

**THE PROFESSIONAL ETHICS COMMITTEE
FOR THE STATE BAR OF TEXAS
Opinion No. 589**

September 2009

QUESTION PRESENTED

Do the Texas Disciplinary Rules of Professional Conduct permit or require a lawyer to report possibly illegal activity by an adverse party or witness when the lawyer acquires information about that activity in the course of representing a client?

STATEMENT OF FACTS

In connection with representing a client, a lawyer learns facts strongly indicating that the opposing party and an adverse witness may be involved in illegal activity in which the client is not involved. The lawyer is considering reporting this information to the appropriate law enforcement authorities.

DISCUSSION

A lawyer's duty to his client is to represent zealously the client's interests. See paragraph 3 of the Preamble to the Texas Disciplinary Rules of Professional Conduct. With very limited exceptions, a lawyer may not in connection with the representation of a client act in a manner that is contrary to the interests of the client. Thus, a lawyer could not report possibly illegal activity of an adverse party or witness to law enforcement authorities if making the report would be contrary to the interests of the client unless the lawyer had an overriding legal obligation to make such a report. Furthermore, in these circumstances, if the information regarding the activity were confidential information that related to the client or was supplied by the client, Rule 1.05 would generally prohibit reporting the information to law enforcement authorities unless the client consented or the reporting was required by a court order, the Texas Disciplinary Rules of Professional Conduct, or other law. See Rule 1.05(b)(1) and (2) and Rule 1.05(c)(2) and (4). The remainder of this opinion assumes that reporting the possibly illegal activity of the adverse party or witness would not be contrary to the interests of the lawyer's client and would not improperly reveal or use confidential information of the client.

The Texas Disciplinary Rules of Professional Conduct do not specifically require a lawyer to report possibly illegal activity of adverse parties or witnesses. Rule 4.04 does, however, restrict a lawyer's use of information about adverse parties, witnesses and other third parties obtained in the course of representing a client. Rule 4.04(a) requires that, "[i]n representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person" If reporting possibly illegal activity of a third

party has a substantial purpose – such as aiding in law enforcement – other than to embarrass, delay, or burden the third party, then Rule 4.04(a) would not prohibit the lawyer from reporting the possibly illegal activity. An additional requirement, set out in Rule 4.04(b)(1), is that “[a] lawyer shall not present, participate in presenting, or threaten to present: (1) criminal or disciplinary charges solely to gain an advantage in a civil matter” Thus, Rule 4.04(b)(1) prohibits the lawyer from reporting the possibly illegal conduct of an adverse party or witness if the lawyer's sole purpose is to gain an advantage in the matter for which the lawyer is providing representation.

For purposes of applying the requirements of Rule 4.04(a) and Rule 4.04(b)(1), a lawyer's purpose or purposes must be evaluated on a case-by-case basis, taking into account all the circumstances. For example, if the lawyer had a history of participating in activities that assisted law enforcement authorities in enforcing laws of the type possibly violated by the adverse party or witness, then evidence of the lawyer's prior actions could be relevant to determining the lawyer's purpose in reporting the possibly illegal activity in the current circumstances. By contrast, if the lawyer had never shown any interest or involvement in the enforcement of the laws at issue before the case at hand, such prior history could be evidence of the absence of any legitimate purpose for making the report. In some situations, the seriousness of the crime that the lawyer proposes to report could be relevant with respect to the lawyer's purpose.

Under Rule 4.04, it does not matter whether the lawyer is reporting the possibly illegal activity on his own initiative or at the direction of or in concert with his client. Determining if such reporting is permissible under the Rule turns on whether the only substantial purpose for reporting is to embarrass, delay or burden a third person and whether the report is being made solely to gain an advantage in a civil matter. Moreover, under Rule 8.04(a)(1), the lawyer is prohibited from seeking to circumvent the requirements of Rule 4.04 by causing the lawyer's client to make a report that would violate Rule 4.04 if the report were made directly by the lawyer.

This opinion addresses only a lawyer's obligations under the Texas Disciplinary Rules of Professional Conduct. It is beyond the scope of this opinion to discuss any limitations or requirements imposed on a lawyer under other applicable laws or rules. An example of a law that requires the reporting of certain possibly illegal activities is section 261.101 of the Texas Family Code, which provides that all persons having cause to believe that a child's physical or mental health or welfare has been adversely affected by abuse or neglect by any person are required to make a report to appropriate authorities.

It should be noted that, if, by failing to report criminal activity of an adverse party or witness, the lawyer is himself committing a serious criminal act or obstructing justice, then Rule 8.04(a)(2) and (4) would be implicated. A lawyer violates Rule 8.04(a)(2) if the lawyer commits “a serious crime” or “any other criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects” Rule 8.04(a)(4) prohibits a lawyer from engaging in conduct that constitutes obstruction of justice.

CONCLUSION

The Texas Disciplinary Rules of Professional Conduct do not specifically require a lawyer to report possibly illegal activity of an adverse party or witness. Assuming that such reporting is not contrary to the interests of the lawyer's client and would not improperly reveal or use a client's confidential information and that there is no law requiring the reporting of the activity, the Texas Disciplinary Rules of Professional Conduct would permit, but would not require, a lawyer to report the information to the appropriate legal authorities unless the only substantial purpose for doing so was to embarrass, delay or burden a third person or the sole purpose for such reporting was to gain an advantage in a civil matter.