



Opinion No. 617, May 2012

QUESTION PRESENTED

Under the Texas Disciplinary Rules of Professional Conduct, may a lawyer who is licensed to practice law in Texas and in North Carolina practice law in North Carolina, without soliciting or representing persons in Texas, under a law firm name that is not permitted under the Texas Disciplinary Rules but that is permitted under the applicable rules of North Carolina law governing the practice of law in North Carolina?

Statement of Facts

A lawyer is licensed to practice law under the laws of both Texas and North Carolina. The lawyer has in the past practiced law in Texas but he now lives and practices law in a city (CityX) in North Carolina. The lawyer practices law in North Carolina in a law firm that proposes to use the trade name “CityX Law Group” in addition to the law firm’s actual name, which is based on the names of lawyers in the firm. The use of the trade name “CityX Law Group” is in accordance with applicable rules governing the practice of law in North Carolina. The lawyer and the law firm do not currently practice in Texas and do not propose to solicit clients located in Texas.

Discussion

Rule 7.01 of the Texas Disciplinary Rules of Professional Conduct provides 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
- . . .
- (e) A lawyer shall not advertise in the public media or seek professional employment by any communication under a trade or fictitious name

Under Rule 7.01, a Texas lawyer is prohibited from practicing or advertising in Texas under a trade name such as “CityX Law Group.” This prohibition in

Texas has been confirmed by both court decisions and Professional Ethics Committee Opinions. See *Rodgers v. Commission for Lawyer Discipline*, 151 S.W.3d 602, 610–11 (Tex. App. — Fort Worth 2004, pet. denied), *Commission for Lawyer Discipline v. C.R.*, 54 S.W.3d 506, 515–16 (Tex. App. — Fort Worth 2001, pet. denied), Professional Ethics Committee Opinion 529 (April 1999) and Professional Ethics Committee Opinion 398 (November 1978).

The only issue here is whether the prohibition on trade names set forth in Rule 7.01 of the Texas Disciplinary Rules applies to a lawyer licensed to practice law in Texas and in North Carolina who is not currently practicing law in Texas but is practicing law in North Carolina as authorized under the laws of North Carolina. For purposes of this opinion, the Committee assumes that applicable North Carolina law permits a North Carolina lawyer to practice under a trade name such as “CityX Law Group” and that the lawyer and his law firm have complied with all applicable requirements of North Carolina law to practice under that trade name in North Carolina.

Rule 8.05 of the Texas Disciplinary Rules provides in pertinent part:

- (a) A lawyer is subject to the disciplinary authority of this state, if admitted to practice in this state or if specially admitted by a court of this state for a particular proceeding. In addition to being answerable for his or her conduct occurring in this state, any such lawyer also may be disciplined here for conduct occurring in another jurisdiction or resulting in lawyer

discipline in another jurisdiction, if it is professional misconduct under Rule 8.04.

Comments 3 and 4 to Rule 8.05 provide in pertinent part:

- 3. If the rules of professional conduct of this state and . . . [another] jurisdiction differ, principles of conflict of laws may apply. Similar problems can arise when a lawyer is licensed to practice in more than one jurisdiction and these jurisdictions impose conflicting obligations. . . . In such cases, this state will not impose discipline for conduct arising in connection with the practice of law in another jurisdiction or resulting in lawyer discipline in another jurisdiction unless that conduct constitutes professional misconduct under Rule 8.04.
- 4. Normally, discipline will not be imposed in this state for conduct occurring solely in another jurisdiction or judicial system and authorized by the rules of professional conduct applicable thereto, even if that conduct would violate these Rules.

Under Rule 8.05, a lawyer licensed to practice law in Texas can be disciplined in Texas for conduct occurring in another state if that conduct violates any of the Texas Disciplinary Rules of Professional Conduct. Rule 8.05(a) permits discipline for any professional misconduct under Rule 8.04, and Rule 8.04(a)(1) provides that a lawyer shall not “violate these rules” Thus, under a literal reading of



these Rules (and without regard to the indications in the Comments on when discipline will not normally be imposed), any violation of the Rules could in theory be the basis for discipline of a Texas lawyer even if the conduct in question occurs in another state where the lawyer is also licensed to practice, is permitted by the applicable rules of such other state, and has no effect in Texas.

However, Comment 3 to Rule 8.05, quoted above, recognizes that, when the professional conduct rules of Texas and another state differ, the question of which rules will apply may have to be determined utilizing principles of conflict of laws. The Supreme Court of Texas has ruled that Texas courts should decide conflict of laws issues by using the “most significant relationship” test as set forth in the Restatement (Second) of Conflict of Laws (American Law Institute 1971) (particularly Sections 6 and 145 of this Restatement). See *Torrington Co. v. Stutzman*, 46 S.W.3d 829, 848 (Tex. 2000), *Hughes Wood Products, Inc. v. Wagner*, 18 S.W.3d 202, 205 (Tex. 2000), and *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 420–21 (Tex. 1984). Although this Committee does not have authority to address conflict of laws issues generally, the Committee believes that it does have authority to look to settled Texas principles of conflict of laws in the determination of whether a provision of the Texas Disciplinary Rules of Professional Conduct has application to particular con-

duct of a Texas lawyer that is also governed by the professional conduct rules of another state.

