THE PROFESSIONAL ETHICS COMMITTEE
FOR THE STATE BAR OF TEXAS
Opinion No. 633
July 2013

QUESTION PRESENTED

Is it permissible under the Texas Disciplinary Rules of Professional Conduct for the general counsel of an entity jointly owned by two cities to be an employee of one of the cities?

STATEMENT OF FACTS

City A and City B jointly own Entity Z, which operates a facility of interest to both cities and which is governed by a board consisting of members appointed by the governing bodies of the two cities. The general counsel of Entity Z is an employee of City A, which pays the salary and benefits of the general counsel and is reimbursed in full by Entity Z after approval by the Entity Z board. Under the agreement between the cities, City A has the right to hire and fire the general counsel of Entity Z, and the general counsel, as an employee of City A, is subject to City A's policies on employment matters, including leave and vacation time. Similarly, City B employs a lawyer to serve as assistant general counsel of Entity Z and pays the salary and benefits of the assistant general counsel, which are reimbursed in full by Entity Z after approval by the Entity Z board. Under the agreement between the cities, when outside counsel is hired, City A must approve the budget for the outside counsel and City A has the right to veto the choice of outside counsel. The general counsel has his office at Entity Z's headquarters and provides full-time legal services exclusively for Entity Z. City A does not direct the work of the general counsel. In some situations, what Entity Z believes to be best for Entity Z is contrary to what City A believes to be best for City A. The present solution for these conflicts is for the general counsel to recuse himself from situations that involve a conflict between City A and Entity Z.

DISCUSSION

The first issue raised is whether Entity Z's general counsel can accept compensation from someone other than Entity Z. This question is addressed by Rule 1.08(e) of the Texas Disciplinary Rules of Professional Conduct, which provides as follows:

> "A lawyer shall not accept compensation for representing a client from one other than the client unless:
>
> (1) the client consents;

(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

(3) information relating to representation of a client is protected as required by Rule 1.05."

In addition, Rule 5.04(c) provides that "[a] lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services."

Under the facts presented, Entity Z is fully aware of how the general counsel is employed and compensated. Provided that there is no interference with the general counsel's independence of professional judgment or with the client-lawyer relationship between the general counsel and Entity Z and provided that the confidentiality of the information relating to the representation is maintained, the general counsel's representation of Entity Z does not in and of itself violate the Texas Disciplinary Rules of Professional Conduct.

In these circumstances, when there arises a significant difference of interest between Entity Z and City A on a matter, the difference may create a conflict of interest for the general counsel. Rule 1.06 specifies how a lawyer is required to handle a conflict of interest. As relevant to the circumstances here considered, Rule 1.06 provides as follows:

"(a) A lawyer shall not represent opposing parties to the same litigation.

(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 become 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."

In the factual situation considered, the general counsel has only one client–Entity Z. The Committee is of the opinion that the fact that the general counsel is paid, and may be fired, by City A does not in and of itself create an impermissible conflict of interest with respect to the general counsel's representation of Entity Z. This Committee has recognized that the source of payment of a lawyer's fees does not result in an

impermissible conflict of interest so long as the lawyer's exercise of independent judgment is not compromised and the client is aware of the source of the lawyer's fees. For example, in Professional Ethics Committee Opinion 533 (Nov. 2008), this Committee, relying in part on Rules 1.01(b), 1.06, 1.08(e) and 5.04(c) of the Texas Disciplinary Rules, recognized long-standing Texas precedent that a lawyer may be employed by an insurance company to represent the company's insureds provided that the lawyer does not have a conflict of interest with regard to the particular insured or matter, that the lawyer is able to exercise independent judgment, that the client is aware of who employs the lawyer and that the lawyer carries out the obligations the lawyer owes to the client. Similarly here, the fact that City A pays the salary and benefits of the general counsel and is reimbursed by Entity Z for the cost of the general counsel's salary and benefits does not in and of itself create an impermissible conflict of interest.

In assessing the application of Rule 1.06 to the situation here considered, the initial issue here is whether under Rule 1.06(b)(2) the general counsel's representation of Entity Z in a matter reasonably appears to be adversely limited by the general counsel's employment relationship with City A. If the general counsel's representation in a matter appears to be so limited, then the exception provided by Rule 1.06(c) must be considered. In these circumstances, Rule 1.06(c) will permit the general counsel to represent Entity Z in the matter only if each of two requirements is met: (1) the general counsel reasonably believes that the representation of Entity Z will not be materially affected by the fact that City A is the general counsel's employer and (2) Entity Z consents to the representation in the matter after full disclosure of the "existence, nature, implications, and possible adverse consequences of the common representation and the advantages involved, if any." Thus the general counsel should seek the consent of Entity Z under Rule 1.06(c)(2) only if he reasonably believes that representation of Entity Z will not be materially affected by the general counsel's relationship to City A. Comment 7 to Rule 1.06 makes clear that "when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved should not ask for such agreement or provide representation on the basis of the client's consent."

