

Opinion No. 630, July 2013

QUESTIONS PRESENTED

Under the Texas Disciplinary Rules of Professional Conduct, may a lawyer provide to a client signed letters on the lawyer's letterhead making demands to third parties purportedly on behalf of persons who are customers of the client when the lawyer does not represent such persons?

Statement of Facts

A lawyer represents a credit repair agency. The client credit repair agency requests the lawyer to furnish to the client letters signed by the lawyer on the lawyer's letterhead addressed to the three main credit bureaus. Each such letter asks the recipient credit bureau to remove negative credit history or furnish verification pertaining to a particular customer of the credit repair agency. The lawyer does not have any contact with the credit repair agency's customers on whose behalf the letters would be claimed to be written. The lawyer would be paid by the client credit repair agency on a per-letter basis to sign and provide the letters.

Discussion

The lawyer in this fact situation would be furnishing a form letter on his letterhead making a demand on behalf of persons who are not clients of the lawyer. Since the lawyer does not represent the credit repair agency's customers, to state or imply in the lawyer's letters that the lawyer represents the customers is impermissible under Rules 4.01, 7.02, and 8.04 of the Texas Disci-

plinary Rules of Professional Conduct.

Rule 4.01 entitled "Truthfulness in Statements to Others," provides in full:

"In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid making the lawyer a party to a criminal act or knowingly assisting a fraudulent act perpetrated by a client."

Rule 7.02, entitled "Communications Concerning a Lawyer's Services," provides in pertinent part as follows:

"(a) A lawyer shall not make or sponsor a false or misleading communication about the qualifications or the services of any lawyer or firm. A communication is false or misleading if it:

(1) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement

considered as a whole not materially misleading;

...

Finally, Rule 8.04(a)(3) provides that a lawyer shall not "engage in conduct involving dishonesty, fraud, deceit or misrepresentation[.]"

In the circumstances presented, the lawyer's provision of signed letters falsely stating or implying that the lawyer represents in each case a customer of the credit repair agency would involve making false and misleading statements to the recipients of the letters and thus would violate Rules 4.01, 7.02(a)(1), and 8.04(a)(3) of the Texas Disciplinary Rules of Professional Conduct.

Conclusion

Under the Texas Disciplinary Rules of Professional Conduct, it is not permissible for a lawyer to provide to a client signed letters on the lawyer's letterhead making demands to third parties purportedly on behalf of persons who are customers of the client when the lawyer does not represent such persons. **TBJ**

Opinion No. 631, July 2013

QUESTIONS PRESENTED

Does a district attorney violate provisions of the Texas Disciplinary Rules of Professional Conduct by publishing the names of persons charged with driving while intoxicated?

Statement of Facts

A district attorney proposes to publish on his office's website the names of persons charged with driv-

ing while intoxicated ("DWI") during a holiday period. It is proposed to announce the decision at a press conference called by the district attorney

that will be widely publicized. The stated purpose for posting the names is to serve as a general deterrent to discourage individuals from operat-

ing a motor vehicle while under the influence of alcohol or drugs.

Discussion

Rule 3.09 of the Texas Disciplinary Rules of Professional Conduct specifically imposes special responsibilities on prosecutors in criminal cases and requires prosecutors to do more than simply be advocates in adjudicatory proceedings. Prosecutors are required “to see that justice is done[.]” Comment 1 to Rule 3.09. Prosecutors are also subject to the requirements of Rules 3.03 through 3.08, which are applicable to all lawyers, with respect to protecting the fairness of adjudicatory proceedings. In the circumstances considered, even though the district attorney’s stated purpose is to influence the public in general and to discourage illegal activity, the potential effect on accused persons and on the district attorney’s responsibilities must be considered.

Rule 3.09(a) requires that a prosecutor “refrain from prosecuting or threatening to prosecute a charge that the prosecutor knows is not supported by probable cause[.]” Rule 3.09(e) requires a prosecutor to “exercise reasonable care to prevent persons employed or controlled by the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.07.” Rule 3.07(a) prohibits lawyers, including prosecutors, from making “an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicatory proceeding.” Subparagraphs (1) and (4) of Rule 3.07(b) provide that ordinarily a lawyer will violate the general standard of Rule 3.07(a) if a publicly disseminated

statement refers to the character or reputation of a suspect or expresses any opinion as to guilt or innocence of a defendant in a criminal case that could result in incarceration. However, Rule 3.07(c)(8) provides that ordinarily disclosure of the identity of the accused in a criminal proceeding will not constitute a violation of Rule 3.07(a).

