

**THE PROFESSIONAL ETHICS COMMITTEE
FOR THE STATE BAR OF TEXAS
Opinion No. _____ [PEC 2024-3]**

Posted for Comment on June 13, 2024

QUESTION PRESENTED

May in-house counsel for a company owned by non-lawyers provide legal services to customers of the company if the company only charges the customers the actual costs associated with the in-house counsel's legal services?

STATEMENT OF FACTS

A company owned by non-lawyers (the "Company") provides litigation management services and support to lawyers, law firms, and corporations, including software and technology to help customers lower their costs and potentially improve litigation results. Non-lawyer employees of the Company provide non-legal services such as assisting customers with invoicing and compliance matters, litigation support, and litigation management. At present, employees do not render legal services to customers.

The Company proposes to give customers the option of retaining lawyers who are salaried, full-time employees of the Company ("In-House Counsel"). The Company claims that if a customer retains the Company's In-House Counsel, the Company will charge the customer no more than the "actual cost" the Company incurs for In-House Counsel's legal services.

The Company asks the Committee to assume that (1) the In-House Counsel providing legal services to customers is licensed or permitted to practice in Texas, (2) the In-House Counsel will not be permitted to represent both the Company and its customers in the same or substantially related matters, (3) when providing legal services to customers the In-House Counsel will exercise independent professional judgment solely for the benefit of customers, free from any compromising influences and loyalties, and (4) the Company and its non-lawyer representatives will not be involved in the lawyer-client relationship and will not control or interfere with the In-House Counsel's representation of customers.

DISCUSSION

The Committee concludes the proposed representation of customers by the Company's In-House Counsel is prohibited because the arrangement violates the prohibition against assisting in the unauthorized practice of law.

Rule 5.05(b) of the Texas Disciplinary Rules of Professional Conduct prohibits a Texas lawyer from assisting in the unauthorized practice of law. Rule 5.05 provides:

A lawyer shall not:

- (a) Practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or
- (b) Assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.

Rule 5.05 does not define the “unauthorized practice of law” but leaves the definition to judicial development. *Id.*, comment 3.

In *Unauthorized Practice of Law Comm. v. Am. Home Assur. Co.*, 261 S.W.3d 24 (Tex. 2008), the Texas Supreme Court addressed whether an insurance company engages in the unauthorized practice of law by assigning staff attorneys employed by the insurance company to defend a claim against an insured. The Court recognized the general rule that a company engages in the unauthorized practice of law when it allows its salaried lawyer employees to provide legal services to the company’s customers. *Id.* at 38 (citing *Hexter Title & Abstract Co. v. Grievance Committee*, 142 Tex. 506, 520, 179 S.W.2d 946, 954 (1944)). But the Court recognized an exception for the use of staff attorneys to defend an insurance company’s insureds. The Court held that a liability insurer does not engage in the unauthorized practice of law by providing staff lawyers to defend claims against its insureds if the insurer’s interests and the insured’s interests in the defense of a particular case are congruent. 261 S.W.3d at 38-39.

The *American Home Assurance* Court identified three factors to be considered in deciding whether a company may allow its staff attorneys to represent others without engaging in the unauthorized practice of law. *Id.*

The first factor is whether rendition of legal services to the customer furthers an existing interest of the company, as opposed to a prospective interest. A liability insurer has an existing interest in satisfying its contractual obligation to provide a defense to its insureds. *Id.* at 38. In contrast, in the scenario assumed above the Company’s interest in the representation of its customers is, at most, prospective. The Company does not currently have any obligation to provide the proposed legal services to others and does not need those legal services for itself. See *Hexter Title & Abstract Co.*, 179 S.W.2d at 954 (title company had no existing interest in having its staff lawyers provide legal services to customers).

The second factor cited by the *American Home Assurance* Court is whether the company has a direct, substantial financial interest in the matter for which it provides legal services. A liability insurer’s interest in defending a claim against the insured is direct and substantial. *Id.* In contrast, in the scenario assumed above the Company does not appear to have any financial interest in the matter for which its In-House Counsel will be providing legal services.

The third factor, which the *American Home Assurance* Court considered “most important,” is whether the company's interest is aligned with that of the person to whom the company is providing legal services. *Id.* at 38-39. Conversely, in the scenario assumed above there

is no reason to believe the Company's interest is aligned with, or even related to, the interests of its customers in the proposed representations.

In short, none of three factors cited by the *American Home Assurance* Court applies to the scenario under consideration. Because the Company would engage in the unauthorized practice of law by allowing its salaried, full-time In-House Counsel to represent the Company's customers, Rule 5.05(b) prohibits the In-House Counsel from assisting the Company by participating in the representation of customers. The fact that Company does not intend to charge the customers more than its actual costs does not affect this conclusion. *See Hexter Title & Abstract Co.*, 179 S.W.2d at 954 (title company engaged in unauthorized practice of law even though lawyer-employees provided legal services to the company's customers for free).

The Committee notes that Professional Ethics Opinion 512 (June 1995) involved the unique question whether a corporation could loan its in-house counsel to a joint venture owned in part by the corporation. The Committee opined such representation is permissible provided that (1) the joint venture does not reimburse the corporation for more than the full "costs" of the legal services, (2) the corporation does not direct the lawyer in the performance of legal services for the joint venture, (3) the corporation and the joint venture consent after full disclosure to conflicts of interest presented by the multiple representation, and (4) the lawyer believes the lawyer's representation of the corporation and the joint venture will not be materially affected by the conflicts of interest. But Opinion 512 predated *American Home Assurance* and is limited to its unique facts. It does not allow a company to sell legal services to customers, even "at cost." Further, and unlike the joint venture scenario of Opinion 512, the assumed facts here raise the possibility of indirect benefit to the Company via increased sales or prices for non-lawyer services.

The Committee notes, without deciding, that the assumed facts may also violate Rule 5.04(a), which prohibits sharing fees with a non-lawyer. *See* Opinion 498 (March 1994) (lawyers employed by a corporation could not prepare estate planning documents for corporation's customers "if the economic arrangements between the corporation and the customer were such that the corporation received income in the form of a mark-up or commission on products sold that was in effect compensation to the corporation for the provision of legal services by the employee/lawyer").

CONCLUSION

In-house counsel employed by a company owned in part by non-lawyers may not provide legal services "at cost" to the company's customers unless (1) the company has an existing interest in the subject matter of the representation, (2) the company has a direct and substantial financial interest in the subject of the representation, and (3) the company's interest in the matter is aligned with the interest of the customer.