

**THE PROFESSIONAL ETHICS COMMITTEE
FOR THE STATE BAR OF TEXAS
Opinion No. 608**

August 2011

QUESTION PRESENTED

Under the Texas Disciplinary Rules of Professional Conduct, is it permissible for a legal services lawyer to represent a client in a child custody matter in the following situations: (1) when another lawyer with the legal services organization previously represented the client's opponent in an unemployment benefits claim; (2) when another lawyer with the legal services organization currently represents the client's opponent with respect to an unemployment benefits claim; and (3) when the legal services organization had previously screened but rejected an application by the client's opponent for representation in the same matter?

STATEMENT OF FACTS

A legal services organization provides free legal services to low-income persons in an area of Texas. The organization handles thousands of applications for services each year. Some applicants apply more than once over the years for help with a variety of legal problems.

When a potential client first contacts the organization, an employee of the organization, who is normally not a lawyer, interviews the client. As part of this intake screening process, the employee asks the applicant not to provide any information until after the employee provides a brief description of the legal services provided by the organization and the basic requirements that must be met in order for an applicant to be provided services by the organization. If, after hearing this brief description of the organization's services and the basic eligibility requirements, the applicant indicates that he wishes to proceed with the application, the employee of the organization then explains in greater detail to the applicant the nature of the organization's services and the organization's role in providing legal services to persons in the community who lack the ability to pay for legal services.

The employee of the organization explains that, for the organization to consider providing legal services to any applicant, the organization requires a written consent from the applicant concerning the removal of certain limitations that might otherwise apply to organization lawyers providing legal services to the applicant or to persons who might have an interest adverse to the applicant. The applicant is told that, if he does not choose to sign the consent, the organization will not be able to represent the applicant. The consent requested of the applicant is an agreement that the applicant's provision of limited information requested by the organization to determine financial eligibility in the

intake screening process will not by itself result in restricting the legal services organization or its lawyers from providing services to other persons who may be adverse to the applicant. The organization employee explains to the applicant that it is the organization's policy that the limited information initially obtained will be used only to determine the applicant's eligibility for services and will not be made available to any lawyer providing services to any client other than the applicant and that the organization has procedures in place that ensure that this policy is carried out. The organization in fact has policies in place that are designed to ensure that all lawyers and other employees of the organization comply with the policies and procedures as described to each potential client in the intake screening process.

After the organization employee explains the terms of the consent requested by the organization and answers any questions raised by the applicant and after the organization employee determines that the applicant understands the terms of the consent requested, the applicant is asked if he wishes to sign the consent. If the applicant indicates that he does not wish to sign the consent, the organization employee confirms that the organization will not be able to provide legal services to the applicant and ends the interview and the intake screening process. If the applicant signs the consent form, the employee then requests information from the applicant required to determine the applicant's eligibility for services from the organization. The information thereby obtained is limited to the applicant's name, date of birth, address, phone number, income, the names of adverse parties, and the type of legal matter for which the applicant is seeking legal services. If the information provided by the applicant shows that the applicant is eligible for legal assistance under the organization's standards, the applicant is accepted as a client and is provided legal representation by an organization lawyer.

Scenario 1

In the first scenario, an applicant to the organization for free legal services (the "Applicant") applies for assistance with a child custody matter. A conflicts check reveals that the adverse party in the child custody case (the "Adverse Party") received services from the organization three years earlier in connection with an unemployment benefits matter. In that case, the Adverse Party was terminated from his job after suffering an on-the-job injury. One of the organization's staff lawyers, who is still employed by the organization, represented the Adverse Party before the Texas Workforce Commission in the unemployment benefits claim, but that representation has ended. A different lawyer in the organization would handle the child custody matter for the Applicant.

Scenario 2

In the second scenario, the facts are the same except that the organization's representation of the Adverse Party in the unemployment benefits matter is ongoing.

Scenario 3

In the third scenario, the facts are the same except that the Adverse Party has never been a client of the organization but the Adverse Party had applied earlier in the year for assistance with respect to the same child custody matter. However, during the intake screening process for the Adverse Party, the organization employee conducting the interview determined that the Adverse Party was not eligible for services provided by organization lawyers because the Adverse Party's income exceeded the program's guidelines. Accordingly, after providing limited information to the organization in the intake screening process, the Adverse Party never received legal services from the organization's lawyers.

DISCUSSION

Scenario 1

In the first scenario, the Adverse Party is a former client of the legal services organization. Therefore, Rule 1.09 of the Texas Disciplinary Rules of Professional Conduct will apply. Paragraphs (a) and (b) of Rule 1.09 provide 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:

(1) in which such other person questions the validity of the lawyer's services or work product for 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.

(b) Except to the extent authorized by Rule 1.10, when lawyers are or have become members of or associated with a firm, none of them shall knowingly represent a client if any one of them practicing alone would be prohibited from doing so by paragraph (a).”