Thus, the proposed posting by the district attorney’s office of the names of persons charged with a crime does not generally violate Rule 3.07 or Rule 3.09. However, the manner in which the information is posted must also be considered to determine if the posting is in violation of Rule 3.07 because it has the likelihood to materially prejudice the accused or to be interpreted as a statement of opinion as to the accused person’s guilt.

Rule 4.04(a) prohibits lawyers from using “means that have no substantial purpose other than to embarrass, delay, or burden a third person” The publication of the names of those charged with DWI during a holiday period in order to publicly embarrass the accused and so deter members of the general public from driving while under the influence of alcohol or drugs does not violate Rule 4.04(a). In the circumstances here considered, the stated purpose of the disclosure is to discourage people from operating a motor vehicle while intoxicated rather than merely to embarrass those charged. To avoid violation of Rule 4.04(a), the publication of names must be carried out in a manner that furthers the purpose to discourage persons in the community from driving while intoxicated. Under this standard, there might be a violation of Rule 4.04(a) if the names of one or a few individuals charged, rather than the names of all persons charged, were singled out for publication.

Conclusion

A district attorney does not violate the Texas Disciplinary Rules of Professional Conduct when his office publishes the names of all those charged during a holiday period with driving while intoxicated, provided that the charges are based upon probable cause, the publication of names is done for the purpose of deterring others from driving while intoxicated, and the publication of names is not carried out in a way that would be likely to affect adversely the criminal process for those charged. **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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Opinion No. 632, July 2013

QUESTIONS PRESENTED

Do the Texas Disciplinary Rules of Professional Conduct require a Texas lawyer to report to the appropriate disciplinary authority another Texas lawyer's use of a trade name that is based on the name of the city where the second lawyer practices?

Statement of Facts

While representing his client in negotiations with another party, a Texas lawyer receives a letter from the other party's lawyer who lives and practices in CityX, Texas. The second lawyer's letterhead uses the trade name "CityX Law Group" to identify the CityX lawyer's law firm. The lawyer who receives the letter recognizes that the other lawyer's use of the trade name "CityX Law Group" violates Rule 7.01 of the Texas Disciplinary Rules of Professional Conduct and wonders whether he is required by the Texas Disciplinary Rules to report the violation.

Discussion

Rule 7.01(a) of the Texas Disciplinary Rules of Professional Conduct provides that, subject to exceptions not here relevant, "[a] lawyer in private practice shall not practice under a trade name . . . or a firm name containing names other than those of one or more of the lawyers in the firm . . ." Rule 7.01(e) further provides that, subject to exceptions not here applicable, "[a] lawyer shall not advertise in the public media or seek professional employment by any communication under a trade or fictitious name . . ." As the lawyer receiving the letter from the CityX Law Group recognized, under these provisions of Rule 7.01, a Texas lawyer is prohibited from practicing law in Texas under a trade name such as "CityX Law Group." The prohibition against practicing law in Texas under a trade name has been confirmed both by court decisions and by 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 Opinions 617 (May 2012), 591 (January 2010), 529 (April 1999), and 398 (November 1978).

In these circumstances the only issue to be resolved is whether the Texas Disciplinary Rules of Professional Conduct require a lawyer to report to the appropriate disciplinary authority another lawyer's violation of Rule 7.01 in using the trade name "CityX Law Group." Rule 8.03(a) provides in relevant part 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."

Exceptions to this requirement for specified circumstances are set forth in Rule 8.03(c) and (d) (concerning impairment and confidential information) but these exceptions do not arise in the factual situation considered here. Rule 8.03(a) thus requires a lawyer to report another lawyer's violation of the Texas Disciplinary Rules only if the violation raises a substantial question as to the violator's honesty, trustworthiness or fitness as a lawyer in other respects. Fitness is defined in the Terminology section of the Texas Disciplinary Rules as follows:

"'Fitness' denotes those qualities of physical, mental and psychological health that enable a person to discharge a lawyer's responsibilities to clients in conformity with the Texas Disciplinary Rules of Professional Conduct. Normally a lack of fitness is indicated most clearly by a persistent inability to discharge, or unreliability in carrying out, significant obligations."

