

Screening of Nonlawyer Employees Requires Formal Institutionalized Measures in Texas

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In re Columbia Valley Healthcare, 2010 WL 3366007, 53 Tex. Sup. Ct. J. 1106 (Tex. 2010)

Brief Summary

The Texas Supreme Court disqualified a law firm based on a conflict imputed from a nonlawyer employee. The firm's screening procedure was inadequate, the Court held, because it was not formal and institutionalized.

Complete Summary

During this medical malpractice action, a nonlawyer employee who initially worked for defense counsel changed employers and began to work for plaintiffs' counsel. Defendants moved to disqualify plaintiffs' counsel, but the trial court denied this motion. Defendants ultimately petitioned the Texas Supreme Court for *mandamus* relief.

The Supreme Court held that the trial court abused its discretion in refusing to disqualify plaintiffs' firm. In Texas there is a non-rebuttable presumption that both lawyers and nonlawyer employees who worked on a matter at a prior firm received confidential information. But nonlawyer employees, unlike lawyers, can rebut the presumption that such confidences have been shared with the new firm. This presumption can be rebutted by establishing that (1) the nonlawyer was instructed not to work on the matter at the new firm, and (2) the new firm took other reasonable steps to prevent the assistant from working on the matter.

There was no dispute that the nonlawyer had been instructed to avoid working on the underlying matter; the firm had even threatened her with termination for working on the matter. But the Court held that the firm failed to take "other reasonable steps" to screen the employee. The Court indicated that such steps include formal institutionalized screening measures such as removing the file from the employee's access and distributing a written policy about conflicts of interest. The Court further held that even if such measures are implemented, the

presumption that the employee has shared confidences becomes conclusive if, as in this case, the employee actually works on the matter at the direction of a lawyer who should have known about the conflict of interest.

Significance of Opinion

This opinion marks the Texas Supreme Court's first discussion of which "other reasonable steps" are necessary for screening nonlawyer employees. Notably, screening and imputation rules pertaining to nonlawyers (and lawyers) vary widely from state to state.

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