Applying the “most significant relationship” standard of Texas law to the circumstances here considered, the Committee concludes that the state with the most significant relationship to the lawyer’s practice and the names used in that practice is unquestionably the state of North Carolina and that there appears to be no significant relationship between Texas and the name of the law firm under which the lawyer practices law wholly outside of Texas in compliance with applicable North Carolina law. In the circumstances presented, while the relationship of the lawyer’s current law practice to North Carolina is clear and substantial, the only relationship to Texas is that the lawyer is licensed to practice law in Texas as well as in North Carolina and has practiced law in Texas in the past. In addition to the fact that the state with the most significant relationship is North Carolina rather than Texas, it is clear that there is no discernible adverse impact on Texas interests when a lawyer licensed in Texas and North Carolina does not comply with the Texas rule on law firm names but does comply with North Carolina’s rules in a law practice in North Carolina that does not touch Texas. Such conduct outside of Texas does not in any way call into question the lawyer’s basic fitness, on a moral or other basis, to practice law in Texas

should he later choose to do so under a firm name that is permitted under the Texas Disciplinary Rules. Accordingly it is the opinion of the Committee that, based on settled Texas principles of conflict of laws and in view of the lack of any significant interest of Texas in the circumstances considered, the prohibition against use of trade names set forth in Rule 7.01 of the Texas Disciplinary Rules does not apply to the use exclusively outside of Texas of the name “CityX Law Group” for a law practice conducted in North Carolina in full compliance with applicable North Carolina law.

Conclusion

A lawyer licensed to practice law in Texas and in North Carolina does not violate the Texas Disciplinary Rules of Professional Conduct if he practices law in North Carolina, without soliciting or representing persons in Texas, under a law firm name that is not permitted under the Texas Disciplinary Rules but that is permitted under the applicable rules of North Carolina law governing the practice of law in North Carolina. ❖

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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Opinion No. 618, June 2012

QUESTION PRESENTED

Do the Texas Disciplinary Rules of Professional Conduct permit lawyers to organize a law firm as a limited partnership in which the general partner is a corporation that is not a professional corporation?

Statement of Facts

Two Texas lawyers wish to practice law together. In order to limit the lawyers' liability in connection with their law practice, their financial advisor recommends that the lawyers form a limited partnership (instead of a general partnership or a limited liability partnership) in which each lawyer is a limited partner and the general partner is an ordinary for-profit corporation, not a professional corporation, that is owned by the two lawyers.

Discussion

The Texas Disciplinary Rules of Professional Conduct do not prescribe specific forms of organization for law firms. Rule 5.04 does prohibit arrangements that would undermine a lawyer's professional independence, such as sharing legal fees with a nonlawyer; forming a partnership for the practice of law with a nonlawyer; or forming a professional corporation or association for the practice of law for profit if a nonlawyer owns any interest in the entity, is a corporate director or officer of the entity, or has the right to direct or control the lawyer's professional judgment. The Texas Disciplinary Rules regarding law firms and associations also address responsibilities of a partner or supervisory lawyer (Rule 5.01); responsibilities of a supervised lawyer (Rule 5.02); responsibilities regarding nonlawyer assistants (Rule 5.03); unauthorized practice of law (Rule 5.05); restrictions on right to practice (Rule 5.06); and prohibited discriminatory activities (Rule 5.08).

Under the Texas Disciplinary Rules, a lawyer practicing law in Texas is required to comply with applicable Texas legal requirements concerning the practice of law. Rule 8.04(a)(12) prohibits violation

of any laws of Texas not otherwise specified in Rule 8.04(a) "relating to the professional conduct of lawyers and to the practice of law." Accordingly, a Texas lawyer must structure his law practice in a form that is permissible under Texas law.

Whether a law firm may be organized as a traditional limited partnership with an ordinary for-profit corporation as general partner is a question that must be answered under the Texas Business Organizations Code (TBOC), not the Texas Disciplinary Rules of Professional Conduct. The TBOC specifically authorizes in Title 7, entitled "Professional Entities," the formation of a "professional entity," which "means a professional association, professional corporation, or professional limited liability company." TBOC Section 301.003(4). A "professional corporation" is defined as "a corporation that is: (A) formed for the purpose of providing a professional service, other than the practice of medicine by physicians, surgeons, or other doctors of medicine, that by law a corporation governed by Title 2 is prohibited from rendering; and (B) governed as a professional entity under this title." TBOC section 301.003(3).

