

Opinion No. 634, July 2013

QUESTIONS PRESENTED

Under the Texas Disciplinary Rules of Professional Conduct, is it permissible for a law firm to continue to include in the firm name the name of a lawyer who temporarily moves out of Texas and accepts a job that prohibits the lawyer from engaging in the private practice of law? Is it permissible for that lawyer to continue as a member of the Texas law firm and to maintain a financial interest in the Texas law firm?

Statement of Facts

Lawyer A and Lawyer B establish a law firm (the “Law Firm”), formed as a professional limited liability company, with both names in the firm name, “A B, PLLC.” Lawyer A moves out of state and accepts a job as an assistant district attorney in another state while Lawyer A’s spouse works for a limited period in the other state. While serving as an assistant district attorney, Lawyer A is prohibited from engaging in the private practice of law. Lawyer A intends to return to Texas and resume practicing with the Law Firm at some undetermined time in the future. Lawyer A will maintain a law license in Texas at all times.

Discussion

Rule 7.01 of the Texas Disciplinary Rules of Professional Conduct provides in pertinent part:

“(a) A lawyer in private practice shall not practice under a trade name, a name that is misleading as to the identity of the lawyer or lawyers practicing under such name, or a firm name containing names other than those of one or more of the lawyers in the firm, except that . . . if otherwise lawful a firm may use as, or continue to include in, its name the name or names of one or more deceased or retired members of the firm or of a predecessor firm in a continuing line of succession. . . .

“(d) A lawyer shall not hold himself or herself out as being a partner, shareholder, or associate with one

or more other lawyers unless they are in fact partners, shareholders, or associates.

. . . .

(f) A lawyer shall not use a firm name, letterhead, or other professional designation that violates Rule 7.02(a).”

Rule 7.02(a) prohibits a lawyer from making or sponsoring “a false or misleading communication about the qualifications or the services of any lawyer or firm.”

In Professional Ethics Committee Opinion 605 (March 2011), a lawyer left a firm to open his own practice. Because the lawyer who left the firm did not “retire” from the practice of law, he was not a “retired” member of the firm for purposes of the exception stated in Rule 7.01(a) for “retired members of the firm.” Continuing to use that lawyer’s name in the firm name was found to be in violation of paragraphs (a) and (d) of Rule 7.01.

In this situation, Lawyer A did not retire from practicing law and she did not leave the Law Firm to open her own practice in Texas. She did, however, cease to be in a position to practice law with the Law Firm when she moved to a different state and accepted a position as an assistant district attorney that prohibited her from practicing law outside her employment. The fact that the new position is expected to have limited duration and that she intends to return to Texas does not change the result. Continuing to use Lawyer A’s name in the firm

name would lead the public reasonably to believe that Lawyer A is in a position that would allow her to practice law with the Law Firm. Because Lawyer A’s new employment arrangement prohibits Lawyer A from practicing law with any private law firm, the continued use of Lawyer A’s name in the Law Firm’s name would be misleading and would violate Rule 7.01(a). The result would be different if Lawyer A were to take a temporary sabbatical for other reasons that did not prevent her from providing legal services as a member of the Law Firm from time to time during the sabbatical.

Rule 7.01(d) prohibits Lawyer A from holding herself out as being a member of the Law Firm unless she is in fact a member. The provisions of chapter 301 of the Texas Business Organizations Code applicable to Texas law firms formed as professional limited liability companies and professional corporations permit a lawyer to be a member of a law firm that is a professional limited liability company or a professional corporation so long as she is a licensed lawyer in Texas. Assuming Lawyer A continues to maintain her Texas law license, she is permitted to continue as a member of the Law Firm. If Lawyer A retains a position as a member of the Law Firm, the firm should avoid any misleading communications regarding Lawyer A’s participation in the firm’s law practice during the period in which Lawyer A’s employment arrangement in the other state prohibits her from practicing law with the firm.

