

Opinion No. 638, October 2013

QUESTIONS PRESENTED

Is it permissible under the Texas Disciplinary Rules of Professional Conduct for Texas lawyers, who practice law in two Texas law firms and who are also licensed to practice in another state, to conduct a cooperative law practice in the other state using a firm name that combines the names of the two Texas law firms?

Statement of Facts

Lawyer A and Lawyer B are Texas lawyers who practice law in two Texas law firms—the “M Law Firm” and the “N Law Firm” respectively. Lawyer A and Lawyer B are also licensed to practice law in State X and they intend to work together cooperatively to handle cases in State X in a joint venture of their two law firms. The two Texas law firms will remain separate and will not combine to form a single law firm. For all purposes in State X, the joint venture will use a name that combines the names of the M Law Firm and the N Law Firm as “The M & N Law Firm.” With respect to the joint venture’s practice in State X, it is assumed that the lawyers involved will conduct their practice in a manner that complies with all the professional conduct rules governing lawyers in State X and, in particular, that the State X rules of professional conduct do not prohibit the lawyers from working together as part of a joint venture under the name “The M & N Law Firm.”

Discussion

Rule 7.01(a) of the Texas Disciplinary Rules of Professional Conduct provides that, subject to specified exceptions that are not involved in the circumstances here considered, “[a] lawyer in private practice shall not practice under a trade name, a name that is misleading as to the identity of the lawyer or lawyers practicing under such name, or a firm name containing names other than those of one or more of the lawyers in the firm” In addition, Rule 7.01(d) provides that “[a] lawyer shall not hold himself or herself out as being a partner, shareholder, or associate with

one or more other lawyers unless they are in fact partners, shareholders, or associates.” Rule 7.04(o) specifically prohibits advertisements in the public media concerning a cooperative practice of lawyers not in the same law firm unless several requirements are met, including the requirement that the advertisements not otherwise violate the Texas Disciplinary Rules. Thus, if the proposed joint venture under the name “The M & N Law Firm” were operating in Texas, the lawyers involved would be violating Rules 7.01(a), 7.01(d) and 7.04(o). The proposed joint venture would be using a prohibited trade name containing names of lawyers not in the same law firm and would publicly hold out the lawyers in the M Law Firm and the N Law Firm to be members in a single firm when in fact they are not all part of one firm. See Professional Ethics Committee Opinion 591 (January 2010).

However, in the circumstances here considered, the question remains whether the Texas Disciplinary Rules apply to the proposed manner of practicing law in State X. Thus the question is whether the requirements of Rules 7.01 and 7.04 of the Texas Disciplinary Rules apply when Texas lawyers, who are also licensed in State X, practice law in State X in a manner permitted by the applicable disciplinary rules in State X. Rule 8.05(a) provides:

“A lawyer is subject to the disciplinary authority of this state, if admitted to practice in this state or if specially admitted by a court of this state for a particular proceeding. In addition to being answerable for his

or her conduct occurring in this state, any such lawyer also may be disciplined here for conduct occurring in another jurisdiction or resulting in lawyer discipline in another jurisdiction, if it is professional misconduct under Rule 8.04.”

Rule 8.04, referred to in Rule 8.05(a) above, includes (in subsection(a)(1) of Rule 8.04) the requirement that a lawyer shall not “violate these rules, knowingly assist or induce another to do so, or do so through the acts of another, whether or not such violation occurred in the course of a client-lawyer relationship.” The Comments to Rule 8.05 provide explanation as to the intended application of the Texas Disciplinary Rules when Texas lawyers practice in another state. Comment 2 emphasizes that Texas lawyers practicing outside Texas remain subject to the Texas Disciplinary Rules: “In modern practice lawyers licensed in Texas frequently act outside the territorial limits or judicial system of this state. In doing so, they remain subject to the governing authority of this state.” Comment 3 adds the following with respect to cases where the Texas Disciplinary Rules differ from the rules of another state where Texas lawyers also practice:

“If the rules of professional conduct of this state and that other jurisdiction differ, principles of conflict of laws may apply. Similar problems can arise when a lawyer is licensed to practice in more than one jurisdiction and these jurisdictions impose conflicting obligations. . . . In such cases, this state will not impose discipline for conduct arising in

connection with the practice of law in another jurisdiction or resulting in lawyer discipline in another jurisdiction unless that conduct constitutes professional misconduct under Rule 8.04.”

