, the rules do expressly provide for the screening of government lawyers and judicial law clerks because when they worked for the government or the courts, they likely were lawyers, requiring the express authorization of screens to overcome the express prohibition of representation under the imputation rules.

This is the key point: No express provision in the imputation rules authorizes the screening of non-lawyers under Phoenix Founders and no express provision authorizes screening of law clerks who become lawyers because under ABA Comment 4 the imputation rules do not cover these situations. Nevertheless, a law firm’s duties under substantive law and various disciplinary rules mandate that a firm not purposefully or inadvertently obtain any confidential information the non-lawyers or non-lawyers turned lawyers may have from their former employment. The profession imposes screening as a procedure to ensure compliance with these duties. As long as the screen is in place, nothing disqualifies the firm.

The best evidence that ABA Comment 4 correctly teaches that the imputation rules do not apply to law clerks turned lawyers is that one can only shoehorn law clerks turned lawyers into the rules with great force as the following discussion demonstrates.

If any Texas rule applied to this situation, it should be Rule 1.09, which concerns duties to former clients. As Opinion 644 concedes, however, Rule 1.09 does not apply. Rule 1.09(b) imputes to a firm only conflicts prohibited in 1.09(a). By its terms, 1.09(a) applies only to former representation by a lawyer.
The only other possibly relevant rule, Rule 1.06, the general rule about conflicts of interest, also does not apply. Rule 1.06(f) imputes to a firm only conflicts prohibited by Rule 1.06. Rule 1.06(a) does not apply (a lawyer on both sides of the litigation at the same time). Rule 1.06(b)(1) also does not apply (representation adverse to another client of the firm).

That leaves only Rule 1.06(b)(2), which provides that “a lawyer shall not represent a person if the representation of that person . . . reasonably appears to be . . . adversely limited by the lawyer’s responsibilities to another client or to a third person or by the lawyers’ or law firm’s own interests.”

Opinion 644 turns 1.06(b)(2) on its head, applying the rule as if it were about protecting third persons rather than clients. Consider this scenario. Sally writes a legal memo as a clerk at Law Firm A in the case of John Smith versus Joe Blow. Firm B is defending Joe Blow. A year later, Firm B hires Sally. Can Sally defend Joe Blow in the case brought by John Smith?

Citing Rule 1.06(b)(2), Opinion 644 says no, reasoning that representation of Joe Blow would reasonably appear to be adversely limited by Sally’s responsibilities to John Smith—her duty as a former law clerk to keep his confidences. Citing Rule 1.06(f), Opinion 644 imputes the disqualification to Firm B.

John Smith, however, is not “another client.” John Smith was never Sally’s client. Sally owes him no duty under the rules governing lawyers. Any duty of confidentiality she owes is under the law of agency. Of course, her former employer or John Smith might be a “third person” to whom she has responsibilities that might adversely limit her representation of Joe Blow; consequently her “own interests” in not incurring any legal liability to Firm A might adversely limit her representation of Joe Blow. In either case, though, under Rule 1.06(c)(2), the only informed consent Sally would need to represent Joe Blow would be that of Joe Blow because he would be the only affected client.

If all it takes for a former law clerk turned lawyer to represent a client on the opposite side of a matter where he was a law clerk is the informed consent of that client, then Opinion 644 would present little problem for former law clerks. To make Rule 1.06(c)(2) do the job it wants done, Opinion 644 stretches the rule to say that a lawyer could never “reasonably believe” the representation of the client would not be materially affected by work the lawyer did as a law clerk. In fact, given the sorts of tasks law clerks do, they will often have no confidential information and the work they did will often have no limiting affected. Opinion 644, however, turns what is supposed to be an *ad hoc* inquiry (see Rule 1.06, Comment 4) into an outright prohibition to reach its conclusion.

Of course, we are not suggesting that former law clerks turned lawyers can personally represent clients on the opposite side of a matter in which they worked as a clerk. Rather we are saying that the imputation rules do not cover this problem, and the best evidence that they do not is that the problem does not fit into the terms of the rules. Opinion 644 ends up shoehorning the problem into Rule 1.06(c)(2) only by turning the rule on its head and turning an *ad hoc* inquiry into a blanket rule. The better approach is to apply *Phoenix Founders* law clerks turned lawyers.
Now we turn to why this issue is so important to us.

