PO 2023-1

THE PROFESSIONAL ETHICS COMMITTEE
FOR THE STATE BAR OF TEXAS

Posted for Comment February 13, 2023

QUESTION PRESENTED

Under Texas Disciplinary Rules of Professional Conduct, may a lawyer-defendant in a legal malpractice case enter into a settlement agreement in which the lawyer-defendant assigns to a non-lawyer plaintiff a portion of contingent fees the lawyer-defendant may earn in unrelated cases?

Does the lawyer representing the non-lawyer plaintiff in the legal malpractice case violate the Rules merely by proposing such a settlement, if the lawyer-defendant rejects the proposal?

STATEMENT OF FACTS

Lawyer 1 represented a non-lawyer client (Client) in a lawsuit. After the court dismissed Client's claims, Client retained Lawyer 2 to pursue a legal malpractice claim against Lawyer 1. Lawyer 2 made a settlement demand whereby Client would release Lawyer 1 from the legal malpractice claim in exchange for an assignment of a portion of future contingency fees that Lawyer 1 earns on certain unrelated cases. Lawyer 1 rejected the settlement demand.

DISCUSSION

A lawyer-defendant may not settle a legal malpractice case by assigning the non-lawyer plaintiff future contingent fees that the lawyer may earn in unrelated matters. Rule 5.04(a) of the Texas Disciplinary Rules of Professional Conduct provides that "a lawyer or law firm shall not share or promise to share legal fees with a non-lawyer," subject to exceptions not applicable here. The proposed settlement agreement is prohibited by Rule 5.04(a), and Lawyer 1 properly rejected it. As a result, no violation of Rule 5.04(a) occurred.

The second question is whether Lawyer 2 violated Rule 8.04(a) by making a settlement proposal that, if accepted, would have resulted in an impermissible fee-sharing arrangement in violation of Rule 5.04(a). Rule 8.04(a)(1) provides that a lawyer shall not "violate these rules, *knowingly assist or induce another to do so,* or do so through the acts of another, whether or not such violation occurred in the course of a client-lawyer relationship" (emphasis added). The question is whether Lawyer 2 violated Rule 8.04(a)(1) by "assist[ing] or induc[ing] another" to violate Rule 5.04(a).

The Rules do not define the word "assist." In the Committee's view, however, a violation of the Rules must have occurred before it can be found that a lawyer "assisted" in that violation.

In other words, a mere proposal of impermissible conduct does not "assist" in a Rules violation if the proposal is rejected. The term "assist" is not synonymous with the term "attempt." Accordingly, the Committee concludes that a lawyer has not "assisted" the violation of a Rule when no violation of that Rule has occurred.

The Rules also do not define the word "induce." In other contexts, Texas courts have held that the word "induce" means bringing about an event or course of conduct by influence or persuasion, as opposed to a mere suggestion of prohibited conduct. *See, e.g., Cerda v. RJL Entm't, Inc.*, 443 S.W.3d 221, 230 (Tex. App.—Corpus Christi-Edinburg 2013, pet. denied) ("'induce' means to 'move by persuasion or influence' or 'to bring about by influence'"); *Scott v. State*, 868 S.W.2d 430, 432 (Tex. App.—Waco 1994, pet. ref'd) ("The legal definition of 'induce' is 'to influence to an act or course of conduct.'") (citing Black's Law Dictionary 697 (5th ed. 1979)). Accordingly, the Committee concludes that a lawyer has not "induced" the violation of a Rule when no violation of that Rule has occurred.

The Committee's interpretation of Rule 8.04(a)(1) is further supported by the fact that several Rules expressly prohibit mere offers or encouragement, whereas Rule 8.04(a)(1) does not. *See* Rule 5.06(a) ("A lawyer shall not participate in *offering* or making" an employment or partnership agreement that restricts the rights of a lawyer to practice after termination of the relationship) (emphasis added); Rule 4.02(a) (a lawyer shall not "communicate or cause or *encourage* another to communicate" with a person that is represented by another lawyer on the matter) (emphasis added); Rule 5.03(b)(1) (subjecting a lawyer to discipline for *encouraging* conduct of a nonlawyer employee that would violate the Rules if committed by a lawyer). The Committee also notes that Rule 8.04(a)(1) differs materially from ABA Model Rules of Prof'l Cond. R. 8.04(a)(1), which provides it is professional misconduct for a lawyer "to violate *or attempt to violate* the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another" (emphasis added).

To be sure, the Committee disapproves of the practice of knowingly proposing a prohibited fee-sharing arrangement, but disapproval is not the test. A Texas lawyer is subject to disciplinary sanction only for conduct that violates one or more of the Rules. In the Committee's opinion, the mere proposal of a prohibited fee-sharing arrangement with a non-lawyer, which proposal is rejected, does not violate the Rules.

CONCLUSION

Under the Texas Disciplinary Rules of Professional Conduct, a lawyer-defendant may not agree to settle a legal malpractice case by assigning to a non-lawyer plaintiff a portion of contingent fees the lawyer may earn in unrelated matters. A plaintiff's lawyer who proposes such an agreement is subject to disciplinary sanction for doing so if the lawyer knowingly "assists" or "induces" another lawyer to violate Rule 5.04(a). A lawyer has not "assisted" or "induced" another lawyer to violate Rule 5.04(a) if the second lawyer has not violated that Rule.