Comment 4 adds that “[n]ormally, discipline will not be imposed in this state for conduct occurring solely in another jurisdiction or judicial system and authorized by the rules of professional conduct applicable thereto, even if that conduct would violate these Rules.”

In Professional Ethics Committee Opinion 617 (May 2012), the Committee considered issues similar to the issues addressed here. The circumstances of that opinion were that a lawyer licensed in Texas but not practicing law in Texas wished to practice law in North Carolina, but not in Texas, under a trade name including the name of the city where the practice was to be conducted and that such practice was permitted by the applicable disciplinary rules of North Carolina. Opinion 617 held that, even though the use of such a trade name in Texas would be prohibited by the Texas Disciplinary Rules, use of the trade name wholly outside of Texas did not constitute a violation of the Texas Disciplinary Rules because under conflict of law principles the Texas Disciplinary Rules did not apply to the use of the trade name in that case. Applying the “most significant relationship” test generally used by Texas courts in resolving conflict of laws issues and in view of the lack of any significant interest of Texas in the conduct of law practice under such a trade name wholly outside of Texas, the Committee found that the Texas lawyer’s use of the trade name did not involve a violation of the Texas Disciplinary Rules.

Unlike the circumstances considered in Opinion 617, here two Texas

lawyers practicing law in separate Texas law firms propose to create a joint venture to conduct a cooperative law practice in State X using a name that combines the names of the Texas firms even though the Texas firms remain separate firms and continue to conduct separate law practices in Texas. The proposed use of a name that combines the names of two separate Texas firms—“The M & N Law Firm”—would be misleading to consumers of legal services in Texas, who (partly because of the requirements of the Texas Disciplinary Rules) do not normally receive communications using combined law firm names indicating that Texas lawyers are practicing in a single law firm when in fact they are not. In an era of instant communications and relatively inexpensive and easy interstate travel, it would not be feasible, except possibly in a very unusual case, for the lawyers involved to ensure that the advertisements and other communications in State X using “The M & N Law Firm” as the joint venture’s name would not reach actual and potential clients of the lawyers in Texas. State X may well have the most significant relationship to the joint venture’s practice in State X, if the practice is considered in itself and without regard to the name used for the practice, and State X also has a substantial interest that the joint venture not use a name that is misleading or otherwise prohibited under State X rules. However, in the view of the Committee, Texas has the most significant interest with respect to use by Texas lawyers outside of Texas of a name, combining the names of Texas law firms, that is misleading and prohibited under the Texas Disciplinary Rules and that is merely permitted but is not required under State X rules. On the other hand, State X would appear to have a less substantial interest in the Texas lawyers’ use of a particular name that is merely permitted but not required under State X rules

when the name is prohibited by the rules applicable to the Texas lawyers in their home state. Accordingly, the Committee concludes that, as to advertising and other actions of Texas lawyers in another state that are permitted but not required by the other state, the interest of Texas is sufficient under Texas conflict of laws principles to require that Texas lawyers not use a name for their practice in the other state that combines the names of Texas law firms to form a name that is misleading under the Texas Disciplinary Rules and that may reach actual and potential clients of the lawyers in Texas. Hence, absent unusual circumstances where Lawyer A and Lawyer B have an appropriate basis for reasonably concluding that persons in Texas will not receive communications involving the joint venture name, Lawyer A and Lawyer B are not permitted under the Texas Disciplinary Rules to use a trade name that combines the names of their two Texas firms for a joint venture to practice law in State X.

Conclusion

It is not permissible under the Texas Disciplinary Rules of Professional Conduct for Texas lawyers, who practice law in two Texas law firms and who are also licensed to practice in another state, to conduct a cooperative law practice in the other state using a name that combines the names of the two Texas law firms except in unusual circumstances where the Texas lawyers have an appropriate basis for reasonably concluding that persons in Texas will not receive communications involving the combined name. **TBJ**

The Supreme Court of Texas appoints the nine members of the Professional Ethics Committee from members of the bar and the judiciary. The court also appoints the committee’s chair. According to Section 81.092(c) of the Texas Government Code, “Committee opinions are not binding on the supreme court.”