For-profit corporations that are not professional corporations are governed by Title 2 of the TBOC and are prohibited under TBOC Section 2.007(4) from engaging "in a business or activity that may not be engaged in by a for-profit corporation without first obtaining a license under the laws of this state and a license to engage in that business or activity cannot lawfully be granted to the corporation." Except for professional corporations specifically authorized under Title 7 of the TBOC as noted above, the general rule is that "a corporation is not

authorized to engage in the practice of law." *Unauthorized Practice of Law Committee v. American Home Assurance Co.*, 261 S.W.3d 24, 33 (Tex. 2008). See also Texas Attorney General Opinion No. MW-99 (Dec. 13, 1979) at page 4 ("The Texas Business Corporation Act [predecessor of the provisions of the TBOC governing ordinary for-profit corporations] and the Texas Professional Corporation Act [predecessor of the provisions of title 7 of the TBOC governing professional corporations] are as a general matter mutually exclusive ...").

This Committee does not have authority to interpret statutory law and expresses no opinion on the interpretation of the provisions of the TBOC quoted above. The interpretation of these provisions, however, will be critical in the application of Rules 5.04, 5.05(b), and 8.04(a)(12) of the Texas Disciplinary Rules of Professional Conduct. For example, if under Texas law a corporation acting as the general partner of a limited partnership practicing law in Texas must be authorized to practice law in Texas and if under Texas law a for-profit corporation cannot be so authorized, then Texas lawyers involved in the proposed law firm structure would violate Rule 5.05(b) by assisting the general partner corporation in the unauthorized practice of law.

Conclusion

The Texas Disciplinary Rules of Professional Conduct do not prescribe specific forms for organizing law firms in Texas. The Texas Disciplinary Rules do, however, prohibit a lawyer from sharing legal fees with a nonlawyer, forming a partnership for the practice of law with a nonlawyer, forming a professional corpo-



ration or association for the practice of law for a profit with a nonlawyer, and assisting a nonlawyer in the unautho-

rized practice of law. Moreover, Texas lawyers must choose for their law practice a form of organization that complies

with all applicable Texas laws, including the requirements of the Texas Business Organizations Code. ✦

Opinion No. 619, June 2012

QUESTION PRESENTED

Do the Texas Disciplinary Rules of Professional Conduct permit a prosecutor to require and defense counsel to agree that documents the prosecutor produces to defense counsel may be shown to the defendant but that copies of the documents may not be given to the defendant?

Statement of Facts

As a condition for providing documents to defense counsel in a criminal case, a prosecutor requires that the defendant's lawyer sign an agreement (1) recognizing that the documents are property of the State, (2) allowing the defendant's lawyer to show the documents to the defendant, (3) prohibiting the lawyer from providing copies of the documents to the defendant, and (4) requiring that the documents and any copies be returned to the prosecutor at the conclusion of the case.

Discussion

Rule 3.09 of the Texas Disciplinary Rules of Professional Conduct addresses special responsibilities of prosecutors in criminal cases. Rule 3.09(d) provides that a prosecutor in a criminal case shall:

[M]ake timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal[.]

Although the prosecutor has an obligation under Rule 3.09(d) to disclose to the defense all exculpatory or mitigating evidence, the Rule is silent as to the disclo-

sure of other evidence and as to restrictions that may be placed on evidence and information disclosed.

No provision of the Texas Disciplinary Rules prohibits a prosecutor from requiring, or defense counsel from signing, an agreement recognizing that discovery provided by the prosecutor is property of the State and prohibiting dissemination of copies of that discovery. Likewise, no provision of the Texas Disciplinary Rules prohibits an agreement requiring defense counsel receiving documents from a prosecutor to return the documents and any copies to the prosecutor.

In civil cases, Texas courts may issue protective orders to safeguard confidential information by limiting the dissemination, copying, and use of such information. See Rule 192.6(b) of the Texas Rules of Civil Procedure (authorizing orders in the interest of justice to protect against undue burden, unnecessary expense, harassment, annoyance, or invasion of rights in connection with discovery requests). See also *In re Ford Motor Co.*, 211 S.W.3d 295 (Tex. 2006); *General Tire, Inc. v. Kepple*, 970 S.W.2d 520 (Tex. 1998). Such protective orders may restrict the recipient of materials produced in discovery from giving or otherwise divulging the protected information to any other person or entity and from copying documents produced and may require the recipient at the conclusion of the litigation to return the documents produced.

Before signing a proposed agreement limiting the provision to the defendant of

documents produced by the prosecutor, defense counsel has a duty to inform his client of the proposed agreement and available alternatives, if any, to obtaining the documents under the terms of the proposed agreement. See Comment 1 to Rule 1.03 ("The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued to the extent the client is willing and able to do so."). In discussing the prosecutor's proposed agreement and in communications with the defendant generally, the defendant's lawyer is required by Rule 1.03(b) to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."

Conclusion

The Texas Disciplinary Rules of Professional Conduct permit a prosecutor to require and defense counsel to agree that documents the prosecutor produces to defense counsel may be shown to the defendant but that copies of the documents may not be given to the defendant. ✦

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."