# Opinion No. 640, April 2014

## QUESTION PRESENTED

*May a Texas professional corporation that is wholly owned by one lawyer use an assumed name that includes the name of the sole shareholder and the name of a lawyer employed by the firm?*

### Statement of Facts

Attorney A, the sole shareholder in a professional corporation named "Attorney A & Associates, P.C.," would like to include the name of Attorney B, an employed associate, in the assumed name of the firm, which is proposed to be "A & B, Attorneys at Law." In the proposed arrangement, Attorney B would have no ownership interest in the firm but Attorney A and Attorney B would fully share in the professional responsibility for providing legal services to the firm's clients. All of the firm's documentation, including letterhead, business cards, bank and operating accounts, would use the new firm name. To effectuate this arrangement, the professional corporation plans to file an assumed name certificate, in the manner provided by law, stating that the firm will be using the assumed name of "A & B, Attorneys at Law."

### Discussion

Rule 7.01 of the Texas Disciplinary Rules of Professional Conduct states, in relevant 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 . . . .
>
> . . . .
>
> (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."

Comment 1 to Rule 7.01 sets forth the following explanation for the Rules limiting the names under which lawyers may practice:

> "Trade names are generally considered inherently misleading. Other types of firm names can be misleading as well, such as a firm name that creates the appearance that lawyers are partners or employees of a single law firm when in fact they are merely associated for the purpose of sharing expenses. In such cases, the lawyers involved may not denominate themselves in any manner suggesting such an ongoing professional relationship as, for example, "Smith and Jones" or "Smith and Jones Associates" or "Smith and Associates." Such titles create the false impression that the lawyers named have assumed a joint professional responsibility for clients' legal affairs."

The Disciplinary Rules do not define the term "trade name." In *Commission for Lawyer Discipline v. C.R.*, 54 S.W.3d 506, 515 (Tex. App.-Fort Worth 2001, pet. denied), the court, in construing Rule 7.01, observed: "A trade name is a designation that is adopted and used by a person either to designate a good he markets, a service he renders, or a business he conducts."

Rule 7.01 is violated if lawyers who do not share joint responsibility within a firm for the representation of clients use a trade name that misleadingly indicates to the public that the lawyers have assumed joint professional responsibility for the firm's legal services. See Professional Ethics Committee Opinion 478 (June 1991).

In Opinion 529 (May 1999), this Committee recognized that the provisions of Rule 7.01

> "allow a lawyer to practice under a firm name that contains names of one or more lawyers who practice, or have practiced, with the law firm together with words or symbols to indicate the nature of the organization or the fact that the firm provides legal services (rather than some other service or product)."

In the circumstances here considered, the assumed name of "A & B, Attorneys at Law" proposed to be used by the professional corporation is not a trade name in violation of Rule 7.01 since the assumed name contains the names of the attorneys providing legal services as shareholder or associate of the professional corporation and the two attorneys whose names are included in the assumed name have joint professional responsibility for the firm's legal services.

### Conclusion

It is not a violation of the Texas Disciplinary Rules of Professional Conduct for a Texas professional corporation that is wholly owned by one lawyer to use an assumed name that includes the name of the sole shareholder and the name of a lawyer employed by the firm if the sole shareholder and the employee have joint professional responsibility for the professional corporation's legal services. 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."*

# Opinion No. 641, May 2014

## QUESTION PRESENTED

*Do the Texas Disciplinary Rules of Professional Conduct permit a lawyer to accept client referrals from a financial planning services company that regularly engages the lawyer to provide legal services to the company?*

### Statement of Facts

A lawyer is regularly engaged by a financial planning services company ("Company A") to provide legal representation and advice. Company A offers financial planning services, including selling securities and life insurance products, to its customers. Under the terms of the lawyer's engagement with Company A, the lawyer's work for Company A does not include providing legal services to Company A's customers. In his law practice, the lawyer represents other clients in addition to Company A. Company A proposes to refer to the lawyer from time to time customers of the company who need legal services.

### Discussion

The referral arrangement described above involves conflict of interest issues governed by Rule 1.06 of the Texas Disciplinary Rules of Professional Conduct. Rule 1.06(b)(2) provides that a lawyer shall not represent a person if that representation "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."

Since the lawyer is regularly engaged to provide legal services for Company A, the lawyer's ability to separately represent and advise a customer of Company A will be limited if the representation involves the customer's dealings with Company A or any investments or investment products recommended or sold to the customer by Company A. The limitations on the lawyer's ability to represent Company A's customers in those situations arises from the lawyer's responsibilities to Company A as well as from the lawyer's own interest in maintaining Company A as a regular client. Comment 4 to Rule 1.06 cautions that

> "[l]oyalty to a client is impaired … in any situation when a lawyer may not be able to consider, recommend or carry out an appropriate course of action for one client because of the lawyer's own interests or responsibilities to others. The conflict in effect forecloses alternatives that would otherwise be available to the client."

