THE PROFESSIONAL ETHICS COMMITTEE
FOR THE STATE BAR OF TEXAS
Opinion No. 658

July 2016

QUESTIONS PRESENTED

May a Texas lawyer bill clients for expenses paid to a third party in an amount that is greater than the amount that the third party charged the lawyer? May Texas lawyers charge for the expenses paid to a third-party vendor that is owned by a member of their law firm?

STATEMENT OF FACTS

A Texas lawyer in a law firm owns a company that employs non-lawyer professionals to provide courtroom graphics to lawyers. The lawyers in the law firm propose to bill their clients in amounts that are greater than the amounts that the company charges to their law firm.

DISCUSSION

In Professional Ethics Opinion 594 (Feb. 2010), this Committee concluded: "In the absence of disclosure to and agreement with a client to the contrary, charging, collecting or recouping from a client more for a third-party expense than the amount of the expense actually paid by a lawyer would violate the requirements of Rules 1.04(c), 1.03(b) and 8.04(a)(3) of the Texas Disciplinary Rules of Professional Conduct." The Committee reaffirms that conclusion. Thus, absent full disclosure to and agreement by the client, a lawyer may not "mark up" expenses paid to a third party for which the lawyer seeks reimbursement from the client.

The additional question considered here is whether lawyers may pass along to their clients the expenses paid to a third-party vendor that is owned by a member of their law firm. The Committee concludes that lawyers that bill clients for expenses paid to an entity whose ownership is materially similar to their law firm's is "a business transaction with a client" within the meaning of Rule 1.08(a). Under Rule 1.08(a), a lawyer may not enter into such a transaction unless:

> "(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed in a manner which can be reasonably understood by the client;
>
> (2) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and

(3) the client consents in writing thereto."

To comply with Rule 1.08(a)(1)'s requirement of full disclosure, the lawyers here must disclose that a member of their law firm owns the graphics company.

The lawyers must also consider Rule 1.06(b), which prohibits a lawyer from representing "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 own interests." For example, if the availability of a law firm-owned graphics company results in the law firm's use of that company exclusively and to the detriment of its clients, then such use of that company would violate Rule 1.06(b). *See* Opinion 555 (Dec. 2004) (discussing a lawyer's ownership interest in a chiropractor's practice, to whom the lawyer refers his clients); and Opinion 536 (May 2001) (discussing a lawyer who refers clients to an investment advisor in exchange for referral fees). If such conflicts arise between the lawyers' interests and their clients' interests, Rule 1.06(c) provides that the lawyers may continue representing their clients only if the lawyers reasonably believe that the representations will not be materially affected and the clients, after full disclosure, consent.

CONCLUSION

Under the Texas Disciplinary Rules of Professional Conduct, absent an agreement to the contrary, Texas lawyers may not bill clients for expenses paid to a third party in an amount that is greater than the amount that the third party charged their law firm. If Texas lawyers pass along to clients the expenses paid to a third-party vendor whose ownership is materially similar to their law firm's, they must comply with Rule 1.08's requirements for entering into a business transaction with a client. The transaction must be on terms that are fair to and fully disclosed to the clients (including disclosure of the ownership of the third-party vendor that is materially similar to their law firm's); the clients must have a reasonable opportunity to seek the advice of independent counsel; and the clients must consent in writing.

The lawyers must also consider whether their or their law firm's own interests in directing their clients' business to the related third-party vendor results in a conflict of interest under Rule 1.06(b)(2). If it does, then the lawyers may continue representing the clients only if they reasonably conclude that the representation will not be materially affected, they make the disclosures required under Rule 1.06(c)(2), and the client, after disclosure, consents.