



Opinion No. 614, April 2012

QUESTION PRESENTED

Is a lawyer prohibited from conditioning the settlement of a civil lawsuit upon the receipt from the other party in the lawsuit of an affidavit that is acceptable to the lawyer's client?

Statement of Facts

During mediation of pending litigation between A and B, B through his lawyer offers to settle the litigation on specified terms provided that A agrees to execute an affidavit that is acceptable in form and substance to B. B's lawyer plans to use A's affidavit and possibly testimony from A at trial in a separate pending lawsuit between B and C.

Discussion

Rule 3.04 of the Texas Disciplinary Rules of Professional Conduct provides in pertinent part that:

A lawyer shall not:

...

- (b) falsify evidence, counsel or assist a witness to testify falsely, or pay, offer to pay, or acquiesce in the offer or payment of compensation to a witness or other entity contingent upon the content of the testimony of the witness or the outcome of the case.

Thus, under Rule 3.04(b) a lawyer is not permitted to pay or acquiesce in the payment of compensation to a witness contingent upon the content of the witness' testimony. See Professional Ethics Committee Opinion 553 (August 2004). This Rule is applicable not only to payments of money but also to other kinds of benefits offered to a witness for testimony. Such benefits would include offering a party in a civil case a settlement on more favorable terms than would otherwise be available in exchange for such party's agreement to give specified testimony in

another case. See also *Castillo v. State*, 221 S.W.3d 689 (Tex. Crim. App. 2007) (ruling in the case of a plea bargain agreement in a criminal proceeding that Rule 3.04(b) is not violated if a criminal defendant's plea bargain is contingent on the defendant's giving truthful testimony in another prosecution but is not contingent on the content of the testimony to be given).

In the situation here addressed, if B offers to enter into a particular settlement with A only if A executes an affidavit that is acceptable in content to B, the arrangement constitutes the payment of compensation — in the form of a presumably more favorable settlement to A — in exchange for particular testimony from A to be contained in the affidavit. Participation by B's lawyer in such an arrangement would thus constitute a violation of Rule 3.04(b). There would be a violation even if the testimony contained in the proposed affidavit was entirely truthful. However, it would be permissible under Rule 3.04(b) for the settlement agreement to require simply that A give an affidavit on a specific subject matter without any requirement for approval of the content or specification as to what the specific testimony should be. For example, it would be permissible to require that A give an affidavit on A's memories regarding a specific incident (e.g., an automobile accident) as a term of the settlement of the lawsuit between A and B, provided that there was no requirement as to what A's particular memories set out in the affidavit must be and no requirement for approval of the content by B. It would also be permissi-

ble under Rule 3.04(b) for the settlement agreement to contain provisions requiring A to cooperate with B with respect to another pending matter in terms of A making himself available for either deposition or trial testimony or both in the other matter without any conditions being placed on the testimony that A would give.

Conclusion

Under the Texas Disciplinary Rules of Professional Conduct, a lawyer is prohibited from conditioning the settlement of a civil lawsuit upon the receipt from the other party of an affidavit providing testimony on a particular subject that is acceptable to the lawyer's client. However, it is permissible to require in an agreement to settle a civil lawsuit that the other party provide as part of the implementation of the settlement an affidavit that addresses truthfully a specified subject or incident but without any requirement concerning the content, or approval for the content, of the affidavit. ✪

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."