CONCLUSION

Under the Texas Disciplinary Rules of Professional Conduct, the general counsel for an entity jointly owned by two cities may be an employee of one of the cities provided that the client entity consents, there is no interference with the lawyer's independence of professional judgment or with the lawyer's relationship with the entity, and information relating to representation of the entity is protected as required by the Texas Disciplinary Rules. When matters arise where the interests of the entity and the city employing the general counsel are divergent and the general counsel's representation of the entity in the matter appears to be adversely limited by the general counsel's interest as an employee of the city, the general counsel is permitted to represent the entity in the matter only if the general counsel reasonably believes that the representation will not be materially affected and the entity consents after full disclosure.

Opinion 497
August 1994
Tex. Comm. on Professional Ethics, Op. 497, V. 57 Tex. B.J. 1136 (1994)

QUESTION PRESENTED

1. May Attorney X, while serving as a city commissioner on the city commission of a home-rule Texas city, represent persons charged with criminal offenses in the county and district courts where the city police department participates in the investigation and/or arrest of the defendant? May Attorney Y, his law partner, represent such persons?

2. May Attorney X represent persons charged with criminal offenses in the county and district courts where members of the city police department are victims (i.e., assault on a peace officer)? May Attorney Y represent such persons?

3. May Attorney X represent persons charged with criminal offenses in the county and district courts where the arrest and/or search warrant in the case is issued by the city judge? May Attorney Y represent such persons?

FACTS

Attorney X is a partner in a two-person firm in a small Texas city. Attorney X also serves as a city commissioner on the city commission of this same home-rule Texas city. The city has a city manager form of government. The city commission hires only the city manager, city judge, and city attorney. All other city positions are filled by the city manager under the city's charter. The city commission does set the police department budget and appoint members to the civil service commission who hear police disciplinary appeals, but has no control or input into the police disciplinary appeals process other than the confirmation of appointments to the civil service commission. Attorney X and his partner Attorney Y have a criminal and civil trial practice and take criminal cases both on a retained and court appointed basis.

DISCUSSION

The applicable rules of the Texas Disciplinary Rules of Professional Conduct which govern this situation are Rules 1.06(b)(2), 1.06(c)(2) and 1.06(f).

Rules 1.06(b)(2) prohibits the representation of a person if the representation 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 law firm's own interests.

Although Attorney X does not exercise control over the day to day operations of the city police department, as a City commissioner, he appoints the city manager, who does ultimately direct the activities of the police department. Certainly, the actions of police officers within a city reflect upon the city commissioners. By representing a person charged with criminal offenses where the city police department participates in the investigation and/or arrest of the defendant, or where the police officers are victims of a crime, Attorney X places himself in a conflict between protecting the city's (and since he is a commissioner, his) interests and in protecting the interests of his client. This situation would also place the police officers in the awkward position of performing their job duties while dealing with a city commissioner who is acting as an attorney in the case.

As a city commissioner, Attorney X exercises even more control over the city judge than he does over the police officers. The city commission actually hires the city judge. The actions of the city judge in executing the arrest and/or search warrant, and any other action taken by the judge would necessarily affect the welfare of the Attorney X's client. However, if the judge did not

perform his job properly, the welfare of the city, and hence that of the city commission which is the personal interest of Attorney X, would be affected.

A similar issue was addressed in Ethics Opinion 429, wherein it was decided that a part-time associate city judge may not represent a person accused of a crime where the police in that city are or may be potential witnesses in the trial of that case.

Attorney X is a public officer, and, or such, is held to a high standard of integrity (Comment 7, Rule 8.04). Having an attorney who is a city commissioner involved in representation of criminal defendants in which employees of the city are involved creates a conflict between the client's interests and city's interests as well as the attorney's own interests. Such representation violates Disciplinary Rule 1.06(b)(2). Further, since Attorney X may not represent these criminal defendants, neither can his partner, Attorney Y. See Rule 1.06(f).

However, Rule 1.06(c) provides for the affected parties to consent to such representation. If lawyer X believes that the representation of his client will not be materially affected by his service as a city commissioner (and vice versa), and both the client and the city consent 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, such representation would not be in violation of the Disciplinary Rules.

CONCLUSION

The representation of a private client by Attorney X, who is also a city commissioner, and Attorney Y, the law partner of Attorney X, in any of the three proposed situations would be a violation of Disciplinary Rule 1.06(b), unless all parties give appropriate consent after consultation and full disclosure pursuant to Rule 1.06(c).

Opinion Number 541

February 2002

QUESTIONS PRESENTED

May a municipal court judge represent a person accused of a crime where (1) the judge/lawyer has not acted in the matter in his position as judge, and (2) where the police in that city are or may be potential witnesses in the trial of that case?

STATEMENT OF FACTS

A municipal court judge seeks to represent a criminal defendant in a matter in which he has not acted in a judicial capacity, but in which the city's police may be potential witnesses.

DISCUSSION

Resolution of these issues requires examination of Rule 1.06(b) and (c), and Rule 1.11 of the Texas Disciplinary Rules of Professional Conduct, since these rules impose obligations upon a lawyer who, while acting as a municipal court judge, concurrently practices law. Rule 1.06 provides, in part:

(b) ... except to the extent permitted by paragraph (c), 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 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 that 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.

Rule 1.11 provides, in part:

> (a) A lawyer shall not represent anyone in connection with a matter in which the lawyer has passed upon the merits or otherwise participated personally and substantially as an adjudicatory official ... unless all parties to the proceeding consent after disclosure.