Lawyer A's continued financial interest in the Law Firm does not violate any provision of the Texas Disciplinary Rules of Professional Conduct. If for any reason Lawyer A ceases to be a member of the Law Firm, any division of fees between Lawyer A and Lawyer B after Lawyer A leaves the firm would have to comply with the provisions of Rule 1.04 that set limits on the division of legal fees

between lawyers who are not in the same firm.

Conclusion

Under the Texas Disciplinary Rules of Professional Conduct, it is not permissible for a law firm to continue to include in the firm name the name of a lawyer who temporarily moves out of Texas and accepts a job that prohibits the lawyer from engaging in the private

practice of law. Nothing in the Texas Disciplinary Rules of Professional Conduct prohibits the lawyer from remaining as a member of the law firm or maintaining a financial interest in the firm so long as no action is taken to mislead the public about the lawyer's lack of participation in the firm's law practice during the time the lawyer's employment outside of Texas prohibits the lawyer from practicing law with the firm. **TBJ**

Opinion No. 635, August 2013

QUESTIONS PRESENTED

Under the Texas Disciplinary Rules of Professional Conduct is a lawyer permitted to advise, for a fee, a pro se litigant in a divorce or related family law matter concerning "self-help" forms prepared by the litigant if such services by the lawyer are conditioned on the litigant's signed agreement that no lawyer-client relationship exists between the lawyer and the litigant? Is the lawyer permitted to limit the scope of his services in such cases to advice concerning the "self-help" forms?

Statement of Facts

A Texas lawyer wishes to provide, for a fee, a service of reviewing and providing advice concerning "self-help" forms prepared by pro se litigants in divorce and similar family law matters. The lawyer proposes to require that, as a condition for providing such services, each pro se litigant enter into a written agreement providing that no lawyer-client relationship is established and that the lawyer has no legal or ethical obligation to provide legal representation to the pro se litigant. If a lawyer-client relationship is determined to exist in these circumstances, the lawyer wishes to limit the scope of his services to a review of, and advice concerning, the "self-help" forms.

Discussion

There is no provision of the Texas Disciplinary Rules of Professional Conduct that expressly describes when a person who is licensed to practice law is acting as a lawyer. The Preamble: A Lawyer's Responsibilities of the Texas Disciplinary Rules discusses in para-

graph 2 various functions a lawyer performs as a representative of clients, including the role of acting as an advisor in which "a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications."

A relationship of lawyer to client is a contractual relationship and results from the mutual agreement and understanding of the parties about the nature of the work to be done. To establish a lawyer-client relationship, the parties must explicitly or by their conduct manifest an intention to create such a relationship. *LeBlanc v. Lange*, 365 S.W.3d 70, 79 (Tex. App.-Houston [1st Dist.] 2011, no pet.) (citations omitted).

Here the lawyer is providing for a fee to pro se litigants a service of reviewing forms relating to legal proceedings and advising the litigants concerning the use of the forms in the legal proceedings. The intent is to review the forms and point out areas of potential concern

that may require further inquiry, such as child support and retirement benefits. Thus, the lawyer's role is as an advisor in which he has explicitly agreed to provide the client with an understanding of legal rights and obligations. These services constitute the practice of law by the lawyer. Consequently, the lawyer has obligations and responsibilities as a lawyer arising from the nature of the relationship with the pro se litigant. These obligations include the obligation to protect the client's confidential information and to represent the client with loyalty and diligence. In such circumstances, the lawyer cannot seek to avoid his obligations as a lawyer by seeking the client's agreement to a disclaimer of the existence of a lawyer-client relationship. Moreover, requiring such a clearly invalid disclaimer in the lawyer's agreement with the client may in itself constitute deceptive or misleading conduct in violation of Rule 8.04(a)(3), which prohibits a lawyer from engaging "in conduct involving dishonesty, fraud, deceit or misrepresentation[.]"

