The Supreme Court of Texas
Professional Ethics Committee

*1 Opinion Number 555
December 2004

QUESTION PRESENTED

Is it permissible under the Texas Disciplinary Rules of Professional Conduct for a lawyer to enter into a business arrangement with a chiropractor where the lawyer owns a portion of the chiropractor's practice, the lawyer refers his clients to the chiropractor, and the lawyer receives a share of the profits of the chiropractor's practice, including a share of the profits attributable to the clients referred by the lawyer?

STATEMENT OF FACTS

A lawyer wishes to enter into a business arrangement with a licensed and competent chiropractor. This arrangement would involve the lawyer's owning a portion of the chiropractor's practice and the lawyer's referring clients who are in need of chiropractic services to the chiropractor. Because of the lawyer's ownership of a portion of the chiropractor's practice, the lawyer would receive a share of the profits from the chiropractic practice, including a share of the medical fee profits generated by clients referred by the lawyer. The lawyer would fully disclose, in writing at the commencement of the attorney-client relationship, this business arrangement to each client who might need chiropractic services.

DISCUSSION

A lawyer is as free as any other person to enter into any lawful business transaction. Thus, if not prohibited by other laws, the Texas Disciplinary Rules of Professional Conduct do not prohibit a lawyer from entering into a business transaction with a chiropractor which would result in the lawyer's owning a portion of the chiropractor's practice. However, when the lawyer's interests conflict with the client's interests, the Disciplinary Rules come into play.

Under the Disciplinary Rules, a lawyer should act with competence, commitment and dedication to the interests of the client and with zeal in advocacy on the client's behalf. Comment 6 to Rule 1.01. Rule 2.01 specifically requires that a lawyer exercise independent professional judgment and render candid advice in representing a client.

Because past and future medical care and the success of such medical care are common issues in most injury claims, the Committee believes that it would be impossible for a lawyer involved in the proposed business arrangement to act with commitment and dedication to the client and to exercise independent professional judgment and render candid and critical advice concerning the client's medical treatment. Certainly the lawyer would be hesitant to advise a client to pursue a claim against the chiropractor if the facts warranted consideration of such action. See Professional Ethics Committee Opinion 543 (April 2002).

The Disciplinary Rules clearly prohibit a lawyer from representing a client in a matter where the lawyer's interests conflict with the interests of the client except in situations where a client may appropriately consent to the representation after being fully informed concerning the conflict. Rule 1.06(b)(2) provides in pertinent part:

> *2 "... except to the extent permitted by paragraph (c), a lawyer shall not represent a person if the representation of that person:
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> ...
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> (2) reasonably appears to be or become adversely limited by the lawyer's or law firm's

responsibilities ... to a third person or by the lawyer's or law firm's own interests."

The Committee believes that, in the circumstances presented, the proper representation of the client would clearly be adversely limited by the proposed business transaction. First, the lawyer would be limiting himself, either contractually or by his pecuniary self interest, to referring his clients in need of chiropractic services to the chiropractor in whose practice the lawyer had an interest. Referrals to other chiropractors would, for all practical purposes, be foreclosed or severely limited at least partly due to financial considerations and not necessarily sound legal strategy. Loyalty and zealousness are impaired when a lawyer's own interests foreclose alternative courses of action. See Comment 4 to Rule 1.06. Second, if the client's injury claim was litigated in a trial, the business arrangement between the lawyer and the chiropractor - who would now be a witness - would undoubtedly have an adverse effect on the client's claim by burdening the credibility of the chiropractor/witness, the lawyer and ultimately the client. A lawyer should not allow related business interests to affect representation of a client. Comment 5 to Rule 1.06. Thus, the proposed business arrangement clearly presents a conflict of interest under Rule 1.06(b)(2).

Even in the presence of a conflict of interest a lawyer may continue to represent the client if the requirements of Rule 1.06(c) are met:

"(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."

This Committee has ruled that a lawyer could not comply with the requirements of Rule 1.06(c)(1) in other similar circumstances. In Opinion 536 (May 2001), the Committee considered an arrangement where a lawyer would receive a referral or solicitation fee from an investment adviser for referring a client to the investment adviser. There, the Committee believed that, because of the lawyer's ongoing fee arrangement with the investment adviser, the lawyer could not reasonably believe the arrangement would not materially affect his representation of the client in keeping a critical eye on the investment adviser's advice. The Committee further held that the full disclosure to the client contemplated by Rule 1.06(c)(2) was impossible because of the uncertainties inherent in any long-term investment program.

***3** Likewise in Opinion 543 (April 2002) the Committee ruled that the exception of Rule 1.06(c) could not apply to an agreement between a healthcare provider and a lawyer who was the healthcare provider's in-house counsel for the referral to the lawyer of patients with personal injury claims. Despite the promise of full disclosure, this Committee concluded that, because of the limitations placed on the lawyer by the arrangement with respect to handling malpractice claims against the healthcare provider and the in-house status of the lawyer, the lawyer could never meet the requirements of Rule 1.06(c)(1). In contrast, the Committee ruled in Opinion 524 (May 1998) that the exception of Rule 1.06(c) could apply where a lawyer would accept referrals from a healthcare provider so long as the lawyer did nothing to induce the referrals and the patients were not being funneled solely to that lawyer.

Finally, in Opinion 547 (January 2003) the Committee found that a law firm could never reasonably conclude that a proposed business arrangement with a group of medical professionals would not materially affect representation of clients such that the law firm could ask for clients' consent to the conflict of interest created by the arrangement. In the proposed arrangement, a group of medical professionals would agree to finance a law firm's television advertising with the expectation, but not the obligation, that the law firm would refer clients to the medical group.

For the reasons cited in the previous opinions, the Committee believes that a lawyer in the proposed business transaction could not reasonably believe that the representation of the lawyer's

clients would not be materially affected. It would in the normal case simply not be possible at the outset of the relationship of the client with the chiropractor to know whether the treating medical practitioner's testimony might be critical to the prosecution of the client's claim. In the event the case was tried to a jury, evidence of the relationship between the lawyer and the chiropractor could have an extremely adverse impact on the jury's ability to be fair and impartial in evaluating the plaintiff's medical claims. Hence the requirement of Rule 1.06(c)(1) that "the lawyer reasonably believes the representation of each client will not be materially affected ..." could not be satisfied. Because the requirement for the exception of Rule 1.06(c)(1) could not be met in the circumstances here considered, the lawyer would never have occasion to seek to obtain the consent of clients pursuant to Rule 1.06(c)(2).

CONCLUSION

The proposed business arrangement involving part ownership by a lawyer of a chiropractic practice to which the lawyer refers his clients for treatment would violate Rule 2.01 of the Texas Disciplinary Rules of Professional Conduct because the arrangement would prevent the lawyer from exercising independent professional judgment and rendering candid advice to the lawyer's client. In addition, the proposed arrangement would involve a conflict of interest under Rule 1.06(b) that could not be cured under Rule 1.06(c).