

Opinion No. 628, May 2013

QUESTIONS PRESENTED

May a lawyer appear as “friend of the court” for a minor who is a party before an immigration court, provide factual background and legal argument to the court, and advise the minor as to the proceedings without acting as a lawyer for the minor?

Statement of Facts

An immigration court allows Texas lawyers to appear as “friend of the court” to assist minors who are parties to court proceedings. The court does not require a lawyer to enter a formal appearance on a minor’s behalf. In such circumstances, the lawyer explains the proceedings to the minor, advises the minor, and provides the court with information about the minor’s case.

Discussion

Under 8 C.F.R. § 1292.1, a person may be represented in proceedings before an immigration court by any of the individuals listed in that regulation. Licensed lawyers are one of the categories of qualified individuals who may appear before the immigration court in representation of another. A “reputable individual” of good moral character also may represent an unaccompanied person before the court, provided that:

- “(i) He is appearing on an individual case basis, at the request of the person entitled to representation;
- (ii) He is appearing without direct or indirect remuneration and files a written declaration to that effect;
- (iii) He has a pre-existing relationship or connection with the person entitled to representation (e.g., as a relative, neighbor, clergyman, business associate or personal friend), provided that such requirement may be waived, as a matter of administrative discretion, in cases where adequate representation would not otherwise be available; and

(iv) His appearance is permitted by the official before whom he wished to appear . . . , provided that such permission shall not be granted with respect to any individual who regularly engages in immigration and naturalization practice or preparation, or holds himself out to the public as qualified to do so.” 8 C.F.R. § 1292.1(a)(3).

In addition 8 C.F.R. § 1292.1(d) permits the Board of Immigration Appeals to “grant permission to appear, on a case-by-case basis, as amicus curiae, to an attorney or to an organization represented by an attorney, if the public interest will be served thereby.”

According to Section 2.1 of the Immigration Court Practice Manual, anyone who represents a person before an immigration court must file a “Notice of Entry of Appearance as Attorney or Representative Before the Immigration Court (Form EOIR-28).” Section 2.3(c) of the Immigration Court Practice Manual provides that “[a]ttorneys must enter an appearance before the Immigration Court by filing a Notice of Entry of Appearance as Attorney or Representative Before the Immigration Court (Form EOIR-28).” Assuming that a lawyer files Form EOIR-28, the lawyer must check one of the six boxes to identify the category in which the lawyer is qualified to appear on behalf of the individual. The first box indicates that the person is a licensed lawyer. A person entering an appearance as a “reputable individual” would check a separate box.

Rule 3.03(a)(1) and (2) of the Texas Disciplinary Rules of Profes-

sional Conduct requires lawyers to be truthful and candid to tribunals:

- “(a) A Lawyer shall not knowingly:
 - (1) make a false statement of material fact or law to a tribunal;
 - (2) fail to disclose a fact to a tribunal when disclosure is necessary to avoid assisting in a criminal or fraudulent act[.]”

Rule 8.04(a)(3) requires a lawyer not to “engage in conduct involving dishonesty, fraud, deceit or misrepresentation[.]” Thus, a lawyer who accepts an appointment as a “reputable individual” to appear as a “friend of the court” on behalf of an individual before the immigration court will violate Rule 3.03 and Rule 8.04(a)(3) if the lawyer has reason to know that the qualifying conditions set forth in the relevant regulations have not been met.

Assuming the lawyer qualifies and is appointed as a “reputable individual” and appears as a “friend of the court,” the question arises as to whether a client-lawyer relationship exists between the lawyer and the individual who is the party to the proceedings before the immigration court. That question is a matter of contract law: “The attorney-client relationship is contractual. . . . In order to establish the relationship, the parties must either explicitly or by their conduct manifest an intent to create it.” *LeBlanc v. Lange*, 365 S.W.3d 70, 79 (Tex. App.-Houston [1st Dist.] 2011, no pet.) (citations omitted). “[A]n attorney-client relationship may arise by implication if the lawyer knows a person reasonably expects him to

provide legal services but does nothing to correct that misapprehension.” *Valls v. Johanson & Fairless*, 314 S.W.3d 624, 634 (Tex. App. – Houston [14th Dist.] 2010, no pet.). The lawyer must consider whether an unaccompanied minor, who may not speak English, might reasonably assume that the lawyer was providing legal services if the lawyer accompanies the minor to appear before an immigration court to explain the proceedings to the minor, to advise the minor, and to provide the court with information about the minor’s case. If a client-lawyer relationship is established under Texas law, the lawyer must comply with the Texas Disciplinary Rules of Professional Conduct regarding the client-lawyer relationship. Among other requirements, Rule 1.01(a) prohibits a lawyer from accepting or continuing the relationship if the matter is beyond the lawyer’s competence unless the lawyer is assisted by another competent lawyer in the matter or the lawyer’s advice or assistance is limited to what is reasonably necessary in an emergency. Under Rule 1.01(b) the lawyer may not neglect a matter entrusted to him. As summarized by Comment

6 to Rule 1.01, “a lawyer should act with competence, commitment and dedication to the interest of the client and with zeal in advocacy upon the client’s behalf.” In addition, under Rule 1.03, the lawyer has a duty to keep the client reasonably informed and to explain a matter to the client to the extent reasonably necessary for the client to make informed decisions.

