



## Opinion No. 615, April 2012

### QUESTION PRESENTED

*Under the Texas Disciplinary Rules of Professional Conduct, may a district attorney take responsibility for the investigation and possible prosecution of a local elected official in a criminal proceeding or a civil removal proceeding when the district attorney previously represented and advised the official on matters relating to the official's performance of public duties?*

### Statement of Facts

A district attorney in the past provided, under Section 157.901 of the Local Government Code, legal representation and written advice to a local elected official (Official A) concerning issues relating to Official A's performance of public duties. However, the district attorney does not routinely provide representation to Official A. The district attorney's legal work for Official A has been completed and no legal services are currently being provided by the district attorney to Official A.

The district attorney and his office have been requested to investigate and possibly prosecute or institute removal proceedings against Official A for alleged abuse of office or official oppression. Unless the district attorney withdraws from the matter, any decision concerning legal action against Official A for the alleged misconduct will be made by the district attorney.

### Discussion

In the facts presented, the district attorney represented Official A in the past but that representation has been completed and no legal services are currently being provided to Official A by the district attorney's office. Official A is, therefore, a former client. Rule 1.09 of the Texas Disciplinary Rules of Professional Conduct addresses a lawyer's obligations to a former client. This Committee has previously concluded that a lawyer representing a governmental entity in the capacity of a state or federal prosecutor is subject to the Texas Disciplinary Rules of Professional Conduct, including the protections for former clients provided in Rule 1.09. Professional Ethics Committee Opinion 538 (June 2001). Comment 2 to Rule 1.10 notes that a lawyer representing a govern-

mental body "is subject to the prohibition against representing adverse interests stated in Rule 1.06 and the protection afforded former clients in Rule 1.09."

Under Rule 1.09, a lawyer may not, without the consent of the former client, engage in representation that would be adverse to the former client if the lawyer will, in reasonable probability, use or reveal confidences of the former client in violation of Rule 1.05 or if the current matter bears a substantial relationship to the previous representation. In pertinent part, Rule 1.09 provides as follows:

- (a) Without prior consent, a lawyer who personally has formerly represented a client in a matter shall not thereafter represent another person in a matter adverse to the former client:
  - ...
  - (2) if the representation in reasonable probability will involve a violation of Rule 1.05; or
  - (3) if it is the same or a substantially related matter.

Rule 1.05 defines confidential information and prohibits a lawyer from knowingly revealing or using confidential information of a former client to the disadvantage of the former client unless the client consents after consultation. The term "substantially related matter" in Rule 1.09(a)(3) primarily refers to situations where a lawyer could have acquired confidential information concerning a former client that could now be used to the former client's disadvantage or for the advantage of the lawyer's current client or some other person. Thus, as noted in Comment 4B to Rule 1.09, there is substantial overlap between the prohibitions set forth in paragraphs (a)(2) and (a)(3) of Rule 1.09.

In the facts presented, the district attorney personally represented Official A with regard to civil matters arising from the performance of Official A's public duties. Depending on the particular facts, there may or may not be a reasonable probability that the district attorney's representation of the State against Official A would involve a misuse of confidential information relating to Official A in violation of Rule 1.05. The particular facts will likewise determine whether the conduct of Official A that is the subject of the current investigation is a "substantially related matter" with respect to the matters for which the district attorney represented Official A in the past. If there is a reasonable probability of a violation of obligations concerning confidential information of Official A or if the current matter and one or more of the prior matters are substantially related, then the district attorney is not permitted to be involved in the investigation unless Official A consents to the adverse representation by the district attorney.

The protections afforded a former client under Rule 1.09 may be waived by the client but only if there is consent after disclosure of the relevant circumstances, including the district attorney's past or intended role on behalf of Official A as the district attorney's former client and on behalf of the State as the district attorney's current client. See Comment 10 to Rule 1.09.

Even if the proposed representation adverse to Official A is permitted under Rule 1.09 (either because of Official A's consent or because such consent is not required under the Rule), the requirements of Rule 1.06 on conflicts of interest with respect to a current client, in this case the State, must also be considered.



Rule 1.06(b) provides in pertinent part:

(b) In other situations and except to the extent permitted by paragraph (c), a lawyer shall not represent a person if the representation of that person:

...

(2) 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.

The district attorney's current client is the State and his former client, Official A, would be treated as a third person under Rule 1.06(b)(2). Loyalty to a client is paramount and that loyalty is impaired if a lawyer may not be able to consider, recommend, or take a course of action for one client because of the lawyer's responsibilities to a third person. In such cases the critical question is the likelihood that a conflict of interest exists and, if there is a conflict of interest, whether it will materially and adversely affect the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the lawyer's current client. See Comment 4 to Rule 1.06. Accordingly, if it reasonably appears that the district attorney's representation of the State in investigating and possibly prosecuting or seeking to remove Official A would be adversely limited by the district attorney's responsibilities to Official A or by the district attorney's own interests, the required loyalty to the State as the current client would be impaired and a conflict of interest would exist.