Comment 5 to Rule 1.06 also cautions that "[a] lawyer should not allow related business interests to affect representation . . . ."

In providing legal advice to a customer of Company A, the lawyer may find himself limited in his ability to advise the client because the lawyer is not able to provide independent advice on matters relating to Company A. For example, the lawyer could not provide unbiased advice on whether the customer of Company A should use Company A or a competitor for investment services and products. The conflict of interest problem would arise in an acute form if the interests of a customer of Company A might require the assertion of a claim against Company A. The provision of legal services to a customer of Company A with respect to investment services and products of Company A thus necessarily involves a conflict of interest within the scope of Rule 1.06(b)(2) since the representation of the customer of Company A in these circumstances would reasonably appear to be limited by the lawyer's responsibilities to Company A and by the lawyer's own interest in continuing to provide services to Company A. In contrast, if the representation of the customer of Company A did not involve investment services and products or an issue involving Company A, then in most cases there would not be a conflict under Rule 1.06(b)(2).

Where an actual or potential conflict of interest under Rule 1.06(b)(2) exists, the conflict of interest would not preclude representation of a customer of Company A if the lawyer is able to comply with the requirements of Rule 1.06(c), which provides as follows:

> "A lawyer may represent a client in the circumstances described in (b) if:
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> (1) the lawyer reasonably believes the representation of each client will not be materially affected; and
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> (2) each affected or potentially affected client consents to such representation after full disclosure of the existence, nature, implications, and possible adverse consequences of the common representation and the advantages involved, if any."

Applying Rule 1.06(c) requires a two-step analysis. First, the lawyer must reasonably determine whether his proposed representation of the customer of Company A while he continues to regularly represent Company A will materially affect the lawyer's representation of either the customer or Company A. Second, if the lawyer reasonably believes that neither the

representation of the customer nor the representation of Company A will be materially affected, both the customer and Company A must consent after full disclosure. Each specific representation would have to be evaluated based upon the specific facts involved. However, the Committee is of the opinion that the lawyer will not normally be able to represent both the customer and Company A if representation of the customer involves financial or investment services generally or the customer's dealings with Company A because in almost all cases the lawyer will not be able to reasonably form the belief that the representation of each client will not be materially affected. Generally, therefore, the lawyer should not accept referrals of customers of Company A, even with the consent of both the customer and Company A, when the representation of the customer involves financial or investment services in general or the customer's dealings with Company A in particular. In contrast, while each particular representation would have to be individually evaluated, if the lawyer who regularly provides legal representation to Company A restricted his representation of customers of Company A to matters that did not involve financial and investment issues in general and the customer's dealings with Company A in particular, such representations generally would not involve prohibited conflicts of interest.

For legal matters where the lawyer is not prohibited by the conflict of interest rules from representing a customer of Company A, the lawyer will of course remain subject to all other requirements of the Texas Disciplinary Rules. In these circumstances, important requirements to be considered include the lawyer's obligation under Rule 2.01 to exercise independent professional judgment and render candid advice to his client and the lawyer's obligation under Rule 5.04(c) not to permit a person who recommends the lawyer to direct or regulate the lawyer's professional judgment on behalf of his client.

In the evaluation of the circumstances presented, it should be noted that the lawyer is prohibited from giving anything of value to Company A in exchange for referrals of prospective clients or as a means of soliciting prospective clients. Rule 7.03(b) and (c) provide in pertinent part as follows:

> "(b) A lawyer shall not pay, give, or offer to pay or give anything of value to a person not licensed to practice law for soliciting prospective clients for, or referring clients or prospective clients to, any lawyer or firm . . . .
>
> (c) A lawyer, in order to solicit professional employment, shall not pay, give, advance, or offer to pay, give, or advance anything of value, other than actual litigation expenses and other financial assistance . . ., to a prospective client or any other person . . . ."

These provisions would thus preclude the lawyer from providing legal services to Company A for a reduced fee or on otherwise favorable terms in exchange for the company's referral to the lawyer of prospective clients.

## Conclusion

The Texas Disciplinary Rules of Professional Conduct would generally not prohibit a lawyer from accepting client referrals from a financial planning services company that also regularly engages the lawyer for legal representation if the lawyer's representation of the company's customers involves only matters unrelated to financial and investment issues or the customer's dealings with the company. However, the Texas Disciplinary Rules would generally prohibit the lawyer from accepting representation of a customer of the company involving financial and investment issues or the customer's relationship with the company. In all cases, the lawyer's regular engagement as a lawyer by the financial planning services company is not permitted to be on terms that would constitute a transfer of something of value to the company in exchange for the company's referral of clients to the lawyer. 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."*