

## OPINION 534

### Questions Presented

Does an attorney who represents a non-employee spouse in a divorce proceeding violate the Texas Disciplinary Rules of Professional Conduct (the "Rules") if the attorney prepares a materially defective Qualified Domestic Relations Order ("QDRO") and does not correct the defects after being informed of the defects by an attorney reviewing the proposed QDRO for the employer concerned? If such conduct by the divorce attorney constitutes a violation of the Rules, is the employer's attorney who notifies the divorce attorney of the defects in the proposed QDRO required to report such violation to the appropriate disciplinary authority?

### Statement of Facts

An employer (the "Employer") maintains a retirement plan (the "Plan") that is qualified under the Employee Retirement Income Security Act of 1974 as amended ("ERISA"). An employee (the "employee") and his or her spouse (the "Spouse") are divorcing. Is it assumed that under ERISA and other applicable law a QDRO is required in order for the Spouse to have certain rights after the divorce with respect to the Employee's interest in the Plan. Although a QDRO is a court order signed by the judge in the divorce proceedings based on the approvals for the parties and the employer.

In this case, a proposed QDRO is prepared by the Spouse's attorney ("Attorney A"), who is representing the Spouse without the assistance of another attorney. The proposed QDRO is reviewed by the Employer's attorney ("Attorney B") prior to submission of the proposed QDRO to the court. In Attorney B's judgment, the proposed QDRO is materially defective. Attorney B calls Attorney A's attention to the defects but Attorney A does not correct them. It is assumed that the consequences of the material defects in the QDRO could manifest themselves at some time after the divorce is final and could be significantly detrimental to the Spouse.

The specific questions considered by the Committee are the following:

1. What are Attorney A's obligations under the Rules with respect to the preparation of a proposed QDRO?
2. What are Attorney B's obligations under the Rules if Attorney B receives from Attorney A a proposed QDRO that is materially defective and Attorney A fails to correct the draft QDRO after the inadequacy is called to the attention of Attorney A?

### Discussion

#### Rules Applicable to Attorney A.

Under Rule 1.01 (a)\*, Attorney A may not accept or continue employment by the Spouse in the divorce action if the lawyer knows or should know that the matter, including the preparation of the QDRO, is beyond Attorney A's competence (and the competence of any other lawyer assisting Attorney A in the matter). The term "competence" is defined in the Terminology for the Rules as denoting "possession or the ability to timely acquire the legal knowledge, skill and training reasonably necessary for the representation of the client." In determining what legal knowledge, skill and training are reasonably necessary for the representation of the Spouse, all the circumstances relating to the matter, including the Spouse's need for an effective QDRO, must be considered.

Under Rule 1.01, Attorney A must represent the Spouse in the divorce, including preparation of the QDRO, with competence (Rule 1.01(a)) and must not "neglect" this representation (Rule 1.01 (b) (1)).

Rule 1.01 (c) defines "neglect" for purposes of Rule 1.01 (b) (1) as signifying "inattentiveness involving a conscious disregard for the responsibilities owed to a client or clients." These standards require that an attorney must correct material defects in work for a client if the attorney's attention is called to the defects at a time when correction is possible. In this case, when Attorney A is informed by Attorney B that the draft QDRO prepared for the spouse is materially defective, Attorney A must take such actions as are required to correct the problem. Such actions may involve additional work by Attorney A, or the association of another lawyer with competence in this area of law, to complete the preparation of the QDRO. Depending on the specific circumstances, including Attorney A's prior agreement with the Spouse, Attorney A may or may not be permitted under the standards of Rule 1.04 on legal fees to include the additional costs of this corrective work in legal fees charged to the Spouse.

### Rules Applicable to Attorney B

If Attorney B has called Attorney A's attention to the material defects in the proposed QDRO and Attorney B knows that Attorney A is taking no action to correct these defects, Attorney B may, depending on the specific circumstances, be required by the Rules to inform the appropriate disciplinary authority as to Attorney A's violation of the Rules. The obligation for Attorney B to inform the appropriate disciplinary authority would arise under Rule 8.03(a) if Attorney B's knowledge of the failure by Attorney A to represent the Spouse competently and diligently under Rule 1.01 "raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects...." As noted in Comment 4 to Rule 8.03, whether or not the question raised as to Attorney A is "substantial" under Rule 8.03(a) refers to the seriousness of the violation by Attorney A and not the quantum evidence of which Attorney B is aware concerning the violation. The term "fitness" is defined in the Terminology for the Rules as denoting "those qualities of physical, mental and psychological health that enable a person to discharge a lawyer's responsibilities to clients in conformity with the [Rules]." If Attorney B determine that the circumstances described in Rule 8.03 (a) are present, Attorney B is required by that Rule to report Attorney A's violation to the appropriate disciplinary authority, subject to the limitation of Rule 8.03 (d) (1) that such report is not required to include disclosure of confidential information relating to Attorney B's client (the Employer) in violation of Rule 1.05. As noted in Comment 4 to Rule 8.03 and in Professional Ethics Committee Opinion 520, Texas Bar Journal May 1997, Attorney B may, but is not required to, report Attorney A's violation of the Rules to the disciplinary authority even if, in Attorney B's judgment, the standards of Rule 8.03 (a) are not met with respect to Attorney A's conduct.

### **Conclusion**

Under the Texas Disciplinary Rules of Professional Conduct, an attorney representing a spouse in a divorce action and having responsibility for the preparation of a Qualified Domestic Relations Order in that action is required to act with competence in the preparation of the QDRO and is required to correct material defects in the QDRO if such defects are called to the attorney's attention by another attorney reviewing the proposed QDRO. An attorney for the employer affected by the QDRO who learns that the attorney for a divorcing spouse has prepared and will not correct a materially defective proposed QDRO that may substantially compromise the interests of such attorney's clients would in some circumstances be reviewed under the Rules (subject confidences) to report this violation to the appropriate disciplinary authority; the circumstances requiring such a report would exist if the employee's attorney concluded that the divorce attorney's failure as to the QDRO raised a substantial question with respect to the divorce attorney's honesty, trustworthiness or physical, mental and psychological health necessary to discharge the lawyer's obligation to clients.

This opinion is confined to the issues under the Rules as discussed above. The Committee expresses no opinion concerning possible liability of a divorce attorney to his client for damages in the circumstances addresses in this opinion, nor does the Committee express any opinion regarding state and

federal legal issues arising in divorce actions that involve retirement plans qualified under ERISA.

\* Unless otherwise indicated, all citations are to provisions of the Texas Disciplinary Rules of Professional Conduct as currently in effect.