As presented to this Committee, the facts are simple. A municipal court judge seeks to represent a criminal defendant in a matter in which he has not acted in a judicial capacity, but in which the city's police may be potential witnesses.

Rule 1.06(b)(2) provides that a conflict of interest may exist if the representation of the criminal defendant either "become[s] adversely limited" or "reasonably appears to be ... adversely limited by the lawyer's or law firm's responsibilities to another client or ... third person or by the lawyer's or law firm's own interests." The municipal court judge's dual role as judge and advocate would therefore pose a potential conflict of interest.

Notwithstanding this potential conflict, Rule 1.06(c) provides that the lawyer may represent the criminal defendant if, after assessing the potential conflict "(1) the lawyer reasonably believes that the representation of each client will not be materially affected; and (2) each affected or potentially affected client consents ... after full disclosure of the existence, nature, implications and possible adverse consequences of the ... representation ...." Comment 8 to Rule 1.06 states that "[d]isclosure and consent are not formalities. Disclosure sufficient for sophisticated clients may not be sufficient to permit less sophisticated clients to provide fully informed consent." Comment 4 states that a "client's consent to the representation ... [will be] insufficient unless the lawyer also believes that there will be no materially adverse effect upon the interests of either client."

*2 In addition to the general rule on conflicts of interest, Rule 1.11 addresses conflicts of interest with regard to adjudicatory officials and law clerks. Specifically, Rule 1.11(a) prohibits lawyers from "represent[ing] anyone in connection with [any] matter in which the lawyer has passed upon the merits or otherwise participated personally and substantially as an adjudicatory official ... unless all parties ... consent after disclosure." Pursuant to Rule 1.11(a), therefore, a municipal court judge would be disqualified from defending a criminal defendant in any case where the judge acted in a judicial capacity, or which is substantially related to a matter heard as a judge, unless the disclosure and consent requirements of Rule 1.11(a) are otherwise met.

Under Rule 1.11(a) and Rule 1.06(b)(2), therefore, a part-time (or full-time) municipal court judge would have a conflict of interest if he represents a criminal defendant (i) in connection with any matter in which he has passed upon the merits or otherwise participated personally and substantially as an adjudicatory official; or (ii) where the client's representation would be adversely limited by the lawyer's/law firm's responsibilities to another client or third party, or by the lawyer's/law firm's own interests.

Pursuant to Rule 1.11(a) and 1.06(c)(2), the judge would have to obtain the client and the municipality's consent, after full disclosure, in order to be able to undertake the representation. Further, Rule 1.06(c)(1) imposes the additional obligation that the judge reasonably believe that the representation of each client/party would not be materially affected, prior to undertaking such representation. The municipal court judge would not have a conflict under either Rule 1.06(b)(2) or 1.11(a) if he defended criminal matters in a city or jurisdiction other than where the attorney acts as a judge.

Opinion 429, December 1985, held that a practicing attorney, who is also a part-time associate city judge, should not represent a person accused of a crime if the city's police were or could be potential witnesses in the trial of that case. The Committee's rationale for Opinion 429 was the fact that a parttime city judge must maintain a neutral role when city policemen testify in municipal court; and in representing a criminal defendant, the attorney/part- time judge would

have little alternative but to adopt an adversarial role towards those same policemen. The Committee was also concerned that the attorney's independent professional judgment in behalf of his private client could be adversely affected by his part-time role as a judge.

Although Opinion 429 was published prior to the adoption of the current Texas Disciplinary Rules of Professional Conduct, it has been cited by more recent opinions. One example is Opinion 497, August 1994, which relies on Opinion 429 in concluding that a city commissioner's representation of criminal defendants in the county and district courts where the commissioner appoints judges (and where the commissioner appoints the city manager who, in turn, controls the police department and police officers acting as witnesses in criminal cases) would create a conflict of interest, subject to Rule 1.06(b) and (c).

*3 In Opinion 497, the Committee opined that the city commissioner (like the judge in the prior case) is a public officer, and as such is held to a high standard of integrity. The Committee also noted that "[h]aving an attorney who is a city commissioner involved in [the] representation of criminal defendants in [cases in] which employees of the city are involved creates a conflict between the client's interests and the city's interests ...." Opinion 497. The Committee, however, found that notwithstanding such a conflict, the lawyer could represent both the client and the city if the lawyer reasonably believes that the representation of each party would not be materially affected; and each affected or potentially affected party consents after full disclosure.

Similarly, in Opinion 530, October 1999, the Committee addressed whether an elected county commissioner could practice law in the justice, statutory county and district courts in Dallas County. Citing Opinion 497, the Committee held that representation of a private client in any justice, statutory county or district court in Dallas County would create a conflict of interest absent disclosure and consent, and would be subject to the requirements of Rule 1.06(b) and (c).

CONCLUSION

A municipal court judge may not represent a criminal defendant (i) in any proceeding where he has passed upon the merits, (ii) in any matter where he has otherwise participated personally and substantially as an adjudicatory official, (iii) in any court on which the judge currently serves, or (iv) where the city's police may be witnesses (or potential witnesses) in the trial of a case, unless the client and municipality give appropriate consent, after full disclosure, in accordance with Rules 1.06(c) and 1.11(a) of the Texas Disciplinary Rules of Professional Conduct. Rule 1.06(c)(1) imposes the additional obligation that the judge reasonably believe that the representation of each client/party not be materially affected, prior to undertaking such representation. This Committee expresses no opinion on whether such representation would be permissible under the Texas Code of Judicial Conduct.

