

**THE PROFESSIONAL ETHICS COMMITTEE
FOR THE STATE BAR OF TEXAS
Opinion No. 545**

October 2002

QUESTION PRESENTED

Is it a violation of the Texas Disciplinary Rules of Professional Conduct for a lawyer to enter into a fee arrangement with a governmental taxing unit to collect its delinquent taxes where, under the arrangement, a portion or all of the statutory penalties designated for legal fees may be kept by the taxing unit rather than paid to the lawyer if certain collection goals are not met?

STATEMENT OF FACTS

Section 6.30(c) of the Texas Tax Code provides that “[t]he governing body of a taxing unit may contract with any competent attorney to represent the unit to enforce the collection of delinquent taxes.” In connection therewith, section 33.07 of the Tax Code permits the taxing unit to charge and collect statutory penalties from taxpayers to pay legal fees incurred in collecting such delinquent taxes.

Under a proposed fee arrangement between a taxing unit and a lawyer, the amount of fees to be paid to the lawyer out of the statutory penalties collected by the taxing unit would depend on whether the amount of delinquent taxes recovered by the lawyer during the term of the fee arrangement exceeded a specified collection goal. The taxing unit would escrow for a specified period of time all statutory penalties imposed and collected for legal fees pursuant to section 33.07 of the Texas Tax Code with respect to tax collection cases handled by the lawyer. At the end of the specified time period, if the lawyer had met or exceeded the collection goal, the full amount of the section 33.07 penalties would be transferred out of escrow and paid to the lawyer. However, if the delinquent tax collections were less than the agreed-upon goal, the governmental taxing unit would transfer out of escrow and include in its tax revenues as much of the escrowed section 33.07 penalties as necessary to make up for the difference between the actual amount collected as a result of the lawyer’s efforts and the agreed-upon collection goal. Then the balance of the escrowed funds, if any, would be transferred out of escrow and paid to the lawyer.

DISCUSSION

This factual scenario describes a proposed contingent fee agreement to be entered into between the lawyer and the governmental taxing unit. That is, the fee the lawyer

actually receives is contingent upon whether the lawyer is able to achieve the agreed-upon collection goal. The lawyer's fee may range from zero to the full amount of section 33.07 penalties collected and escrowed by the taxing unit depending upon the aggregate amount of delinquent taxes actually collected by virtue of the lawyer's collection efforts.

Rule 1.04 (d) of the Texas Disciplinary Rules of Professional Conduct provides in pertinent part as follows:

“A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (e) or other law.”

The exception provided in Rule 1.04(e) is not relevant to this discussion. However, a contingent fee is not permitted under Rule 1.04(d) if the proposed contingent fee arrangement is prohibited by “other law.”

Attorney's fees are assessed as a penalty against the delinquent taxpayer pursuant to section 33.07 of the Texas Tax Code. Specifically, sections 33.07 (a) and (c) provide as follows:

“(a) A taxing unit or appraisal district may provide, in the manner required by law for official action by the body, that taxes that become delinquent on or after February 1 of a year but not later than May 1 of that year and that remain delinquent on July 1 of the year in which they become delinquent incur an additional penalty to defray costs of collection, if the unit or district or another unit that collects taxes for the unit has contracted with an attorney pursuant to Section 6.30. The amount of the penalty may not exceed the amount of the compensation specified in the contract with the attorney to be paid in connection with the collection of the delinquent taxes.”

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“(c) If a penalty is imposed pursuant to this section, a taxing unit may not recover attorney's fees in a suit to collect delinquent taxes subject to the penalty.”

The interpretation of the penalty imposed by section 33.07 was first addressed in Texas Attorney General Opinion JM-857 issued on February 16, 1988.

Attorney General Opinion JM-857 states at page 7 that:

“We conclude that the penalty imposed and collected under section 33.07 of the Tax Code may not be spent to defray costs of collection incurred by a taxing unit itself. The penalty payments must go to compensate the attorney with whom the taxing unit has contracted to collect its delinquent taxes. . . .”

Thereafter, Attorney General Opinion JM-857 concludes at page 8 as follows:

“Pursuant to section 33.07 of the Tax Code, a taxing unit that has

contracted with an attorney to collect delinquent taxes under section 6.30 of the Tax Code is authorized to impose a penalty not to exceed 15 percent [the standard specified by section 33.07(a) prior to amendment in 2001] against delinquent taxpayers to cover the attorney's compensation. The taxing unit may not apply any part of the penalties collected under section 33.07 to any additional costs of collection which it incurs but must use all of the assessed penalties solely to compensate the attorney with whom it contracted."

A fact scenario very similar to the one presented here was recently submitted to the Attorney General of Texas for opinion. Texas Attorney General Opinion JC-0443 issued on December 20, 2001 reaffirmed the holding of Attorney General Opinion JM-857 that the penalty imposed under section 33.07 may not be spent to defray the taxing unit's costs of collection. Attorney General Opinion JC-0443 at page 3 specifically holds that "[t]he purpose of the penalty authorized by section 33.07 of the Tax Code is to compensate the attorney and not to pay other county expenses."

The proposed fee arrangement between the lawyer and the governmental taxing unit described in the above Statement of Facts would clearly violate the requirements of section 33.07 as interpreted by Attorney General Opinion JC-0443 because, if the lawyer's collection goal is not met, the proposed contract "impermissibly allocates some of the article 33.07 penalty to the county." Attorney General Opinion JC-0443 at page 4. Consequently, a lawyer's entry into the proposed fee arrangement would constitute a violation of the Rule 1.04(d) prohibition against an arrangement for a contingent fee that is in violation of "other law" (in this case, section 33.07 of the Tax Code).

CONCLUSION

Retention by the taxing unit of any of the penalty imposed and collected for legal fees under section 33.07 of the Texas Tax Code would clearly be contrary to that section as interpreted by Attorney General Opinion JM-857 and Attorney General Opinion JC-0443. Accordingly, it is the opinion of the Committee that a lawyer's entry into a fee arrangement with a governmental taxing unit that is based on the possibility that part or all of section 33.07 penalties would not be paid over to the lawyer involved in the tax collection proceedings would constitute a violation of Rule 1.04(d) of the Texas Disciplinary Rules of Professional Conduct because the arrangement would be a contingent fee agreement that requires violation of section 33.07 of the Texas Tax Code upon the occurrence of certain contemplated events.