Although the lawyer would be permitted to limit the scope of representation of the minor as a client, the limitation could not remove the lawyer’s obligation to provide competent and diligent representation. Furthermore, any limitation on the representation would have to be effectively communicated to the client and the client would have to give an informed consent to the limitation. Rule 1.02(b). In the circumstances here considered, the lawyer must consider whether an unaccompanied minor, who may not speak English, would be capable of making an informed decision about limitations on the scope of representation. In addition, Rule 1.02(g) obligates the lawyer to consider whether the appointment of a guardian would be necessary for the client’s protection.

Rule 8.04(a)(3) prohibits lawyers from engaging in “conduct involving dishonesty, fraud, deceit or misrepresentation[.]” If the lawyer appointed as a “friend of the court” for a minor does not intend to create a client-lawyer relationship with the minor, the lawyer must clearly define to the minor the role the lawyer intends to perform and such role cannot involve participating in the proceeding in any manner that would reasonably lead the minor to believe that the lawyer was representing the minor.

Conclusion

If a lawyer provides advice to a minor appearing before an immigration court and provides legal and factual argument to the court on behalf of the minor, the lawyer must ensure that the minor clearly understands the nature of their relationship and the role of the lawyer. When the actions of the lawyer establish a client-lawyer relationship by express or implied agreement, the lawyer is obligated to comply with the requirements of the Texas Disciplinary Rules of Professional Conduct regarding the client-lawyer relationship. **TBJ**

Opinion No. 629, May 2013

QUESTIONS PRESENTED

Is it permissible under the Texas Disciplinary Rules of Professional Conduct for a personal injury lawyer to agree to refer all criminal cases to another lawyer in exchange for the other lawyer’s agreement to refer all personal injury cases to the personal injury lawyer?

Statement of Facts

Lawyer A, whose practice is focused on personal injury cases, frequently receives telephone and other communications from individuals with legal problems involving other areas of law. Lawyer B’s practice is focused on criminal defense. Lawyer A and Lawyer B propose to agree that Lawyer A will refer to Lawyer B all

prospective criminal defense clients who contact Lawyer A and Lawyer B will refer to Lawyer A all prospective personal injury clients who contact Lawyer B. Under the proposed agreement, no fees on referred cases will be shared and neither lawyer will receive any compensation from the other for the referral of prospective clients under this agreement.

Discussion

Rule 7.03(c) of the Texas Disciplinary Rules of Professional Conduct provides as follows:

“A lawyer, in order to solicit professional employment, shall not pay, give, advance, or offer to pay, give, or advance anything of value, other than actual litigation expenses and other

financial assistance as permitted by Rule 1.08(d), to a prospective client or any other person; provided however, this provision does not prohibit the payment of legitimate referral fees as permitted by Rule 1.04(f) or by paragraph (b) of this Rule.”

Thus Rule 7.03(c) prohibits a lawyer from paying or otherwise transferring anything of value to any other person, including a lawyer, for the purpose of soliciting professional employment, subject to exceptions that are not involved here. In the circumstances considered, Lawyer A is undertaking to refer all criminal cases to Lawyer B in exchange for an undertaking from Lawyer B to refer all personal injury cases to Lawyer A. An undertaking by one lawyer to refer cases to another

lawyer is an item of value to the other lawyer. Here, Lawyer A and Lawyer B are exchanging these valuable undertakings for the purpose in each case of soliciting professional employment. Hence this arrangement, in which each lawyer gives something of value to the other lawyer in order to solicit professional employment, constitutes a violation by each lawyer of Rule 7.03(c). Moreover, if one of the lawyers obtains professional employment as a result of the agreement with the other lawyer, the lawyer obtaining employment will violate Rule 7.03(d) by charging or collecting a professional fee resulting from the prohibited solicitation and will violate Rule 7.06(a) by accepting or continuing professional employment obtained as a result of the solicitation arrangement.

Conclusion

It is not permissible under the Texas Disciplinary Rules of Professional Conduct for a personal injury lawyer to agree to refer all criminal cases to another lawyer in exchange for the other lawyer’s agreement to refer all personal injury cases to the personal injury lawyer. **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.”

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