THE SUPREME COURT OF TEXAS
PROFESSIONAL ETHICS COMMITTEE
Opinion No. 567
February 2006

QUESTION PRESENTED

May a lawyer who represents a city render legal advice to an ethics board appointed by the city council regarding the investigation and determination of a complaint against a majority of the members of the city council?

STATEMENT OF FACTS

A lawyer in private practice represents a city as its city attorney. The city charter provides that the city attorney serves at the discretion of the city council, receiving such compensation as may be fixed by the council, represents the city in all litigation and legal proceedings, and performs other duties prescribed at the direction of the city council. The city council subsequently enacts an ethics ordinance that establishes an ethics board with powers to review and investigate complaints alleging ethics code violations made against employees or officials of the city. The ordinance specifically provides that the city attorney shall have the responsibility to render legal advice to the ethics board. A citizen then files a complaint against a majority of the members of the city council asserting claims of ethics code violations. The city attorney is called upon to provide legal advice to the ethics board concerning the complaint.

DISCUSSION

The city attorney does not represent the individual city council members. Therefore, in representing the ethics board concerning charges against city council members, the city attorney will not violate Rule 1.06(b)(1) of the Texas Disciplinary Rules of Professional Conduct, which provides that, unless the requirements of Rule 1.06(c) (discussed below) can be met, a lawyer shall not represent a person if the representation "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...." Although representation of the ethics board may be materially and directly adverse to the interests of the members of the city council against whom the complaint has been filed, those city council members are not clients of the city attorney.

However, Rule 1.06(b)(2) is applicable to the proposed representation of the ethics board with respect to this complaint. Rule 1.06(b)(2) provides in pertinent part that, unless the requirements of Rule 1.06(c) (discussed below) can be met, a lawyer shall not represent a person if the representation "reasonably appears to be or become adversely limited....by the lawyer's own interests." The city charter provides that the city attorney serves at the discretion of the city council and receives such compensation as may be fixed by the city council; therefore, representation of the ethics board against a majority of the members of the city council at least "reasonably appears" to be adversely limited within the meaning of Rule 1.06(b)(2) by the city attorney's own interests in his position as city attorney.

Rule 1.06(c) provides that a lawyer may represent a client in the circumstances described in Rule 1.06(b)(2) if under Rule 1.06(c)(1) the lawyer "reasonably believes" that the representation of the client will not be materially affected and under Rule 1.06(c)(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." In this case the "affected or potentially affected" clients

would be the ethics board and the city. Comment 7 to Rule 1.06, in discussing Rule 1.06(c)(1), states that when a "disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, " the lawyer should not ask for, or provide representation on the basis of, client consent. Under Rule 1.06(c)(1), given the inherent conflict between the ethics board's responsibility to investigate and determine the complaint against a majority of the members of the city council and the personal employment interests of the city attorney, the city attorney should not ask for consent to the proposed representation of the ethics board with respect to this complaint.

CONCLUSION

In the circumstances presented, a lawyer who represents a city may not render legal advice to a city ethics board concerning the investigation and determination of a complaint against a majority of the members of the city council.

Opinion No. 551

May 2004

Question Presented
Is it permissible under the Texas Disciplinary Rules of Professional Conductto require a lawyer who was employed as a lawyer by a city to comply with a provisionof the city's Ethics Code that prohibits all former city employees from representing unrelated persons before the city for compensation for a period of two years after termination of employment with the city?

Statement of the Facts
A city in Texas (the "City") has an ethics code (the "Ethics Code") that is intended to apply to all City employees. The Ethics Code includes provisions imposing a duty of continuing confidentiality and generally prohibiting representation at any time of non-family members against the City in matters as to which the employee participated while a City employee. The Ethics Code also includes a provision (the "Two-Year Prohibition") that prohibits a former City official or employee from representing for compensation any person, group, or entity, other than himself and certain members of the employee's family, before the City with respect to any matter for a period of two years. The City has employed and continues to employ lawyers as full-time employees of the City.

Lawyer A had been employed as a lawyer by the City. Within two years after Lawyer A left employment with the City, Lawyer A proposed to represent an unrelated client before the City with respect to legal matters that were wholly unrelated to matters that Lawyer A had handled for the City. Lawyer B, who is currently employed by the City as a lawyer, sought to enforce the Two-Year Prohibition to prevent Lawyer A from representing his client before the City.

Discussion
Rule 1.10 of the Texas Disciplinary Rules of Professional Conduct specifically deals with successive government and private employment of lawyers. Rule 1.10(a) prohibits a lawyer from representing a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee unless the appropriate government agency consents after consultation. However, Rule 1.10 does not include a requirement comparable to or in conflict with the Two-Year Prohibition of the City's Ethics Code. Therefore, compliance with or enforcement of the Two-Tear Prohibition would not violate Rule 1.10.