Rule 1.02(b) of the Texas Disciplinary Rules of Professional Conduct provides that “[a] lawyer may limit the scope, objectives and general methods of the representation if the client consents after consultation.” As long as a lawyer ensures that his client is aware of and consents to the limited scope of the lawyer’s services and the risks associated with proceeding without full legal representation, limiting the scope of the lawyer’s services is permitted under the Texas Disciplinary Rules. Thus, the lawyer in the circumstances considered here may limit the scope of his services to advice concerning the “self-help” forms so long as it is clear to the client that the lawyer’s services are so limited.

It should be noted that because the

lawyer in these circumstances has a lawyer-client relationship with a spouse in a divorce or related proceeding, the lawyer is not permitted to provide legal services to the other spouse in the same proceeding. Even though the lawyer’s services with respect to a divorce may be limited in scope by agreement, a lawyer is not permitted to advise both spouses in a divorce proceeding since such spouses are adverse parties in a litigation matter. See Rule 1.06(a) of the Texas Disciplinary Rules of Professional Conduct; Professional Ethics Committee Opinion 583 (September 2008). Moreover, in such circumstances, a lawyer must take care that the spouse that is not being advised by the lawyer does not mistakenly believe that the lawyer is providing advice to such spouse.

Conclusion

Under the Texas Disciplinary Rules of Professional Conduct a lawyer is not permitted to advise, for a fee, a pro se litigant in a divorce or related family law matter concerning “self-help” forms prepared by the litigant if such services by the lawyer are conditioned on the litigant’s signed agreement that no lawyer-client relationship exists between the lawyer and the litigant. A lawyer is permitted under the Texas Disciplinary Rules to limit by agreement the scope of his services in such cases to advice concerning the “self-help” forms. A lawyer providing limited advice with respect to “self-help” forms in divorce and related cases is not permitted to advise both parties in such proceedings. **TBJ**

Opinion No. 636, August 2013

QUESTIONS PRESENTED

Is it permissible under the Texas Disciplinary Rules of Professional Conduct for a court-appointed criminal defense lawyer to accept payment from a county based on a fee schedule that authorizes fixed fees based on the stage at which the case is disposed of?

Statement of Facts

A Texas county pays court-appointed lawyers for their services representing indigent criminal defendants according to a fee schedule adopted by the District Court judges in the county. The fee schedule permits lawyers to choose in advance either to receive the fee specified in the fee schedule for all services provided in a case or to bill by the hour. The question presented applies only to fees payable pursuant to the fee schedule.

The county’s payment schedule provides that the fixed fee for representation in a criminal case varies depending on the type of disposition of the case. For example, the fixed fee for pre-indictment dismissals is one-half of the fixed fee payable if a case is disposed of by guilty plea or dismissal after indictment,

and the highest fee is paid if the case is tried.

Discussion

Rule 1.04(e) of the Texas Disciplinary Rules of Professional Conduct provides that “[a] lawyer shall not enter into an arrangement for, charge, or collect a contingent fee for representing a defendant in a criminal case.”

The primary reason for the ban on contingent fees in criminal cases is that “[a] fee based upon acquittal creates a conflict of interest because it may tempt a defense lawyer to push for trial rather than a plea bargain, or to forego mitigating evidence if it could lead to conviction of a lesser-included offense.” Annotated Model Rules of Professional Conduct (American Bar Association, 7th Ed. 2011), Rule 1.5

Annotation—Subsection (d): Contingent Fees in Domestic Relations Matters and Criminal Cases at page 125.

In the facts presented, the amount paid pursuant to the county’s fee schedule is not based on whether a lawyer obtains a favorable result for the client. Rather, a lawyer is paid the fee specified in the fee schedule without regard to the outcome. The rationale behind the differing fees appears to be that there are normally differences in the amount of time and effort required for representations of criminal defendants that result in different dispositions of the cases. Thus a pre-indictment dismissal should usually require less time and effort than a guilty plea based on a plea bargain. Similarly, a trial normally will require the most effort. The county’s fee schedule reflects

these expected differences in time and effort involved in the representation.