**Lost Job Opportunities for Young Lawyers**

Under Opinion 644, in deciding whether to hire a young lawyer, a firm must check all the lawyer’s clerkship assignments for conflicts with firm clients. The inability to screen the young lawyer in the event of a conflict will force firms not to hire lawyers they otherwise would. Such a strict rule is unfair to young lawyers.

In adopting the rule in *Phoenix Founders*, the Texas Supreme Court, concerned about the job opportunities of non-lawyers, followed the reasoning of the ABA to allow screening:

> Underlying these decisions is a concern regarding the mobility of paralegals and other nonlawyers. A potential employer might well be reluctant to hire a particular nonlawyer if doing so would automatically disqualify the entire firm from ongoing litigation. This problem would be especially acute in the context of massive firms and extensive, complex litigation. Recognizing this danger, the ABA concluded that “any restrictions on the nonlawyer's employment should be held to the minimum necessary to protect confidentiality of client information.” ABA Op. 1526 at 2.

*Phoenix Founders, Inc. v. Marshall*, 887 S.W.2d 831, 835 (Tex. 1994). We urge you to follow this precedent.

We also urge you to consider the powerlessness of young law clerks. When a lawyer decides to take on a legal matter, the lawyer’s training and experience equip the lawyer to evaluate whether taking on the matter is worth the potential loss of other business. A lawyer can always say no. A young law student, however, has neither the training nor experience to decide whether a particular clerkship or assignment might cost them a later job. Moreover, a young law clerk has few options and little ability to say no.

Moreover, Opinion 644 imposes the ethical obligations and concerns of licensed attorneys onto law students well before we have had an opportunity to train them and they have had a chance to obtain experience in professional ethics. While Texas lawyers are on notice of the Texas Disciplinary Rules of Professional Conduct (and the Professional Ethics Opinions published in the Texas Bar Journal), law students are not in the same position. Many law students accept clerkships before taking our professional responsibility courses.

**Lost Educational Opportunities**

Under Opinion 644, if they do have choices, law students may forego some clerkship opportunities or certain clerkship assignments to avoid jeopardizing job opportunities. Consider these examples:

- A student may decide to turn down the experience of working for a nonprofit involved in some public interest area because the student hopes to get a job with a firm who represents clients who oppose the nonprofit.
A student may decide not to try clerking for a firm representing plaintiffs in personal injury cases because the student may then be unable to get a job in an insurance defense firm.

A student may want to clerk for the several big firms in Houston or Dallas, but picks only one because they all oppose each other in a major multiyear bankruptcy, litigation, or corporate matters.

Not only may law students forgo opportunities, law firms may limit opportunities by limiting law clerks exposure to client matters. For example, law firms may only ask clerks to write memos completely based upon hypotheticals or law firms may otherwise exclude law clerks from any discussion of client matters. If this happens, it would diminish the clerkship experience, which in the modern day serves as a substitute for apprenticeship.

At a time when the American Bar Association is pushing the profession to increase experiential learning opportunities so that young lawyers can be practice ready, we need to encourage, not discourage, clerkships. Law students should experiment with practice in different settings and undertake varying assignments.

The American Bar Association’s Task Force on the Future of Legal Education stated in its key conclusions:

The calls for more attention to skills training, experiential learning, and the development of practice-related competencies have been heard and many law schools have expanded practice-preparation opportunities for students. Yet, there is a need to do much more.


Our law schools have embraced experiential education for many decades but the ABA has called upon us to do even more. The ABA recently strengthened Law School Accreditation Standard 303 to require students to complete six hours of experiential education. We offer clinics, internships, externships, and other programs to produce students who are practice ready. Opinion 644 will make it harder to provide students with experiential learning opportunities and to prepare them for the practice of law.

Client Protection

Although the profession should not place the needs of law students before the protection of clients, the position we are urging does not do so. Screening new lawyers who were formerly law clerks adequately protects clients. Moreover, preparing law students to be practice ready through clerkship opportunities is itself an important protection for clients.
Conclusion

We urge the committee to revisit Opinion 644 and adopt the approach of the American Bar Association and the Restatement. With summer clerkships approaching, and fall job offers not far behind, we urge the committee to act quickly.

Respectfully submitted,

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