Rule 5.06 of the Texas Disciplinary Rules of Professional Conduct prohibits certain agreements relating to a lawyer's employment that would restrict the lawyer's right to practice law:

Rule 5.06 Restrictions on Right to Practice

A lawyer shall not participate in offering or making:

(a) a partnership or employment agreement that restricts the rights of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement; or

(b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a suit or controversy, except that as part of the settlement of a disciplinary proceeding against a lawyer an agreement may be made placing restrictions on the right of that lawyer to practice.

Application of the Two-Year Prohibition of the City's Ethics Code does not violate Rule 5.06 because the Two-Year Prohibition is not part of a partnership or employment agreement but is, instead, part of a set of rules applicable to all employees of the City. The fact that a lawyer employed by the City is subject to the City's Ethics Code does not make the City's Ethics Code a part of the lawyer's employment agreement for purposes of applying the requirements of Rule 5.06.

Conclusion
It is permissible under the Texas Disciplinary Rules of Professional Conduct for a lawyer who was formerly employed as a lawyer by a city to be required to comply with a provision of a city's ethics code that prohibits all former city employees from representing before the city for compensation any unrelated person for a period of two years after termination of employment with the city.

THE ATTORNEY GENERAL OF TEXAS

JIM MATTOX
ATTORNEY GENERAL

January 10, 1989

Honorable Carl A. Parker
Chairman
Education Committee
Texas State Senate
P. O. Box 12068
Austin, Texas 78711

Opinion No. JM-1004

Re: Whether member of school district board of trustees who has sued the other six members may be excluded from an executive session held to discuss the litigation (RQ-1493)

Dear Senator Parker:

You inform us that a member of the board of trustees of a school district has sued the other six board members in federal court. The claim was denied by a three member panel of federal judges but an appeal has been filed. You ask the following question:

> Can the member which has filed the lawsuit against other members be excluded from an executive session during which the only agenda topic is the defense of the lawsuit?

Your question refers to an executive session for discussion of the lawsuit, thereby indicating that the six board members are meeting in their capacity as a governing body subject to the Open Meetings Act. We assume that they have determined that the litigation was brought against them in their capacity as representatives of the school district. See generally Attorney General Opinion JM-824 (1987) (suit by member of commissioners court against district attorney and sheriff). Executive session meetings to discuss litigation are permitted by the following provision of the Open Meetings Act:

> Private consultations between a governmental body and its attorney are not permitted except in those instances in which the body seeks the attorney's advice with respect to pending . . . litigation . . . and matters where the duty of a public body's counsel to his client, pursuant to the Code of Professional Responsibility of the State Bar of Texas, clearly conflicts with this Act.

V.T.C.S. art. 6252-17, § 2(e).

This provision allows the governmental body to exclude the general public from its discussions of litigation but it does not address the exclusion of a board member from an executive session on litigation brought against the board by that board member. A board which exercises authority delegated to it by the legislature "must act thereon as a body at a stated meeting, or one properly called, and of which all the members of such board have notice, or of which they are given an opportunity to attend." Webster v. Texas & Pacific Motor Transport Co., 166 S.W.2d 75, 76 (Tex. 1942). The purpose of this rule is

> to afford each member of the body an opportunity to be present and to impart to his associates the benefit of his experience, counsel, and judgment, and to bring to bear upon them the weight of his argument on the matter to be decided by the Board, in order that the decision . . . may be the composite judgment of the body as a whole.

Id. at 77.

This is a common law rule which applies to the board of trustees of a school district. See Garcia v. Angelini, 412 S.W.2d 949 (Tex. Civ. App. - Eastland 1967, no writ) (trustees of school district could not remove other trustees from office nor bar them from participation in meetings and proceedings of school board); see also Attorney General Opinion JM-119 (1983); Birdville Indep. School Dist. v. Deen, 141 S.W.2d 680 (Tex. Civ. App. - Fort Worth 1940), aff'd, 159 S.W.2d 111 (Tex. 1942). Each board member would ordinarily be entitled to attend all board meetings. However, under the circumstances you inquire about, we believe that the board of trustees may exclude the trustee who has sued it from executive session meetings held to consult with its attorney about this lawsuit.

The board of trustees may sue and be sued in the name of the school district. Educ. Code § 23.26(a). The trustees of an independent school district may employ an attorney where the district's interests require assertion or defense in court. Graves & Houtchens v. Diamond Hill Indep. School Dist., 243 S.W. 638 (Tex. Civ. App. - Fort Worth 1922, no writ). The right to the advice and assistance of retained counsel in civil litigation is inherent in the idea of an adversarial system of justice. Mosley v. St. Louis Southwestern Ry., 634 F.2d 942 (5th Cir.), cert. denied, 452 U.S. 906 (1981) (right to assistance of counsel in civil litigation and administrative proceedings).

It is well established in the common law that confidential communications between an attorney and his client are privileged in civil cases. Cochran v. Cochran, 333 S.W.2d 635 (Tex. Civ. App. - Houston [1st Dist.] 1960, writ ref'd n.r.e.); see Attorney General Opinion M-1261 (1972). Rule 503 of the Texas Rules of Civil Evidence expressly provides a lawyer-client privilege and defines client as "a person, public officer, or corporation, association, or other organization or entity, either public or private" who consults a lawyer or receives legal services from a lawyer. Tex. R. Evid. 503. The privilege exists for the benefit of the client. Ex parte Lipscomb, 239 S.W. 1101 (Tex. 1922); Bearden v. Boone, 693 S.W.2d 25 (Tex. App. - Amarillo 1985, no writ).