The Committee is of the opinion that “an agreement for payment of one amount if the case is disposed of without trial and a larger amount if it proceeds to trial is not a contingent fee but merely an attempt to relate the fee to the time and service involved.” ABA Standards for Criminal Justice: Prosecution Function and Defense Function (American Bar Association, 3rd Ed. 1993) Commentary to Standard 4-3.3 at page 157.

In *Fogarty v. State*, 513 S.E.2d 493 (Ga. 1999), the Supreme Court of Georgia cited the Commentary to ABA Standard 4-3.3 quoted above in support of its holding that an agreement to pay defense counsel \$25,000 in advance,

with the fee reduced to \$10,000 if the charges were dismissed before trial, was a valid fee arrangement. The Court reasoned that the “critical element” in a contingent fee contract is the existence of some chance that the lawyer will not receive the fee because of an unwanted result for the lawyer’s client. The fact that the agreement in that case provided for a greater or lesser fee depending upon the extent of counsel’s services did not make the agreement an improper contingent fee contract. 513 S.E.2d at 496.

In the factual situation here considered, the county’s fee schedule does not constitute an impermissible agreement for a contingent fee in a criminal case because the lawyer is paid without regard to the outcome of the case. The county’s fee schedule attempts to rationally

relate the fees payable to the differences in the amount of time and effort required to represent the client in various dispositions of typical cases. Consequently, the fee schedule does not result in impermissible contingent fees in criminal cases.

Conclusion

It is permissible under the Texas Disciplinary Rules of Professional Conduct for a court-appointed criminal defense lawyer to accept payment from a county based on a fee schedule that authorizes fixed fees based on the stage at which a case is disposed of, provided that the amount payable is not contingent upon a successful outcome for the client and the fee schedule is based on an attempt to rationally relate the fee payable to the time and effort involved in the representation. **TBJ**

Opinion No. 637, August 2013

QUESTIONS PRESENTED

Do the Texas Disciplinary Rules of Professional Conduct permit a lawyer to include in an agreement with a client the client’s waiver of rights under Texas statutes providing civil remedies for violations of laws against barratry?

May a lawyer settle with a client who is not represented by other legal counsel a claim under Texas statutes providing civil remedies for barratry violations?

Must a lawyer who has been sued under the Texas statutes providing civil remedies for barratry violations report such fact to the State Bar of Texas?

Statement of Facts

In 2011, the Texas Legislature amended section 82.065 of the Texas Government Code to provide that any contract for legal services is voidable by the client if the contract is procured by violating Texas law or the Texas Disciplinary Rules of Professional Conduct regarding barratry by lawyers or other persons. The Legislature also added section 82.0651 of the Texas Government Code, which provides civil liability for violating laws against barratry. Effective September 1, 2013, Sections 82.065 and 82.0651 of the Texas Government Code were

amended in certain respects. In this opinion, sections 82.065 and 82.0651 of the Texas Government Code as currently in effect are collectively referred to as the “Barratry Remedies Provisions.”

A Texas lawyer proposes to enter into an agreement with a prospective client in which the client would waive any and all rights under the Barratry Remedies Provisions.

In the event that a client did not validly waive rights against the lawyer under the Barratry Remedies Provi-

sions and a claim is asserted against the lawyer under these provisions, the lawyer wishes to negotiate a settlement of the claim with the client who is not represented by another lawyer.

Discussion

Section 38.12 of the Texas Penal Code (hereafter referred to as “Section 38.12”) defines barratry to include the solicitation of, or the payment for solicitation of, employment for legal services with the intent to obtain an economic benefit. The provisions of Section 38.12 are discussed in more detail in Professional Ethics Committee Opinion 623

(February 2013). Section 38.12 provides that violations of its provisions are felonies or misdemeanors subject to criminal penalties.