Although the general rule of Rule 1.09(a) applies only to lawyers who “personally” have formerly represented a client, Rule 1.09(b) generally extends any prohibition applicable to one lawyer in a firm to all other lawyers in the firm. These requirements apply to lawyers employed in a legal services organization since the term “Firm” is defined in the Terminology section of the Texas Disciplinary Rules of Professional Conduct to include “a lawyer or lawyers employed in the legal department of a corporation, legal services organization, or other organization” Thus, if one lawyer in the legal services organization would be prohibited from representing a potential client under Rule 1.09(a), then all lawyers in the legal services organization would be subject to the same prohibition.

Because in this case the lawyer who represented the Adverse Party is still employed by the legal services organization, the representation of the Applicant by any of the organization's lawyers could be prohibited by Rule 1.09 if one of the circumstances

described in subparagraphs (1), (2) or (3) of Rule 1.09(a) exists. In this scenario, the only circumstance that would be likely to require consideration would be the risk of violating the requirements of Rule 1.05 with respect to the confidential information of a former client. Rule 1.05 generally prohibits a lawyer from using confidential information of a former client to the disadvantage of the former client unless the former client consents or the information has become generally known. Therefore, whether the lawyer for the legal services organization may represent the Applicant against the Adverse Party will depend on whether a reasonable probability exists that the representation would involve either an unauthorized disclosure of confidential information acquired in the prior representation of the Adverse Party or an improper use of such information to the disadvantage of the Adverse Party. See Professional Ethics Committee Opinions 584 (September 2008) and 598 (July 2010). Whether such a reasonable probability exists in any given case is a question of fact. See Comment 4 to Rule 1.09.

The Committee notes that the provisions of the Texas Disciplinary Rules of Professional Conduct specify the standards for professional discipline of Texas lawyers. The Rules are not designed to be rules for procedural decisions, including decisions by courts as to disqualification of Texas lawyers because of prior representation of other clients. See paragraph 15 of the Preamble to the Texas Disciplinary Rules of Professional Conduct.

Scenario 2

In the second scenario, the legal services organization currently represents the Adverse Party in an ongoing unemployment benefits proceeding before the Texas Workforce Commission. The general confidentiality obligations of Rule 1.05 apply to prohibit in most circumstances the disclosure or use without the Adverse Party's consent of confidential information obtained in the representation of the Adverse Party. In addition, because this scenario involves two current clients rather than a current client and a former client, the legal service organization's conduct will be governed by the provisions found in Rule 1.06 of the Texas Disciplinary Rules of Professional Conduct governing conflicts of interest in simultaneous representations. Rule 1.06 provides in relevant part:

“(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:

(1) involves a substantially related matter in which that person's interests are materially and directly adverse to the interests of another client of the lawyer or the lawyer's firm; or

(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.

....

(f) If a lawyer would be prohibited by this Rule from engaging in particular conduct, no other lawyer while a member or associated with that lawyer's firm may engage in that conduct."

Under the facts presented, the dispositive issues with respect to the applicability of Rule 1.06 are (1) whether the matters are substantially related such that one client's interests are materially and directly adverse to the interests of the other client, and (2) whether it reasonably appears that the representation of one client will be adversely limited by the lawyer's or the legal service organization's responsibilities to the other client within the meaning of Rule 1.06(b)(2). Rule 1.06(f) requires that, if any lawyer with the legal services organization is prohibited by Rule 1.06 from representing the Applicant, then all lawyers with the organization are likewise prohibited.

Conflict situations under Rule 1.06 are particularly likely to arise in litigation matters between two clients of a lawyer or law firm even if the lawyer or firm only represents one of the two clients in a particular litigation matter. So long as the law firm is not representing both parties in the same litigation matter, representation of each client will not be prohibited by Rule 1.06(a). However, if the litigation is expected to require a lawyer representing one client to examine the other client as an adverse witness, the situation is likely to pit the lawyer's duty of loyalty to one client against the lawyer's duty of loyalty to the other client and to risk breaching the lawyer's duty of confidentiality. As noted in American Bar Association Standing Committee on Ethics and Professional Responsibility Formal Opinion 92-367 (October 16, 1992), the conflict of loyalties will normally result in a prohibited conflict, absent appropriate client consent. Even if the matters for which the lawyer represents the clients are wholly unrelated, the need for the lawyer or law firm to consider the interests of each client in the conduct of the cross examination will frequently be a material limitation on the lawyer's representation under Rule 1.06(b)(2) and may make it impossible for the lawyer to conclude that "the representation of each client will not be materially affected" as required by Rule 1.06(c)(1). Ultimately, the applicability of Rule 1.06 will depend upon the particular circumstances in which the question arises.

