

## ETHICS OPINION 528

April 1999

Tex. Comm. on Professional Ethics. Op. 528, V. 62 Tex. B.J. 4 (1999)

### QUESTIONS PRESENTED

1. Is it a violation of the Texas Disciplinary Rules of Professional Conduct for a law firm to represent a client against a defendant corporation in a lawsuit where an attorney in the law firm is related by marriage to an employee of the defendant?
2. Is the employee's status or position in the defendant's organization relevant?
3. If the foregoing results in a conflict of interest, can the conflict be remedied by informed consent?

### FACTS

Beginning in June 1990, an individual ("X") began working for a law firm ("Firm") as a general office assistant. X's employment with the Firm was sporadic, mostly occurring in the summer. In the last two years of his employment with the Firm, X worked as a law-student intern. X ceased working for the Firm on Feb. 1, 1996. During his employment with the Firm, X was never a licensed attorney or a law school graduate.

During the time of X's off-and-on employment, the Firm undertook legal representation of clients ("Clients") in a lawsuit against a corporation ("Defendant"). While X was employed at the Firm, X dated the daughter of an employee of Defendant ("Employee"). In August 1996, after he ceased working for the Firm, X married Employee's daughter. Employee is a mid-level employee in Defendant's organizational structure and does not have management decision-making authority on matters relevant to the lawsuit. Employee has never been called or designated as a fact or expert witness in the litigation between the Clients and Defendant. It is not anticipated that Employee will be called or designated as a witness in such litigation.

The Firm has never represented Defendant or Employee in any legal matter, nor has Employee or Defendant ever contacted the Firm for the purpose of obtaining legal advice. X is expected to graduate from law school in the near future, and the Firm wishes to offer him employment as an attorney. If hired, new lawyer X will not be involved in the subject litigation.

### DISCUSSION

A conflict of interest can arise when a lawyer's or law firm's representation of a client is or reasonably appears to be adversely limited. Texas Disciplinary Rule 1.06(b)(2) provides:

(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 becomes 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.

The language of Rule 1.06(b)(2) is broad; it includes even the reasonable appearance that a representation may be adversely limited. In that regard the comments to Rule 1.06 indicate that Rule 1.06(b)(2) applies 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 issue of family relationships creating a conflict of interest has arisen most often when lawyers who are related to each other by blood or marriage represent opposing parties in the same litigation. The risks involved there are that confidences of the lawyers' adverse clients may be revealed, and the personal relationships between the lawyers may interfere or adversely limit the independent professional judgment required of an attorney in representing a client. Although the Texas Disciplinary Rules do not address this specific issue, the ABA Model Rules of Professional Conduct expressly provide that certain close relationships between lawyers who represent adverse parties do create a conflict of interest. ABA Model Rule 1.8(i) provides:

A lawyer related to another lawyer as parent, child, sibling or spouse shall not represent a client in a representation directly adverse to a person who the lawyer knows is represented by the other lawyer except upon consent by the client after consultation regarding the relationship. A comparable rule does not exist in the Texas Disciplinary Rules.

The fact situation of this opinion does not involve close relationships between the lawyers representing adverse parties in litigation. Rather, the Firm proposes to hire new lawyer X who is married to the daughter of an employee of the Defendant corporation that the Firm has sued on behalf of certain current clients of the Firm. The Employee of the Defendant corporation is not a party to the lawsuit, his position in the Defendant corporation does not involve him in management decisions that relate to the subject matter of the litigation, and the Firm does not anticipate that Employee will be called as a fact or expert witness in the litigation. In addition, new lawyer X will not be involved in the subject litigation.

Although Rule 4.02 potentially could be relevant in this type of situation, it is not applicable under these particular facts and circumstances. Rule 4.02(a) provides that a lawyer shall not communicate with a person or organization the lawyer knows to be represented by another lawyer. Rule 4.02(c) defines an "organization" to include:

(1) those persons presently having a managerial responsibility with an organization ... that relates to the subject matter of the representation, or (2) those persons presently employed by such organization or entity and whose act or omission in connection with the subject of the representation may make the organization ... vicariously liable for such act or omission.

Comment 4 to Rule 4.02 provides clarification that this rule does not prohibit a lawyer from contacting a person presently employed by such an organization or entity whose conduct is not a matter at issue but who might possess knowledge concerning the matter at issue. In this opinion, the Employee of Defendant is not involved in management decisions related to the litigation and will not be a witness who could make the organization vicariously liable because of his statements, acts, or omissions.

Under these particular facts, we do not believe that the Firm's hiring of lawyer X creates a conflict of interest under the Texas Disciplinary Rules. Lawyer X will not be involved in the litigation, and his marital relationship to the daughter of a mid-level employee of the Defendant, who is not a witness or party in the litigation, is not sufficiently close and does not involve any factual considerations so as to create any reasonable risk or appearance either of violating the

confidential information of the Firm's Clients, or of limiting in any way the Firm's ability to consider, recommend, or carry out any course of action on behalf of the Clients.

If different factual circumstances were to create a reasonable appearance that the Firm's representation could be adversely limited by the relationship between one of its lawyers and an employee of an opposing party in litigation, the conflict of interest under Rule 1.06(b)(2) normally could be resolved by the Firm obtaining the informed consent of its clients, provided that the lawyer reasonably believes that the representation of each client will not be materially affected.

#### **CONCLUSION**

Under the facts presented, the Firm's hiring of new lawyer X will not constitute a conflict of interest under the Texas Disciplinary Rules. Since the Employee does not have managerial responsibility that relates to the subject matter of the litigation and is not a witness in the litigation, there is no violation of Rule 4.02.