THE PROFESSIONAL ETHICS COMMITTEE
FOR THE STATE BAR OF TEXAS
Opinion No. 624
February 2013

QUESTIONS PRESENTED

Under the Texas Disciplinary Rules of Professional Conduct, may a lawyer representing a client in a misdemeanor case include in an engagement agreement with the client a provision in which the client gives advance authorization for the lawyer to enter a plea of "no contest" or "guilty" in the case?

May a lawyer make such an engagement agreement with a client if the lawyer also serves as the client's bail bondsman?

STATEMENT OF FACTS

Scenario 1

A lawyer represents an individual who is being prosecuted for a misdemeanor in municipal court. After consulting with the client, the lawyer determines the facts of the case and is able to advise the client about the client's options and the range of possible outcomes in the case. The lawyer and the client then sign an engagement agreement, which includes the client's agreeing, in advance, that the lawyer may enter a plea of "no contest" or "guilty" on the client's behalf.

Scenario 2

In addition to the facts in Scenario 1, the lawyer also serves as the client's bail bondsman.

DISCUSSION

Scenario 1

In many misdemeanor cases, such as those in which the defendant is accused of a minor traffic offense, a lawyer may easily and confidently predict for the client the possible range of punishment for the alleged violation. The likely outcome of a case is especially predictable in cases in which the client has admitted guilt.

Furthermore, in many misdemeanor cases, the client's only exposure to punishment is a relatively small fine. For some clients, the amount of the potential fine does not justify the expense and inconvenience of, for example, having to take time off from work or having to make arrangements for child care in order to attend court hearings or to meet with a lawyer. For such

clients, there is genuine value in being able to turn over the entire handling of the case to a lawyer without any further need for the client to spend significant time on it. Other clients prefer to avoid a court appearance because it could expose them to the risk of arrest for other, more serious criminal charges that are also pending against the client. Thus, under the facts assumed here, the client's advance agreement on the acceptable form of the plea (potentially including a "no contest" or "guilty" plea) and on the potential disposition of the case may have important benefits for the client.

Rule 1.02(a)(3) of the Texas Disciplinary Rules of Professional Conduct requires, subject to exceptions not relevant here, that a lawyer abide by a client's decisions "[i]n a criminal case, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial, and whether the client will testify." Rule 1.02(a)(3) does not specify when such consultation must take place.

Rule 1.03(b) provides: "A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." Whether a client may be asked to agree, in advance, to a plea in a misdemeanor case therefore depends upon whether the lawyer is able to explain the matter at the start of the engagement "to the extent reasonably necessary to permit the client to make informed decisions" about the case. If the lawyer can do so, then obtaining the client's instructions about a plea early in the representation would satisfy the lawyer's obligations under Rules 1.02(a)(3) and 1.03(b).

On the other hand, if the nature of the alleged offense, the possible range of punishment, or other factors in the matter are sufficiently complex that the lawyer would be unable to explain the matter to the extent reasonably necessary for the client to make an informed decision about a plea, then Rule 1.03(b) precludes the lawyer from obtaining the client's decision early in the representation. Furthermore, if, after a client's authorization of a plea, circumstances unexpectedly and materially change during the course of the representation, then Rule 1.03(b) would require that the lawyer notify the client of such developments and consider with the client whether the client's prior authorization should be modified.

Scenario 2

In Scenario 2, the lawyer, in addition to representing the client, is engaging in a business transaction with the client by serving as the client's bail bondsman. Professional Ethics Committee Opinion 599 (July 2010) concluded that a lawyer who serves as bail bondsman for his client in a criminal case may not add to the court's form of bond a provision in which the client agrees that, if the client fails to appear in court, the lawyer may enter a "no contest" plea that will result in a fine and may result in the issuance of a warrant for the client's arrest. Opinion 599 concluded that, under Rules 1.08(a)(1), 1.06, and 1.02(a)(3), "[s]uch an arrangement is a prohibited business transaction between lawyer and client that is not on terms fair and reasonable to the client, creates an impermissible conflict of interest for the lawyer, and impermissibly purports to eliminate the lawyer's duty to consult with, and abide by the decision of, the client concerning the entry of a plea."

The question considered here is whether there is any material difference between the client's making such an agreement in an engagement agreement instead of making the agreement in a bail bond.

Unlike the facts presented in Opinion 599, the facts in Scenario 2 include the lawyer's compliance with Rule 1.02(a)(3)–i.e., the lawyer's consulting with the client before a plea is entered. The remaining questions are: (1) whether the lawyer's serving as his client's bail bondsman is a prohibited business transaction under Rule 1.08(a); and (2) whether such an agreement creates an impermissible conflict of interest under Rule 1.06.