Rule 8.04(a)(9) of the Texas Disciplinary Rules of Professional Conduct provides that a lawyer is prohibited from engaging “in conduct that constitutes barratry as defined by the law of this state[.]” In addition, Rule 7.03 prohibits certain solicitations of legal business and payments to other persons for the purpose of soliciting legal business. Many of the actions prohibited by Rule 7.03 would also constitute barratry as defined in Section 38.12. Thus a lawyer who commits barratry as defined in Section 38.12 will in all cases violate Rule 8.04(a)(9) of the Texas Disciplinary Rules and in many cases will also violate provisions of Rule 7.03. Although a Texas lawyer may be disciplined for an act that also constitutes an offense under the Penal Code, the Texas Disciplinary Rules—not the Penal Code—provide the basis for discipline. See section 82.062 of the Texas Government Code (“An attorney may be suspended from practice or the attorney’s license may be revoked under this section regardless of the fact that the act complained of may be an offense under the Penal Code and regardless of whether the attorney is being prosecuted for or has been convicted of the offense.”); *Smith v. State*, 523 S.W.2d 1, 5-6 (Tex. App.—Corpus Christi 1975, writ ref’d, n.r.e.) (“Professional misconduct is grounds for disciplinary action regardless of whether the act or acts in question constituted an offense under the Penal Code of this State.”). A disciplinary proceeding is civil in nature, not criminal. *State Bar of Texas v. Evans*, 774 S.W.2d 656, 657 n.1 (Tex. 1989).

With respect to Section 38.12 and the Barratry Remedies Provisions, while it would seem unlikely that these provisions would be construed to exclude from the definition of barratry, or from

civil remedies for barratry, conduct as to which a client has purportedly waived his rights, this question of statutory construction would ultimately be a question of law as to which this Committee does not have authority to provide an opinion. However, even if a client’s waiver of rights under the Barratry Remedies Provisions were found to be valid as a matter of state law, it is the opinion of this Committee that such a waiver could not prevent the application to the lawyer of the Texas Disciplinary Rules prohibiting barratry as defined under state law (Rule 8.04(a)(9)) and solicitation and payments for solicitation (Rule 7.03). Some provisions of the Texas Disciplinary Rules provide that a lawyer may obtain a client’s consent to certain conduct that would otherwise be prohibited. See e.g. Rule 1.05(b)(2) (use of a client’s confidential information); Rule 1.06(c) (representation of clients with material, adverse interests to each other); Rule 1.09(a) (conflicts of interest with respect to former clients); Rule 1.10(a) (private employment after government employment in a matter). That is not the case with respect to Rules 7.03 and 8.04. It is the opinion of the Committee that the Rules do not permit lawyers to obtain waivers or consents from clients with respect to conduct prohibited by Rules 7.03 and 8.04.

Thus there is no basis in the Texas Disciplinary Rules of Professional Conduct for giving effect to a purported waiver by clients of provisions of the Texas Disciplinary Rules prohibiting barratry as defined under the Texas Penal Code and prohibited under the Texas Disciplinary Rules. The question of whether civil or criminal remedies may be waived by clients in agreements with their lawyers is ultimately a matter of statutory construction rather than interpretation of the Texas Disciplinary Rules. However, it is the Committee’s view that, unless a lawyer has a reasonable basis for believing that such

a waiver is likely to be legally effective, a lawyer would be prohibited under the Texas Disciplinary Rules from including such a purported waiver provision in a lawyer’s agreement with a client without a complete explanation by the lawyer to the client of the possible legal ineffectiveness of the purported waiver. Without a full explanation to the client of the possible ineffectiveness of the waiver provision, the provision would be a misrepresentation to the client as to the client’s rights and would therefore constitute a violation of Rule 8.04(a)(3), which prohibits a lawyer’s conduct that involves “dishonesty, fraud, deceit or misrepresentation[.]”

