

**THE PROFESSIONAL ETHICS COMMITTEE
FOR THE STATE BAR OF TEXAS
Opinion No. 600**

August 2010

QUESTION PRESENTED

Under the Texas Disciplinary Rules of Professional Conduct, is a lawyer for a Texas governmental agency required to ensure that the agency's enforcement officers do not communicate directly with a regulated person who is represented by a lawyer except with such lawyer's consent?

STATEMENT OF FACTS

A Texas governmental agency issues licenses to qualified persons to engage in a specific business. The agency is comprised of a legal division and an enforcement division. The legal division represents the agency in obtaining enforcement orders but does not have supervisory authority or control over the enforcement division.

The enforcement division of the agency, which is staffed by licensed officers who are not lawyers, investigates complaints against persons regulated by the agency and monitors such persons' compliance with orders previously issued for violations of the agency's regulations. Lawyers in the agency's legal division are not involved in the investigation of violations until the matter is referred to the legal division for the possible issuance of a disciplinary order. After a disciplinary order is issued against a regulated person, the enforcement division, without further involvement of the legal division, is charged with monitoring the regulated person's compliance with the requirements of the order, which may continue for up to five years.

In most cases, regulated persons that are investigated by the agency's enforcement division or are subject to monitoring for compliance with a disciplinary order are represented by legal counsel with respect to the agency's regulation. In some cases, lawyers for regulated persons have formally requested that the agency's enforcement division personnel communicate with a regulated person only through the particular regulated person's lawyer.

DISCUSSION

Rule 4.02(a) of the Texas Disciplinary Rules of Professional Conduct provides as follows:

“(a) In representing a client, a lawyer shall not communicate or cause or encourage another to communicate about the subject of the representation with a person, organization or entity of government the lawyer knows to be represented

by another lawyer regarding that subject, unless the lawyer has the consent of the other lawyer or is authorized by law to do so."

Rule 4.02(a) thus prohibits a lawyer from communicating directly concerning a matter with a person known to be represented by a lawyer with respect to that matter unless the person's lawyer consents or the communication is otherwise authorized by law. In addition to generally prohibiting direct communications by a lawyer with a represented person except with the consent of the lawyer for the represented person, Rule 4.02(a) also prohibits the lawyer from indirectly effecting such communications by causing or encouraging a non-lawyer to communicate with the represented person in such circumstances. As noted in Comment 1 to Rule 4.02, Rule 4.02(a) prohibits communications that are in form between a lawyer's client and another person represented by counsel where, "because of the lawyer's involvement in devising and controlling their content," such communications are in substance between the lawyer and the represented person. However, as noted in Comment 2 to Rule 4.02, Rule 4.02(a) does not prohibit communications between a lawyer's client and persons represented by counsel "as long as the lawyer does not cause or encourage the communication without the consent of the lawyer for the other party." This Comment further recognizes that Rule 4.02(a) "does not impose a duty on a lawyer to affirmatively discourage communication between the lawyer's client and other represented persons, organizations or entities of government."

In this case, the lawyer's client is the governmental agency. It is assumed for purposes of this opinion that there is no other legal authorization for the communications in question if consent of a regulated person's lawyer for direct communications with the regulated person would otherwise be required by Rule 4.02(a). However, provided that the agency's lawyer does not have direct supervisory authority over the enforcement personnel of the agency and does not cause or encourage communications by such personnel with represented persons, neither Rule 4.02(a) nor any other provision of the Texas Disciplinary Rules of Professional Conduct imposes restrictions on the lawyer with respect to communications by enforcement personnel with represented persons. There is likewise no requirement under the Texas Disciplinary Rules of Professional Conduct that a lawyer for the agency comply with a request from a regulated person's lawyer that all communications by enforcement personnel with the regulated person be carried out through the lawyer.

A different analysis would apply if the agency lawyer had direct supervisory authority over enforcement personnel of the agency. In that event, Rule 5.03 would make the lawyer responsible for the actions of the employees supervised by the lawyer. Under Rule 5.03(b), the lawyer would be in violation of the Texas Disciplinary Rules of Professional Conduct if the lawyer ordered, encouraged or permitted employees under the lawyer's direct supervision to communicate with represented persons contrary to the requirements of Rule 4.02(a).

CONCLUSION

Under the Texas Disciplinary Rules of Professional Conduct, a lawyer for a Texas governmental agency is not required to limit communications by the agency's enforcement officers who are not subject to the lawyer's direct supervisory authority with regulated persons

who are represented by lawyers. However, a lawyer for a governmental agency is not permitted to communicate directly with a regulated person that is represented in the matter by a lawyer who has not consented to the communications and is not permitted to cause or encourage such communications by other agency employees, and the agency lawyer is obligated to prevent such communications by employees over whom the lawyer has direct supervisory authority.