

**THE PROFESSIONAL ETHICS COMMITTEE  
FOR THE STATE BAR OF TEXAS  
Opinion No. 678**

**September 2018**

**QUESTIONS PRESENTED**

Under the Texas Disciplinary Rules of Professional Conduct, may a Texas lawyer agree to serve concurrently as the executor of an estate and as legal counsel for the executor? If not, may another lawyer in his law firm serve as legal counsel for the executor?

**STATEMENT OF FACTS**

A parent of a Texas lawyer died. The parent's will named the lawyer as the independent executor of the deceased's estate and the lawyer and his siblings as beneficiaries under the will. The lawyer did not draft the will. Following the death of the parent and the appointment of the lawyer as the executor for the parent's estate, the lawyer intends to represent himself in his capacity as executor unless he is prevented from doing so by a conflict of interest. If he may not act as legal counsel for the executor, he would like to retain another lawyer in his law firm to serve as legal counsel for the executor.

**DISCUSSION**

Under Texas law, an executor owes a fiduciary duty to the beneficiaries of the decedent's estate. An executor has several legal obligations in that capacity, including locating and notifying beneficiaries under the will; notifying creditors of the estate; determining and paying the estate's debts; filing tax returns and paying taxes owed by the estate; identifying, valuing, accounting for, and protecting estate assets; asserting estate claims and defending the estate against claims; and distributing remaining estate assets to the beneficiaries on an equitable basis consistent with the will's provisions.

Similarly, Texas lawyers owe a fiduciary duty to their clients. The role of a lawyer for an executor may include rendering legal advice regarding the executor's role and legal obligations and assisting the executor with respect to court filings and hearings. A lawyer also may represent the executor in asserting estate claims or defending against claims against the estate or the executor. Depending on the estate's legal needs, an executor may seek the assistance of more than one lawyer in carrying out his duties, including, for example, separate counsel for probate proceedings, taxation issues, and estate-related litigation. A lawyer for an executor would be obligated to advise his client objectively when additional counsel might be required based on considerations such as specialized training or experience or because the executor's legal needs require more than one lawyer or law firm.

When a lawyer serves as an executor and also seeks to appoint himself to render legal services to the executor there is a potential conflict of interest that should be analyzed under Rule 1.06 of the Texas Disciplinary Rules of Professional Conduct. Rule 1.06 applies to lawyers serving in dual roles as well as in situations where the lawyer's interests, the client's interests, or a third party's interests may conflict. Here, the lawyer proposes to serve as both an executor of the estate and as the lawyer for the executor. In some situations, there may not be a conflict between those roles in part because they involve the same person who owes a fiduciary duty in either role; however, the lawyer must be alert to "dual role" conflicts of interest that may be similar to those arising when a lawyer serves as a member of an organization's board of directors and also provides legal advice or other legal services to the board or the organization's management or where a lawyer serves as both a non-lawyer trustee for a trust and as the lawyer for the trustee. Depending on the estate's size and complexity, the magnitude of debts and legal claims against it, the compensation required for legal services, and the needs and identities of its beneficiaries, there may be practical considerations that objectively weigh in favor of (or against) the lawyer serving in both roles.

Rule 1.06(b), in pertinent part, states that except to the extent permitted by paragraph (c) of the Rule, "a lawyer shall not represent a person if the representation of that person ... 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." Rule 1.06(c) provides that a lawyer may represent a client in those circumstances 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."

Under these provisions, a lawyer who has agreed to serve as executor must assess the applicability of Rule 1.06 before appointing himself or his firm to perform legal services for the executor. Under the limited facts considered, if the representation of the executor is not adversely limited by the lawyer's or law firm's own interests, the Rules do not prohibit a lawyer from serving as both the executor and as the lawyer for the executor. *Cf.* American Bar Association Standing Committee on Ethics and Professional Responsibility Formal Opinion 02-426 (May 31, 2002) (concluding that the ABA Model Rules of Professional Conduct do not prohibit a fiduciary from appointing himself or his firm as counsel to perform legal work for the fiduciary because the "dual roles do not involve a conflict of interest").

If the representation of the executor will be adversely affected by the lawyer's or law firm's own interests, then the lawyer may not serve as counsel for the executor unless

the lawyer can obtain the consent required under Rule 1.06(c). In most circumstances, obtaining such consent will cause the lawyer to be in the untenable position of deciding whether to consent to representation despite the fact that the representation “reasonably appears to be or become adversely limited” by the lawyer or the lawyer’s law firm’s own interests. Under Rule 1.06(f), if a lawyer cannot serve as counsel for the executor because of such a conflict, the other lawyers in the lawyer’s law firm are also prohibited from representing the executor.

Finally, an additional limitation could arise under Rule 3.08, the “lawyer as witness” rule, if the lawyer, serving as executor, should or may be a witness in a probate or other legal proceeding related to the estate. This limitation would not prohibit the lawyer from serving as both executor and the executor’s lawyer, but could affect whether the lawyer could be both a fact witness and an advocate before a tribunal in the same proceeding.

## **CONCLUSION**

Under the Texas Disciplinary Rules of Professional Conduct, a lawyer is not prohibited from serving as both executor and as counsel for the executor; however, the lawyer must evaluate whether there are conflicts of interests before and during the representation including any arising from the lawyer serving in the dual roles. If the representation of the executor will be adversely affected by the lawyer’s or law firm’s own interests, then the lawyer may not serve as counsel for the executor unless the lawyer can obtain the consent required under the Texas Disciplinary Rules of Professional Conduct. If a lawyer cannot serve as counsel for the executor because of such a conflict, the other lawyers in the lawyer’s law firm are also prohibited from representing the executor. Finally, additional limitations can arise if the lawyer, serving as executor, should or may be a witness in a probate or other legal proceeding related to the estate, which limitations may affect whether the lawyer can be both a fact witness and an advocate before a tribunal in the same proceeding.