

Opinion Number 560
August 2005

QUESTION PRESENTED

May a law firm lease its lawyer and nonlawyer personnel from an unaffiliated employee leasing company that leases lawyers and nonlawyer personnel to other law firms?

STATEMENT OF FACTS

A law firm proposes to enter into a contractual relationship with an unaffiliated employee leasing company under which the law firm and the leasing company are coemployers of the law firm's employees. The contract provides that the law firm's employees will be considered the leasing company's employees for the payment of wages and payroll taxes. The law firm will reimburse the employee leasing company for all payroll expenses and will pay a negotiated service fee. The leasing company will provide the same service for other law firms, whose clients may hold adverse interests.

None of the client law firms will, through the leasing company, interact with each other, share client information, or share office space. The client law firm will retain control over the selection, hiring, and termination of its employees. The employees will act under the client law firm's exclusive supervision and will be compensated based on salaries and terms set by the client law firm. In the case of each client law firm that is a client of the employee leasing company, neither the staff of the employee leasing company nor any employees employed by other law firms under similar arrangements with the leasing company will participate in the client law firm's provision of legal services. The employee leasing company will not have access to the law firm's privileged communications or confidential information, including the identity of its clients. The employee leasing company will provide limited employer and personnel management services to employees who have been hired by the client law firm; the employee leasing company will not recruit, place, train, or supervise the law firm's employees.

DISCUSSION

The relationship proposed here appears to be a traditional employee leasing relationship. The leasing company will provide limited payroll functions and provide benefits to client law firms' employees while refraining from any management or control of the law firm or its employees. The issue is whether such an arrangement creates either actual or potential conflicts in violation of [Rule 1.06\(b\) of the Texas Disciplinary Rules of Professional Conduct](#). [Rule 1.06\(b\)](#) provides in relevant part that: "... a lawyer shall not represent a person if the representation of that person: (1) involves a substantially related matter in which that person's interests are materially and directly adverse to the interests of another client of the lawyer or the lawyer's firm; or (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"Because the employee leasing company is a single entity that "employs" individuals from multiple law firms that serve clients with varying interests, the possibility of actual or potential conflicts of interest must be considered. The nature of the relationship between the law firm and the employee leasing company is, therefore, extremely important. *2 This Committee previously addressed this issue in Professional Ethics Committee Opinion 508 (October 1994), which determined that: "... it would be improper for a lawyer who is employed by a leasing company to perform work for a client whose interest is adverse to that of the client of another lawyer who is employed by the same leasing company, even though those lawyers are "leased" to separate law firms." At the time that Opinion 508 was

issued in 1994, employee leasing in Texas was governed by [article 9104 of the Texas Revised Civil Statutes](#), which had been enacted in 1993. Section 1 of article 9104 provided in relevant part: "...(8) "Licensee" means a person licensed under this Act to provide staff leasing services.....(11) "Staff leasing services" means an arrangement by which employees of a licensee are assigned to work at a client company" The importance of the nature of the employer-employee relationship between leased attorney and employee leasing company for the result reached in Opinion 508 was made clear in Professional Ethics Committee Opinion 515 (July 1996), which held that an attorney may contract with a placement agency that assigns attorneys to various law firms for short-term projects. The Committee noted that the leased attorneys in Opinion 508 were the legal employees of the employee leasing company, whereas the contract lawyers considered in Opinion 515 were employees of the law firms to which they were assigned and were not employees of the placement agency because the agency did not have the power to direct the attorneys' work. In 1995, [article 9104 of the Texas Revised Civil Statutes](#) was reenacted as chapter 91 of the Texas Labor Code. New section 91.004 was added to deal specifically with the special circumstances of staff leasing in the case of employees, such as attorneys, who are subject to licensing requirements. Section 91.004 as originally enacted provided as follows: "Sec. 91.004. Effect of Other Law on Clients and Employees. (a) This chapter does not exempt a client of a license holder, or any assigned employee, from any other license requirements imposed under local, state, or federal law. (b) An employee who is licensed, registered, or certified under law and who is assigned to a client company is considered to be an employee of the client company for the purpose of that license, registration, or certification." The legal status of lawyers and other licensed professionals who are employed under staff leasing arrangements was further clarified by the enactment in 1997 of [section 91.004\(c\) of the Labor Code](#), which provides as follows: "(c) A license holder is not engaged in the unauthorized practice of an occupation, trade, or profession that is licensed, certified, or otherwise regulated by a governmental entity solely by entering into a staff leasing agreement with a client company and assigned employees." *3 Finally, in 1999, the co-employment relationship between staff leasing companies and their clients was clarified by amendment of [section 91.032 of the Labor Code](#) to read as follows: "[Sec. 91.032. Contract Requirements.](#)