If one of the conflict circumstances specified in Rule 1.06(b) arises, Rule 1.06(c) permits representation to continue if each of two requirements is met: (1) each client consents after appropriate full disclosure (Rule 1.06(c)(2)) and (2) the lawyer reasonably believes that the representation of each client will not be materially affected (Rule 1.06(c)(1)). With respect to the requirement for client consent in conflict situations,

under Rule 1.06(c)(2) representation may continue only if each client consents “after full disclosure of the existence, nature, implications, and possible adverse consequences of the common representation and the advantages involved, if any.” In the circumstances here considered, the Applicant and the Adverse Party may in some cases be willing to give such consents based on agreements that the particular lawyer representing the Applicant or the Adverse Party, as the case may be, will not be involved in any way with respect to the organization’s representation of the other party in the matter. With respect to the requirement of Rule 1.06(c)(1), it must be noted that consent by the affected clients does not relieve a lawyer of the duty to determine independently that the representation of each client will not be materially affected by a representation that involves a potential conflict of interest. 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.” Accordingly, assuming that client consent under Rule 1.06(c) is required, the representation of the Applicant in the child custody matter will be permitted under Rule 1.06 only if the organization lawyers who are involved in the representation of the Applicant and the Adverse Party reasonably believe that their zealous representation of their respective clients will not be materially affected and only if each of the clients gives informed consent to the representation.

Under Rule 1.06(f), if any lawyer with the legal services organization is prohibited under the provisions of Rule 1.06(a), (b) and (c) from representing the Applicant in a matter, then no lawyer with the organization would be permitted to represent the Applicant in the matter.

Scenario 3

In the third scenario, the legal services organization made a determination not to represent the Adverse Party because of his failure to qualify under the organization’s standards as to client income, but the organization proposes to represent the spouse, who qualifies for representation. On the facts presented, no lawyer-client relationship exists with the Adverse Party because representation of the Adverse Party was declined during the initial screening process based on financial ineligibility. However, the duty of confidentiality can apply before the formation of the lawyer-client relationship, as paragraph 12 of the Preamble to the Texas Disciplinary Rules makes clear:

“Most of the duties flowing from the client-lawyer relationship attach only after the client has requested the lawyer to render legal services and the lawyer has agreed to do so. For purposes of determining the lawyer’s authority and responsibility, individual circumstances and principles of substantive law external to these rules determine whether a client-lawyer relationship may be found to exist. But there are some duties, such as of that of confidentiality, that may attach before a client-lawyer relationship has been established.”

Further, Comment 1 to Rule 1.05 recognizes that a lawyer may be required to protect the confidences of one who seeks to employ the lawyer:

“Both the fiduciary relationship existing between lawyer and client and the proper functioning of the legal system require the preservation by the lawyer of confidential information of one who has employed or sought to employ the lawyer. Free discussion should prevail between lawyer and client in order for the lawyer to be fully informed and for the client to obtain the full benefit of the legal system. The ethical obligation of the lawyer to protect the confidential information of the client not only facilitates the proper representation of the client but also encourages potential clients to seek early legal assistance.”

To the extent that obligations to the Adverse Party regarding the treatment of confidential information arose from the initial intake screening process, these obligations would appear to have been fully met as a result of the consent given by the Adverse Party. Since the Adverse Party has been informed as to the necessity for the provision of limited information and the procedures used by the legal services organization to protect the interests of each applicant with respect to the use of this limited information, the Adverse Party’s consent to the subsequent representation by organization lawyers of other persons against the Adverse Party should be given effect. Accordingly, in the subsequent representation of other persons against the Adverse Party, lawyers working for the legal services organization will not be limited as a consequence of the Adverse Party’s prior unsuccessful application to the organization. Thus, the situation here considered is very different from the situation considered in Professional Ethics Committee Opinion 494 (February 1994), where among other things there was no consent, by the person who had contacted a lawyer on a preliminary basis, to the lawyer’s future representation against such person of an adverse party in the same matter.

The Committee concludes that in the circumstances here considered, the written consent given by the Adverse Party operates to permit, under the Texas Disciplinary Rules or Professional Conduct, the legal services organization to represent a client in a custody matter against the Adverse Party who had previously and unsuccessfully sought legal services from the organization and shared limited confidential information in the intake screening process. As noted earlier in this opinion, the permissibility of representation under the Texas Disciplinary Rules may not be determinative if the question of representation by the legal services organization is presented in a disqualification motion addressed to the court before which the matter is pending.

CONCLUSION

Under the Texas Disciplinary Rules of Professional Conduct, a lawyer for a legal services organization is permitted, without consent of the former client concerned, to represent a client in a child custody matter against the former client who was represented by an organization lawyer in an unrelated matter, provided that there is no reasonable

probability that the representation will involve an unauthorized disclosure or use of confidential information of the former client that has not become generally known. A lawyer for a legal services organization that represents a client in a child custody matter against another client whom the organization currently represents in an unemployment benefits claim will in most circumstances be involved in an impermissible conflict of interest absent appropriate consent of both clients, which should be sought only if the lawyers involved reasonably conclude that their representation of each client will not be materially affected. A lawyer for a legal services organization is permitted under the Texas Disciplinary Rules of Professional Conduct to represent a client in a child custody matter against an adverse party who had unsuccessfully applied for services of the legal services organization in the same matter, provided that the unsuccessful applicant had consented in writing, after appropriate disclosure by the organization of the relevant circumstances, that the provision of limited information requested by the organization to determine financial eligibility in the intake screening process would not by itself result in restricting the legal services organization or its lawyers from providing services to other persons who might be adverse to the unsuccessful applicant.