Comments 1 and 2 to Rule 8.03 give some guidance to determining when reporting is required by Rule 8.03(a):

"1. Self-regulation of the legal profession requires that members of the profession initiate disciplinary investigations when they have knowledge not protected by Rule 1.05 that a violation of these rules has occurred Frequently, the existence of a violation cannot be established with certainty until a disciplinary investigation has been undertaken. Similarly, an apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover. Consequently, a lawyer should not fail to report an apparent disciplinary violation merely because he cannot determine its existence or scope with absolute certainty. Reporting a violation is especially important where the victim is unlikely to discover the offense.

2. It should be noted that this Rule describes only those disciplinary violations that must be revealed by the disclosing lawyer in order to avoid violating these rules himself. It is not intended to, nor does it, limit those actual or suspected violations that a lawyer may report.

However, if a lawyer were obliged to report every violation of these rules, the failure to report any violation would itself be a professional offense. Such a requirement existed in many jurisdictions but proved to be unenforceable. This Rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is, therefore, required in complying with the provisions of this Rule. . . . The term ‘substantial’ refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware. . . .”

Thus Rule 8.03(a) would require a lawyer to report another lawyer’s use of the trade name “CityX Law Group” in violation of Rule 7.01 only if this violation raised a substantial question as to the other lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects. In the opinion of the Committee, the use of a trade name such as “CityX Law Group” in the circumstances considered, although clearly a violation of Rule 7.01, is not the type of violation that, standing alone, is sufficiently serious to be the basis for a substantial question about a lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects within the meaning of Rule 8.03(a). Accordingly, in the opinion of the Committee, a lawyer who becomes aware of another lawyer’s use of a pro-

hibited trade name such as CityX Law Group in letterhead or other public communications is not required to report the violation of Rule 7.01 to disciplinary authorities. As recognized in Comment 2 to Rule 8.03, a lawyer would be permitted to report the other lawyer’s violation even though Rule 8.03(a) would not require a report.

It should be noted that a different conclusion could be required if the trade name in question were affirmatively false and misleading with respect to the lawyer or lawyers using the trade name. For instance, if the firm using the trade name “CityX Law Firm,” instead of being located in CityX, were located far away from City X and had nothing to do with CityX, the use of such a false and misleading trade name by a lawyer would in many circumstances raise questions about the honesty and trustworthiness of the lawyer concerned, and if so a report to disciplinary authorities of the violation of Rule 7.01 would be required by Rule 8.03(a). In addition, the lawyer’s continuous use of the trade name CityX Law Group in violation of Rule 7.01, even if not affirmatively false and misleading, could when combined with other circumstances raise a substantial question about a lawyer’s honesty, trustworthiness or fitness such that a report to disciplinary authorities of the violation of Rule 7.01 would be required by Rule 8.03(a). For exam-

ple, a lawyer who was aware of a second lawyer’s continuing use of such a trade name after receipt of an administrative or judicial notification that this use constituted a violation of Rule 7.01 might reasonably conclude that the continued violation raised a substantial question about the second lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects.

Conclusion

The Texas Disciplinary Rules of Professional Conduct do not require a Texas lawyer to report to the appropriate disciplinary authority another Texas lawyer’s use of a trade name that is based on the name of the city where the second lawyer practices even though use of such trade name is prohibited by the Texas Disciplinary Rules. A report concerning another lawyer’s use of a trade name that is prohibited under the Texas Disciplinary Rules would be required only if the Texas lawyer who considered making such a report concluded that in the particular circumstances the other lawyer’s use of the trade name raised a substantial question as to such lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects. **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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Opinion No. 633, July 2013

QUESTIONS PRESENTED

Is it permissible under the Texas Disciplinary Rules of Professional Conduct for the general counsel of an entity jointly owned by two cities to be an employee of one of the cities?

Statement of Facts

City A and City B jointly own Entity Z, which operates a facility of interest to both cities and which is governed by a board consisting of members appointed by the governing bodies of the two cities. The general counsel of Entity Z is an employee of City A, which pays the salary and benefits of the general counsel and is reimbursed in full by Entity Z after approval by the Entity Z board. Under the agreement between the cities, City A has the right to hire and fire the general counsel of Entity Z, and the general counsel, as an employee of City A, is subject to City A's policies on employment matters, including leave and vacation time. Similarly, City B employs a lawyer to serve as assistant general counsel of Entity Z and pays the salary and benefits of the assistant general counsel, which are reimbursed in full by Entity Z after approval by the Entity Z board. Under the agreement between the cities, when outside counsel is hired, City A must approve the budget for the outside counsel and City A has the right to veto the choice of outside counsel. The general counsel has his office at Entity Z's headquarters and provides full-time legal services exclusively for Entity Z. City A does not direct the work of the general counsel. In some situations, what Entity Z believes to be best for Entity Z is contrary to what City A believes to be best for City A. The present solution for these conflicts is for the general counsel to recuse himself from situations that involve a conflict between City A and Entity Z.