If a conflict of interest exists under the terms of Rule 1.06(b)(2), then it must be determined whether the district attorney may nonetheless continue to represent the State under the standards of Rule 1.06(c), which provides:

(c) A lawyer may represent a client in the circumstances described in (b) if:

(1) the lawyer reasonably believes the representation of each client will not be materially affected; and

(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.

Under this Rule, the district attorney's continued representation of the State requires a two-step analysis. First, the district attorney must reasonably believe that his representation of the State will not be materially affected by the prior representation of Official A. Second, the State must consent 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. Absent a constitutional provision or statute authorizing an officer of the State to give consent on behalf of the State, it may not be possible to obtain the required consent on behalf of the State, and in such circumstances the district attorney would be prohibited from investigating and prosecuting alleged misconduct of his former client, Official A. See Professional Ethics Committee Opinion 539 (February 2002). This Committee does not have authority to decide questions of law and can therefore express no opinion on the question of whether or from whom the district attorney might obtain a valid consent in the circumstances considered.

It should be noted that, since the district attorney's office is a "firm" under the Texas Disciplinary Rules, if the district attorney is prohibited by Rule 1.09 or Rule 1.06 from representing the State in a manner adverse to Official A, then all other lawyers in the district attorney's office would likewise be prohibited from such representation of the State. See definition of "Firm" in Texas Disciplinary Rules of Professional Conduct, Terminology; Rule 1.09(c) and Rule 1.06(f); Opinion 539 cited above.

### Conclusion

Under the Texas Disciplinary Rules of Professional Conduct, a district attorney

is permitted to take responsibility for the investigation and possible prosecution of a local elected official in a criminal proceeding or a civil removal proceeding when the district attorney previously represented and advised the official on matters relating to the official's performance of public duties only if either (1) there is no reasonable probability that confidential information obtained in the representation of the official will be disclosed or used in violation of the district attorney's obligations to protect the confidential information of the official and the proposed current representation is not substantially related to the prior representation of the official or (2) the official consents after disclosure of the circumstances. If representation would be permitted under the standard set forth in the preceding sentence, the representation would nevertheless be prohibited unless either (1) the district attorney's current representation of the State in the matter would not reasonably appear to be adversely limited by the district attorney's responsibilities to the official as a former client or (2) the district attorney reasonably believes that the representation of the State in the current matter will not be adversely affected by responsibilities to the official and the State validly consents to the representation. No opinion is expressed by the Committee as to whether under Texas law it is possible for the State to give such consent if it would be required under the Texas Disciplinary Rules for a district attorney's representation of the State in a particular case. If the district attorney is prohibited under the Texas Disciplinary Rules from representing the State in a proceeding adverse to the official, then all other lawyers in the district attorney's office would likewise be prohibited from such representation. ❖

*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. 616, April 2012

### QUESTION PRESENTED

*Under the Texas Disciplinary Rules of Professional Conduct, may a law firm agree with a for-profit legal service contract company to provide legal services at discounted rates to persons who have contracted with the legal service contract company? May a law firm having such an agreement with a for-profit legal service contract company accept referral fees from lawyers to whom the law firm refers matters that initially come to the firm under the agreement with the company?*

### Statement of Facts

A company owned by non-lawyers (the Company) is validly licensed as a for-profit legal service contract company by the Texas Department of Licensing and Regulation under Chapter 953 of the Texas Occupations Code. The Company enters into contracts with individuals (Contract Holders) under which the Contract Holders will pay a monthly amount and in exchange the Contract Holders will be entitled to specified legal services to be provided by licensed Texas lawyers. These contracts frequently include provisions that, if a Contract Holder needs legal services with respect to certain types of matters beyond those specifically provided under the contract, the Contract Holder is entitled to receive additional legal services on these specified matters at a discount. Such contracts are frequently included in benefit packages made available to employees by employers under which the monthly payments for the employee Contract Holders are paid in whole or in part by the employer.

The Company enters into an agreement with a Texas law firm (the Law Firm) under which the Company will pay the Law Firm a set amount per month per Contract Holder and the Law Firm agrees to provide specified legal services to the Contract Holders with no additional payment. An essential feature of the Company's business plan is that for each period the total of amounts received by the Company from the Contract Holders is expected to exceed the total of payments by the Company to the Law Firm and other law firms contracting with the Company. An additional feature of the agreement between the Company

and the Law Firm is that the Law Firm will provide legal services beyond the specified services for fees to be paid by Contract Holders that are discounted 25 percent from the Law Firm's standard rates for hourly and flat-fee cases.

The agreement between the Law Firm and the Company authorizes the Law Firm to refer some matters to lawyers outside the Law Firm (Referral Lawyers) who have agreed with the Company to take these matters as referrals from the Law Firm at the agreed discount from the normal fees charged by the Referral Lawyers for these matters. The Company's contract with Contract Holders and the Company's agreement with the Law Firm further provides that some matters, including some contingent fee matters, may be referred to one of the Referral Lawyers without discount on fees normally charged by the Referral Lawyers. With respect to some or all matters referred to Referral Lawyers, the Law Firm proposes to charge Referral Lawyers a referral fee.