The attorney-client privilege is a barrier to the attorney's testimony about confidential communications. Tex. R. Evid. 503; see Ex parte Lipscomb, supra. It has also been held to authorize private consultations between attorney and client. Attorney General Opinion M-1261 (1972) held that the policy underlying this privilege permits governmental bodies to consult privately with their attorney even though the Open Meetings Act did not at that time expressly allow such private consultations. A California case relied upon by Attorney General Opinion M-1261 states as follows:

> Plaintiffs do not dispute the availability of the lawyer-client privilege to public officials and their attorneys. They view it as a barrier to testimonial compulsion, not a procedural rule for the conduct of public affairs. The view is too narrow. The privilege against disclosure is essentially a means for achieving a policy objective of the law. The objective is to enhance the value which society places upon legal representation by assuring the client full disclosure to the attorney unfettered by fear that others will be informed. . . . [Citations omitted.] The privilege serves a policy assuring private consultation. If client and counsel must confer in public view and hearing, both privilege and policy are stripped of value.

Sacramento Newspaper Guild v. Sacramento Co. Bd. of Supervisors, 69 Cal. Rptr. 480, 489 (Cal. App. 1968). See also City of San Antonio v. Aguilar, 670 S.W.2d 681 (Tex. App. - San Antonio 1984, writ dism'd n.r.e.) (stating that public meeting on city's decision to appeal case would have

violated attorney-client privilege as discussed in Sacramento Newspaper Guild).

The policy assuring private consultation also applies to the six members of the school board who have been sued by an individual school trustee. They have a right to communicate privately with their attorney outside of the presence of the opposing party in the lawsuit. This policy, in our opinion, justifies an exception from the usual rule that each board member must have an opportunity to attend all board meetings. The purpose of this rule, as already pointed out, is to allow each member of the board to contribute his ideas, arguments, and judgment to his associates, so that the board's decision may be the judgment of the whole. When one member's disagreement with the board leads him to invoke the adversary system of justice against the rest of the board, there is little likelihood that a composite judgment on the matter can be reached through discussion. Thus, no injury is done to the policy entitling all board members to attend all board meetings if the plaintiff board member is excluded from the board's private consultations with its attorney. Admitting the plaintiff board member to such attorney-client conferences would moreover undermine the common law and statutory protection given attorney-client communications and compromise the efficacy of the adversary system of justice. We conclude that the board member who has filed the lawsuit against other members may be excluded from an executive session during which the only agenda topic is the defense of the lawsuit. We caution that this result is limited to the specific facts presented here.

SUMMARY

The attorney-client privilege permits the six members of a school board who have been sued by another board member to exclude the plaintiff board member from their executive session meetings held to consult with the board's attorney about this lawsuit.

Very truly yours,

Jim Mattox

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Opinion 474
June 1991
Tex. Comm. on Professional Ethics, Op. 474, V. 55 Tex. B.J. 882 (1992)

STATEMENT OF FACTS

Plaintiff has sued a municipality. The City Attorney of the Municipality represents the City and is engaged in settlement negotiations with Plaintiff through Plaintiff's counsel. Defendant, with the City Counsel's approval, has offered a certain sum in settlement. Plaintiff has taken the position that the amount offered is inadequate. Unbeknownst to the City Attorney's Office, Plaintiff's counsel telephones an individual Council member to express his disapproval of the City's settlement offer. When questioned about the propriety of such contact, Plaintiff's counsel refuses to acknowledge that the prohibition of such contact with the opposition's client is applicable when the client is a municipality.

QUESTION PRESENTED

Is the communication by Plaintiff's counsel with City Counsel members described above a violation of Rule 4.02 of the Texas Disciplinary Rules of Professional Conduct?

DISCUSSION

Rule 4.02 of the Texas Disciplinary Rules of Professional Conduct provides in part as follows: (a) In representing a client, a lawyer shall not communicate or cause or encourage another to communicate about the subject of the representation with a person, organization or entity of government the lawyer knows to be represented by another lawyer regarding that subject, unless the lawyer has the consent of the other lawyer or is authorized by law to do so. . . . (c) For the purpose of this rule, "organization or entity of government" includes: (1) those persons presently having a managerial responsibility with an organization or entity of government that relates to the subject 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 representation may make the organization or entity of government vicariously liable for such act or omission.

CONCLUSSION

Yes. These provisions of Rule 4.02 prohibit communications by a lawyer for one party concerning the subject of the representation with persons having a managerial responsibility on behalf of the organization that relates to the subject matter of the representation.

THE PROFESSIONAL ETHICS COMMITTEE
FOR THE STATE BAR OF TEXAS
Opinion No. 585

September 2008

QUESTION PRESENTED

In a community with only a limited number of lawyers available, may a lawyer counsel his client to retain all of the lawyers in that community for the purpose of denying local representation to the opposing party?

