

The Supreme Court of Texas
Professional Ethics Committee
For the State Bar of Texas
Opinion Number 569
April 2006

QUESTION PRESENTED

Do the Texas Disciplinary Rules of Professional Conduct permit a lawyer to provide legal representation to a client in a matter against a third party who was a customer of a law-related business owned by the lawyer?

STATEMENT OF FACTS

A lawyer is an owner of and active in a business that is separate and independent from the lawyer's law practice and that provides law-related consulting services. These services are in conjunction with and in substance related to the lawyer's law practice. The law-related consulting service (the "law-related business") is not prohibited by any provision of the Texas Disciplinary Rules of Professional Conduct.

The law-related business normally receives confidential information furnished to it by the customers to whom consulting services are provided. The law-related business agrees with customers not to share customers' confidential information with third parties. Business customers are advised that they do not have a client-lawyer relationship regarding the consulting services provided.

The lawyer is asked to provide legal representation to a person (the "client") in a matter adverse to a customer of the law-related business. The customer of the law-related business was never a client of the lawyer for the provision of legal services.

DISCUSSION

The Texas Disciplinary Rules of Professional Conduct do not prohibit a lawyer from engaging in other lawful businesses provided the lawyer's law practice complies with all applicable provisions of the Texas Disciplinary Rules. It is presumed that, in the fact situation here, the customer of the law-related business is explicitly advised that legal services are not being provided to the customer and that there is no client-lawyer relationship between the customer and the law-related business.

In the circumstances presented, the lawyer must determine whether or not a conflict of interest exists in the legal representation of the client against the customer of the law-related business. The lawyer must be presumed to have an interest in the continuing success of his law-related business and in the goodwill of past and prospective customers of the business. Such an interest would normally create a conflict of interest for the lawyer in a proposed legal representation of a client against a customer of the law-related business. A conflict of interest would be much more likely if the proposed representation of the client against the customer of the law-related business was in some way related to the services that had been provided to the customer of the law-related business. Rule 1.06(b)(2) and Rule 1.06(c) provide:

"(b) In other situations and except to the extent permitted by paragraph (c), a lawyer shall not represent a person if the representation of that person:

...

(2) 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.

(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."

These Rules require that the lawyer determine whether his representation of the client will reasonably appear to be or become adversely limited by the lawyer's interest in the success of the law-related business or his interest in relationships with actual or potential customers of the law-related business. Comment 1 to Rule 1.06 states that "[l]oyalty is an essential element in the lawyer's relationship to a client." Comment 4 to Rule 1.06 provides in pertinent part:

"Loyalty to a client is impaired not only by the representation of opposing parties in situations within paragraphs (a) and (b)(1) but also in any situation when a lawyer may not be able to consider, recommend or carry out an appropriate course of action for one client because of the lawyer's own interests or responsibilities to others. The conflict in effect forecloses alternatives that would otherwise be available to the client. Paragraph (b)(2) addresses such situations. A potential possible conflict does not itself necessarily preclude the representation. The critical questions are the likelihood that a conflict exists or will eventuate and, if it does, whether it will materially and adversely affect the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client. It is for the client to decide whether the client wishes to accommodate the other interest involved"

Loyalty to a client is a cornerstone of the legal profession. In this fact situation, the lawyer's representation of the client must be unfettered in the use of all information, however obtained (and without regard to any contractual or other confidentiality obligations of the lawyer to the customer of the law-related business), and free of the lawyer's personal interest in the success of the law-related business. If the lawyer determines under Rule 1.06(b)(2) that the representation of the client is permitted because in the circumstances there is no adverse limitation on the representation of the client from the fact that the representation is against the customer of the law-related business, then the lawyer may proceed with the representation. This conclusion would normally be possible only where the subject matter of the lawsuit has no relation to the services that had been provided to the customer of the law-related business and there is no possibility of use of confidential information from the business customer in the legal representation of the client.

If Rule 1.06(b)(2) does not permit the representation of the client, then the lawyer must consider under Rule 1.06(c) (1) whether the lawyer reasonably believes that the representation of the client will not be materially affected. The guideline in making this determination is set forth in Comment 7 to Rule 1.06 as follows: "... when a disinterested

lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved should not ask for such agreement or provide representation on the basis of the client's consent."

If the lawyer has the belief described in Rule 1.06(c)(1), the lawyer's representation of the client may proceed if, under Rule 1.06(c)(2), the client consents to the representation after full disclosure of the existence, nature, implications and possible adverse consequences of the lawyer's relationship with the law-related consulting business and the customer of that business. The disclosure and consent must take into account the level of sophistication of the client. See Comment 8 to Rule 1.06. It should be noted that these requirements apply to disclosure and consent with respect to the client of the lawyer's law practice and not to the law-related business and the customer of that business.

If a conflict of interest precludes the lawyer from representing the client in this fact situation, no other lawyer in the lawyer's law firm may accept the representation. Rule 1.06(f). It is not permitted under the Texas Disciplinary Rules to screen a conflicted lawyer except as provided in Rules 1.10 and 1.11, which are not applicable to the fact situation here addressed. The Supreme Court of Texas refused to accept the concept of a screening of a conflicted lawyer from other lawyers in a law firm (sometimes referred to as a "Chinese Wall") in order to allow representation by the law firm. That refusal is based upon the conclusive presumption that confidential information is shared among all lawyers in a firm. See *Phoenix Founders, Inc. v. Marshall*, 887 S.W.2d 831 (Tex. 1994).

CONCLUSION

The Texas Disciplinary Rules of Professional Conduct permit a lawyer to provide legal representation to a client in a matter against a third party who was a customer of a law-related business owned by the lawyer provided that the lawyer fully complies with Rule 1.06(b)(2) and if necessary Rule 1.06(c) as to any possible conflict of interest that arises with respect to the interests of the client.