### Discussion

Rule 5.04 of the Texas Disciplinary Rules of Professional Conduct prohibits a lawyer or law firm from sharing or promising to share legal fees with a non-lawyer except in certain circumstances not relevant here. The initial question presented is whether the Law Firm's arrangement with the Company, involving as it does total payments on behalf of the Contract Holders to the Company that are expected to be more than total legal fees paid by the Company to the Law Firm, constitutes an impermissible sharing of legal fees by the Law Firm with a non-lawyer, namely the Company.

Comment 1 to Rule 5.04 states that "[t]he principal reasons for these limitations are to prevent solicitation by lay persons of clients for lawyers and to avoid encouraging or assisting nonlawyers in the practice of law." In the case of for-profit legal service contract companies licensed under Chapter 953 of the Texas Occupations Code, such companies are specifically prohibited by Section 953.154 from interfering with the lawyer-client relationship between a contracting lawyer and the client and from interfering with the contracting lawyer's independent exercise of professional judgment. Thus, so long as the Company complies with this provision of the Occupations Code, there should be no concern regarding interference by nonlawyers in a lawyer's practice of law. In this regard, it should be noted that Rule 5.04(c) expressly contemplates that a lawyer's fee may be paid by a person other than the client so long as the person paying is not permitted to interfere in the lawyer's exercise of professional judgment: "A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services." In the case of such payments for legal services by someone other than the client, Rule 1.08(e) requires safeguards with respect to client consent, lawyer independence, and protection of the client's confidential information, but there is no prohibition against such payments when subject to these safeguards.

The question remains as to whether this arrangement should be considered fee splitting in violation of Rule 5.04(a)



based on the view that the arrangement encourages improper solicitation by the Company of clients for the Law Firm. In the opinion of the Committee, this arrangement does not involve impermissible fee splitting because the payments made by or on behalf of Contract Holders to the Company do not constitute fees for legal services but are rather in the nature of insurance premiums paid to the Company, viewed as an insurer, to insure the risk that a particular Contract Holder would require specified legal services during the period covered by the contract. The fact that for-profit contract legal services companies are specifically authorized and regulated under Chapter 953 of the Texas Occupations Code further supports the conclusion that these arrangements do not implicate the concerns that underlie Rule 5.04's prohibition against sharing legal fees with nonlawyers.

The next question is whether the Law Firm's agreement with the Company involves an impermissible payment or other transfer to a nonlawyer for soliciting employment or referring clients in violation of Rule 7.03(b) or an impermissible payment or other transfer to a prospective client or other person in order to solicit employment in violation of Rule 7.03(c). Rule 7.03(b) provides that, with exceptions not applicable here, 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 ... ." Rule 7.03(c) provides that a lawyer "in order to solicit professional employment, shall not pay, give, advance, or offer to pay, give, or advance anything of value" to a prospective client or any other person, with limited exceptions for litigation expenses and certain other payments not involved here.

In the arrangement between the Law Firm and the Company considered in this opinion, there is no payment or other transfer of something of value by the Law Firm to the Company or the Contract Holders that would make Rules 7.03(b) and 7.03(c) applicable. Although

a discount or price reduction is valuable to the person receiving the discount or price reduction, a discount or price reduction from standard rates for legal services does not in the Committee's view constitute a transfer of something of value within the meaning of Rules 7.03(b) and 7.03(c) that would be prohibited by these Rules. A contrary view would require the obviously unacceptable conclusion that Rules 7.03(b) and 7.03(c) prohibit price competition in the provision of legal services in Texas.

In these circumstances, any arrangement that is represented by a lawyer or law firm to provide for "discounted" fees must involve real reductions from fees that are themselves permissible under Rule 1.04. Any misrepresentation by a lawyer or law firm concerning reductions in legal fees would violate Rule 7.02(a) and 8.04(a)(3), which require truthfulness by a lawyer in his communications regarding his or his firm's qualifications or services. In other words, in any offer or agreement to "discount" a lawyer's fee, the stated discount must be genuine.

A different type of issue is presented in the case of referral fees proposed to be paid by Referral Lawyers to the Law Firm with respect to matters referred by the Law Firm. Rule 1.04(f) provides that a division of fees between lawyers not in the same firm is permitted only if several requirements are met, including the requirement of Rule 1.04(f)(1) that the division must be either in proportion to professional services performed by each lawyer or made between lawyers assuming joint responsibility for the representation. Because in the circumstances considered, the Law Firm does not provide legal services with respect to the matters referred and does not take joint responsibility for the representations with the Referral Lawyers to whom the matters are referred, such referral fees are prohibited by Rule 1.04(f).

### Conclusion

A law firm does not violate the Texas Disciplinary Rules of Professional Con-

duct by entering into an agreement with a for-profit legal service contract company to provide legal services at discounted rates to persons who have contracted with the company. The law firm would violate the Texas Disciplinary Rules of Professional Conduct if it received referral fees from lawyers outside the firm to whom the firm referred matters that came to the firm under the agreement with the legal service contract company. \*

*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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