STATEMENT OF FACTS

A lawyer represents a party in a lawsuit filed in a community where there are a limited number of local lawyers. The lawyer proposes to counsel his client to hire all of the lawyers in that community with the result that the opposing party would not be able to employ a local lawyer for representation in the lawsuit.

DISCUSSION

The Texas Disciplinary Rules of Professional Conduct do not directly address this question. Rule 5.06 prohibits certain agreements restricting a lawyer's right to practice, but this Rule concerns partnership, employment or settlement agreements, none of which is involved here. Thus Rule 5.06 does not prohibit the practice here in question.

A lawyer counseling his client to hire all lawyers in a community in order to deprive the opposing party of local representation could however violate Rule 4.04(a) in certain circumstances. Rule 4.04(a) provides: "In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person . . . ." The question then becomes whether the proposed course of conduct has no substantial purpose other than to delay or burden a third person, in this case the opposing party.

This question cannot be answered in the abstract. The facts of the particular situation concerning the presence or absence of other reasons for hiring all lawyers in a community would determine whether the lawyer's proposed course of conduct would violate Rule 4.04(a). See *Resolution Trust Corp.* v. *Bright*, 6 F.3d 336 (5th Cir. 1993) (no violation of Texas Disciplinary Rule 4.04(a) where purpose of "laborious" witness interviews was to obtain a truthful affidavit); compare *In re Dvorak*, 2000 N.D. 98, 611 N.W.2d 147 (2000) (lawyer disciplined under North Dakota's equivalent of Texas Disciplinary Rule 4.04(a) because she had no substantial purpose, other than harassment, for writing a letter to a person's employer pointing out the person's allegedly false statements in litigation) with *Scales* v. *Committee on Legal Ethics*, 191 W.Va. 507, 446 S.E.2d 729 (1994) (no violation of West Virginia's equivalent of Texas Disciplinary Rule 4.04(a) where wife's lawyer's letter to husband's commanding officer was written for the purpose of stopping the husband from abusing the wife). If the only substantial purpose for a lawyer's actions in a particular case is to embarrass, delay or burden another person, such conduct violates Rule 4.04(a) without regard to whether the other person was actually embarrassed, delayed or burdened. See generally *Idaho State Bar* v. *Warrick*, 137 Idaho 86, 44 P.3d 1141 (2002).

In this case, if there is no substantial purpose other than delaying or burdening the opposing party, then advising a client to retain all of the available local lawyers in the community where a lawsuit is filed would violate Rule 4.04(a). See Virginia Standing Committee on Legal Ethics Opinion 1794 (June 30, 2004) (noting that a lawyer would violate Virginia's equivalent of Texas Disciplinary Rule 4.04(a) by directing a client to interview all the lawyers in a small community about a prospective legal matter with no intention of actually hiring any of those lawyers but instead with the purpose of sharing confidential information in those interviews and thereby disqualifying the interviewed lawyers from representing the opposing side).

CONCLUSION

Counseling a client to hire all the local lawyers in a community where a lawsuit is filed would violate the Texas Disciplinary Rules of Professional Conduct if such course of conduct had no substantial purpose other than to delay or burden the opposing party.

THE PROFESSIONAL ETHICS COMMITTEE
FOR THE STATE BAR OF TEXAS
Opinion No. 578
July 2007

QUESTIONS PRESENTED

Under what circumstances is a law firm permitted to represent one municipality against another municipality that was a former client of the law firm? Would screening lawyers who had been involved in representation of the former client have an effect on the law firm's eligibility to undertake the proposed representation against the former client?

STATEMENT OF FACTS

Municipality A and Municipality B are involved in a controversy that they expect to result in litigation. Municipality A proposes to hire a lawyer employed by Firm C. Firm C had previously represented Municipality B in a matter unrelated to the current controversy. The lawyer in Firm C that Municipality A wishes to hire did no work for Municipality B in the prior matter. Firm C proposes to screen all lawyers who had previously worked on the prior unrelated matter for Municipality B so that these lawyers will not participate in Firm C's proposed representation of Municipality A. When asked to consent to Firm C's representation of Municipality A in the current controversy, Municipality B declined to give such consent. The dispute between the municipalities does not involve the validity of the services or work product of Firm C in the prior representation of Municipality B.

DISCUSSION

A lawyer's duty to protect a client's confidential information does not end with the termination of the lawyer-client relationship. Instead, in handling matters for current clients, a lawyer owes a continuing duty not to reveal or use confidential information that was gained in the representation of a former client. This duty is reflected in Rule 1.09(a) and (b) of the Texas Disciplinary Rules of Professional Conduct:

"(a) Without prior consent, a lawyer who personally has formerly represented a client in a matter shall not thereafter represent another person in a matter adverse to the former client:

> (1) in which such other person questions the validity of the lawyer's services or work product for the former client;
> (2) if the representation in reasonable probability will involve a violation of Rule 1.05; or
> (3) if it is the same or a substantially related matter.

(b) Except to the extent authorized by Rule 1.10, when lawyers are or have become members of or associated with a firm, none of them shall knowingly represent a client if any one of them practicing alone would be prohibited from doing so by paragraph (a)."