Discussion

The first issue raised is whether Entity Z's general counsel can accept

compensation from someone other than Entity Z. This question is addressed by Rule 1.08(e) of the Texas Disciplinary Rules of Professional Conduct, which provides as follows:

“A lawyer shall not accept compensation for representing a client from one other than the client unless:

- (1) the client consents;
- (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
- (3) information relating to representation of a client is protected as required by Rule 1.05.”

In addition, Rule 5.04(c) provides that “[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.”

Under the facts presented, Entity Z is fully aware of how the general counsel is employed and compensated. Provided that there is no interference with the general counsel's independence of professional judgment or with the client-lawyer relationship between the general counsel and Entity Z and provided that the confidentiality of the information relating to the representation is maintained, the general counsel's representation of Entity Z does not in and of itself violate the Texas Disciplinary Rules of Professional Conduct.

In these circumstances, when there arises a significant difference of inter-

est between Entity Z and City A on a matter, the difference may create a conflict of interest for the general counsel. Rule 1.06 specifies how a lawyer is required to handle a conflict of interest. As relevant to the circumstances here considered, Rule 1.06 provides as follows:

“(a) A lawyer shall not represent opposing parties to the same litigation.

(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.

(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.”

In the factual situation considered, the general counsel has only one client—Entity Z. The Committee is of the opinion that the fact that the general counsel is paid, and may be fired, by City A does not in and of itself create an impermissible conflict of interest with respect to the general

counsel's representation of Entity Z. This Committee has recognized that the source of payment of a lawyer's fees does not result in an impermissible conflict of interest so long as the lawyer's exercise of independent judgment is not compromised and the client is aware of the source of the lawyer's fees. For example, in Professional Ethics Committee Opinion 533 (Nov. 2008), this Committee, relying in part on Rules 1.01(b), 1.06, 1.08(e) and 5.04(c) of the Texas Disciplinary Rules, recognized long-standing Texas precedent that a lawyer may be employed by an insurance company to represent the company's insureds provided that the lawyer does not have a conflict of interest with regard to the particular insured or matter, that the lawyer is able to exercise independent judgment, that the client is aware of who employs the lawyer and that the lawyer carries out the obligations the lawyer owes to the client. Similarly here, the fact that City A pays the salary and benefits of the general counsel and is reimbursed by Entity Z for the cost of the general counsel's salary and benefits does not in and of itself create an impermissible conflict of interest.

In assessing the application of Rule 1.06 to the situation here considered, the initial issue here is whether under Rule 1.06(b)(2) the general counsel's representation of Entity Z in a matter reasonably appears to be adversely limited by the general counsel's employment relationship with City A. If the general counsel's representation in a matter appears to be so limited, then the exception provided by Rule 1.06(c) must be considered. In these circumstances, Rule 1.06(c) will permit the general counsel to represent Entity Z in the matter only if each of two requirements is met: (1) the general counsel reasonably believes that the representation of Entity Z will not be materially affected by the fact that City A is the general counsel's employer

and (2) Entity Z consents to the representation in the matter after full disclosure of the "existence, nature, implications, and possible adverse consequences of the common representation and the advantages involved, if any." Thus the general counsel should seek the consent of Entity Z under Rule 1.06(c)(2) only if he reasonably believes that representation of Entity Z will not be materially affected by the general counsel's relationship to City A. Comment 7 to Rule 1.06 makes clear that "when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved should not ask for such agreement or provide representation on the basis of the client's consent."

Conclusion

Under the Texas Disciplinary Rules of Professional Conduct, the general counsel for an entity jointly owned by two cities may be an employee of one of the cities provided that the client entity consents,

there is no interference with the lawyer's independence of professional judgment or with the lawyer's relationship with the entity, and information relating to representation of the entity is protected as required by the Texas Disciplinary Rules. When matters arise where the interests of the entity and the city employing the general counsel are divergent and the general counsel's representation of the entity in the matter appears to be adversely limited by the general counsel's interest as an employee of the city, the general counsel is permitted to represent the entity in the matter only if the general counsel reasonably believes that the representation will not be materially affected and the entity consents after full disclosure. **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."