(a) A contract between a license holder and a client company must provide that the license holder: (1) shares, as provided by Subsection (b), with the client company the right of direction and control over employees assigned to a client's worksites; (2) assumes responsibility for the payment of wages to the assigned employees without regard to payments by the client to the license holder; (3) assumes responsibility for the payment of payroll taxes and collection of taxes from payroll on assigned employees; (4) shares, as provided by Subsection (b), with the client company the right to hire, fire, discipline, and reassign the assigned employees; and (5) shares, as provided by Subsection (b), with the client company the right of direction and control over the adoption of employment and safety policies and the management of workers' compensation claims, claim filings, and related procedures. (b) Notwithstanding any other provision of this chapter, a client company retains responsibility for: (1) the direction and control of assigned employees as necessary to conduct the client company's business, discharge any applicable fiduciary duty, or comply with any licensure, regulatory, or statutory requirement; (2) goods and services produced by the client company; and (3) the acts, errors, and omissions of assigned employees committed within the scope of the client company's business." [Section 91.032\(b\)\(1\) of the Labor Code](#) provides that the client company retains direction and control of assigned employees for the purposes of conducting the client company's business,

discharging any applicable fiduciary duty, and complying with professional licensing requirements. Additionally, [section 91.004\(c\)](#) provides that a staff leasing company will not, by entering into a staff leasing agreement with a client company that involves licensed employees, be engaged in the unauthorized practice of a licensed occupation, trade or profession. The Labor Code thus explicitly contemplates the existence of a dual employer relationship, such as the one contemplated here. In the contractual arrangement described here, the law firm will retain its employer status over its licensed attorneys and support staff and will retain responsibility for ensuring that its employees comply with professional licensing requirements, such as the requirement to avoid conflicts, and fiduciary requirements including the requirement to protect confidential information as required by [Rule 1.05 of the Texas Disciplinary Rules of Professional Conduct](#). Neither the leasing company described here nor any of its other law firm clients will have actual knowledge of a particular law firm's clients because the leasing company will have no access to law firms' client information. Furthermore, any presumption of imputed knowledge is unwarranted in this situation because each client law firm retains its individual identity and employer status, as well as the exclusive ability to control its employees; any imputed knowledge is therefore contained within the individual law firm. *4 The law firm, pursuant to [section 91.032\(b\)\(3\) of the Labor Code](#), will remain liable for the malpractice of its employees. The law firm will retain all the rights and responsibilities of a traditional employer except for the limited personnel management functions explicitly provided for in the proposed contract. The law firm will specify the salaries to be paid, and the leasing company's fee will be contractually determined and unrelated to any fees charged by the law firm for services performed. In such circumstances, there is no violation of Rule 1.04(f)'s prohibition against the division of legal fees. The leasing company and the law firm are completely separate entities, and the leasing company will have no access to confidential client information. The leasing company is merely providing an administrative service, the provision of which requires that the law firm's employees also be considered the "employees" of the leasing company. Comment 1 to [Rule 1.06](#) notes that "[l]oyalty is an essential element in the lawyer's relationship to a client." That loyalty is not threatened by the contractual relationship considered here.

CONCLUSION

Under the Texas Disciplinary Rules of Professional Conduct, a law firm may contract with an employee leasing company for the provision of limited employee compensation and benefit services for the law firm's employees so long as the law firm maintains exclusive control over the hiring and termination of its employees, there is no sharing of employees among the various clients of the employee leasing company, the leasing company has no managerial or supervisory rights over the law firm's employees, and the leasing company has no access to client information.