Under the facts presented, the current litigation matter for Municipality A is not the same as, and is not substantially related to, the matter for which Firm C had represented Municipality B, and the proposed representation for Municipality A does not

question the validity of Firm C's prior services or work product for Municipality B. The requirement of subparagraph (a)(2) of Rule 1.09(a) remains: the representation must not "in reasonable probability" involve a violation of Rule 1.05. Rule 1.05 requires that, with exceptions not here relevant, a lawyer not reveal confidential information acquired by the lawyer in representing a client or, in the case of a former client, use such information to the disadvantage of the former client without the former client's consent after consultation. A substantial overlap exists between the prohibitions contained in subparagraphs (a)(2) and (a)(3) of Rule 1.09. Matters are "substantially related" under subparagraph (a)(3) in situations where a lawyer "could have acquired confidential information concerning a prior client that could be used either to that prior client's disadvantage or for the advantage of the lawyer's current client or some other person." Comment 4A to Rule 1.09.

Under Rule 1.09(a)(2), Firm C may not undertake representation against its former client Municipality B if there is a reasonable probability that the representation would cause the firm to violate the obligations of confidentiality owed to the former client under Rule 1.05. "[I]f there were a reasonable probability that the subsequent representation would involve either an unauthorized disclosure of confidential information under Rule 1.05(b)(1) or an improper use of such information to the disadvantage of the former client under Rule 1.05(b)(3), that representation would be improper under paragraph (a). Whether such a reasonable probability exists in any given case will be a question of fact." Comment 4 to Rule 1.09. Thus, whether Firm C would be prohibited by Rule 1.09(a)(2) from representing Municipality A would depend on the particular facts as to whether there is a reasonable probability that the representation of Municipality A against Municipality B in the proposed matter would involve either disclosure of confidential information acquired by Firm C in representing Municipality B or use of such confidential information to the disadvantage of Municipality B.

The provisions of the Texas Disciplinary Rules of Professional Conduct specify the standards for professional discipline of Texas lawyers. The Texas Disciplinary Rules are not designed to be rules for procedural decisions, including decisions by courts as to disqualification of Texas lawyers because of prior representation of other clients. See paragraph 15 of the Preamble to the Texas Disciplinary Rules. However, Texas courts have chosen to look to Rule 1.09 for guidelines in the case of disqualification motions based on prior representation of former clients. *In re Epic Holdings, Inc.*, 985 S.W.2d 41, 48 (Tex. 1998). Courts address the question of disqualification at the request of a former client by analyzing whether the two matters are "substantially related" under Rule 1.09, applying the following test: "[t]wo matters are 'substantially related' within the meaning of Rule 1.09 when a genuine threat exists that a lawyer may divulge in one matter confidential information obtained in the other because the facts and issues involved in both are so similar." 985 S.W.2d at 51.

In these circumstances, Firm C should disclose to Municipality A the possibility that Municipality B may seek disqualification of the firm and the potential consequences of such action:

"The possibility that such a disqualification might be sought by the former client or granted by a court, however, is a matter that could be of substantial importance to the present client in deciding whether or not to retain or continue to employ a particular lawyer or law firm as its counsel. Consequently, a lawyer should disclose those possibilities, as well as their potential consequences for the representation, to the present client as soon as the lawyer becomes aware of them; and the client then should be allowed to decide whether or not to obtain new counsel." Comment 9 to Rule 1.09.

The proposed screening of the particular lawyers in Firm C who previously represented Municipality B would not alter the application of Rule 1.09(a). The lawyers who participated in the representation of Municipality B and the lawyer who is proposed to represent Municipality A are members of or associated with Firm C. Hence under Rule 1.09(b), if the lawyers in Firm C who had represented Municipality B are prohibited from representing Municipality A in the proposed matter, all lawyers in Firm C are similarly prohibited. The exception in Rule 1.09(b) relating to authorization under Rule 1.10 is not applicable in this case since Rule 1.10 applies in the case of lawyers who are public officers or employees and not in the case of lawyers in private practice who represent governmental entities. Therefore, in the circumstances presented, the proposal to screen the lawyers who previously represented Municipality B will not cure an otherwise prohibited representation by Firm C. See *National Medical Enterprises, Inc.* v. *Godbey*, 924 S.W.2d 123, 131 (Tex. 1996) (presumption that lawyers in the same firm share confidences is irrebuttable); see generally *Henderson* v. *Floyd*, 891 S.W.2d 252, 254 (Tex. 1995) (screening of associate who transferred to opposing counsel's firm did not prevent disqualification of firm).

CONCLUSION

Under the Texas Disciplinary Rules of Professional Conduct, a law firm is permitted to represent a municipality against another municipality that was a former client without prior consent of the former client if the litigation matter does not involve questioning the validity of the law firm's services or work product for the former client, the proposed representation does not involve a matter that is the same or substantially related to the matter for which the firm represented the former client, and there exists no reasonable probability that the proposed representation would cause the law firm to violate the obligations of confidentiality owed to the former client under Rule 1.05. If any lawyer in the law firm could not represent the municipality client in the proposed matter because of prior representation of a former client while the lawyer was in private law practice, the entire law firm would be prohibited from undertaking the representation. The representation would be prohibited without regard to the law firm's attempt to screen from the current representation all lawyers who could not themselves represent the current client in the proposed matter because of their prior representation of the adverse party.