Rule 1.08(a) prohibits a lawyer from entering into a business transaction with a client unless:

> "(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed in a manner which can be reasonably understood by the client;
>
> (2) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and
>
> (3) the client consents in writing thereto."

In Opinion 599, the Committee concluded that the transaction (the client's advance agreement on the bond form to a plea that would prevent the lawyer from being liable on the bond if the client failed to appear in court) violated the requirement of Rule 1.08(a)(1) that the terms of the transaction be "fair and reasonable to the client." The Committee reasoned that "[t]he provision added to the bond form is contrary to the interests of the client because the provision subjects the client to the possibility of automatic punishment without regard to whether any punishment is deserved and without regard to whether or not the court would have excused the client's failure to appear."

In the circumstances considered here, there are genuine benefits for the client if the client, after conferring with the lawyer, gives advance direction to the lawyer about the plea to be entered. Thus, unlike the facts addressed in Opinion 599, the terms of the transaction may be "fair and reasonable to the client" as required under Rule 1.08(a)(1). If the client is given a reasonable opportunity to seek the advice of independent counsel and if the client consents in writing, Rule 1.08(a) does not preclude the lawyer from serving as the client's bail bondsman in these circumstances.

The next question is whether the lawyer's dual role as lawyer and bail bondsman creates an impermissible conflict of interest under Rule 1.06.

Rule 1.06(b)(2) provides in pertinent part that a lawyer shall not represent a person if that representation "reasonably appears to be or become adversely limited . . . by the lawyer's or law firm's own interests."

In the facts presented, the client authorized the lawyer, at the beginning of the representation, to enter a plea on the client's behalf, including a plea of "no contest" or "guilty."

But if there is an opportunity for the client to obtain a more favorable outcome by making a different plea (i.e., a plea of "not guilty"), then pleading "no contest" or "guilty" may no longer be in the client's best interest–although that may be the simplest course of action for the lawyer and is also the course of action that prevents the lawyer from being liable on the bail bond.

For example, if the client's ability to defend the case were significantly improved (say, by the discovery of evidence favorable to the client or because of the prosecution's inability to meet its burden of proof) then a "not guilty" plea would be in the client's best interest. But if the client fails to appear in court, the lawyer will face a conflict: the client's interest in a vigorous defense to avoid an adjudication of guilt versus the lawyer's own interest both in avoiding liability on the bond and in obtaining a resolution of the matter that requires the least effort by the lawyer.

On the other hand, if there is no opportunity for the client to obtain a more favorable outcome in the case and the circumstances warrant a plea of "no contest" or "guilty" (as the client and lawyer contemplated at the start of the engagement), then a conflict between the client's interest and the lawyer's interest does not exist. When the client does not appear in court (as expected all along), the lawyer has not discovered any evidence materially favorable to the client's case, and the prosecution is ready to proceed, the fact that the lawyer is also the client's bail bondsman creates no conflict of interest for the lawyer in representing the client.

The remaining question, therefore, is whether the <u>possibility</u> of a future conflict between the client's interest and the lawyer's interest is one that precludes the lawyer from representing the client while serving as the client's bail bondsman. Under Rule 1.06(b)(2), the answer depends upon whether, at the outset of the representation, the lawyer's representation of the client "reasonably appears" to be "adversely limited" by the lawyer's interest arising from his role as bail bondsman. If the lawyer reasonably believes that there is no significant likelihood that the client will have an opportunity to defend the case, then a conflict would not exist. But if, at the early stage of the lawyer's engagement, it would be unreasonable to assume that a defense will likely be unavailable to the client, then a conflict of interest within the meaning of Rule 1.06(b)(2) would exist.

Although Rule 1.06(c) generally allows representation to continue if the client consents, subparagraph (1) of Rule 1.06(c) permits the representation to continue with client consent only when "the lawyer reasonably believes the representation of each client will not be materially affected . . . ." If the lawyer concluded at the outset of the representation that a reasonable possibility exists for the client to defend the case successfully, then the lawyer could not reasonably believe that the representation of the client will not be materially affected. Thus, if a conflict of interest under Rule 1.06 exists, the client's consent could not remedy the conflict and Rule 1.06 would prohibit the lawyer's representation of the client while the lawyer acts as the client's bail bondsman in the matter.

CONCLUSION

Under the Texas Disciplinary Rules of Professional Conduct, a lawyer representing a client in a misdemeanor case may include in an engagement agreement with the client a provision in which the client gives advance authorization for the lawyer to enter a plea of "no contest" or "guilty" in the case, provided that, at the time of the engagement agreement, the client is able to make an informed decision about the plea.

If the lawyer also acts as the client's bail bondsman, the lawyer may represent the client under such an engagement agreement only if the lawyer reasonably believes that there is no significant likelihood that the client will have an opportunity to defend the case.