With respect to a lawyer’s negotiating directly with a client a settlement of a claim against the lawyer under the Barratry Remedies Provisions, it is the opinion of the Committee that the principles outlined in Professional Ethics Committee Opinion 593 (February 2010) should apply. Opinion 593 considered a lawyer’s negotiation with a client concerning settlement of the client’s claim against the lawyer for malpractice. Opinion 593 determined that several provisions of the Texas Disciplinary Rules of Professional Conduct are applicable in the case of a lawyer’s negotiating a settlement of a client’s claim against a lawyer. First, Rules 1.06(b)(2) and 1.06(c) (concerning prohibited conflicts of interest) require that a lawyer seeking to negotiate a settlement with his client terminate the representation of the client in the matter that is the subject of the client’s claim against the lawyer if that representation has not already ended. Second, Rule 2.01 (concerning the requirement that a lawyer render candid advice), Rule 1.15(d) (relating to obligations of a lawyer to protect the client’s interest when representation of the client terminates) and Rule 8.04(a)(3) (prohibiting lawyers from engaging in conduct involving dishonesty, fraud, deceit or misrepresentation), require that the lawyer inform

the client of the circumstances relating to the client's possible claim against the lawyer and of the fact that the lawyer cannot advise the client with respect to the settlement of the claim. Opinion 593 also relied on Rule 1.08(g), which specifically concerns a lawyer's settlement with an unrepresented client of a claim against the lawyer for malpractice. Applying the principles of Opinion 593, the Committee concludes that a lawyer may settle a claim against the lawyer under the Barratry Remedies Provisions with a client who is not represented by other counsel provided that the lawyer terminates the representation of the client in the matter if the representation has not already terminated, discloses to the former client the lawyer's conduct that might constitute barratry, advises the former client in writing that independent representation is appropriate for the former client's consideration of the lawyer's offer to settle the claim, and avoids any conduct involving dishonesty, fraud, deceit or misrepresentation in connection with the negotiation and settlement of the claim.

Reporting professional misconduct under the Texas Disciplinary Rules is governed by Rule 8.03(a), which provides, with exceptions not here applicable, that:

“... a lawyer having knowledge that another lawyer has committed a violation of applicable rules of professional conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate disciplinary authority.”

This Rule applies to one lawyer who has knowledge of another's lawyer's violation under the Texas Disciplinary Rules but it does not require self-reporting by a lawyer of his own violations of the Texas Disciplinary Rules. Hence a lawyer against whom a claim has been

asserted under the Barratry Remedies Provisions is not required to report the claim to Texas disciplinary authorities. However, Rule 8.03 would require a lawyer who represents a party asserting a claim of barratry against another lawyer to inform the appropriate disciplinary authority if the nature of the alleged barratry violation raises a substantial question as to the other lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects.

Conclusion

The Texas Disciplinary Rules of Professional Conduct do not permit a lawyer to include in an agreement with a client the client's waiver of provisions of the Texas Disciplinary Rules prohibiting barratry by the lawyer, but the question of the validity of an agreed waiver by a client of Texas statutes providing civil remedies for barratry is a question of state law rather than of the interpretation of the Texas Disciplinary Rules.

A lawyer is permitted to negotiate with a client who is not represented by other counsel a settlement of a claim

under the Texas statutes providing civil remedies for barratry provided the lawyer terminates the representation of the client in the matter involved if the representation has not already terminated, discloses to the former client the lawyer's conduct that might constitute barratry, advises the former client in writing that independent representation is appropriate with respect to the settlement, and does not engage in conduct involving dishonesty, fraud, deceit or misrepresentation in connection with the negotiation and settlement of the claim.

A lawyer against whom a claim is filed under the Texas statutes providing civil remedies for barratry is not required by the Texas Disciplinary Rules of Professional Conduct to report the claim to disciplinary authorities. **TBJ**

The Supreme Court of Texas appoints the nine members of the Professional Ethics Committee from members of the bar and the judiciary. The court also appoints the committee's chair. According to Section 81.092(c) of the Texas Government Code, "Committee opinions are not binding on the Supreme Court."

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